

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

Date: August 11, 2009

Re: Comments on Proposed Rule – Facilitating Director Nominations
Release Nos. 33-9046; 34-60089; IC-28765
File No. S7-10-09

My name is Steve Quinlivan and I am a practicing securities lawyer, and the views expressed herein are my own and not those of any firm or client. Some of the comments herein address the need to revise the proposed rules:

- To specify what steps a registrant can take to oppose a shareholder nominee
- So that they will not deter settlements with activist investors
- To specify the appropriate course of action when multiple nominations are received on the same day
- To provide guidance on a registrant's course of action when the registrant believes one nomination is not eligible and another nomination is received
- To provide additional clarification on the calculation of the maximum number of shareholder nominees to be included in a proxy statement
- To specify the course of action the registrant should take if multiple nominating shareholders dispute the eligibility of one another's nominees
- So that a registrant may exclude a nomination if the nominating shareholder files an amended Schedule 14N indicating the nominating shareholder or nominee is no longer eligible
- To further limit the number of nominations for registrant's with a staggered board
- So that the registrant's liability limitations for a nominating shareholder's false and misleading statements are workable
- To state a date before which nominations cannot be made
- So that nominating shareholders have to make additional disclosures about important matters
- To eliminate duplicative disclosures on Form 10-Q that have already been reported on Form 8-K

The Rules Should be Revised to Specify What Steps a Registrant Can Take to Oppose a Shareholder Nominee

The proposed amendment to Item 7 of Schedule 14A will require the registrant to include a 500 word statement of the nominating shareholder in support of the nominating shareholder pursuant to Rule 14a-18(l). However, the Rules do not provide any clarity as to what the registrant may state in opposition to this statement, other than the registrant's board recommendation included on a proxy card as set forth in Rule 14a-4. While footnote 217 to the proposing release states the process will be similar to the practice under Rule 14a-8, the extent that the registrant may lawfully oppose the shareholder nominee is not clearly set forth in the rules. In this regard I note that Rule 14a-8(m) specifically permits the registrant to oppose a shareholder proposal, and that guidance is missing from the proposed rules. The Commission should adopt proposed rules similar to Rule 14a-8(m).

Likewise, the rules permit nominating shareholders wide latitude to make statements in support of its nominee outside of the proxy statement under Rule 14a-2(8). The Commission should clarify the ability for the registrant to permissibly make solicitations in opposition to the shareholder nominee outside of the proxy statement.

The Rules Should be Revised so that They Will Not Deter Settlements with Activist Investors

Rule 14a-18(d) as written will likely have the effect of deterring settlements between the registrant and activist investors. Activist investors often negotiate with registrants for representation on the board of directors. Ideally, one way for a registrant to satisfy an activist investor would be to agree not to oppose the eligibility of an activist's nominee pursuant to the proposed rules and let the shareholders decide whether to elect the activist. However, if the registrant were to agree to such an arrangement, an activist investor could not represent there is no agreement with the registrant regarding the nominee as required by Rule 14a-18(d). In addition, a registrant may be reluctant to otherwise settle with an activist if another shareholder nominee can be included in the proxy statement by another shareholder. As a result, Rule 14a-18(d) should be revised to (i) permit a registrant to agree not to contest the eligibility of a shareholder nominee and (ii) if the registrant has settled a threatened election contest by placing a shareholder's designee on the board of directors, further shareholder nominees would not be permitted under the proposed rules for a specified period of time.

The Rules Should be Revised to Specify the Appropriate Course of Action When Multiple Nominations Are Received on the Same Day

It is possible that a registrant could receive multiple nominations from different shareholders or groups on the same day. In such event, how does the registrant determine who is the "first nominating shareholder or shareholder group from which the registrant receives timely notice" under proposed Rule 14a-11(d)? Does the rule hinge on receipt of the notice "sent" to the registrant pursuant to the first paragraph of Rule 14a-18, the "simultaneous" notice to the registrant referred to in Rule 14n-1, dissemination of the notice pursuant to Rule 14n-3, or constructive receipt by filing of the notice on the EDGAR system? If it is in the order in which the Schedule 14N is received on the EDGAR system that should be made clear.

The Rules Should be Revised to Provide Guidance on a Registrant's Course of Action When the Registrant Believes One Nomination is Not Eligible and Another Nomination is Received

A registrant may receive a nomination which the registrant believes does not meet the criteria for inclusion under Rule 14a-11, and the registrant may then follow the procedures under Rule 14a-11(f). A registrant may then receive a proposal from a second nominating shareholder that it believes is eligible for inclusion under Rule 14a-11. However, at this point the registrant may not know whether the Commission will agree with its decision to exclude the first proposal, yet the registrant is required to advise the second nominating shareholder within 14 days of whether its proposal will be excluded as required by Rule 14a-11(f)(3). The rules should provide for guidance in this area. Is the registrant supposed to notify the second nominating shareholder that the nomination is not eligible pursuant to the procedures under Rule 14a-11(f) and wait until eligibility for the first nomination is finally determined? Or the rules could be revised to allow the registrant to defer notifying the second nominating shareholder as to exclusion of its proposal until such time as the SEC has taken action on the first nomination.

The Rules Should be Revised to Provide Additional Clarification On the Calculation of the Maximum Number of Shareholder Nominees to be Included in a Proxy Statement

Rule 14a-11(d)(1) provides that the registrant need not include in its proxy statement more than the greater of one shareholder nominee or the number of nominees that represents 25% of the registrant's board. The rule should be revised to state that the determination of the number of nominees is determined as of the date the Schedule 14N is received by the registrant, so the registrant can determine at that time if the nominee must be included. Otherwise subsequent changes in the size of the registrant's board could result in significant uncertainty as to whether prior nominations were appropriately accepted or rejected.

The Rules Should be Revised to Specify the Course of Action the Registrant Should Take if Multiple Nominating Shareholders Dispute the Eligibility of One Another's Nominees

It is also possible that two or more nominating shareholders or groups could dispute a registrant's determination as to which nominees should be included. Proposed Rule 14a-11(f) should be modified to take into account the likelihood of such a dispute and the SEC's role in resolving such a dispute. The proposed rules should include a safe harbor that states when two or more nominating shareholders dispute one another nominees as not being eligible, the registrant shall incur no liability so long as the nominee it selects for inclusion was chosen in good faith. In that regard, proposed Rule 14a-11(f)(10) should be explicitly modified. Registrants should not be expected to arbitrate such disputes.

The Rules Should be Revised so that a Registrant May Exclude a Nomination if the Nominating Shareholder Files An Amended Schedule 14N Indicating the Nominating Shareholder or Nominee is No Longer Eligible

A registrant may initially receive a nomination it believes is eligible for inclusion under Rule 14a-11. The nominating shareholder or group may subsequently file an amended Schedule 14N, indicating the nominating shareholder or group or nominee is no longer eligible under Rule 14a-11. However, the 14 days to provide notification of non-inclusion may already have passed under Rule 14a-11(f)(3). It is unclear whether the provisions of Rule 14a-11(f)(1) ("Upon the registrant's receipt of a notice described in paragraph (c)") refer to only initial receipt of the notice or receipt of an amended notice. The proposed rules should be revised so that is clear that if an amended Schedule 14N is filed indicating the nominating shareholder or nominee is no longer eligible, the registrant can take steps to exclude the nomination at that time.

The Rules Should be Revised to Further Limit the Number of Nominations for Registrant's with a Staggered Board

The Commission solicited comments on how Rule 14a-11 should be applied to staggered boards. For instance, in a typical situation where a registrant has a nine member staggered board, three directors would be up for election in each year. Yet Rule 14a-11(d)(1) would permit nominations for two of these board seats, and Rule 14a-11(d)(2) would prohibit further shareholder nominations during two years of the three year term, assuming two directors were originally elected. Given the potential long term consequences of election of a shareholder nominee where staggered boards exist, it seems inappropriate to give an advantage of the first nominating shareholder to file and exclude other shareholders for an extended period of time. Therefore, the Commission should further limit the number of nominees a shareholder may nominate where a registrant has a staggered board.

The Rules Should be Revised so that the Registrant's Liability Limitations for a Nominating Shareholder's False and Misleading Statements Are Workable

The proposed liability provisions in 14a-11(e) for false and misleading statements seem unworkable. A registrant has no control over what a nominating shareholder might submit on a Schedule 14N. Yet the registrant is in immediate violation of securities laws upon such submission if the registrant has knowledge of false and misleading statements. The registrant cannot cause removal or correction of the Schedule 14N. How is the registrant to comply with securities law in this instance?

The Rules Should be Revised to State a Date Before Which Nominations Cannot be Made

The proposed rules do not specify a date before which nominations cannot be made. This could potentially result in some problems. For instance, Rule 14a-11(b) requires nominating shareholders to own a specified percentage of securities based on the registrant's classification as a "large accelerated filer", an "accelerated filer" or a "non-accelerated filer." As the Commission knows, registrants can move in and out of the foregoing classifications. This leads to the possibility that differing ownership levels can apply for any given annual meeting. For instance, nominations for an annual meeting for Year 1 would generally have to be submitted before the end of Year 1 (the "Year 1 Deadline") and would be based on

the registrant's status as of the last completed fiscal year under Rule 12b-2. Under the proposed rules, nominations could be submitted for the Year 2 annual meeting either before or after the Year 1 Deadline. However, the registrants classification could change during the time nominations for Year 2 are eligible to be submitted. Thus the Commission should fix a date so that there will be a consistent classification that will apply during the entire time eligible nominations can be submitted. This could be done by prohibiting nominations for Year 2 prior to the holding of the annual meeting for Year 1 in this example.

Likewise, it is possible that with respect to some nominations, the registrant may not be able to determine if the proposal can be excluded within 14 days and notify the nominating shareholder as required by proposed Rule 14a-11(f)(3). Following on the foregoing example, where a registrant has a staggered board, if a nomination was made for the Year 2 annual meeting prior to the time the results for the Year 1 annual meeting are determined, the registrant may not know whether a director nominated by a shareholder in Year 1 will be elected to the board and whether there will be a vacancy for which a nomination can be submitted. So again, the Commission should by rule preclude nominations before a certain date.

The Rules Should be Revised so that Nominating Shareholders Have to Make Additional Disclosures About Important Matters

It is possible that a nominating shareholder could pay consideration to other shareholders to join in the nominating shareholders' group in order to obtain the requisite share ownership. Paying this consideration may be cheaper than proceeding with a person's own proxy statement or may eliminate market risk from holding the requisite securities. Proposed Rule 14a-18 and Schedule 14N should require disclosure of any such payments.

Likewise, it is possible that a nominating shareholder or group may acquire ownership of the requisite number of shares and then eliminate the economic risk of holding the position through derivative transactions or short sales. This basically leads to empty voting and potentially misleading disclosures. Proposed Rule 14a-18 and Schedule 14N should be revised to require disclosure of any such hedging transactions and the intent to enter into any such hedging transactions before the shareholder meeting.

There appears to be some confusion in the Release regarding the further intent to own shares through the date of the meeting. Part III.B.3. of the proposing release refers to a representation that the nominating shareholder "continues to own those securities through the date of the annual or special meeting." This can be read as a reference that the entire ownership position be maintained. On the other hand, Rule 14a-18(f) refers to a representation to own the "requisite shares" through the meeting. This could be read as a reference to only maintain the minimum ownership position. As a matter of policy, the nominating shareholder should be required to make a representation regarding its entire ownership position as an intent to reduce a position would be material to those considering whether to support the nominee.

The Rules Should be Revised to Eliminate Duplicative Disclosures on Form 10-Q that Have Already Been Reported on Form 8-K

The Commission proposes to require a filing requirement on Form 8-K pursuant to Item 5.07 if the date of an annual meeting should change by more than 30 days. Currently, Rule 14a-5(f) and Rule 14a-8(e) require that information be reported in Form 10-Q. If the 8-K filing requirement is adopted, Rule 14a-5(f) and Rule 14a-8(e) should be modified to no longer require reporting on Form 10-Q as well.

Other Comments

Rule 14a-11(f)(1) provides that the "registrant shall determine whether any of the events permitting exclusion of a shareholder nominee has occurred." This seems to not be the correct choice of words. There is no discrete occurrence that one can equate to an "event." Rather, I think the rule should ask the registrant to determine whether the shareholder nominee may be excluded because the requirements of Rule 14a-11 have not been complied with.

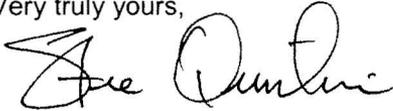
Rule 14a-11(f)(10) speaks of a registrant "filing" its notice with the Commission when the registrant seeks to exclude a nomination. The final rule should address the manner of filing. For instance, for shareholder proposals under Rule 14a-8, Rule 14a-8(j) refers to the filing of "six paper copies" and Staff Legal Bulletin 14 gives further instructions as to the filing process.

Proposed Rules 14a-18(h)(i) and 14a-19(d) require disclosure about specific legal proceedings in the last five years regarding the nominating shareholder. The Commission recently proposed that these disclosures be provided for the last ten years in Release No. 34-60280 (Proxy Disclosure Solicitation Enhancements) for incumbent and nominee board members. The same ten year period should be applied with respect to the proposed Rules 14a-18(h)(i) and 14a19(d).

The first paragraph of Rule 14a-18 requires as a prerequisite to nominating a shareholder that the "notice on Schedule 14N shall be sent to the registrant by the date specified in the registrant's advance notice by-laws." Many advance notice by-laws require such notices be received by a certain date, as opposed to being "sent" by a certain date, so the rules should be modified to accommodate this. Likewise, if there is no advance notice by-law, Rule 14a-18 requires the notice to be sent no later than 120 calendar days before the prior years proxy was mailed. The reliance on "sending" rather than "receiving" means there is no clear cut-off date for inclusion. Rule 14a-8(e) currently works off of a "received" concept, and that same concept should be used in Rule 14a-18.

I appreciate the opportunity to comment on the proposed rules.

Very truly yours,

A handwritten signature in black ink, appearing to read "Steve Quinlivan", written in a cursive style.

Steve Quinlivan