



*Making Our Planet More Productive*

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Via Email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

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

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

Dear Ms. Murphy:

Praxair, Inc. is submitting this letter in response to the Securities and Exchange Commission ("SEC") request for comments on the above-referenced proposals ("Proxy Access Proposals"). Praxair is the largest industrial gases company in North and South America with 2008 revenue of \$10.8 billion and 27,000 employees worldwide. Praxair is incorporated in Delaware and its shares of common stock are listed on the New York Stock Exchange ("NYSE").

Praxair has a history of constructive engagement with shareholders on governance matters and of thoughtfully considering and implementing governance reforms. While we endorse the SEC's goal of providing shareholders a meaningful opportunity to propose nominees, we believe that Proposed Rule 14a-11 includes a number of problematic provisions. Moreover, the proposal rests on a risky and untested structure when compared to the proposed amendment of Rule 14a-8(i)(8), which would also accomplish the SEC's goal of enhancing shareholder rights to nominate directors.

### **I. Proposed Rule 14a-11**

**Stock Ownership Threshold and Holding Period.** The proposed threshold of 1% stock ownership (for large accelerated issuers) is too low to provide reasonable assurance that nominees placed in the company's proxy will, if elected, act in a manner that is consistent with the long-term best interests of the company and its shareholders as a whole. Empowering single shareholders (or small group of shareholders) holding just 1% of the company's stock to

nominate director candidates in the proxy poses a substantial risk that nominations will be made to further more narrow interests and objectives. We believe that a significantly higher threshold of 5% for individual shareholders, and 10% for groups, with a minimum two-year holding period for either, would better ensure the SEC's goal of boards acting in the longer-term interests of shareholders. A 5% ownership threshold is widely used in many other SEC rules, including the requirement to file Schedules 13D and 13G as well as in Regulation S-K Items 404(a) and 407(c)(2), and would be more appropriate here. Such a higher threshold would make it more difficult for shareholders and groups dominated by special interests from nominating candidates with short-term, special interest agendas. In addition, the SEC should also ensure that minimum stock ownership for this purpose reflects true economic interests and is not inflated by derivative positions such as hedging and the like.

**Nominee Disclosures.** The minimal certifications and disclosures required by the proposed Schedule 14N would provide insufficient information about shareholder nominees to the nominating committee to allow the committee to make informed decisions about whether to endorse nominees for election (or allow shareholders to make informed voting judgments about whether to vote for nominees). As such, the proposed rule would actually prevent the members of the nominating committee from exercising their core fiduciary responsibility to vet director candidates and to assess such candidates' respective strengths and capacities to make meaningful contributions to the Board and its work. In this regard, we believe that the proposal seriously undervalues the nominating committee's role in constructing a Board with a broad portfolio of skills, backgrounds, and personalities while adhering to various regulatory requirements regarding independence and expertise.

**Multiple Nominating Shareholders.** We believe that the "first in line" approach to allocating proxy access for shareholder nominations would promote disorder while ignoring equally objective and clearly more sensible alternatives. Under the "first in line" approach, it is likely that shareholders seeking to make director nominations in the proxy would rush to propose nominees for the next year as soon as a company's current annual meeting is concluded. A better alternative would be to prioritize nominees (up to the maximum number allowed each year) based upon the greatest amount of stock owned by those proposing shareholders otherwise meeting the minimal threshold requirements.

**Deadline for Submitting Nominee.** Proposed Rule 14a-11 mandates that companies apply their advance notice rule for matters to be raised at the annual meeting (commonly 60-90 days in advance of the annual meeting anniversary) for nominations intended to be included in the proxy.<sup>1</sup> This is inconsistent with the SEC's existing rules, which provide a 120-day advance notice period in the context of inclusion of shareholder proposals in the company's proxy statement. Using this same 120-day advance notice period for shareholder nominations would be more appropriate. This longer period would provide a company with enough time to pursue the SEC's proposed no-action procedure applicable to director nominees, and also allow nominating

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<sup>1</sup> In the event that the company's charter or by-laws contains no such notice requirement, the proposed rule mandates an advance notice deadline of 120 days before the anniversary of the prior year's mailing of the proxy statement.

committees sufficient time to attempt what limited due diligence they are able to perform so as to make responsible voting recommendations to shareholders.

## **II. Proposed Rule 14a-8(i)(8)**

We do not believe that the mandatory structure of proposed Rule 14a-11 is needed and that such a mandatory regime would impose a “one size fits all” structure that would involve many significant risks and unintended consequences, some of which are discussed above. The complexity of implementing such a new, untested methodology is evidenced by the nearly 500 questions as to which the SEC requested comments in its release concerning the Proxy Access Proposals. Instead, we believe that the SEC should adopt proposed amendments to Rule 14a-8(i)(8) that would require public companies to include in their proxy statements any qualifying shareholder proposal to change public company governance rules relating to director nomination procedures.

This approach would allow companies and their shareholders to determine for themselves the processes they deem best for director nominations. Such a “private ordering” approach would likely result in a variety of different nomination procedures tailored to individual companies and their particular circumstances. Under such an approach, shareholders would be free to offer amendments to a company’s governing rules related to the nominating process, or to propose an entirely different nominating procedure. Through this process, rather than through the mandated approach of Rule 14a-11, the shareholders’ preferences would be gauged and then implemented. This approach would also avoid the significant logistical challenges and unintended consequences implicated by the proposed Rule 14a-11. Finally, this approach would allow the SEC to evaluate whether the “private ordering” of amended Rule 14a-8(i)(8) is working as intended and to observe any logistical difficulties or other issues faced by public companies adopting new governance structures. Such observations and learning would be key to future reform efforts if the SEC determined that “private ordering” was not effective.

In view of these and other deficiencies, we respectfully submit that the Proxy Access Proposal, in its current form, would fail to enhance Board accountability to shareholders in a prudent and effective manner.

We hope that these comments are useful. Please feel free to contact the undersigned should you have any questions or require further information.

Sincerely,



Mark D. Nielsen