

Company Response

On Dec. 24, State Street filed a 13-page challenge to the proposal at the SEC. The company is arguing that the resolution is proposing “inappropriate and unlawful considerations for SsgA as a fiduciary to its clients,” which would force it to breach Massachusetts state law and the federal Employee Retirement Income Security Act. Section i-2 of the SEC’s shareholder proposal rule allows exclusion of proposals that would require companies to violate the law.

Writing about the ordinary business exclusion (section i-7 of the rule), State Street says the proposal should also be excludable because it relates to its assessment of the risks and liabilities of its business operations. The SEC staff, which had long complained that the shareholder proposal rule puts it in the unpleasant position of being forced to make subjective judgment calls, in its June 2005 Legal Bulletin 14C arguably made its job more subjective by decreeing that resolutions

can be excluded as ordinary business if they involve “an internal assessment of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public’s health.”

State Street is now arguing that it should be able to omit the resolution under the policy articulated in that 2005 bulletin because “the proposal is essentially inward-looking, focusing on the risks and liabilities associated with the company’s obligations and duties to its clients and its strategies with respect to the portfolio companies.” Beyond the risk question, State Street also says the proposal should be excluded on ordinary business grounds because it “seeks to micro-manage the company” and because it “relates to the sale of a particular product,” which it defines as fund performance and management strategy. The SEC staff has long classified micromanagement and product sales as being in ordinary business territory.

Letter on Broader Concerns

Walden is still working on its detailed response to the company’s SEC challenge. However, on Jan. 14, Walden and co-sponsor Pax World sent a letter to State Street’s corporate governance committee “to address our broader concern that State Street is providing contradictory and potentially misleading information to its investors and clients about the State Street position regarding the impact of ESG factors on long-term business success.”

The letter details the business case that State Street makes for corporate social responsibility in its own CSR reports and objects that the company’s SEC challenge to the resolution “appears to ignore State Street’s own testimony about how ESG factors can and do affect shareholder value, a position we share with the company.” It concludes that if the CSR reports accurately reflect the company’s view, “then ignoring ESG factors in the proxy voting process (other than client-directed) would seem to be the real breach of fiduciary duty.”

—Carolyn Mathiasen

Investors Against Genocide Expands Drive For Holder Votes at More Mutual Funds

Investors Against Genocide continues to expand the campaign aimed at large mutual funds that put it on the map last year. The activist group this year has submitted its signature resolution, urging genocide-free portfolios for widely held, multibillion-dollar U.S. mutual funds, at four times as many of the funds.

The nonprofit organization, which describes itself as working to create financial and regulatory pressure for investment firms to change, so far this year has 81 pending proposals at funds managed by 10 mutual fund companies. In 2008, as a first-time shareholder proponent, Investors Against Genocide got its

proposal on the proxy ballots of 21 funds at **Fidelity Investments** after the Securities and Exchange Commission staff overruled a raft of challenges by the fund

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management company. “Yes” votes at the 14 funds that reached the required 50 percent quorum averaged about 26 percent, demonstrating surprisingly strong support for the first social proposal put to proxy votes by mutual fund holders at Fidelity.

As Investors Against Genocide attempts to expand its shareholder support, its leaders also see more attention to its mission coming from Capitol Hill and the White House, now that President Barack Obama has replaced George Bush. Eric Cohen, chairperson of Investors Against Genocide, told RiskMetrics that he expects the House of Representatives’ Financial Services Committee to call large financial services companies to a formal hearing later this year to ask “tough questions” about shareholdings that may underpin genocidal activities in countries like Sudan.

The campaign is preparing for voting on its resolution later this year at two other

mutual fund companies whose shareholder meeting dates are known. One, large institutional investor **TIAA-CREF** (short for the Teachers Insurance and Annuity Association and the College Retirement Equities Fund), has a meeting scheduled for mid-July, with proxy materials going out to holders about a month before that time, Cohen said.

The CREF portion of the asset manager, investing primarily on behalf of college and university pension funds, has one fund that practices socially responsible investing. Unlike Fidelity's mostly mute response last year to activist shareholders' request that it eliminate holdings tainted by links to human rights abuses in Sudan, TIAA-CREF tells activists that it gives investors who seek to avoid supporting genocidal regimes that option, its Social Choice Equity Fund. This fund, with assets of \$485.07 million under management as of Dec. 31, 2008, seeks to track the performance of the Russell 3000 Index while screening investments for specific social criteria, including human rights abuses such as acts of genocide.

Cohen pointed out, however, that the TIAA-CREF Social Choice fund's allocation, investment style and relatively small size aren't well-suited for all types of CREF investors. Some of them may not realize that the majority of CREF funds in which their money may be placed are not prohibited from buying stock associated with genocide controversies, he said.

Investors Against Genocide also is working to ready supportive shareholders for a likely August vote on its genocide-free investing proposal at funds in the Investment Co. of America family overseen by **American Funds**. Proxy voting materials are expected to be distributed to these holders about four weeks before the funds' voting date, once that's established. The Investment Co. of America fund family comprises growth and income funds that totaled \$53.1 billion in assets under management as of Dec. 31, 2008.

Beyond the two fund management companies that have scheduled summer meetings, Investors Against Genocide also says it plans to continue pressuring Fidelity on genocide-free investing. Fidelity, like most U.S. fund managers, doesn't have a requirement in its charter to hold annual shareholder meetings, so no new dates for its next annual meeting or shareholder voting have been set. The activist group submitted the proposal again this year at 32 Fidelity funds, including the seven that underwent several rounds of proxy voting but didn't reach quorum in 2008.

Another initiative led by Investors Against Genocide met resistance this month. On Jan. 12, Georg Kell, the executive director of the UN Global Compact (UNGC), refused to drop Chinese oil company **Petro-China** from its membership, as requested by a group of more than 80 civil society organizations led by Investors Against Genocide. The publicly traded arm of China National Petroleum Corp. (CNPC) is deemed one of the worst "highest offenders" by the Sudan Divestment Task Force because it provides funds to the Khartoum government that allow it to carry on genocide in Darfur.

Kell responded to the activists' request to remove PetroChina by saying, "... handling this matter as an integrity issue of one company would run counter to the Global Compact's approach of looking for practical solutions on the ground."

Investors Against Genocide responded in a Jan. 19 press release that its non-governmental organizations group would escalate the matter to the UNGC's board of directors, chaired by UN Secretary-General Ban Ki-moon. The groups submitting the request for UNGC action against PetroChina now are asking the Global Compact, which is the world's largest voluntary corporate responsibility initiative, to formally apply its "Integrity Measures" in the PetroChina matter to define steps to protect the reputation and integrity of the Compact and its participants.

PetroChina's parent, CNPC, is not a member of the UNGC, but the two companies were shown the activists' letter by the UNGC this month. The Chinese parent company responded, "CNPC ... is going to ... take an active part in the activities of the [UNGC network], further understand and learn the conflict sensitive practices in conflict prone countries stipulated by UNGC"

Investors Against Genocide and other activists in May last year tried to start talks with the UNGC about their objections to PetroChina's activities in support of the Khartoum government. The Compact forwarded the activists' letter to PetroChina, but the company failed to respond to either party over the next seven months, Cohen said. Their Dec. 15 complaint letter on PetroChina filed with the UNGC was an acceleration of the engagement aspect of the campaign, Cohen told RiskMetrics. PetroChina and its parent company are known for rejecting requests for shareholder engagement.

Cohen said the campaign he leads "may be close to a tipping point for the appreciation of the American polity" for its cause. "America may not have been ready" [in the last two years], he said, to take some of the suggestions to prevent genocide made in December by a special task force led by former U.S. Secretary of State Madeline Albright and former U.S. Defense Secretary William Cohen. Among other steps, the task force recommended that President-elect Obama issue an executive order soon after he's inaugurated that shows preventing genocide is a top U.S. foreign policy priority.

Even more than U.S. political realignment, the recent upheaval in world financial markets may have created "an appetite for reform now," Cohen said, that could result in louder shareholder calls for divestment related to humanitarian crises such as the genocidal killings documented for years in Sudan.

—Jane Meacham