Via Electronic Mail – (rule-comments@sec.gov)

August 13, 2009

Elizabeth Murphy, Secretary
U.S. Securities and Exchange Commission
One Station Place
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: Release Nos. 33-9046; 34-60089: File No. S7-10-09;
Facilitating Shareholder Director Nominations (the "Proposal")

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to provide comments on the above-referenced release, which proposes changes to the federal proxy rules and would require, under certain circumstances, a company to include in its proxy materials a shareholder's, or group of shareholders', nominees for directors.

I. Initial Adoption of Amendment to Rule 14a-8 to Provide for Proxy Access and the Private Ordering Approach

We recognize the increasing interest in providing shareholders with access to a company's proxy statement for director nominations, and we appreciate the Commission's desire to take action to amend the proxy rules in light of recent events. We question the merits of the "one-size-fits-all" approach evident in the Proposal, as the proposed rules fail to acknowledge that shareholders of various companies may have differing views as to the most suitable proxy access standard.

[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

We believe that more tailored standards can be achieved if the Commission first adopts only the amendments to Rule 14a-8, and later makes an assessment as to whether Rule 14a-11 is still necessary.

As the Commission acknowledged in the Proposal, allowing shareholders to propose and vote on governance standards has led to significant reforms, most notably the majority voting provisions that have been adopted by many companies. The amendments to Rule 14a-8 will permit shareholders to submit proxy access proposals that are designed to fit a company's particular circumstances. Companies routinely engage both with proponents who submit proposals through Rule 14a-8, and with their major shareholders to solicit their views about those proposals. A company and its shareholders would benefit from having the company adopt the type and form of proxy access standard that best reflects the will of the majority of shareholders, rather than the uniform standard under Rule 14a-11. Adopting amendments to Rule 14a-8 first, and delaying consideration of Rule 14a-11, also furthers the goal of an orderly transition to proxy access. A process that allows a company and its shareholders to work together to respond appropriately to shareholder concerns regarding any perceived need for proxy access, and permits the adoption of a proxy access standard that is supported by a majority of its shareholders, achieves the objectives of the Proposal without the unnecessary burden of applying Rule 14a-11 to all companies.

If the Commission decides nonetheless to go ahead and adopt Rule 14a-11, we encourage the Commission to provide for a private ordering mechanism in the final rules. Rule 14a-11 could become the default proxy access standard, but if a majority of shareholders agree, a company should be able to make modifications to establish an alternative that is better for the company's individual circumstances. This enables at least a majority of shareholders to continue to have a voice in establishing key aspects of a company's governance structure and still gives shareholders the ability to nominate directors, while avoiding the restrictive mandatory requirements currently proposed that ignore important distinctions among companies.

Below we raise several issues with respect to the impact of the Proposal on the process of nominating and electing directors. Our purpose is not to question the policy goal of increasing shareholder participation in the nominations process. We believe the Commission is rightly attempting to balance competing concerns that boards should clearly be held accountable to shareholders and responsive to their concerns, but at the same time shareholder nomination procedures should not turn every election into costly and disruptive contests; nor should shareholder nominated directors impede the proper functioning of boards and cause inefficiencies by imposing the agenda of a small group of shareholders. Our comments are intended to reflect the need for a transparent and efficient process that addresses both sides of the debate.

II. Shareholder and Nominee Eligibility and the Maximum Number of Shareholder Nominees under Rule 14a-11

We agree with the Commission that shareholders intending to submit a nominee should have interests that are aligned with the company and its shareholders, and we urge the Commission to reconsider the appropriate eligibility ownership thresholds for submitting shareholder nominations. Specifically, the proposed 1% threshold for large accelerated filers is too low, particularly when an unlimited number of shareholders may aggregate together in order to meet this requirement. The Commission's data in support of the thresholds proposed only considers individual shareholders or groups of exactly two shareholders joining together, which significantly under-represents the potentially unlimited number of shareholders who could aggregate their shares to meet the eligibility requirements.

Rule 14a-11 nominations will be inherently costly and disruptive, even where nominations will not be actively contested by the company. The company will in all cases need to fully review the information in the Schedule 14N filing and the background and profile of the nominating shareholders, as well as the nominee put forth for election. While no due diligence is required, companies will want to thoroughly vet any candidate who may become elected to their boards, which is necessary to assess whether grounds exist to exclude the nomination through the SEC no-action letter process. The company's nominating committee, and its board, will need to be fully informed in light of the board's own nomination process.

In our experience, both traditional proxy contests and "vote no" or "withhold" campaigns arise when dissatisfied shareholders perceive corporate failures and then agitate for significant changes, and that reason will likely be the driving force behind the use of Rule 14a-11 to propose nominees. The company will need to understand the concerns that underlie the shareholder nomination, and may hold discussions about possible solutions with the nominating shareholders. The company must also be prepared to review and respond quickly to the assertions of corporate failures that are part of the dissident's campaign for change, often under the glare of the media. These efforts occupy substantial amounts of both board and management time. The company will engage both legal counsel and proxy solicitation firms for this purpose, adding to the cost.

In order to preserve a balance between providing shareholders with access while mitigating the cost and disruption to the company, we propose that the Commission increase the threshold for large accelerated filers from 1% to 5%, with a 10% threshold if shareholders aggregate their holdings. We believe that the slightly higher thresholds would still provide a substantial opportunity for shareholders to make nominations.

Consistent with this goal and the proposal made in 2003,[2] we believe that each nominating shareholder should be required to hold the company's voting securities for a continuous period of at least two years rather than only one year. A two-year holding period would better ensure that the proponents invoking Rule 14a-11 are long-term shareholders. For the same reason, we ask that the Commission consider imposing a holding requirement beyond the date of the annual meeting and through the term of any shareholder nominee who is elected to the board.

We are also concerned about investors disaggregating the economic and voting interests normally associated with share ownership. As proposed, Rule 14a-11 would not take into consideration whether nominating shareholders have reduced or eliminated their economic exposure to securities through hedging or other arrangements. When nominating shareholders have so limited their exposure, their interests may be out of line with the company's as their incentives may differ. We recommend that the Commission require nominating shareholders to count only "net long" economic interests in the shares of the company toward the eligibility requirements.

We believe that the Commission intends for Rule 14a-11 to be used by nominating shareholders to set forth candidates who sufficiently represent the interests of all shareholders, rather than generating a continuous stream of nominations that do not achieve even a minimum level of shareholder support. We therefore encourage the Commission to provide that nominating shareholders whose nominees fail to receive at least 25% of the votes cast in an election cannot put forth a shareholder nominee, or be part of another nominating shareholder group, for the next two annual meetings. Similarly, any nominee who fails to receive 25% of the votes cast should also be excluded from being put forth by any nominating shareholder for the next two annual meetings. The initial ability of the nominating shareholders to place their nominees on the company's ballot and have them voted on by all shareholders means they were able to exercise their rights to nominate and elect directors without undertaking an expensive proxy contest, meeting the Proposal's key objective. The continuing access of these shareholders, and that of their nominees, to the company's ballot should then be dependent upon the views of all shareholders, as expressed through their votes, on the quality and suitability of their nominees for election to the company's board.

The Proposal would require a company to include in its proxy statement a number of shareholder nominees representing 25 percent of the company's board of directors, or one nominee, whichever is greater. Because adding new shareholder nominees to a board can be costly and disruptive as discussed above, and 25 percent of a company's board of directors approaches becoming a vehicle for a

[2] See Security Holder Director Nominations, Release No. 34-48626 (October 14, 2003) (the "2003 Proposal").

change in control, we urge the Commission to lower the maximum number of shareholder nominees to 10 to 15 percent, depending on the size of the board. In addition, each nominating shareholder or group should be allowed a maximum of one director nominee in any year.

We encourage the Commission to count toward the calculation of the maximum number of shareholder nominations available for any election all directors initially nominated pursuant to proposed Rule 14a-11, whether or not they are then re-nominated by the company. A company's board should be encouraged to successfully integrate an elected shareholder nominee into the life of the board, in order to promote effective functioning of the board and board stability. The board should then be able to benefit by counting such directors toward the maximum number of shareholder nominations permitted. Otherwise, boards are discouraged from re-nominating these directors even if a board or nominating committee determines that a shareholder nominated director meets the board's own qualifications and criteria for re-nomination.

III. Notice and Disclosure Requirements under Rule 14a-11

We believe that the time period for nomination submissions should be based on a specified range of time rather than a deadline, in order to avoid turning the proxy season into a year-round focus for both nominating shareholders and companies. Without a specified range, and as a result of the first-in time standard, a nominating shareholder is legitimately motivated to make a submission as early as possible. The race to be first creates the potential that a nominating shareholder would be encouraged to submit a proposal before it is even able to consider and evaluate a company's current board and governance structure, which harms both nominating shareholders as well the company and its other shareholders who are voting on the shareholder nominee. A window period rather than a deadline will encourage shareholders to submit the most qualified nominees after careful consideration without fear that it will be too late, and will address the Commission's concerns regarding certainty and administrative difficulties that led the Commission to select the first-in standard.

Since companies' advanced notice deadlines are generally later than their deadlines under Rule 14a-8 for state law reasons, we urge the Commission both to modify the deadline and to provide a specified range of time, such as no earlier than 180 days and no later than 150 days prior to the date the company mailed its proxy materials the previous year. This provides certainty and sufficient notice for both the nominating shareholder and the company. As an alternative, given the challenges posed by proxy access nominations for both companies and nominating shareholders, we suggest that the Commission consider instead providing a period for proxy access nominations to occur within a 30-day time frame, to commence five months after the company's annual meeting. Since the governance or performance issues that preceded a shareholder nomination likely developed over time, there is no reason why nominating shareholders should be

required to wait, and then force companies to react quickly within a short period because of the impending deadlines for mailing its proxy statement.

Instead of a first-in approach, we recommend that the Commission adopt the approach outlined in its 2003 Proposal, whereby the largest shareholder (as determined as of the last day of the deadline for receipt of shareholder nominations) would take precedence, rather than the first shareholder. The Proposal indicates that the limited number of shareholders that commented on this approach did not generally object to deferring to the largest shareholder who submitted a nomination; but the Commission has now decided to propose a first-in standard out of concern that a size-based rule would be difficult for companies to administer because it "lacks certainty," and the Commission wants companies to have the ability to begin preparing proxy materials promptly and coordinate with the nominating shareholders. We believe that, like the 2003 Proposal, available nominations should be allocated according to the size of the shareholdings of nominating shareholders. The largest shareholder who submits nominees better represents the overall interests of a company's shareholders, and is more likely to have a substantial, long-term stake in the company.

In addition to requiring that the shareholder nominee be independent, as defined under the objective standards of the applicable listing exchange, the nominee should also be required to meet the subjective standards that apply to candidates put forth by the board. Otherwise, once elected, boards may determine that those directors are not independent after analyzing the facts and circumstances of any relationships, which can upset the balance of the number of independent and non-independent board members. Having additional non-independent directors would reduce the number of directors available for the key committees required by the listing exchanges, and may result in boards having to increase their size to allow for new independent members. This would not be optimal for either the board or the nominating shareholders whose seats on the board become diluted.

Since shareholders will be making choices by selecting among nominees to fill a limited number of board seats, it is important that they have sufficient information. We encourage the Commission to require additional disclosure in Schedule 14N about any relationships between the nominating shareholders and the nominee, including family or employment relationships, ownership interests, commercial relationships and any other arrangements or agreements. In addition, the nominating shareholders should also disclose any direct or indirect interests in any competitors of the company, as in the 2003 Proposal.

Since every company may have its own particular legal and other requirements that apply to directors, which is especially true for the highly regulated industries in which our members operate, we believe that nominating shareholders and their nominees should also be subject to any additional informational requirements set forth in a company's advance notice bylaws.

As a further step beyond disclosure, we encourage the Commission to re-consider and adopt final rules that would require the shareholder nominee to be independent from the nominating shareholders. This element was part of the Commission's 2003 Proposal to respond to concerns regarding the disruptive effect a shareholder nomination procedure could have on board dynamics and board operation, especially the risk of "special interest" or "single issue" directors who would advance the interests of the nominating shareholder over the interests of all shareholders. Because those concerns still exist, it would be appropriate to require each person who is a shareholder nominee to meet the standards of independence from the nominating shareholder as set forth in the prior proposal.

IV. Additional Representations in Schedule 14N

The Proposal makes clear that Rule 14a-11 is not intended to allow shareholders to gain a change in control at a company. Given the importance of this issue, we recommend that in addition to the nominating shareholder, the nominee should also be required to certify that they are not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors.

We note that the Proposal indicates that once elected, the shareholder nominee will owe the same duty to the company as all of the company's other directors. Besides state law fiduciary duties, these obligations include requirements under the securities laws such as insider trading prohibitions. In particular, directors of banks and financial institutions are subject to multiple complex laws and regulations, and companies have also developed additional policies to both ensure compliance with these laws and to protect against reputational damage resulting from perceived conflicts of interest. It is vital to these companies that their directors, who are expected to set the "tone at the top" for their organizations, comply with applicable laws, regulations and policies. Therefore, we propose that the shareholder nominee make a representation in the Schedule 14N that specifically acknowledges this responsibility.

Schedule 14N, as filed with the Commission, would be subject to the liability provisions of Exchange Act Rule 14a-9. The Proposal does not address situations where false and misleading statements are determined after a shareholder nominee is elected to the board, such as those related to the representation regarding lack of control intent or information that would render the director not independent or in non-compliance with laws, regulations and policies. We recommend that Schedule 14N contain an additional representation that in those situations the shareholder nominated director must resign from the board.

We appreciate this opportunity to comment on the Proposal. If you have any questions concerning these comments, or would like to discuss these comments further, please feel free to contact the undersigned at 212-313-1000 or via email at tprice@sifma.org.

Sincerely,

Thomas F. Price
Managing Director

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Luis A. Aguilar, Commissioner
The Honorable Kathleen L. Casey, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Elisse B. Walter, Commissioner
Ms. Meredith B. Cross, Director, Division of Corporation Finance
Mr. David M. Becker, General Counsel and Senior Policy Director