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August 12, 2009

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

VIA E-MAIL

Re: File No. S7-10-09
Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

We strongly support the SEC proposed proxy rules that would allow shareholders to include a limited number of their director nominees in a company's proxy statement under certain circumstances (the "SEC Proposal"). The SEC Proposal will begin to level the corporate governance playing field that has for too long been stacked against shareholders and will lead to better accountability and responsiveness of boards of directors.

The SEC Proposal is a vast improvement over the status quo and strikes an appropriate balance between providing shareholders a meaningful voice in corporate elections and protecting companies from shareholder abuse of the proxy process. In particular, we applaud that the SEC Proposal addresses some of the key short comings of the prior 2003 shareholder access proposal that we noted in our comment letters on December 21, 2003 and March 23, 2004. In our comment letters, we proposed that a shareholder be allowed to nominate directors who are affiliated with the shareholder. We believe that the SEC Proposal's approach of not restricting nominees by virtue of their shareholder affiliation, but requiring detailed disclosure regarding any affiliation, reaches a suitable compromise. We also suggested in our 2003 and 2004 comment letters that in lieu of adopting an across the board 5% ownership threshold for proxy access, that a sliding scale based on a company's market capitalization would be more appropriate. The proposed 5% threshold for non-accelerated filers, 3% threshold for accelerated filers and 1% threshold for large accelerated filers ensures that only shareholders with a large and meaningful financial stake will be allowed to propose nominees through a company's proxy statement.

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The SEC Proposal's requirement that a nominating shareholder own the requisite percentage of shares for at least one year prior to submission of its nomination and state its intention to own such shares through the annual meeting obviates the concern that short-term, opportunistic shareholders would abuse the proxy access process. In actuality, the SEC Proposal necessitates a holding period for much longer than one year. Under the SEC Proposal, if there are no advance notice provisions in a company's bylaws, shareholder nominations must be submitted 120 days before the one-year anniversary of the mailing date of the company's previous annual proxy statement. Assuming that a proxy statement is mailed 30 days prior to the annual meeting, a shareholder would be required to maintain its ownership threshold for nearly a year and a half prior to the annual meeting where its nominee is up for election. Stated another way, a shareholder would need to have a significant stake in the company for two full annual meetings. The holding period would be longer if a company's advance notice provisions provided for a lengthier notice period. Accordingly, we believe that the one year holding period is a meaningful threshold that should not be extended.

We believe that it is highly unlikely that the proxy access process would be dominated by "special interest" slates. First, many "special interest" shareholders would not be able to meet the significant ownership threshold and holding period requirements. Second, the financial resources and time commitment required from a nominating shareholder will impose a meaningful barrier against frivolous, one-issue candidates. Although access to a company's proxy statement will save shareholders significant fees and expenses from producing and mailing a separate proxy statement, companies are still free to spend unlimited resources and have developed infrastructure to support incumbent nominees. As a result, shareholders desiring successful outcomes will certainly need to expend meaningful funds, time and effort to support a nominee. For example, in our withhold campaign against the re-election of four directors of The Walt Disney Company at its 2004 annual meeting, we spent millions of dollars and devoted considerable time and effort during the course of a three-month campaign. However, our expenditures and efforts were dwarfed by Disney, which spent an estimated tens of millions of dollars and had the advantage of a full-time corps of public relations, legal and other staff to conduct the campaign, even though the election of their slate was guaranteed given the plurality voting standard.

Fundamentally, the concern over "special interest" slates takes an overly paternalistic view of shareholders. Putting aside the basic principle that as the owners of a corporation shareholders are entitled to elect a board that reflects their interests, shareholders have shown that they take their franchise rights seriously. For example, looking at voting patterns over the past five proxy seasons based on data set forth in the Georgeson Annual Corporate Governance Reviews for years 2004 through 2008, the average approval rate for all corporate governance related shareholder proposals is 27.4%. Of these proposals, the approval rate is even lower for binding bylaw provisions at 23.8% and significantly lower for social interest proposals at 6.1%. Consequently, it should be appreciably more difficult for a special interest candidate whose interests were misaligned from the shareholders as a whole to be elected to a board. We believe, and the foregoing empirically supports the view, that most shareholders actively evaluate contested matters submitted to them and make informed decisions in their own best interests as shareholders and not the special interests of a few shareholders.

Accordingly, the SEC Proposal is clearly a significant step in the right direction. However, we believe a few of the proposal's provisions should be modified to promote the SEC's goal of facilitating the exercise of shareholders' rights to nominate and elect directors.

First, there should not be an exclusion for nominations or candidates that would be prohibited by a company's governing documents. There is no compelling rationale to allow a company to opt out of compliance with SEC rules, especially given there is no analogous exclusion for Rule 14a-8 proposals and a company would be allowed to exclude nominations or candidates if they would violate controlling state law, federal law or the applicable rules of a national securities exchange or national securities association. An exclusion for governing documents would give entrenched companies an incentive to amend their bylaws to prohibit shareholder access to the proxy statement, which can generally be done in most key jurisdictions by a board without a shareholder vote. In doing so, a company would thereby require a shareholder to launch a campaign at two annual meetings — one annual meeting would be needed to approve a bylaw amendment removing this restriction and another annual meeting would be needed for the shareholder's nominee to be elected. Perhaps more troubling is that in connection with becoming public, a company could prohibit shareholder access to its proxy statement in its articles of incorporation or certificate of incorporation, which could not be amended by shareholders in most key jurisdictions without the board's consent. This would, absent extraordinary circumstances, effectively prevent shareholder access to the company's proxy statement in perpetuity.

Second, if multiple shareholder nominations are submitted, a company should be required to include the nomination from the shareholder or shareholder group holding the most shares as opposed to the shareholder or shareholder group who submits their nomination first. A first-in approach is arbitrary and puts a premium on speed at the cost of a carefully-considered nomination. In our experience, vetting and selecting an appropriate nominee is a time consuming process. Couple the selection process with drafting a statement of support and gathering the information that would be required to be submitted with the nomination under Schedule 14N, a first-in approach would penalize shareholders who spent more time, effort and resources evaluating the board's performance throughout a significant portion of the period following the most recent annual meeting and submitting a nomination or who tried to engage with a dialogue with the company prior to its submission. In contrast, we believe speed in submitting nominations has no correlation to representing shareholder interests. In addition, by favoring larger shareholders, the rules would encourage shareholders to work together to submit a joint nominee, which again would reflect the interests of a wider base of shareholders. A first-in approach also would result in practical difficulties. For example, in the case of a company with advance notice provisions where multiple nominations were received on the first day that the nomination period opens, it would be put in a difficult position of determining which nomination it received first. In the case of a company without advance notice provisions, more bizarre consequences could arise. Because there would be no date when the nomination period opens, shareholders would have the incentive to submit their nomination for the next year's annual meeting as soon as possible following the conclusion of the current year's annual meeting.

Third, we suggest that a company be required to disclose at least 30 days prior to the deadline for shareholders to submit director nominations the company's intended slate of directors at the upcoming annual meeting and, in the case of a staggered board, the composition of the rest of the board, and include a short biography for each new nominee or director. With this information, shareholders may make a more educated decision as to whether to submit a director nomination, for example, because a prior shareholder nominee is included in the slate. If shareholders do decide to submit a director nomination, knowing the anticipated composition of the board will allow shareholders to select a candidate that would provide an optimal addition to a board, whether in terms of background, industry experience or otherwise.

In conclusion, through our service on the boards of numerous public companies, we have seen first hand the difference that new voices make on the direction of a company and the responsiveness of management and a board to shareholder issues. In our experience, any concern over "dysfunctional boards" is overstated and far outweighed by the harm to shareholders that results from an insular and entrenched board. The SEC Proposal will give shareholders a meaningful voice to combat ineffective boards. This is the third time that the SEC has proposed reforms allowing shareholder proxy access, and the time has come for its adoption. We urge the SEC to finalize promptly the SEC Proposal with amendments to address our three areas of concern.

Very truly yours,

Shamrock Capital Advisors, Inc.

Stanley P. Gold
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