



JOHN L. WEINBERG CENTER
FOR CORPORATE GOVERNANCE

Alfred Lerner Hall
University of Delaware
Newark, Delaware 19716-2709
Ph: 302/831-6157
Fax: 302/831-3329

January 15, 2010

U.S. Securities and Exchange Commission
100 F Street NE
Washington DC 20549

Attention: Elizabeth Murphy, Secretary

Re: File No: S7-10-09; Release Nos. 33-9086; 34-61161; IC-29069; Release Nos. 33-9046;
34-60089; IC-28765
Facilitating Shareholder Nominations

Ladies and Gentlemen:

The undersigned Director and Associate Director of the John L. Weinberg Center for Corporate Governance of the University of Delaware¹ submit this letter in response to the request by the Securities and Exchange Commission (the "SEC") for comments in its release entitled "Facilitating Shareholder Director Nominations" published on December 14, 2009 (the "Comment Proposal"). The Comment Proposal served to re-open the comment period on the SEC's proposed changes to the federal proxy rules contained in Release No. 33-9046; 34-60089; IC-28765, "Facilitating Shareholder Director Nominations" (the "Proposal").

As the SEC acknowledged in the Proposal, the ability of shareholders to nominate and select directors is a fundamental right, one which lies at the heart of the U.S. system of corporate governance. We have long believed and advocated the position that open, fair, regular board elections are one of the basic pillars of sound governance and modern corporate accountability. The exercise of shareholder voting rights, together with an independent board properly incentivized by stock ownership in the corporation, forms the basis of a powerful and effective system of governance and economic incentive. This model has served the U.S. capital markets well, and has led to innovation, prosperity and growth.

¹ The John L. Weinberg Center for Corporate Governance was established in 2000 and named in 2002 ("Weinberg Center"). Our mission is to encourage thoughtful discourse and reform by providing a forum for business, academia, the legal profession and the judiciary to study corporate governance and related issues.

We believe that these principles provide the theoretical pole stars around which the current proposed legal reforms should be evaluated. For our economic system to continue to attract and retain investment in the global economy, governance mechanisms should be linked to, and enhance the goal of, investor protection. We believe investors are served when they have a readily accessible right, together with a fair and open process, to select or reject the directors who would serve as their fiduciaries and corporate stewards. This franchise right should be free of any artificial or overly restrictive economic or other barriers to entry.

We commend the SEC for its work in bringing the Proposal out for public comment. The issues raised therein, and the goals expressed, are the right ones, and are as important today as at any time in our nation's history. At its core, the Proposal would require a company, under defined circumstances, to include in the proxy statement disclosure concerning a shareholder's or group of shareholder's nominees for director, and to include in the company's proxy card the names of those nominated for the board of directors. The Proposal would also require, in certain instances, companies to include in their proxy materials shareholder proposals that would amend, or request amendments to, the company's governing documents regarding board nomination procedures or disclosures relating to shareholder nominations.

The SEC received hundreds of comment letters to the Proposal, including certain submissions received after the technical close of the comment period which necessitated the Comment Proposal. We observe that the commenters have provided a well reasoned and thorough public record on the relative pros and cons of a federally mandated proxy access regime versus a state law system in which companies may adopt an open or limited access system through private ordering. We do not wish to repeat, for repetition sake, any of the points advanced to date. Instead, we hope to offer an update on a recent development in proxy access, and share our perspective on what we see in the contemporary boardroom.

As the SEC is aware, Delaware General Corporation Law ("DGCL") Section 112 permits shareholders to adopt bylaws that require the corporation to include shareholder nominees for board election and permits the right to be conditioned on several factors. Section 113 permits shareholders to adopt bylaws that require the reimbursement of expenses incurred by a shareholder in connection with a proxy solicitation, again, with certain permitted conditions.

We submit that proxy access, without a corresponding right to expense reimbursement, is half a right. We note that the HealthSouth Corporation, in October of 2009, became the first large

U.S. public company to adopt a bylaw implementing sections 112 and 113 of the DGCL.² We believe that corporations should not only be responsive to shareholder concerns, but also take leadership positions in good governance principles.

In announcing the amendments, Jon F. Hanson, non-executive Chairman of the Board, said "HealthSouth believes there is a close correlation between good governance and good performance. By reimbursing shareholders under certain conditions for reasonable expenses relating to director nominations, we believe we will further enhance director accountability and permit shareholders to have a greater say in the running of their company. This far-reaching amendment to our Bylaws will be good for our shareholders, our Board and our Company."

Access to a company proxy, while vital, is an empty right without a corresponding right to shareholder expense reimbursement. It is our view that the expense of waging a full scale proxy contest, rather than the exclusion from the proxy card, is the real barrier—because it is economic--to the exercise of this critical shareholder right.

Further, it is our understanding that shareholder activists and institutional investors will be making proposals at other major U.S. companies for reimbursement rights this proxy season. We hope that some of these other proposals will resonate in the boardroom, and more public companies follow the HealthSouth board's lead. We urge corporate America to do so, in ways that are tailored to the individual company's specific situation and needs.

Overall we believe that any legal framework benefits from a process of continual re-evaluation and reform. In that sense, the current debates over executive compensation, shareholder rights, and proxy access and reimbursement are healthy. We maintain that, as long as the SEC, the states, and the shareholder and board constituencies maintain a focus on the protection of investors, the end result will most likely be beneficial from a governance perspective.

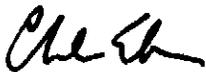
Investor protection is best served by companies being led by independent directors, incentivized by stock ownership, subject to open, fair elections. The system currently in effect in the state of Delaware, by permitting shareholders to be reimbursed for the real and material expenses it takes to win a public proxy contest, is such a system. More companies should be urged to align themselves with the position recently taken by HealthSouth; more states should adopt statutes similar to DGCL 112 and 113.

² The Director of the Weinberg Center, Charles Elson, is the Chairman of the Nominating and Governance Committee of the HealthSouth board of directors.

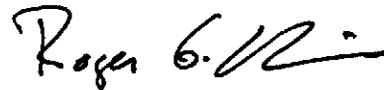
We recommend the SEC adopt the amendments in the Proposal pertaining to Rule 14a-8 as soon as reasonably practical, and for the SEC to study proxy reimbursement. Shareholders benefit from having as many tools in the kit as possible—we recognize this truism. We believe however, that the SEC should reconsider Rule 14a-11 in light of this important state law development. If the practice at HealthSouth becomes a trend, the SEC may find proposed Rule 14a-11 unnecessary to accomplish the objective of investor protection.

We appreciate the opportunity to offer these comments to the SEC and we thank the staff and the Commission in advance for its consideration of not only this letter but of the many hundreds that preceded it. If we can provide any additional assistance or insights into this letter or to the issues more generally, please feel free to contact Charles Elson at 302.831.6157 or Roger Coffin at 302.831.2261.

Respectfully submitted,



Charles M. Elson
Director



Roger G. Coffin
Associate Director

CC:

The Honorable Mary Schapiro, Chairman
The Honorable Kathleen Casey, Commissioner
The Honorable Elisse Walter, Commissioner
The Honorable Luis Aguilar, Commissioner
The Honorable Troy Paredes, Commissioner

Meredith Cross, Director, Division of Corporation Finance
David Becker, General Counsel and Senior Policy Director
Kayla Gillan, Senior Advisor to the Chairman
Lillian Brown, Senior Special Counsel to the Director, Division of Corporation Finance
Tamara Brightwell, Senior Special Counsel to the Director, Division of Corporation Finance
Eduardo Aleman, Special Counsel, Division of Corporation Finance