

NIRI BRINGS ADVOCACY PRIORITIES TO THE SEC

Board members ask the SEC to improve equity ownership transparency.

By Ted Allen



One of NIRI's four mission areas is advocacy on behalf of the investor relations profession. The NIRI Board of Directors meets privately each September with the U.S. Securities and Exchange Commission staff in Washington, D.C., to discuss key regulatory issues.

In preparation for this year's meeting, NIRI surveyed U.S.-based IR practitioners on a variety of financial reform issues. The results were used by the Board's Advocacy Committee to identify those topics that are most important to members.

Speaking on behalf of NIRI were Valerie Haertel, IRC, head of global IR at BNY Mellon, who also chairs the Advocacy Committee, and four other Board members: Ronald A. Parham, senior director, IR and corporate communications at Columbia Sportswear; Lee M. Ahlstrom,

IRC, senior vice president for IR, strategy and planning at Paragon Offshore; Hala Elsherbini, senior vice president at Halliburton Investor Relations; and Nils Paellmann, vice president and head of IR at T-Mobile US. They were joined by David Dragics, senior vice president for IR at CACI, who is an advocacy ambassador from the NIRI Capital Area chapter, and Sally Curley, IRC, senior vice president for IR at Cardinal Health, who is a NIRI Fellow and former Board member.

The SEC was represented by Keith Higgins, director of the Division of Corporation Finance, and several senior division staffers, as well as Douglas Scheidt, chief counsel at the Division of Investment Management.

This year, Haertel kicked off the discussion by reminding the SEC staff of their request for more data and examples from NIRI members on the issues of most importance. She

outlined a set of core principles that provided structure and context for the discussion.

"NIRI is aligned with you on several important key principles – improving transparency for all market participants, providing a sound corporate governance structure, and enabling an efficient and effective capital markets system," Haertel said. "We recently conducted a member survey to provide you with the data you requested in an effort to have a productive dialogue about modernizing rules that were put into place decades ago."

Parham added, "Underpinning each of those principles is the foundational concept of mutual trust, which is the core of our capitalistic democracy and therefore also at the core of what investor relations professionals try to build and maintain between their company and the investment community."

Parham and Dragics outlined NIRI's case for the modernization of the 13(f) rules, which require institutions with more than

\$100 million in U.S. equity investments to report their holdings. In 1979, the SEC set a deadline of 45 days after the end of each quarter for institutions to file these reports. While technological innovations since then have made it possible for institutions to track their holdings on a nearly real-time basis, the SEC has not updated this deadline. At the same time, the Commission has accelerated many of the disclosure deadlines that apply to issuers. Meanwhile, institutional ownership of U.S. companies has risen to about 70 percent, and the arrival of high-speed, computer-assisted trading and the availability of “dark pools” and other alternative trading venues has made it easier for fund managers to quietly move in and out of stock positions, which means that much of the information contained in 13(f) filings is out of date by the time that companies see it 45 days later.

NIRI asked the SEC to consider a NYSE proposal to adopt a monthly reporting frequency for 13(f) filers and to shorten the reporting period to 15 days. The staff was not sympathetic to this request, noting that changing the current 13(f) rules would likely prompt investors, such as Warren Buffett and well-known hedge funds, to file more confidential treatment requests, which would require more SEC staff time to review.

Timely Disclosure of Activist Stakes

On a related issue, NIRI voiced support for the Brokaw Act, a bill introduced by U.S. Senator Tammy Baldwin of Wisconsin, which would shorten the 13(d) deadline for activists to report when they obtain more than 5 percent of a company’s stock. The current deadline of 10 days is a relic of the 1968 Williams Act, and has not been updated since, even though other major countries, such as the United Kingdom and Germany, have adopted shorter deadlines. Baldwin’s bill

calls for a two business day deadline and for modernizing the SEC’s definition of beneficial ownership to include derivatives, swaps, and short positions.

Activist hedge funds often amass significant positions that are not disclosed in 13(f) filings and later in 13(d) filings in a timely manner and often have rights to additional shares through unreported derivative transactions. Companies often receive letters requesting management and board time – not only from the key activist fund that files a 13(d) – but also other wolf pack investors demanding similar time and attention. Often issuers have no idea of the significance of these other positions because of the 13(f) and 13(d) filing delays.

The SEC staff noted that activists have argued that shortening the 13(d) deadline would make it more expensive for them to build significant positions and thus handicap their ability to take on unresponsive corporate management teams and directors.


Short Selling Disclosure

NIRI also urged the SEC to implement a Dodd-Frank Act provision to require 13(f) filers to publicly disclose their short positions each quarter. NIRI, NYSE, and Nasdaq have filed rulemaking petitions that ask the SEC to adopt such a disclosure rule, and 14 companies have written comment letters in support. Ahlstrom recounted the ongoing attacks from anonymous short investors that his company has faced, while Elsherbini talked about the abuses that short sellers have committed against her small- and mid-cap clients. The SEC staff didn’t raise any specific objections, but did not say when they might address this issue. (NIRI encourages members to submit comment letters on this topic. Please visit the Short Selling page on the NIRI website for letter templates for both NYSE and Nasdaq companies.)

Proxy Advisors

Paellmann, Curley, and Dragics urged the SEC to exercise greater oversight over proxy advisory firms. Paellmann said all issuers should have an opportunity to review proxy report drafts for factual accuracy before investors vote based on potentially flawed information, as has been recommended in France. The largest U.S. proxy advisor, ISS, allows S&P 500 firms a brief opportunity (often 24-48 hours) to review drafts. The other major proxy firm, Glass Lewis, allows some issuers to review the underlying data that are included in the reports, but does not share its draft recommendations, and then charges companies if they want to see the final report. Paellmann recounted his experience at T-Mobile US, a \$37 billion market cap company, which cannot review ISS reports before publication because it is not an S&P 500 firm.

The SEC staff was not overly receptive, noting that they haven’t heard complaints from institutional investors about report quality and have received few specific complaints from issuers. Higgins said companies should contact Raymond Be, a senior counsel in the Corporation Finance Division, if proxy advisor report errors are not corrected or to express other concerns.

One of the key takeaways from the NIRI visit to the SEC is that IROs and public companies will need to do more to make sure that their regulatory concerns are heard in Washington. NIRI urges members to contact their chapter advocacy ambassadors or the NIRI Board of Directors with their specific advocacy concerns. Members and their companies also are encouraged to write letters to Congress and the SEC in support of greater equity ownership transparency and proxy system reform. 

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