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Nathaniel L. Daliner  
4221 West Boy Scout Boulevard  
Suite 1000  
Tampa, FL 33607-5780

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Lynne B. Barr  
Exchange Place  
53 State Street  
Boston, MA 02109-2803

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Linda J. Rusch  
P.O. Box 3528  
721 North Cincinnati Street  
Spokane, WA 99220-3528

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Martin E. Lybecker  
1875 Pennsylvania Avenue NW  
Washington, DC 20006-3642

**BUDGET OFFICER**

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8300 Fox Hound Run NE  
Warren, OH 44484-1774

**CONTENT OFFICER**

Scott E. Ludwig  
Suite 900  
200 Clinton Avenue W  
Huntsville, AL 35801-4933

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Karl J. Ege  
Suite 4800  
1201 Third Avenue  
Seattle, WA 98101-3099

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**SECTION DIRECTOR**

Susan Daly  
Chicago, IL  
(312) 988-6244  
[suedaly@staff.abanet.org](mailto:suedaly@staff.abanet.org)

December 8, 2009

Via e-mail to: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090  
Attn: Elizabeth M. Murphy, Secretary

RE: File No. S7-13-09 Release Nos. 33-9052; 34-60280; IC-28817  
Proxy Disclosure and Solicitation Enhancements

Ladies and Gentlemen:

We are writing you in order to supplement our comment letter dated October 16, 2009 relating to the Commission's Release concerning Proxy Disclosure and Solicitation Enhancements (Release Nos. 33-9052; 34-60280; IC-28817; File No. S7-13-09) (the "Proposing Release"). Pursuant to current Rule 14a-4(d)(4), a person is not deemed to be a bona fide nominee and shall not be named as such unless he has consented to being named in the proxy statement and to serve if elected. The Rule provides, however, that nothing in Rule 14a-4 shall prevent any person soliciting in support of persons who, if elected, would constitute a minority of the board of directors from seeking authority to vote in support of nominees named in the registrant's proxy statement. In the Proposing Release, the Commission has proposed amendments to Exchange Act Rule 14a-4(d)(4) to allow a non-management soliciting person to "round out" its short slate by seeking authority to vote for nominees named in the proxy statement of registrant or in the proxy statement of one or more other nominating person. The authority would be subject to certain conditions, including the condition that the non-management soliciting person represent in its proxy statement, if it is seeking authority to vote for nominees named in one or more other non-management soliciting persons' proxy statements, that it has not agreed and will not agree to act, directly or indirectly, as a group or otherwise engage in activities that would be deemed to cause the formation of a "group" as determined under Section 13(d)(3) of the Securities Exchange Act of 1934 (the "Exchange Act") and in Regulation 13D-G with any such other non-management soliciting person or persons; and it has not acted and otherwise will not act as a "participant," as defined in Schedule 14A, in any solicitation by any such other non-management

soliciting person or persons. Our supplemental comments relate principally to this portion of the proposal.

Our view is that a non-management soliciting person offering a short slate of director nominees should not be permitted to "round out" its short slate if the rounding out would create the potential for a change of control of the issuer. In this context, we are using the term "change in control" to mean a change in the majority of the members of the Board of Directors.<sup>1</sup>

Applying this view, we see the various permutations under the proposed amendment to Rule 14a-4(d)(4) to be the following.

### **Classified board**

Minority of directors to be elected. If the total number of directors to be elected at the shareholder meeting would constitute a minority of the full board, we are of the view that a non-management soliciting person (Party A) should always be permitted to round out its short slate by designating one or more director nominees of management and/or of one or more soliciting persons, subject to the conditions set forth in proposed clauses (i) through (v) of Rule 14a-4(d)(4) (the conditions set forth clauses (i) through (v), the "Proposed Conditions").

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<sup>1</sup> We note that nothing in the Rule, as currently in effect or as proposed to be amended, appears to prevent one person from agreeing to serve as a director nominee on more than one soliciting person's slate. As we understand, the proposed Rule amendment would not have any effect on the ability of a non-management soliciting person (which is soliciting in support of nominees who, if elected, would constitute a minority of the board of directors) to include as a nominee on its slate a person who has consented to being so named, whether or not that person has been previously designated (or is thereafter designated) as a nominee of another nominating person's slate. The designation of such a person would also not, under the proposed Rule amendment, require the non-management soliciting person to complete its short slate. This would therefore appear to contrast with the situation where the non-management soliciting person ("Party A") seeks authority to vote for a nominee proposed by the registrant or another non-management soliciting person who has not given his or her consent to Party A. In this latter case, the non-management soliciting person would be required to seek authority to vote in the aggregate for the number of director positions then subject to election. Although the registrant's slate of director nominees is generally announced prior to the designation of a slate by a non-management soliciting person, we believe that if a person is designated as a nominee of the registrant at any time prior to the commencement of proxy voting, that person should be deemed to be a nominee of the registrant for the purposes of Rule 14a-4(d)(4), regardless of whether the person is also a designated nominee of a non-management soliciting person.

Non-minority of directors to be elected. If the total number of directors to be elected at the shareholder meeting would not constitute a minority of the full board (i.e., would constitute 50% or more the full board), we are of the view that the total number of (i) the director nominees of the non-management soliciting person (Party A) and (ii) the director nominees of one or more other soliciting persons (other than management nominees) rounding out Party A's slate, should, if elected, not exceed a minority of the full board. Accordingly, if a total board of 18 persons were classified into two 9-person classes, and in an election for one of the classes Party A were to designate 4 persons, it could round out its slate by seeking authority to vote for up to 4 nominees of any other non-management soliciting person or persons (i.e., for a total of 8), subject to the Proposed Conditions. By contrast, Party A would not be limited as to the number of management nominees for whom it sought authority to vote on its proxy card, and in the example in the preceding sentence could complete the rounding out of the Party A slate by also designating one management nominee.

#### **Non-classified board**

We are of the view that a non-management soliciting person (Party A) should be permitted to round out its short slate in elections not involving a classified board, subject to the following:

As under the current rule, Party A should always be able to round out its short slate by seeking authority to vote for one or more management nominees.

The total number of (i) the director nominees of Party A and (ii) the director nominees of one or more other non-management soliciting persons for whom Party A is seeking authority to vote to round out its slate, should, if elected, not exceed a minority of the full board. Accordingly, if a total board of 9 persons were to be elected at a shareholder meeting, and Party A were to designate 2 nominees, it could seek authority to vote for up to 2 additional nominees who are on the slates of one or more other non-management soliciting persons, and would in this instance be entitled to seek authority to vote for 5 management nominees. The foregoing would be subject to the Proposed Conditions.

In the situation described above, we have made no distinction as to (i) whether there is more than one other soliciting person or (ii) whether or not the other soliciting person or persons are, individually, seeking a number of directors that would constitute only a minority of the board. As long as the shareholder voting the proxy of the soliciting person (Party A) would not, by doing so, be effecting a change of control of the issuer, we do not believe the number of director designees of the other soliciting person or persons is relevant to the analysis.

### **Incumbency and Cumulative Voting Considerations**

The incumbency of a director would not affect the views expressed above. If an incumbent director is not included on the registrant's slate in connection with a shareholder meeting at which directors are to be elected, such person would not be deemed to be a nominee named in the registrant's proxy statement. Accordingly, we believe that under Rule 14a-4(d)(4): (i), in determining the number of nominees who, if elected, would constitute a minority of the board of directors, the non-management soliciting person would be limited to proposing, on its own slate, a number of directors constituting less than a numerical majority of directors, regardless of the identity of such nominees, and (ii) in seeking authority to vote for nominees named in the registrant's or in one or more non-management soliciting person's proxy statements, an incumbent director not named in the registrant's proxy statement would not be deemed to be a nominee of the registrant.

In our view, the existence of a cumulative voting structure should not affect the ability of a non-management soliciting person to seek authority to vote for a nominee of the registrant or one or more other non-management soliciting persons. However, we believe that there should be a change to the provisions of the Proposed Conditions in this situation. In the case of cumulative voting, we do not believe that a non-management soliciting person which is seeking authority to vote for the nominees of the registrant or other nominating persons should be obligated to seek authority to vote in the aggregate for the number of director positions then subject to election. In the absence of cumulative voting, a non-management nominating person can either choose to propose a short slate (which would result in shareholders voting for the slate casting votes for fewer directors than they are statutorily entitled to vote for) or to round out the short slate to the full number of director positions then subject to election (and thereby permit shareholders to vote for the full number of directors they are entitled to vote for). As set forth in the Proposing Release, the proposed rule would continue the existing requirement that non-management soliciting persons seeking authority to round out a short slate do so for the full number of director positions to be elected. We do not object to that provision in the absence of cumulative voting. However, in a cumulative voting situation, where a shareholder has the ability to vote all of his or her shares for one nominee, or to split his or her vote for two or more nominees in whatever combination the shareholder determines, we see no basis for requiring a non-management soliciting person seeking authority to vote for a nominee of the registrant or another soliciting person to seek authority to vote for the aggregate number of director positions then subject to election. In this instance, the voting rights of a shareholder would not be impaired by having a non-management soliciting person propose less than a full slate, because the shareholder could vote all the voting power represented by his or her shares for fewer than all of the persons on the slate. Moreover, if a non-management soliciting person seeking additional voting authority is required to seek authority to vote for persons other than its own designated nominees, who may draw votes away from its designated nominees, it may be

inclined not to seek any such additional authority. We do not believe it would be in the best interests of shareholders of public companies with cumulative voting structures to inhibit the flexibility of a non-management soliciting person in this manner.

We should add that the foregoing views are provided in the context of the proposed rule only, and are not intended to affect in any way the views expressed in our comment letter relating to Facilitating Shareholder Director Nominations (SEC Rel. Nos. 34-60089, IC-28765, File No. S7-10-09). In that letter, we expressed our views in Section III. H. that any prescriptive proxy access rule adopted by the Commission preclude use of its rule for access nominations for any election of directors with respect to which there is a solicitation under the proxy rules on behalf of candidates in opposition to the company's slate of nominees (that is, a traditional election contest under the proxy rules). Further, we believe that if the Commission's final proxy access rule were to permit concurrent proxy access nominations and a traditional election contest, the Commission should make clear in its proxy access rule that access nominees could not be used to fill out, in whole or in part, any short slate emanating from the traditional election contest and that neither the nominating shareholder or shareholder group nor the proxy access candidate be permitted to solicit in favor of the opposition candidates in the traditional proxy contest.

The Committee appreciates the opportunity to comment further on the Proposing Release and requests that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Sincerely,

/s/ Jeffrey W. Rubin  
Jeffrey W. Rubin, Chair of  
the Committee on Federal  
Regulation of Securities

U.S. Securities and Exchange Commission  
December 8, 2009  
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Drafting Committee:

Catherine T. Dixon  
Carol M. McGee  
James J. Moloney  
Jeffrey W. Rubin  
Jonathan Wolfman