

# A voice in director choice

In his latest column from New York, **Michael J Reilly** reports on how the issue of shareholder access to board nominations is still on the table.

In my first column for the IRS over three years ago, I took note of changes that appeared to be coming to America's companies based on the proposal that shareholders get more of a voice in nominating corporate directors.

At the time, the Securities and Exchange Commission (SEC) was concluding a remarkable burst of regulatory speed in the enactment within 18 months of a large number of rules to enforce the Sarbanes Oxley (SOX) legislation of 2002.

The pace of change in investor relations has slowed a bit since then,

letter from  
America



although there have been many adjustments to the process, both in practice and as a result of SEC actions.

Nonetheless, overall the breakneck pace of the early SOX-energised years has withered.

Three and a half years on, the chairman of the SEC this summer announced to the world that the question of shareholder access to the board nominations remains on the table, precisely where it was back in 2003, despite intensive reviews by SEC staff members, written submission from many interested parties and no less

than three heavily attended public roundtables on the subject.

This is an interesting juxtaposition of hot topics. SOX legislation was so politically fuelled that fast action was an absolute. A host of new rules were proposed, reviewed, approved and enacted in the comparative blink of an eye. On the other hand, the question of shareholders having a greater voice in director choice is so hotly contested from both sides of the issue that it can't move. It hangs in space like one of the solar satellites studying the sun, magically suspended at a gravitational point balanced between the tides of each sphere - which prevents any movement whatsoever.

## Tippling point

Here we have an issue that is at the famed tipping point, but no one seems able to push it over the edge. That said, SEC chairman Christopher Cox said in

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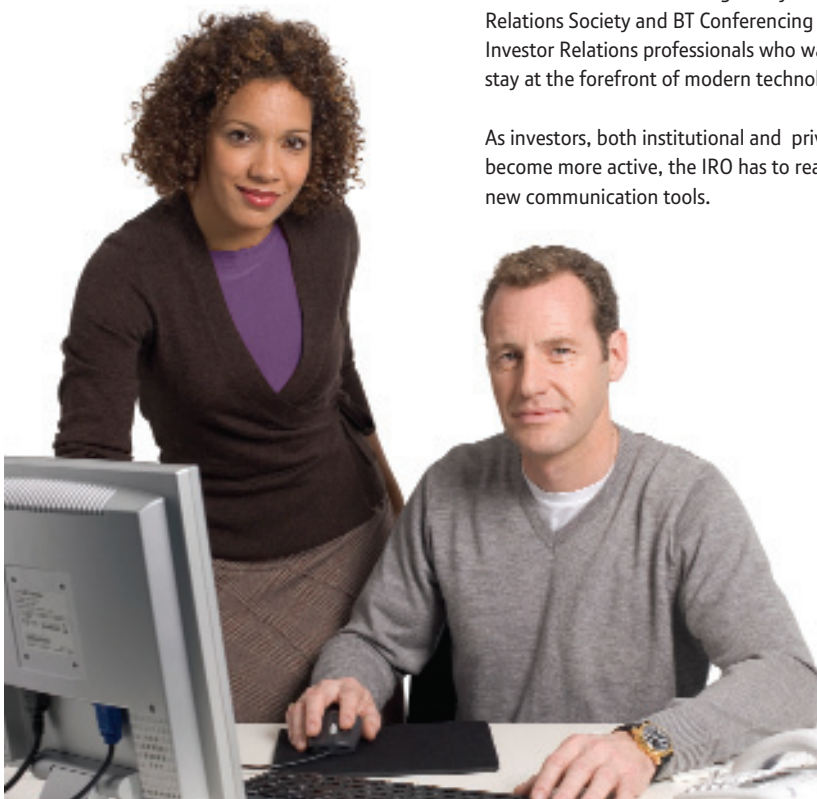
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late July at a public meeting of the commission on the topic that it was "my intention as chairman to have a clear, unambiguous rule in place in time for the next proxy season." Thereupon, he presided over a meeting in which two contesting solutions were presented for consideration. He voted in favour of both.

The chairman explained his duplicitous position by saying what is needed is more input from across the entire country and that such input, in form of further debate and dialogue is the right way to go. This is so, a transcript of his statement says, because:

- "... we will have the benefit of the full breadth of commentary about different ways of attacking this issue;
- "... we will have the benefit of thorough analysis of a variety of ways to accomplish our stated objectives;
- "... this approach will also give us a richer context in which to evaluate public comment concerning the potential costs and benefits of any new rule;
- "and, exposing both of these proposals to public comment will enable us to better understand the impact that any new rule would have on competition."

In other words, there is so much disagreement amongst the commissioners that they can't come to a unified or even majority conclusion, so they will wait and see what happens next, with the help of the public.

To be fair, this is a complex subject, bringing into the debate legal questions regarding proper disclosure, shareholders property rights and many aspects of appropriate corporate governance. In addition, the warren of laws covering securities regulation in the US is not simply a one-off body of federal statutes and rulings. Each of the states has jurisdiction

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over securities matters, especially as they pertain to private property rights that are invested in equity stock shares.

**Emphatic**

Chairman Cox made note of these matters in his explanation of the state of affairs regarding the election of board directors. He was particularly emphatic about the need to respect state law and what he termed the fundamental principle of shareholder choice. Unstated at the July meeting was the very political matter of companies not wanting to lose their grip on boardroom practice and the very strident views from labour and shareholder groups who say they must have a greater voice.

But this issue has a long history of non-resolution. Cox quoted his counterpart of more than 25 years ago, chairman John Shad who said during the Reagan years that it was a matter "of fair corporate suffrage for every security holder" which needed to be addressed. Cox also remind-

ed listeners that his predecessor, William H Donaldson, proposed a solution only four years ago, which created so much controversy it was crushed within a few months.

Earlier in this column I made reference to this subject being "on the table." Many of you will know why I chose that exact wording. According to a Wikipedia citation, Winston Churchill observed a linguistic hurdle in his book *The Second World War, Volume 3: The Grand Alliance*. Commenting on confusion that arose between US and UK military leaders during the Second World War he said:

"The enjoyment of a common language was of course a supreme advantage in all British and American discussions. (...) The British staff prepared a paper which they wished to raise as a matter of urgency, and informed their American colleagues that they wished to 'table it.' To the American Staff 'tabling' a paper meant putting it away in a drawer and forgetting it. A long and even acrimonious argument ensued before both parties realised that they were agreed on the merits and wanted the same thing."

Such agreement is not the case with the contesting parties on the subject of shareholder votes for directors. Nevertheless, it is probably not wrong to observe that, at least at the SEC just now, this matter is tabled. However, rather than apply the American interpretation as some might prefer, it is the UK definition that applies. More to come. ■



*Mike Reilly provides advice on markets and communications through Hally Enterprises Inc and its writing and editing division, Globalwriters.net. Skype address: GLOBALWRITER*

[mjr@hallyenterprises.com](mailto:mjr@hallyenterprises.com)

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