

## SEC Nixes Fidelity's Proxy Request Quest to Banish Companies Linked to Genocide Continues

By Lori Pizzani

Three weeks after the Securities and Exchange Commission officially declined the no action request of Fidelity Investments of Boston, which had asked permission last November to exclude a shareholder-driven proposal from its mutual fund proxies, leaders of activist group Investors Against Genocide are feeling victorious but know they haven't yet won the war.

Despite the proxy victory, the group isn't expecting to immediately win the wholehearted support of Fidelity funds' shareholders but has promised to continue fighting. It's also committed to targeting a broader group of mutual funds including Barclays Global, Franklin Templeton, T.Rowe Price, Vanguard and banks the group has identified as being the largest investors in companies providing funding for human rights atrocities and genocide in Darfur, a region in Western Sudan.

"We are only seeking to embarrass those with large holdings," said Eric Cohen, chairperson of the group. "We've raised the issue because these financial institutions invest in the worst companies connected with the genocide."

The issue will rear its head again in coming weeks as the first of several Fidelity mutual funds sends out a proxy to fund shareholders in preparation for a March 19 shareholder meeting. Additional shareholder meetings are scheduled for mid-April and mid-May.

### Screen Out or Get Out

This past September the first letter to Fidelity, signed by several fund shareholders who support efforts to compel investment companies to divest their funds of companies with ties to genocide, was sent. In fact, a handful of letters were mailed to a total of 51 senior Fidelity executives and the independent board trustees asking for them to screen out such companies, Cohen said. "But we got only unsatisfactory and dismissive responses," he said.

The group's formal proxy proposal asked for Fidelity's fund "board to institute oversight procedures to screen out investments in companies that, in the judgment of the board, substantially contribute to genocide, patterns of extraordinary and egregious violations of human rights, or crimes against humanity."

The group further noted that while it was requesting procedures be established to avoid future investments in these companies, Fidelity could take one of two acceptable actions to address existing holdings in companies such as PetroChina and Sinopec. These companies' parent company, China National Petroleum Company, was implicated by way of supporting and funding the Government of Sudan's military needs in the commission of genocide, the letter said.

In cases where the holdings were large enough to influence management and management was receptive, the group suggested Fidelity engage the company and request an end to the genocide. In cases where investment was considerably smaller or where management was unwilling to discussing these issues, then investments should be withdrawn, the proposal said.

### Fidelity Balks at Proposal

In November, Fidelity petitioned to the SEC to grant a so-called no action, under which the Commission would agree to not fine, penalize or institute enforcement against the company if it omitted the proposal from the upcoming fund proxies.

In its request, Fidelity argued that it should be allowed to exclude the proposal because it interferes with ordinary business operations by seeking to micro-manage the funds' investment process.

"By seeking to impose limits on the investments selected for each fund, we believe that the proposal touches on issues central to the day-to-day management of each fund and not on a broad or fundamental corporate policy," argued an attorney with Dechert, the law firm representing Fidelity.

The SEC does allow such proposals to be omitted if they "deal with a matter relating to the company's ordinary business operations." The scope of that operation can be subject to interpretation.

But the SEC will not allow a fund group to exclude proposals that raise social policy issues. To this point, Fidelity took exception, noting that the board would have to implement procedures that would restrict each fund's investments and impose on Fidelity's discretionary authority to manage fund assets. Furthermore, it argued the term "screen out" was too vague, and no specifics were offered for how the board would determine which

companies substantially contribute to genocide, the Fidelity request argued.

Fidelity's lawfirm also argued that it should be allowed to exclude the proposal because it contains false and misleading statements. One of the SEC's provisions allows a firm to avoid including a proposal if there are statements that directly or indirectly "impugn character" or the integrity or personal reputation can be omitted.

Dechert noted that portions of the shareholders' proposal does impugn the character and integrity of fund management by implying that Fidelity is not an ethically managed fund company.

In the end, without detailed explanation, the SEC declined to grant Fidelity's no action request. Consequently, Fidelity must include this proposal, as is, within its own funds' proxies. Fidelity is allowed, however, to include a statement refuting the request and explaining to investors why it believes they should vote against the proposal.

"Although the SEC staff has not concurred with our position, we continue to believe the proposal deals with matters relating to a fund's ordinary business operations and contains false and misleading statements," said a Fidelity spokesman.

### Seeing the Social Light

"The social issues are a major concern for a lot of fund groups," agreed Carl Frischling, partner with the New York law firm of Kramer Levin Naftalis & Frankel. "Lots are prodding advisors to change. It's a hotly contested area because it's very emotional."

Cohen of Investors Against Genocide makes no apologies. "It's the mutual fund companies that are at fault and have inadvertently caused investors to invest in PetroChina," he said, adding that most investors, when polled, do not want their funds investing in these companies.

Some have already taken action. Cohen acknowledges that Fidelity has already divested a significant portion of its holdings in PetroChina, although it did not indicate the reason for this. In addition, Allianz Global Investors which manages several fund groups including the PIMCO Funds, in the third quarter of last year completely divested its holding without explanation. An Allianz spokeswoman could not immediately be reached for comment.