CIEBA
The Committee on Investment of Employee Benefit Assets

August 13, 2009

Elisabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20002

RE: File Number S7-10-09

The Committee on Investment of Employee Benefit Assets (CIEBA) represents more than 100 of the sponsors of many of the nation's largest private sector retirement plans. CIEBA members, the chief investment officers and fiduciaries of these plans, manage more than one trillion dollars in defined benefit and defined contribution assets on behalf of 16 million plan participants and beneficiaries.

As long-term investors, CIEBA members recognize the need to assure transparency and accountability for boards of directors of publicly-traded companies. Boards of directors should be independent overseers of management activities. Unfortunately, they sometimes fail through lack of independence, management entrenchment, dilution of shareholder value, and/or rights and abuses in compensation. Long-term investors should have the means to address these types of failures. However, we have concerns that the Commission's proposed rule on "*Facilitating Shareholder Director Nominations*" may encourage actions that are not in the interest of long-term investors.

Ownership Thresholds/Holding Periods

The proposed rule states that, " …we are proposing that only holders of a significant, long-term interest in a company be able to rely on Rule 14a-11 to have disclosure about their nominees for director included in the company proxy materials." We believe that neither the ownership threshold nor the holding period meet this standard. The ownership thresholds for shareholder nomination of directors for large organizations (1 percent of the shares of organizations with net assets of $700 million or more) and medium-size enterprises (3 percent of the shares of organizations with net assets between $75 million and $700 million) are too low. Multi-billion dollar pools of capital are not uncommon. These thresholds would not be difficult to reach by capital pools either individually or in combination. We urge the Commission to consider higher thresholds for large and medium-size companies of at least 3 percent of shares of organizations with net assets of $700 million or more and 5 percent of organizations between $75 million and $700 million of net assts.

We are concerned that some organizations will use these new rules to further their short-term financial interests at the expense of long-term investors. The temptation to make a quick profit by offering (or threatening to offer) a candidate or slate of candidates is obvious. For example, the threat of a proxy fight can drive down stock prices, giving an organization a reason to engage in aggressive short selling through unaffiliated subsidiaries. They can then afford to wait until the stock price recovers (after the election) to relinquish their original investment. At its most extreme, the nominating group could benefit more by the failure of the company than by its continuation. Such actions are not only harmful to long-term investors, but also to retirement plan participants.

Further, corporations may take short-term actions to mollify ‘dissident’ shareholders that are not in the interests of long-term shareholders or retirement plan participants. Therefore, we propose that the SEC require disclosure of any non-public contacts between shareholders and companies with respect to proxy access. Such disclosure will allow all shareholders to understand if actions were taken in avoidance of a proxy battle.

We are also concerned that the proposed thresholds will encourage proxy contests over non-economic issues. A director or slate of directors whose primary purpose is to achieve a non-economic goal does not serve the interests of long-term investors. A director or slate of directors who are promoting one narrow special interest may result in boards that are politicized, incapable of performing their appropriate duties and/or unable to focus on adding long-term value to shareholders.

We recognize that all directors, once elected, are subject to State law fiduciary standards. Some would argue that this protects corporations from a director or group of directors who would put the narrow interests of a few above the broader interest of a majority of shareholders. Unfortunately, this is a judgment that can only be made after the fact. The director(s) can only be judged to have failed this standard retrospectively, when the interests of long-term investors may have already been damaged. Further, the director(s) who is elected may not fail in this duty, but the nominating group may have taken actions that are harmful to the company and its shareholders.

A one-year holding period is too short. Again, the opportunity for short-term gain at the expense of long-term investors is not mitigated by the one-year holding period. The statement of intent by the nominator(s) to hold the shares through the date of the annual or special meeting adds little or no protection. We urge the Commission to consider a longer holding period of not less than two years. In addition, shareholders who have divested themselves of the economic risk of ownership, e.g., through derivatives transactions, should not be allowed to nominate directors. Specifically, nominating shareholders should be required to represent that they have not and will not hedge or otherwise divested themselves of economic ownership of the requisite shares during the holding period.

Role of Proxy Advisory Firms

CIEBA members are also concerned that the proposal, as drafted, will enhance the authority of the proxy advisory services. Currently, only three organizations control the business, with one of the three enjoying the dominant market position. There is little oversight or regulation of these proxy advisory services by any public entity nor is there any meaningful disclosure about the significant role they play in proxy voting decisions. They exercise significant power over corporate governance since the vast majority of institutional investors use their guidance on proxy voting. These new proxy access standards will give them even greater power over the election of boards of directors.

As with the Nationally Recognized Statistical Rating Organizations (NRSRO) prior to the recent changes in law and regulation, the lack of competition and oversight has the potential for abuse, especially conflicts of interest. This proposed rule, by fostering more proxy contests will increase the volume of business for the advisory services without addressing any of the competitive or oversight issues associated with the current system.

CIEBA does not oppose shareholder nomination of directors and/or proxy contests. In fact, there are times when they are necessary and in the interest of long-term investors. However, this proposed rule, may lead to activities that truly are counter to the interests of most shareholders. We urge the Commission to consider redrafting the rule so that it really addresses the needs "… of only holders of a significant, long-term interest in a company …"

If you have any questions about this submission, please contact me at (301) 961-8682 or jschub@afponline.org.

Sincerely,

Judy Schub

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