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August 17, 2009

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Comments on Proposed Rules Regarding Facilitating Shareholder Director Nominations (File No. S7-10-09)

Dear Ms. Murphy:

We are responding to the request of the Securities and Exchange Commission (the "Commission") for comments about proposed Rule 14a-11 under the Securities Exchange Act of 1934 (the "Exchange Act") and amendments to existing Exchange Act rules, including Rule 14a-8, to facilitate shareholder director nominations.[1] We appreciate the opportunity to comment.

The Commission's proposal reflects the shift in the proxy access debate from one that focuses on whether access should be facilitated to one that focuses on how best to do so. We agree that the Commission should act to facilitate access. An approach limited to the proposed amendments to Rule 14a-8 (with no concurrent adoption of proposed Rule 14a-11) would preserve the separation between regulation of substantive shareholder rights under state law and disclosure under federal law, but risks leaving shareholders of some companies without immediate access to the nomination process. On the other hand, proposed Rule 14a-11 would mandate access based on a uniform framework at the cost of the flexibility that the Rule 14a-8 model permits. Although one could debate which of these two approaches is preferable as a policy matter,[2] we will confine our comments to ways in which the Commission can improve the concurrent approach it has proposed.

[1] Release Nos. 33-9046; 34-60089; IC-28765 (June 10, 2009) (the "Proposing Release").
[2] Although issues have also been raised regarding the Commission's authority to adopt proposed Rule 14a-11, we do not address those issues in this letter.

First, we believe that any final version of Rule 14a-11 should apply only to a subset of large accelerated filers that are subject to Exchange Act Section 14(a),[3] and in any event not beyond the class of large accelerated filers.[4] Limited implementation is appropriate given the significant shift in governance that the Rule would represent and the complexity and variety of consequences it will likely have for both companies and the Staff. The Commission should not underestimate the burden of compliance with a detailed federal rule, especially for smaller companies. In addition, as discussed further below, the Commission should not underestimate the burden on its Staff of the administrative process that is described in the Proposing Release, which would operate under compressed time frames, involve contentious issues and provide for complex rights of appeal. Given the increased importance of the outcomes of the process, we are concerned that the Staff, which devotes substantial resources to the shareholder proposal process under existing Rule 14a-8, could find itself with unmanageable burdens and facing very substantial pressures from the contending parties. We believe that the most appropriate way of dealing with these new burdens is to adopt the Rule for the largest issuers and consider expanding application of the Rule in the future on the basis of the Commission's experience with that group and developments among smaller companies under the amended Rule 14a-8.

Second, the final version of Rule 14a-11 should provide some flexibility to allow shareholders to tailor the access right to their company's circumstances. The proposed changes to Rule 14a-8 would permit a company's shareholders to make changes to director nomination procedures or disclosure requirements provided that the changes do not conflict with Rule 14a-11. We believe that the Commission should empower shareholders to modify the proposed framework, without limiting that right to changes that would conform to the "minimum" access requirements prescribed by the Rule. Unlike the proposed Rule 14a-11, which purports to "trump" any by-law providing for access under state law, the final rule should permit the reverse: shareholder-adopted by-law amendments regarding access should be permitted to override the proposed Rule 14a-11 framework. If the Commission disagrees with this approach as to all aspects, we believe that the final rule should at least permit companies to customize certain provisions of the 14a-11 framework (*e.g.*, as discussed below, certain disclosure requirements and, subject to shareholder approval, the ownership threshold and required holding period).

Lastly, if the Commission decides against permitting shareholder-adopted by-laws to override the Rule 14a-11 framework, we do not believe that companies subject to Rule 14a-11 should also be subject to shareholder proposals regarding proxy access pursuant to the proposed changes to Rule 14a-8.

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[3] The Commission is following a similar approach in connection with the initial implementation of its XBRL initiative. Companies subject to the initial phase of that initiative are those with a worldwide float of more than $5 billion at the conclusion of the second quarter of their most recently completed fiscal year.

[4] To promote access at companies that may now be facing shareholder dissent, the Commission could also expand this group to include any company whose board includes at least one member who received a substantial "withhold" or "no" vote (e.g., 30-35%) in the most recent director election or, for those companies with majority voting, a member who failed to be elected but whose resignation was not tendered or accepted by the board.

I. The Timetable for Implementing Rule 14a-11 Should Permit Adequate Time for Companies to Prepare

While recognizing the importance of moving forward on proxy access, we believe that the Commission, in addition to limiting application to the largest companies, should also allow sufficient time for companies to prepare for compliance with any final rule, particularly if the tight deadlines in the proposal are retained. We recommend that the Commission work to adopt a final rule no later than mid-October or, if this schedule proves unworkable, that the final rule be first effective for solicitations made on or after July 1, 2010.[5] Earlier implementation will likely create a host of practical issues for many companies in complying with the deadlines provided in proposed Rule 14a-11 at a time when preparations for their annual meetings are well underway, and would not permit companies to take other actions, such as making changes to by-laws or other governance practices, that may be appropriate in light of the final rule. Implementing the final rule early in July 2010 would also allow the Staff to gain experience dealing with the process when the volume of annual meetings is typically lower.

II. Clarifications and Changes to the Scope and Operation of Rule 14a-11 Are Needed

We urge the Commission to exclude from the Rule's application companies with controlling shareholders,[6] unless such company's by-laws permit cumulative voting. Allowing shareholder nominations for these controlled companies that do not provide for cumulative voting – and therefore present no prospect of a successful shareholder nominee – would be a waste of corporate resources. The Rule should also apply only to companies that are subject to Section 14(a) of the Exchange Act and therefore would not apply to "debt only" registrants or to foreign private issuers. In the case of foreign-domiciled issuers that are nonetheless subject to U.S. proxy rules, the Commission should defer to home country law to the extent that it conflicts with the final rule.

Finally, we recommend that any final rule not apply to director elections at the initial annual meeting of a newly-public company. Directors and agreed upon future directors at the time of an IPO are fully disclosed, independent directors and other elements of a full board are often being adjusted, and the balance of investor interests against surprise and burdens for the newly public company would, we submit, favor excluding such companies immediately following an IPO.

We generally support the Commission's proposal regarding the maximum number of shareholder nominees to be included in company proxy materials, which is calculated as the greater of (a) one shareholder nominee and (b) the number of nominees that represents 25% of the company's board of directors, but believe that the following refinements are necessary.

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[5] Even if a final rule is adopted by mid-October, we believe that many companies (particularly those with annual meetings in March, April or early May) will be challenged in managing compliance for the 2010 proxy season, which further militates in favor of limited implementation of any final rules to the largest public companies.

[6] By "controlling shareholders," we are referring to those shareholders with more than 50% of the voting power in a company that has no separate class of shares entitled to elect its own directors that is not majority-owned.

A Size-Based Allocation Rule Should Replace the Proposed "First-In" Approach

We disagree with the Commission's proposed "first-in" approach for allocating nominees when multiple nominating shareholders[7] are eligible to include nominees in a company's proxy materials. The Commission's rationale centers on the certainty this approach provides by contrast to a rule based on shareholder size, which in the Commission's view could permit a company's largest shareholders to override earlier-filed Schedule 14Ns until the submission deadline.

We support the Commission's efforts to provide certainty to facilitate administration of any final rule, but we believe that the first-in approach is the wrong way to do so. Any final rule should reflect the importance of a company's largest shareholders, which have the most significant economic stake in the company. Advance notice provisions and appropriate deadlines in the final rule can provide adequate certainty. We also believe that a first-in approach could encourage a race to deliver a nomination notice, perhaps far in advance of the relevant election or, if an "earliest date" concept is added as we recommend, encourage "Day One" 12:01 a.m. submissions, solely to lock-in nomination rights and without regard to any meaningful assessment of incumbent directors. By contrast, an allocation by shareholder size would help reduce opportunities for abuses of the access right.

Instead of the first-in approach, we propose that notices of intent to nominate should be filed during a period commencing not earlier than a specified date before the anniversary of the mailing date of the company's proxy materials for its prior annual meeting (*e.g.*, 180 days prior) and for a limited period thereafter. The company should be required to disclose the dates of this period for the next succeeding election in its proxy statement, and given this advance notice, there would be no need for a lengthy submission period. Assuming a relatively short window (*e.g.*, 10 business days), the Commission could also achieve its goal of ensuring certainty around shareholder nominations early in the proxy calendar.[8] If multiple shareholders file a notice of intent to nominate within that period, the nominations would be allocated by size of shareholdings, beginning with the inclusion of the nominees of the largest nominating shareholder. If that shareholder proposes fewer than the maximum permissible number of nominees, the next largest shareholder would be entitled to propose any remaining nominees.

Under a size-based allocation standard (unlike the first-in approach), implementation of Rule 14a-11 could foster a positive dynamic between companies and their largest shareholders. By providing a company's largest shareholder the right to nominate, the Rule may produce a dynamic of negotiation with nominating committees that could result in access without the need to resort to Rule 14a-11.

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[7] Unless the context otherwise requires, references to nominating shareholders include both individual shareholders and those acting as a group.

[8] If the Commission decides that a 10 business day period is too short, but nonetheless wants to promote certainty for companies receiving nominations, the Rule could provide that if no Schedule 14Ns have been filed by the end of the window period, nominations would then be determined on a "first-in" basis.

The Implications of Election of a Candidate Nominated under Rule 14a-11 Should be Clarified

We agree that, when determining the maximum number of permissible nominees under Rule 14a-11 for an election involving a company with a staggered board of directors, the company should take into account incumbent directors elected pursuant to proposed Rule 14a-11 in prior years for the full terms of those directors (*i.e.*, normally for the next two years).

To further the purposes of an access right by integrating new board members and effectively promoting their retention, we also believe that the calculation of the maximum number of permissible nominees in any election period should take into account past shareholder nominees who have been elected in the immediately preceding year, provided that they have been re-nominated for election by the board.[9] We recognize that this approach could effectively foreclose use of Rule 14a-11 when, in the immediately preceding election, the maximum permissible number of directors under proposed Rule 14a-11 is elected. We believe, however, that it would promote better board integration of a shareholder-nominated director and allow for the greater possibility of retention and continuity in board functions.[10]

This approach is particularly appropriate if the final rule retains the maximum number of permissible nominees at 25% (or increases the percentage). If a quarter of the board's seats have changed in what will likely be contentious circumstances, company management and the board will already have a significant burden to orient and integrate the new directors and should not have the additional pressure associated with the prospect of more changes in a matter of months. In the absence of this hiatus, boards may also be more inclined not to re-nominate the new directors, an inclination that we believe is not in the interests of shareholders or boards themselves.

Finally, to address the possibility of an election in which there are fewer open director seats than the maximum number of permissible nominees that the company would otherwise be required to include in its proxy materials under Rule 14a-11, the Commission should clarify that a company will never be required to include more shareholder nominees than the number of directors otherwise required to stand for election.

The Commission Should Implement "Universal Ballots" to Address the Challenges of Rule 14a-11 Nominations Made Concurrently with a Traditional Proxy Contest

If proposed Rule 14a-11 is adopted, an eligible shareholder or group could seek to nominate one or more directors pursuant to that Rule, while other shareholders simultaneously engage in a traditional proxy contest. Concurrent nomination contests would be confusing for shareholders who would be faced with multiple ballots and could lead to unintended outcomes.

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[9] We believe the longer period that will result in the case of a staggered board would be appropriate since, in that case, the director remains on the board, even if the other directors would not choose to re-nominate him if given the choice.

[10] The Commission should also consider whether directors elected in traditional proxy contests in prior years should be taken into account in determining the maximum number of permissible nominations in a given year. Taking them into account would arguably be consistent with the Commission's intention that any new rule not facilitate a change of control. On the other hand, the importance of the access right for other shareholders may be even greater in the wake of a successful proxy contest.

Without a mechanism for addressing concurrent nominations, nominees elected pursuant to Rule 14a-11, when taken together with directors elected in a concurrent "short-slate" proxy contest, could result in a majority of the incumbent directors being replaced, even though not a single shareholder voted for both the insurgent slate and the Rule 14a-11 nominees.[11] Such a result would have a dramatic impact on the governance of the company and could result in a variety of unintended consequences (*e.g.*, triggering a change of control termination or default under company debt or other material contracts). That outcome would clearly fly in the face of the Commission's intent in advancing the proposal.

By including shareholder nominees on a company's ballot, the approach contemplated by proposed Rule 14a-11 already provides for a form of universal ballot. In our view, this approach should also apply in the case of a concurrent proxy contest so that shareholders receive a single ballot including company nominees, Rule 14a-11 nominees and any nominees proposed in a concurrent proxy contest. A universal ballot approach, which we also support in the context of proxy contests where there is no Rule 14a-11 nominee, could facilitate greater shareholder participation in the election of directors, and would substantially reduce the confusion, costs and potential shareholder disenfranchisement[12] associated with director elections involving multiple ballots. To avoid any confusion for shareholders using a universal ballot, we recommend that the company proxy materials (including the ballot itself) clearly identify company nominees, Rule 14a-11 nominees and traditional proxy contest nominees (*e.g.*, listing different nominees in different columns or rows and/or highlighting them in different colors). Furthermore, to minimize the risk of partial disenfranchisement that could occur if a shareholder selects only the candidates in the 14a-11 column or a short-slate column, proxy materials should clearly indicate that shareholders should select as many candidates as there are open director seats at the election.

We recognize that implementing a universal ballot may require further "notice and comment" rulemaking and therefore additional lead-time.[13] If a final version of Rule 14a-11 is adopted but does not initially provide for universal ballots, we believe that the Commission should develop interim rules to address the circumstances where a company faces concurrent nomination contests under a traditional proxy contest and proposed Rule 14a-11. Given the risk for shareholder confusion and the excessive costs and management burden involved in concurrent nomination contests, we believe that until a universal ballot is implemented shareholder

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[11] In a recent a no-action letter (Eastbourne Capital, L.L.C. (March 30, 2009)), the Staff permitted a shareholder that was nominating a short-slate of candidates in a proxy contest to "round out" its slate not only with management nominees but also with nominees of another shareholder that was proposing a separate short-slate. The Commission has proposed revisions to the proxy rules to make this exception generally available. Release No. 33-9052 (July 10, 2009). Under such a revised rule, a shareholder engaging in a traditional proxy contest presumably would be permitted to "round out" its short-slate ballot by including individuals nominated pursuant to Rule 14a-11.

[12] Disenfranchisement could occur, for example, for shareholders who want to vote for candidates on a short-slate ballot and also candidates on the Rule 14a-11 ballot because a shareholder can only submit one proxy to be counted in the election. While the Commission could address this issue by allowing a shareholder nominating a short-slate to include Rule 14a-11 nominees on its proxy card, doing so may give rise to concerns that the Rule 14a-11 nominees, together with the short-slate, could result in a change of control of the company, which the Commission has stated is not the purpose of the Rule.

[13] Any rulemaking should focus not only on the contents of the proxy card, but also on the form of instructions permissible for intermediaries to use. As a practical matter, that is the form received by the vast majority of shareholders, and it often varies from the company's form of proxy in ways that could, in the context of a universal ballot, affect a shareholder's understanding of the vote called for.

nominations pursuant to proposed Rule 14a-11 should not be permitted if another person or entity engages in a traditional proxy contest in connection with the same election. If the Commission does not adopt such an approach, we believe that proposed Rule 14a-11 should be revised so that the maximum number of permissible nominees thereunder is reduced by the number of directors being nominated in any concurrent proxy contest. We recognize that in many instances this approach may effectively eliminate the availability of proposed Rule 14a-11 for director nominations for one year, but without such a rule, the risks of unintended consequences from concurrent nominations are too significant.

More Clarity is Needed About Filing Deadline If Meeting is Moved More Than 30 Days

If a company does not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 days from the prior year, proposed Rule 14a-11 requires the notice of intent to nominate a director to be given a "reasonable time" before the company mails its proxy materials. This "reasonable time" standard is not sufficiently precise or clear in its consequences, both due to its ambiguity and the challenge of satisfying the Rule's time frames for addressing nominations. A typical circumstance in which this could arise is a restatement that delays an annual meeting. A company that has completed its restatement will wish to move quickly to set its annual meeting date with the certainty that the date will not be challenged for failing to provide a "reasonable time" for the filing of a nomination notice. We therefore recommend that any final rule should replace that approach with a specified deadline for delivery of notices (*e.g.*, not later than 30 days prior to the mailing of proxy materials). The company would of course be required to provide public notice of this deadline to allow shareholders to comply.

III. Further Conditions and Clarifications to Proxy Access Are Appropriate

The Proposed Ownership and Holding Period Requirements Should be Reconsidered

We agree with the Commission that nominating shareholders must hold a meaningful long-term stake of at least a minimum specified percentage of company voting shares. However, we do not think that the 1% threshold and one-year holding period for large accelerated filers adequately serve the Commission's objectives. In our view, the minimum required percentage should be higher and the holding period longer.[14]

First, we are concerned that a 1% threshold may significantly expose even large companies to the possibility of multiple shareholder nominees for the same election period and to shareholder nominations, with their attendant costs to the company and potential for shareholder confusion, in

[14] Because we recommend that Rule 14a-11 apply only to a subset of large accelerated filers, we comment here only on the eligibility requirements applicable to the largest companies under the proposal. If the Commission determines to apply any final rule more broadly, we believe that the ownership thresholds for smaller companies should also be increased. For a small- or mid-cap company, the dollar amount of investment needed to reach a significant ownership stake may be a trivial sum for many institutional investors. For example, a $5 million investment in a company with a market capitalization of $70 million would mean a greater than 7% ownership interest. In such circumstances, the possibilities for use of the nomination right in a manner contrary to the Commission's intentions in proposing the Rule would be significant.

more years than the Commission envisions. We understand from the Proposing Release that the Commission obtained information from the Office of Economic Analysis ("OEA") about the number of companies for which at least one shareholder could take advantage of proposed Rule 14a-11, on the theory that the Commission did not want to set the threshold at a level where no shareholder nominees would be eligible. However, it is not apparent from the Proposing Release whether the Commission also obtained information about the number of companies for which, at a given ownership threshold, more than one shareholder could rely on the Rule. If, for example, the 1% threshold would result in a significant number of large companies having ten or even five eligible individual shareholders, we believe the Commission should recalibrate its approach and consider a final rule that uses, for example, a 3% threshold. We would also observe that because the OEA information in the Proposing Release does not, and indeed cannot, take account of the impact of permitting groups of shareholders aggregating their shares in order to nominate directors, that information necessarily understates the ability of shareholders to use the Rule and further militates in favor of a higher threshold.

Second, we are concerned that a one-year holding period may permit more use of Rule 14a-11 by shorter-term holders than the Commission may expect. While no solution will be perfect, we believe that a two-year holding period would strike a better balance between the burdens on a company of proxy access and the benefits to those shareholders with a long-term economic interest in a company that the Commission seeks to achieve through the access right.

We would also note that as a result of rule-making dynamics proceeding incrementally often has advantages. If the Commission adopts a rule with a 3% threshold and a minimum two-year holding period, it can observe the Rule in operation and later adopt a lower threshold and/or a shorter holding period if experience warrants a change. While it may be an impolitic observation, it is nonetheless almost certainly true that it would be more difficult for the Commission to start with a lower threshold and shorter period and then revise the Rule to provide for a higher threshold or a longer holding period. This dynamic is of course not a reason for the Commission to adopt a rule that in its view is not the best solution at the time, but if there is uncertainty as to the preferred course of action, the incremental approach seems to us the more sensible one.

Eligibility Requirements Should Take Into Account Derivative Positions

We believe that any final rule should condition eligibility to file Schedule 14N on a net long position that also satisfies the requisite threshold throughout the relevant holding period. Specifically, for a large accelerated filer subject to the Rule, this approach would require a nominating shareholder or group to beneficially own the specified minimum percentage of voting stock of the company throughout the period and also would require that, after considering the effect of derivative instruments held by it, such shareholder or group have an economic interest in the company throughout the period that is at least equivalent to a holder of the specified minimum percentage of the outstanding voting shares. At a minimum, the concept of derivative instrument for these purposes should be defined broadly to include any option, swap or other similar arrangement with respect to the company's shares. We also suggest that any final rule should require a nominating shareholder to disclose on Schedule 14N any indirect ownership of, or short-positions in, a company's voting shares held through derivative instruments.

There Should Be Consequences if Ownership Position is Not Held Through Election

We agree with the requirement under proposed Rule 14a-11 that any nominating shareholder should be required to represent in its Schedule 14N that it intends to hold the company's securities through the date of the annual meeting. We do not believe it is practical to require a shareholder to represent that it will hold its position beyond the election, even if its nominee is elected. We recommend that any final rule provide for specific consequences if a shareholder ceases to hold the requisite position through the election date, as well as an obligation to file an amended Schedule 14N not later than the next business day after the threshold is no longer met, disclosing that fact and the reasons for the change in ownership. More generally, we recommend that from the date of its initial Schedule 14N filing until a date following the relevant shareholder meeting (*e.g.*, 60 days following the meeting), a shareholder should be required to promptly amend its Schedule 14N to report any changes of more than 1% in its ownership of voting shares or its net economic position in respect of the company's shares (taking into account derivatives). For unaffiliated nominating groups, the Rule should require an updated Schedule 14N only by any participating shareholder in the group that (together with its affiliates) changes its voting share ownership or net economic position by more than 1%.

We believe that the proper consequence of a failure to hold the requisite position through the date of the election is the automatic withdrawal of the shareholder's nominee(s). This approach is not unlike the existing approach with respect to shareholder proposals, whereby the proposal of a shareholder who fails to present the proposal at the meeting becomes a nullity. Since the company-designated proxies have the authority to vote a completed proxy in their discretion in the event a director nominee becomes unwilling or unable to serve, no disruption of the election would result from this approach.

We also believe that a company should be permitted to exclude for a specified period any nominations submitted by a shareholder that failed to maintain the requisite ownership position through the date of the election. The Commission should also consider imposing on that shareholder (or each member of a shareholder group) a requirement to disclose its failure to maintain the required ownership position in connection with any nomination or proxy contest involving any <u>other</u> company made during a specified period (*e.g.*, the next five years).

There Should Be Consequences if Nominees Fail to Win a Minimum Favorable Vote

We believe that a nominating shareholder whose nominees are included in the company's proxy materials in accordance with Rule 14a-11 but then fail to receive meaningful support should not be eligible to nominate directors under Rule 14a-11 for a specific period of time. This concept already exists in the context of shareholder proposals, and it is a reasonable means to prevent shareholders from clogging the annual meeting preparations with repeated nomination initiatives that have been plainly rejected by shareholders.

Specifically, we would propose that any shareholder that has successfully submitted nominees under the final rule (whether individually or as part of a group) be ineligible for one

year if none of its nominees in the preceding election received at least a specified minimum percentage of favorable votes (*e.g.*, 25%).[15]

Nominating Shareholders Should Represent Their Non-Control Intent Without Qualification

A nominating shareholder's non-control intent is a fundamental predicate of the Commission's determination to proceed with proxy access. As such, we disagree with the approach described in the Proposing Release, which contemplates a knowledge-qualified certification. Instead, the certification as to the absence of control intent by a nominating shareholder or each member of a nominating group as to itself should be unqualified.

There Should Be No Risk of Company Liability for False or Misleading Information Provided by a Nominating Shareholder

Under proposed Rule 14a-11, a company would not be responsible for information that is provided by a nominating shareholder or group under proposed Rule 14a-11 and included by the company in its proxy statement, except where the company "knows or has reason to know" that the information is false or misleading. We agree that the company should not be responsible for information that is provided by the nominating shareholder or group under proposed Rule 14a-11 and then reproduced by the company in its proxy statement. However, we disagree with the Commission's proposed exception to this rule where the company "knows or has reason to know" that the information is false or misleading. There is no good policy reason to put a company at risk of a retrospective "should have known" standard in this context or even an argument that someone within the company had constructive knowledge. This is an unnecessary invitation to contentiousness in an area that will already be fraught with it. The full and sole responsibility for the nominating shareholder's statements should lie with the nominating shareholder, as it is in a traditional proxy contest.

Availability of Schedule 13G for Nominating Shareholders Should Be Determined on a Facts and Circumstances Analysis

The Commission would revise Exchange Act Rule 13d-1 so that nominations under proposed Rule 14a-11 and related activities would be disregarded in determining whether a shareholder acquired securities for the purpose or effect of changing or influencing the control of the company. We agree that a nominating shareholder should not automatically forfeit its passive status (and therefore its ability to use Schedule 13G rather than Schedule 13D), but we oppose a wholesale carve-out from Rule 13d-1. While the proposed Schedule 14N certification requires a shareholder to confirm that it is not seeking to change control of the company or to gain more than a limited number of seats on its board, a shareholder's certification under Schedule 13G goes further to require confirmation from a shareholder that its shares "were not acquired and are not held for the purpose of or with the effect of changing *or influencing* the control of the issuer" (emphasis added). As the 13G analysis requires a determination regarding "influence" and not

[15] If the Commission rejects this approach, an alternative would be to permit the company to move the nominating shareholder to the end of the "queue" of all nominating shareholders in the relevant year, without regard to any contrary allocation provision in the final rule.

solely "control," a shareholder that is able to make the Schedule 14N certification may not necessarily be able to qualify under Schedule 13G. For that reason, we believe that the availability of Schedule 13G for Schedule 14N filers should be – as is the case under the existing rules – based on all the facts and circumstances, including the identity of the nominee and the circumstances of his or her nomination. For example, we believe that a shareholder nomination of its affiliate is a fact that, would today, and should in the future, be taken into account in assessing that shareholder's passive status and whether it is necessary to file a Schedule 13D.

The Exemption for Shareholder Communications Should Apply to Oral Communications

We agree with the Commission's proposed exemption from the proxy rules for communications made in connection with proposed Rule 14a-11 that are limited in content, filed with the Commission and made for the purpose of forming a nominating shareholder group. However, the exemption should be expanded to include oral statements made in connection with shareholder nominations. We acknowledge the Commission's concern about the difficulty of determining compliance with content restrictions in the case of oral communications, but in our view this concern does not justify a rule that would operate to prohibit customary communications incidental to a shareholder nomination. To mitigate the risk of inappropriate communications, the Commission could require that oral statements made in reliance on the exemption not be inconsistent with any communications previously filed by the shareholder in connection with the nomination process.

IV. Shareholder Nominees Should Be Required to Comply with Categorical Standards for Independence and Generally Applicable Disclosure Requirements

We believe the final rule should not only require compliance by shareholder nominees to a company's board with generally applicable independence requirements but also with other categorical independence requirements adopted by the company that are generally applicable to directors. In addition, we recommend that nominees should be required to comply with non-discriminatory disclosure requirements that are required by a company's charter or by-laws.

Nominees Should Comply with a Company's Generally Applicable Categorical Standards for Independence

Under proposed Rule 14a-11, a nominating shareholder or group would be required to make a representation in its Schedule 14N that its nominee is in compliance with the generally applicable independence requirements of applicable listing standards. The nominee would not be required to satisfy any independence standard that requires a subjective determination by the company's board (or board committee).

We also believe that nominees should comply with any generally applicable categorical independence standards a company has adopted, whether or not under applicable listing standards, so long as they apply equally to all directors and are not tied to who nominates them or whether they are affiliated with a significant shareholder (*e.g.*, a 20% holder). Boards that have implemented generally applicable categorical standards have taken considerable care to identify

and address common circumstances that they believe should not affect independence. Because these standards must be publicly available,[16] shareholder nominees should have no difficulty in determining the nature of the standards, and because they are also "objective" to facilitate independence judgments, determining compliance should present no special challenges for nominating shareholders or their nominees.

Nominees and Nominating Shareholders Should Be Required to Comply With Non-Discriminatory Disclosure Requirements Included in a Company's Governing Documents

Under the proposal, a company would not be permitted to exclude a nominee based on eligibility standards or disclosure requirements contained in its advance notice by-law or other provisions of its governing documents that are more restrictive than those included in proposed Rule 14a-11. With the limited exception of categorical independence standards (which we describe above), we agree that eligibility requirements that are more restrictive than those provided under the Rule would be inappropriate (unless approved by a shareholder-adopted by-law amendment). That said, we believe that the ability of boards and shareholders to assess director nominees would benefit from a requirement that nominating shareholders and the nominees themselves provide any generally applicable disclosure that may be separately called for by a company's governing documents as part of the Schedule 14N, provided such disclosure is required for all nominees. Indeed, we believe that this approach should be followed for all director nominees, whether nominated under Rule 14a-11 or under a traditional proxy contest.

V. Further Consideration Should Be Given to the Workability of the Proposed No-Action Process

We urge the Commission to reconsider the no-action process contemplated by proposed Rule 14a-11, which is likely to result in a substantial and, at worst, an unmanageable burden for the Staff, particularly if the final rules apply to all U.S. reporting companies. Wholly apart from the time needed by a board to assess a nominee, the process requires a complex and time-consuming exchange of communications in which the Staff is the ultimate arbiter – all this in a contentious environment and without an outcome that assures finality. The fact that the vast majority of U.S. companies hold their annual meetings during a period of about three months will only exacerbate the burden. Moreover, the issues at stake will be viewed by both sides as more important than those under the existing Rule 14a-8 process, and the burdens on the Staff (and the Commission through the appeal process) will commensurately increase. In short, it is hard to imagine a less desirable administrative process for a matter as serious as the elections of those charged with oversight of the nation's public companies.

If the process contemplated by proposed Rule 14a-11 is retained, we believe that the Commission should restrict implementation of any final rule to a subset of large accelerated filers as discussed above. This approach would moderate the Staff's workload, while still facilitating

[16] *See, e.g.*, Section 303A.02(a) of the New York Stock Exchange Listed Company Manual. *See also* Item 407(a) of Regulation S-K.

proxy access for the largest companies. As noted above, access proposals relating to other companies could still be advanced through the amended Rule 14a-8 process, and the Commission can later consider expanding the application of Rule 14a-11.

We also recommend that the Commission consider changes to the process (*e.g.*, an earlier filing deadline for Schedule 14N) that would facilitate timely treatment of shareholder nominees and that it provide interpretive guidance around its expected deliberative process that will foster more timely resolution by boards of questions surrounding shareholder nominees outside the no-action process, as well as greater finality about the outcome of a determination to include or exclude a shareholder nominee in the company's proxy materials.[17]

VI. Companies Should Not Be Subject to Both Rule 14a-11 and Amended Rule 14a-8 unless the Final Rules Permit Shareholder Proposals Under Rule 14a-8 to Fully Modify the Access Framework Proposed Under Rule 14a-11

As stated above, we believe the Commission should limit application of Rule 14a-11 to the largest public companies, while allowing shareholders of all other companies to rely on an amended version of Rule 14a-8. We believe that unless Rule 14a-11 is amended to permit shareholder-adopted by-laws that can trump the operation of the federal rule**,** companies should not otherwise be subject to additional shareholder proposals under Rule 14a-8 in this area, at least until some experience is gained under Rule 14a-11. This approach will mitigate the compliance burdens of the largest companies, while at the same time provide for some form of access for all companies.

VII. Changes to the Eligibility Requirements under the Amended Rule 14a-8 Are Necessary

In addition to revising the proposed amendments to Rule 14a-8 to permit by-law proposals whether or not they conflict with the proposed Rule 14a-11 framework, the Commission should amend certain of the eligibility requirements for proposals under Rule 14a-8. First, the requisite ownership threshold under amended Rule 14a-8 should be consistent with the ownership thresholds required under the final version of Rule 14a-11. We believe that the minimum holding amount for shareholder proposal eligibility under the current Rule 14a-8 – $2,000 – is far too low as a general matter in light of the cost incurred and time invested by a company in dealing with shareholder proposals under Rule 14a-8. But it is particularly inappropriate for shareholder-proposed by-laws that would set standards for director nominations, and there is no policy reason to distinguish between proposed Rule 14a-11 and the proposed amendments to Rule 14a-8 for purposes of this eligibility requirement. The need for this change is even greater if the Commission determines that companies should be subject to both Rule 14a-11 and amended Rule 14a-8.

[17] We note that the Staff's practice in the area of shareholder proposals to provide guidance as to how it plans to act with respect to various matters that have attracted significant interest among proponents has helped companies to address many proposals more efficiently outside the no-action process.

Second, we believe that if any person or entity submits, or is part of a group that submits, a Schedule 14N for any proxy season, proposals under Rule 14a-8 should not be permitted by that person or entity in that proxy season in order to avoid potentially conflicting disclosure requirements. This approach would also reduce the burden on the company, which would otherwise need to address nominations under both rules, as well as potential confusion among shareholders.

VIII. The Commission Should Not Adopt Proposed Rule 14a-19

We oppose the creation of a separate rule – proposed Rule 14a-19 – to deal with director nominations for inclusion in a company's proxy materials using procedures established under state law or a company's governing documents rather than under Rule 14a-11. We believe there are no policy grounds to justify disparate treatment of shareholder nominations in such circumstances, and we believe that the framework of the federal rules should apply equally to nominations in a company's proxy statement under state law or its governing documents. An additional rule is not necessary, is likely to be confusing and may hamper efforts to create a consistent approach to the access right.

IX. The Commission Should Continue to Permit Shareholders to Vote for a Company's Nominees as a Group and Allow Signed But Blank Proxy Cards to Be Voted for Management's Nominees

Proposed Rule 14a-11 would prohibit the grant of a proxy to vote for the company's nominees as a group if the ballot includes a shareholder nominee. We believe that such a change will be confusing to shareholders and will lead to disenfranchisement of shareholders who sign and submit a blank proxy card expecting to have their votes counted on behalf of management's nominees. We believe the Commission should continue to permit a signed proxy card that is otherwise blank to grant to the company's designated proxies the authority to vote "for" all company nominees, even where shareholder nominees under Rule 14a-11 are named on the proxy card.

* * *

We commend the Commission for returning to regulation of proxy access and its determination to make progress with respect to this important tool of corporate governance. We also note the statements made at the open meeting for the proposal that the Commission intends to continue its consideration of other rules that affect the proxy solicitation process. As noted above, we believe that implementation of a universal ballot for all proxy contests should be a central focus. We also urge the Commission to include within the scope of this review rules that impair a company's ability to communicate directly with its shareholders, such as the OBO/NOBO rules, and the desirability of changes to the Schedule 13D and 13G reporting requirements to require disclosure of derivative positions.

We would be pleased to respond to any inquiries you may have regarding this letter or our views on the Proposing Release more generally. Inquiries may be directed to Alan L. Beller or Victor I. Lewkow at (212) 225-2000.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

cc: Securities and Exchange Commission
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Hon. Kathleen L. Casey, Commissioner
Hon. Elisse B. Walter, Commissioner
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