CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

DAVID T. HIRSCHMANN
SENIOR VICE PRESIDENT

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5609 • 202/955-1152 FAX

August 14, 2009

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

Re: Facilitating Shareholder Director Nominations
Release Nos. 33-9046; 34-60089; IC-28765
File No. S7-10-09

Dear Ms. Murphy:

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CMCC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve this objective, it is an important priority of the CMCC to advance an effective and transparent corporate governance structure. Accordingly, the CMCC is pleased to comment on the amendments to the proxy rules under the Securities Exchange Act of 1934 (the "Exchange Act") proposed by the Securities Exchange Commission ("SEC") on June 10, 2009 in the release entitled "Facilitating Shareholder Director Nominations" (the "Proposal").

On April 28, 2009, the CCMC wrote to the SEC (copy attached) and expressed grave misgivings about potential rule-making on shareholder access. The CCMC's position remains unchanged and has very serious concerns about the Proposal, including both proposed Rule 14a-11 and the proposed amendments to Rule 14a-8. Accordingly, the CCMC believes the Proposal to be unwise, unnecessary, and beyond the Commission's authority. It is built on

the faulty, unproven assumption that significant shareholders today have difficulty getting the attention of Nominating Committees or being otherwise heard by the Board of Directors. The opposite is true. The real question the Commission should be considering is how to safeguard the interests of retail investors against the sometimes differing interests of influential minority shareholders, particularly when those shareholders are pursuing agendas that undermine the long-term interests of retail investors.

Rather than addressing this important consideration, the Commission's flawed proposal makes this problem significantly worse. In fact, the proposal seems designed to specifically favor some shareholders over others. For example, only one favored group of shareholders would be eligible to have its own candidates on the company's proxy materials. For this reason, among others, this is probably the most flawed and unworkable proposal the SEC has issued on these issues.

This is the third time in six years that the SEC is considering rules to facilitate shareholder director nominations. It is the judgment of the CCMC that the States, not the SEC, have the authority to act in this realm, through the traditional usage of state corporate law. In advancing the Proposal the SEC fails to give compelling reasons why reconsideration is warranted at this time. While the SEC suggests that the current economic conditions merit reconsideration of this proposal, over 97% of public companies were not connected with the financial crisis. Accordingly, the Proposal seems to be a solution in search of a problem.

Similarly, the Proposal fails to demonstrate how the efficiencies of the capital markets will be increased, and ignores ongoing changes in corporate governance that companies have initiated within the state corporate law structure. Tinkering with the capital markets, increasing costs on businesses, and potentially endangering shareholder value all point to a proposal that is deeply flawed and full of unintended consequences. Unintended consequences will flow from the one size fits all approach, as put forth in the Proposal, causing dramatic adverse impacts particularly on small and midsize companies.

Because of these dangers, the CCMC recommends that this rulemaking be withdrawn. Instead, the SEC should study changes in Board composition when alternatives have been suggested by shareholders. Such a study should also include a review of the many changes in corporate governance structures that have occurred over the past 5 years, without government mandates and within the existing regime of state corporate law. This can give a clear understanding of the true state of corporate governance. If shareholders, directors and management are already engaged in a dialogue that is bringing about corporate governance reform, the SEC should better understand what is happening, rather than create a new system that will hamper directors and management in the performance of their responsibilities and harm shareholders. The failure of the SEC to review the state of corporate governance in the development of these rules is troubling.[1]

Accordingly, the CCMC strongly opposes the Proposal as unnecessary, overreaching, and potentially disruptive and harmful to companies and shareholders alike. The CCMC's concerns are discussed in greater detail below.

1. The Proposal Exceeds the Commission's Authority under Section 14 of the Securities Exchange Act of 1934.

The Proposal would directly regulate the balance of power between corporations and their shareholders, and among shareholders, in a manner that exceeds the Commission's authority under Section 14 of the Securities Exchange Act of 1934. Under the guise of disclosure and facilitation of existing state rights, the Commission would effectively adopt a federal corporate governance standard that would provide certain large shareholders with a new federal substantive right of proxy access that does not generally exist under state law.

[1] For instance, a study found that of the companies targeted by Just Vote No campaigns, 30% change the CEO, while 51% make other strategic changes. Diane Del Guercio, Laura Seery & Tracie Woidtke, *Do Boards Pay Attention When Institutional Investor Activists "Just Vote NO"*? 90 J. Fin Econ. 84, 85 (2008). Accordingly, under the existing system shareholders can exert change through the use of their voting powers. Similarly, ongoing changes in corporate governance are more fully discussed in section 4 of this letter.

The limits of the Commission's authority under Section 14 were the subject of a 1990 opinion of the Court of Appeals for the District of Columbia, in *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990). In that case, which related to the Commission's "one-share, one-vote" rule, the court stated that the Commission's authority to regulate proxy disclosure does not permit it to regulate "the distribution of powers among the various players in the process of corporate governance" or to regulate issues that are "part of corporate governance traditionally left to the states." In this regard, the court noted that when enacting the Exchange Act in 1934, Congress expressly disavowed any intent to regulate or interfere in the internal affairs and management of corporations. The court stated that:

> Congress acted on the premise that shareholder voting could work, so long as investors secured enough information and, perhaps, the benefit of other procedural protections. **It did not seek to regulate the stockholders' choices**. If the Commission believes that premise misguided, it must turn to Congress. (emphasis added)

The SEC frames the Proposal as merely "intended to remove impediments so shareholders may more effectively exercise their rights under state law to nominate and elect directors at meetings of shareholders." In fact, the Commission's Proposal conflicts with state law and would fundamentally and substantively change the relationship between corporations and their shareholders with regard to director elections, a matter which lies at the core of corporate governance.

Mandating shareholder access to company proxy materials would create a substantive federal requirement under which a company, in effect, must solicit proxies for dissident director candidates and the establishment of director election procedures that it does not support and that will lead to future proxy contests in opposition to the company's own candidates. Such substantive regulation is clearly inconsistent with Congressional intent, as it goes far beyond the central and process-based purpose of the proxy rules, namely to ensure a fully informed and orderly vote on matters coming before the shareholders.

As the Supreme Court stated in *Santa Fe Industries v. Green*, "corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporations." 430 U.S. 462 (1977) (emphasis in original, quoting *Cort v. Ash*, 422 U.S. 66 (1975)). Clearly, the internal affairs of a corporation include the "relations between management and stockholders." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The Proposal would substantively alter existing state systems of corporate governance and work fundamental and substantive effect on the state-determined allocation of governance power among shareholders and directors. States that want to establish procedures to permit shareholder access to company proxy materials for purposes of director elections can do so and in fact have done so. The Commission's role is not to override these state-level determinations. The Proposal's exemption from its requirements if state law prohibits shareholders from nominating candidates for election to the board of directors will have no real effect since, as the Commission acknowledges, to their knowledge no state precludes shareholders from nominating directors.

2. Adopting the Proposal Would be Costly and Disruptive to Companies.

The potential negative effects of the proposed rule changes on the corporate election process and functioning of boards of directors need to be carefully considered. If the Proposal is adopted, it is likely that proxy contests (in which the company is required to solicit proxies on behalf of shareholders) will increase greatly and may become customary. Such contests are inevitably an extremely disruptive event for a company that will divert vast amounts of time, energy, and funds away from the company's operations and towards defending the company.

The Proposal addresses these increased costs in only an indirect way, stating that "we estimate the total annual incremental paperwork burden resulting from proposed Rule 14a–11 and the related rule changes for reporting companies (other than registered investment companies), and registered investment companies to be approximately 17,149 hours of internal company or shareholder time and a cost of approximately $2,796,320 for the services of

outside professionals" and "we estimate the total annual incremental paperwork burden resulting from the proposed amendment to Rule 14a–8(i)(8) and the related rule changes for reporting companies (other than registered investment companies), registered investment companies, and shareholders to be approximately 7,692 hours of internal company or shareholder time and a cost of approximately $1,025,500 for the services of outside professionals."[2]

While these statements may represent an underestimate of the time and expense involved in the rules changes, the estimates do provide a glimpse into the burden that will be placed on companies and shareholders in a delicate economic environment. In addition to the monetary cost, proxy contests require large expenditures of time by directors. Time spent considering proxy contests could be better used overseeing business strategies, risk management, executive compensation, succession plans, compliance programs, and other issues—not weighing responses to proxy contests where the nominating shareholder has no cost associated with the nomination.

The CCMC believes that the adoption of the Proposal would lead to an increase in full-scale proxy contests that will cause companies to expend significant resources to defend their slate of director nominees against one or more competing candidates' slates nominated by shareholders. Such proxy contests are currently relatively rare, but the Proposal would make shareholders much more willing to advance a slate of nominees—a qualifying shareholder would be able to include its nominees in the company proxy materials at the company's expense, and therefore the shareholder would suffer very little downside financial risk in initiating a proxy contest.

The intensity with which boards will campaign against the election of shareholder nominees depends on the particular circumstances, but given the centrality of directors to a company's business, it is highly likely that a board would take extraordinary efforts to oppose a slate of shareholder nominees that it does not consider qualified or appropriate for the company. This would involve significant media and public relations efforts, advertising in a number of forums, mass mailings, and other communication efforts, as well as the hiring of outside consultants and advisors and the expenditure of significant

[2] The Securities and Exchange Commission, Facilitating Shareholder Director Nominations, RIN 3235-AK 27, Pages 148-149.

time and effort of the company's employees. Experience shows that these costs will dwarf the costs presented by the Commission in the Proposal.

A sense of the potential costs associated with such intense campaigns may best be gained from looking at the estimated costs of some major proxy contests in both large and small companies. Among the most prominent and strenuous recent proxy contests relating to director elections were those at Motorola, Inc., H.J. Heinz Company, and H&R Block Inc. In their 2007 proxy statements, these companies estimated the total costs of proxy solicitations in connection with the contests to be $14 million, $7 million and $4 million, respectively. The costs for proxy contests at smaller companies or for less serious challenges are, of course, smaller than these, but often represent equally great burdens proportionately on the income or assets of these companies and the time and attention of their leadership.

For instance, press reports in 2009 stated that a proxy contest surrounding Tollgrade Communications, Inc. cost the company $800,000, or half of its loss for the second quarter. The proxy contest costs represented almost 7% of Tollgrade's revenue for the quarter. Earlier this year, Cowlitz Bank estimated that a potential proxy contest could cost as much as $3 million. Cowlitz Bank reported a loss of $8 million and held $587 million in assets in 2008. Proxy fights are not only costly, but the costs are particularly regressive for small and mid-size public companies. Clearly, a one-size fits all approach does not work.

The CCMC believes that adoption of the Proposal would rearrange the incentives such that these sorts of full-scale proxy contests would become much more common and perhaps even a perennial feature of director elections. The company's resources would be expended to the detriment of shareholders generally, but for the benefit of the large, but still minority, shareholders whose proxy solicitation would be funded by the company. The fact that the company (in effect, the shareholders) will be forced to fund the proxy solicitations of certain shareholders is particularly worrisome because of the likelihood that some large shareholders will abuse a system that does not force them to internalize the costs of their behavior. Under the current system, any shareholder, large or small, is free, within the confines of applicable state law, to wage a proxy contest against a company's directors. But in doing so, the

contesting shareholder must consider whether the associated costs are an efficient use of its resources. If large shareholders are able to use the company's assets to fund a proxy contest relating to director elections, they will have no incentive to avoid wasteful activities or proposals designed merely to garner publicity or gain leverage against management to advance a narrow agenda, as discussed in the next section below.

3. Adopting the Proposal will Impair the Functioning of Boards to the Detriment of All Shareholders.

It is likely that most proposals to permit shareholder access and to advance shareholder nominees will be advanced by the types of activist shareholders that traditionally have used the shareholder proposal mechanism for the promotion of parochial interests or political or social issues having little to do with the company's business. To the extent that such shareholders are actually successful in electing special interest or "protest" directors, the effect may be to create divided boards of directors with a diminished capacity to function effectively and to increase distrust and hostility, while possibly impairing communications between management and directors.

More generally, creating an environment where election contests are a constant threat will turn the company-shareholder relationship into an essentially adversarial relationship, instead of one where the parties' interests are aligned and the parties are working toward a common purpose. This alignment does not suggest cronyism, rather a desire to obtain a common goal - the continued long-term well being of the company and increasing shareholder value.

Also, the CCMC feels that the threat of acrimonious, contested elections and the resulting uncertainty may dissuade many qualified directors from board service. In recent years, stock exchange independence and other corporate governance requirements, the Commission's rule-making under the Sarbanes-Oxley, and the expansion of disclosures regarding director compensation have already made it much more difficult for companies to find qualified independent directors who have the time, ability, and inclination to serve. The proposed rules would aggravate this situation.

4. There has been No Compelling, Objective Showing of Need for the New Rules

As stated earlier, in the CCMC's opinion, the SEC has failed to demonstrate a compelling need to adopt the Proposal. As presented, the Proposal does not advance any objective basis for demonstrating that shareholder access to company proxy materials for purposes of director elections would bring a benefit to shareholders or an improvement to the director election process. The extent to which, and the manner in which, shareholders may nominate directors or amend the bylaws to permit shareholder nominations are established and delineated by state law, and these rights are in no way under attack or in need of federal vindication.

Rather a careful study of state law and corporate governance structures would show that many changes have occurred over the past several years through the current system. These changes have not occurred by government mandate; rather, they have developed through a dialogue between shareholders, directors and management.

It is the CCMC's view that corporate governance developments and advances in recent years on a number of fronts have indicated that there is no need for new rules. A fuller discussion flows below.

A. Changes in State Law

State law defines the rights of shareholders in relation to the governance of a corporation, including the extent to which shareholders can propose by-law amendments and nominate directors, and the extent to which they have access to the company's proxy to do so. States can and do modify their laws to adjust the balance of power between companies and shareholders, and to give more or less discretion to companies as to the rights that shareholders have.

Most recently, Delaware enacted a law to clarify the ability to amend a company's bylaws to provide shareholder access to the company proxy materials for the purpose of nominating directors. Delaware will also allow a company's bylaws to include a provision that the company, under certain circumstances, will reimburse a stockholder for the expenses incurred in

soliciting proxies in connection with an election of directors. The Delaware statute does not dictate the terms of such access, but rather leaves it to the corporation and its shareholders to resolve. This will ensure that directors and shareholders can shape a right to access that fits the size and character of a particular company. For example, the determination of which shareholders should have the right (i.e. the threshold ownership level), any time-based share holding requirements, the frequency with which such rights can be exercised, and the director qualifications required, can all be crafted to meet the needs of the company at hand and the interests of its shareholders.

The broad influence of Delaware on practices of publicly traded companies and on the corporate laws of other states can hardly be understated. The American Bar Association's Committee on Corporate Laws, which is responsible for the Model Business Corporation Act, is considering similar changes to the Model Act. Thirty states have adopted all or substantially all of the Model Act as their general corporation statute.

State law is the traditional and appropriate forum for defining the rights of shareholders with regard to director elections, by-law amendments and other fundamental corporate matters. The recent revisions in state law in these areas illustrate that states are appropriately responsive to shareholder concerns and able to balance the competing interests. The laws of the various states provide flexible environments in which new corporate governance ideas can be tested, refined, and applied and the competitiveness of American businesses can be enhanced. There is no reason for the Commission to override state decision-making in this area and impose a one-size-fits-all federal solution.

B. Corporate Responsiveness to Shareholder Concerns.

Recent developments have shown that shareholders and shareholder interest groups are increasingly capable of influencing corporate action, and that corporations are increasingly responsive to investor concerns. While Boards are making reasonable choices, they are forced to deal with agendas foisted upon them by activist investors. Many of these activist investors are pursuing issues to gain leverage or make political statements.

Though the merits of some of these improvements are debatable, what is not debatable is that under the current system a dialogue exists between directors, shareholders, and management. Because this dialogue exists and is bringing about changes in governance structures, no compelling reason is demonstrated for this proposal moving forward.

For instance, a growing number of corporations have revised their corporate governance practices in significant ways in response to shareholder concerns, including with regard to director elections. A Corporate Library survey reports that as of December 2008, 49.5 percent of companies in the S&P 500 index had made the switch to majority voting in uncontested director elections and another 18.4 percent had, while retaining a plurality standard, adopted a policy requiring that a director that does not receive majority support must submit his or her resignation.

A Governance Group Issues Report issued by RiskMetrics Group on December 17, 2008 includes the following observations:

- The average board independence level rose four percentage points in 2008, to 78 percent, from 74 percent in 2007. Average board independence had leveled off at 72 percent in 2006 (the first year that no increase at all was found from the prior year). Notably, the percentage of companies whose boards are at least two-thirds independent rose by approximately seven points, to 85 percent, in 2008, similar to the increase found in 2007.

- The number of companies with staggered boards continued to decline in 2008 across all indices. Among S&P 1,500 companies, 50 percent maintain classified boards as of 2008, a two point drop from the prior year and the first time on record a majority of companies do not maintain a classified board. Just 36 percent of S&P large capital companies, meanwhile, still maintain classified boards, compared to 57 percent at S&P MidCap companies and 56 percent at S&P SmallCap companies.

- As of the end of June 2008, 46 percent of study companies had separate individuals serving as chairman and CEO at the time of their most

> recent shareholder meeting—an increase of 21 percentage points since 2000, and one percentage point over the previous year. Small and MidCap companies are significantly more likely than firms in the S&P 500 to have separate chair and CEO positions. Almost half–48 percent–of the separate board chairs in the study universe are considered independent. That represents a 10 percentage point increase over 2007 and follows a seven percentage point year-over-year increase from 2006. Overall, 22 percent of the study companies now have an independent board chairman.

While the virtues of these changes may be questioned, corporate responsiveness to shareholders is a demonstrable fact. Therefore, it is respectfully submitted that the SEC has failed to prove why a reconsideration of this rule making is justified for the third time in six years.

C. SEC and Stock Exchange Rule-Making.

In recent years, the New York Stock Exchange, NASDAQ, and other major stock exchanges, acting in response to the Commission, each adopted significant changes to their corporate governance listing standards. Under these standards, the independent directors, generally in the form of an independent nominating committee, have greater involvement in the director nomination process. In addition, these standards heightened the requirements for determining whether a director is "independent" of management and the company.

Numerous additional corporate governance changes have been imposed by the stock exchanges and the Commission. The SEC recently approved a change to a New York Stock Exchange rule that will eliminate broker discretionary voting in director elections, effective for shareholder meetings held on or after Jan. 1, 2010. Brokers will no longer be able to vote "street name" shares on behalf of beneficial owners who do not give specific voting instructions. Since the change applies to brokers, it will affect essentially all public companies. These changes, along with other trends, continue to dilute the participation and relevance of retail investors in favor of activist institutional investors. Pitting various investor interests against each other, not only harms proxy voting, but endangers the well being of public corporations.

In addition, the SEC has proposed amendments to its disclosure rules that would require companies to disclose the specific experience, qualifications, attributes, or skills that qualify a person to serve as a director – and as a member of any committee on which the person serves or is chosen to serve – in light of the company's business and structure. This disclosure would apply to sitting directors and nominees, whether selected by the company's nominating committee or another proponent, and would also include directorships held by each director and nominee at public companies at any time during the past five years (rather than only current positions, as now required) and legal proceedings over the past 10 years that are material to an evaluation of the director's ability or integrity (rather than proceedings over five years, as now required).

Current disclosure rules, which are set out in Item 407(c)(2) of Regulation S-K, already require the company to provide detailed information on the practices and policies of its nominating committee. In particular, any U.S. reporting company is required to disclose the following:

- If the nominating committee has a policy with regard to the consideration of director candidates recommended by shareholders, a description of the material elements of the policy (including, but not necessarily limited to, a statement as to whether the committee will consider director candidates recommended by shareholders). If the committee does not have such a policy, the company must include a statement of that fact and the basis for the view of the board of directors that it is appropriate for the company not to have such a policy.

- A description of the procedures to be followed by shareholders in submitting recommendations for director candidates, if the nominating committee will consider them.

- A description of any specific, minimum qualifications that the nominating committee believes must be met by nominating committee-recommended board nominees and any specific qualities or skills that the nominating committee believes are necessary for one or more of the company's directors to possess.

- A description of the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether or not the nominee is recommended by a security holder.

- With regard to each nominee approved by the nominating committee for inclusion on the company's proxy card (other than nominees who are executive officers or directors standing for re-election), the company must disclose which one or more of the following categories of persons or entities recommended the nominee: shareholder, non-management director, chief executive officer, other executive officer, third-party search firm, or other specified source.

- If the nominating committee receives a recommended nominee from a shareholder or shareholder group who, either individually or in the aggregate, beneficially owned more than 5% of the company's voting common stock for at least one year as of the date of the recommendation was made, identification of the candidate and the shareholder or shareholder group who recommended the candidate, and disclosure of whether the nominating committee chose to nominate the candidate.

The effect of the SEC's existing and proposed disclosure rules is to provide investors with a great deal of information on a company's director nomination process, thus enabling them to participate fully in this process to the extent permitted by state law and the company's policies, and to enable comparisons of the processes of different companies in the interest of developing best practices.

These stock exchange rules and Commission rules obviate any need for greater shareholder access to company proxy materials. As the Commission has previously recognized, use of independent nominating committees addresses the same concerns that underlie the shareholder access proposals.

The stock exchange and Commission rules have had a significant impact on the director nomination process and have expanded the information available to shareholders in making director election decisions.

The CCMC, in fact, regards the rules established by the stock exchange and Commission, which emphasize the involvement of independent directors and the transparency of the nominating process, constitute a superior system for protecting the interests of all shareholders as compared to the shareholder access requirements. The company's directors have a fiduciary duty to *all* shareholders, and the heightened independence standards ensure that the independent directors can truly act in a manner independent of management. These independent directors are in the best position to weigh all recommendations – from management, shareholders or other sources – and make recommendations to the full board as to the nominees for inclusion in the issuer proxy.

The Proposal would give certain shareholders the ability to force the company to expend funds to advance the nomination of the shareholders' nominees. These shareholders do not owe a fiduciary duty to the corporation or to other shareholders, and there is no reason to think that they will strive to act in the best interests of the other shareholders or of the corporation. The interests of all shareholders are best served by having the independent directors, and not shareholders, serve as the primary filter for director nominees, or at least by permitting companies and their shareholders to determine that process.

5. Conclusion

The CCMC appreciates the opportunity to comment to the Commission on the releases, and would be pleased to discuss any questions the Commission may have with respect to this letter. However, based on the forgoing, it is the opinion of the CCMC that the SEC has failed to demonstrate a compelling need for this rule-making, or how capital markets will be made more efficient. Furthermore, the CCMC believes that from these proposals will flow substantial unintended consequences that will harm corporate governance, shareholder value, and future economic growth in the United States.

Accordingly, the CCMC respectfully requests that the SEC withdraw this rule-making and engage in other projects that will assist the safety and soundness of the capital markets in these trying times.

Sincerely,

David T. Hirschmann

Attachment

CENTER FOR CAPITAL MARKETS COMPETITIVENESS

RICHARD H. MURRAY
CHAIRMAN

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(212) 317-5339
Richard_Murray@swissre.com

April 28, 2009

The Honorable Mary Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Schapiro:

The U.S. Chamber of Commerce, the world's largest business federation represents more than three million businesses and organization of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve this objective, it is an important priority of the CCMC to advance an effective and rational corporate governance structure. Accordingly, the CCMC is opposed to a federal shareholder access right for the following reasons:

- Substantive regulation of shareholder rights and director elections fall squarely within the purview of state corporation law and pre-empt action by the Securities and Exchange Commission ("SEC");
- Numerous reforms of recent years have provided shareholders with sufficient access to relevant information and to corporate decision-makers. Because of these reforms there is no compelling need for a federal access right; and
- The integrity of the voting system is a more urgent issue requiring the SEC's attention and should be addressed before putting further stress on the system with shareholder access.

Shareholder Access is a Matter of State Law

Director elections and shareholder rights have been under the purview of state law since the inception of the corporate structure in the 19th century. Because of this longstanding responsibility and the lack of authority by the SEC to act in

this area of corporate governance, the CCMC urges the SEC to leave the rules and methods of electing directors, in the proper venue, the States.

Section 14 (a) of the Securities Exchange Act of 1934 lacks authority to regulate corporate governance and limits the SEC's rulemaking powers to the proxy solicitation process. Therefore, the SEC's authority is limited to the regulation of disclosures, made and the procedures followed, in connection with proxy solicitations. While the SEC lacks authority to regulate corporate governance, the United States Supreme Court has held that corporate governance is a matter of state law. In so ruling, the Supreme Court has stated "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.[1]

No compelling reason exists to overturn the long-standing state law role in controlling the substantive rules regarding director election and that role should in fact be preserved and protected. Experience shows that the state law route is more likely to preserve flexibility for companies and shareholders to define the right approach given the circumstances at hand. The CCMC believes the SEC can and should play a pivotal role by exercising its jurisdiction over disclosure to ensure that shareholders are fully informed about their rights and that there are transparent procedures for the exercise of such rights. Moreover, such a role is in accord with the SEC's limited authority under Section 14(a) of the Securities Exchange Act of 1934.

By way of example, the recent actions by Delaware should give pause to any federal action in the field of shareholder access. As the preeminent actor in corporate law in the United States, Delaware has enacted a new law to clarify company's ability to amend their bylaws to provide shareholder access to the company proxy materials for the purpose of nominating directors. The broad influence of Delaware on practices of publicly traded companies and on the corporate laws of other states can hardly be understated. Other states are expected to follow suit.

[1] *Santa Fe Industries v. Green* 430 U.S. 462, at 479.

The Delaware statute does not dictate the terms of such access, but rather leaves it to the corporation and its shareholders to resolve. This will ensure that management, directors and shareholders can shape a right to access that fits the size and character of a particular company. For example, the determination of which shareholders should have the right (i.e. the threshold ownership level), any time-based share holding requirements, the frequency with which such rights can be exercised, and the director qualifications required, can all be crafted to meet the unique situation at hand. The CCMC strongly believes that such an approach is practical and workable for individual companies, reflects the concerns of their constituents and is consistent with the long-term company growth.

The pursuit of a federal right to access will lead to a one size fits all rule. This results in unnecessary burdens for small and mid sized companies which cannot afford the distraction and expense of the process. It means that all companies will be viewed similarly in determining access design features. However, it is obvious that no one approach can respond to the diversity in business strategy, profit model, size, scope and ownership structure that characterizes corporate America.

If, in the alternative, states are allowed to exercise their rightful authority, companies will be able to work with shareholders to determine the features that are meaningful and workable for them. By preserving flexibility in design and implementation, the CCMC believes the competitiveness of American businesses will be enhanced. Currently, this is the model being used for majority voting of directors, staggered boards and the right of shareholders to call special meetings, among others. The CCMC believes that this flexibility has served American companies and shareholders well and that preserving and even fostering it should be the touchstone for corporate governance reform. Accordingly, the thousands of public companies, through management, directors and millions of shareholders will be allowed to foster a structure that best fits their needs.

Recent Reforms Have Expanded Shareholder Rights

In recent years, new and multiple rules have reformed corporate governance structures. These reforms include, but are not limited to, enhanced director independence, audit committee financial expertise, independent lead directors, majority voting for directors, decreased staggered boards, and enhanced disclosure of executive pay. In addition, companies have taken a variety of steps to enhance communication with shareholders.

These steps include using web-based technology to communicate with shareholders, holding meetings with major holders and conducting shareholder surveys.

In light of these reforms the CCMC does not see a need for a broad, uniform shareholder access rule. In fact, shareholders have made very limited use of their right to recommend candidates for nomination, evidence that there is no compelling need for access.

Communication and Proxy Voting Improvements Should be Reviewed

Whereas the CCMC believes that shareholder access is outside of the scope of the SEC's authority, issues regarding the proxy system should be reviewed and action taken if warranted. As the marketplace has changed, issues have emerged that merit a review of proxy voting participation, including the lack of retail investor familiarity with the proxy solicitation process and the separation of voting and economic rights. For example, improvements to the Notice and Access framework are needed to increase retail investor participation and the appropriate disclosure of ownership interests may be needed. Additionally, new technologies can be introduced into the proxy voting system to better foster communications between investors and boards. Alternative voting processes also present opportunities to better balance the diverse voices of the investing community. The SEC should take a holistic view of all market participants in examining and improving broader proxy voting participation.

The CCMC respectfully requests the SEC to focus on ensuring adequate disclosure of access rights provided by state law and on considering appropriate changes in the shareholder communication and proxy voting participation, which clearly are within the SEC's authority.

Sincerely,

Richard Murray
Chairman
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

cc: The Honorable Luis Aguilar, Commissioner, U.S. Securities and Exchange Commission

The Honorable Kathleen Casey, Commissioner, U.S. Securities and Exchange Commission

The Honorable Troy Paredes, Commissioner, U.S. Securities and Exchange Commission

The Honorable Elise Walter, Commissioner, U.S. Securities and Exchange Commission