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Via e-mail: rule-comments@sec.gov

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

RE: File No. S7-10-09
(Facilitating Shareholder Director Nominations, Release No. 33-9046 dated June 10, 2009).

Dear Ms. Murphy:

I am an investor and close observer of U.S. public company governance practices. I wish to offer comments on my own behalf with respect to the subject proposed rules on “proxy access”.

Summary

As an investor, I heartily endorse the Commission’s goal to provide shareholders a meaningful opportunity to suggest director nominees short of an expensive (and hostile) proxy fight. But the proposal **by-passes a relatively simple alternative of strengthening an existing process (SK Item 407(c)(2)(ix))** in favor of a radical major surgery of the director election system that, with respect to shareholder-nominated nominees at least, **ignores the central role of the nominating committee and the other investor-protective disclosures and controls** already built into the existing election and proxy process by state law and SEC/NYSE rules.

The proposal displays a stunning lack of concern or curiosity about (1) the willingness or ability of a shareholder-nominated nominee to exercise his/her fiduciary duties under state law, (2) the willingness or ability of that nominee to exercise independence from the nominating shareholder, (3) the purposes or agenda motivating the nominating shareholder’s action in imposing the nominee, (4) the qualifications of the nominee to be a director at this company, and (5) how that nominee might better serve the interests of shareholders than those nominees put forward by the nominating committee. **This is a surprisingly relaxed regulatory treatment of shareholder-nominated nominees, especially since the nominating shareholder (in contrast to the board’s nominating committee) owes no fiduciary duty to the other shareholders in imposing its nominee.**

In my eyes, this proposal does not provide to shareholders the reasonable process and disclosure assurances necessary to allow them to make an informed voting judgment with respect to shareholder-nominated nominees. This seems inconsistent with the diligence with which the SEC usually pursues its investor protection mission.

These points are elaborated upon below, including a **suggested alternative more in keeping with the SEC's traditional approach towards rulemaking in the governance area.**

I also find disturbing and misguided some of the attitudes, rationale and rhetoric surrounding these and other recent governance reform proposals. Since these broader concerns don't go directly to the specifics of this proposal, I relegate my commentary to an addendum at the end of this letter. **But I urge the Commission to reexamine some of the premises on which these reform proposals are built.**

Discussion of the SEC Proposal

Proposal By-Passes the Essential Role of the Nominating Committee:

The Commission, in its proposing release, apparently does not trust (or even allow) the existing independent directors on nominating committees to exercise their fiduciary duties in constructing a board. Accordingly, the current proposal puts the cart before the horse. It prevents the nominating committee from exercising a core responsibility before there is evidence that the committee will not act in the interest of shareholders. It presumes that the nominating committee cannot be trusted before that premise is even tested. While maybe a disaffected shareholder or one-issue-activist can muster 1% support to proffer a nominee, this does not mean that I or even a significant minority (much less a majority) of shareholders believe that the existing board is not properly exercising its fiduciary duties. Let the nominating committee's fiduciary duty to all shareholders be tested by its disclosed treatment of a shareholder-nominated nominee. If shareholders find the nominating committee's rejection of the nominee to be unreasonable, then they can exercise their majority vote power in that very same election. It is probably fair to say that, in recent years, it has become much harder for a recalcitrant board to ignore majority votes on proposals, and investors should not underestimate the impact of a majority, or even a significant minority, vote against a director. **With the sunlight of the disclosure proposed below, nominating committees will be hesitant to summarily reject a credible candidate put forth by a qualified shareholder.**

The proposed process also by-passes all of the due diligence (background checks, reference checking, interviews) normally conducted by a responsible nominating committee before adding a director to the board. Shareholders are asked to vote for a shareholder-nominated nominee solely on the basis of information and certification supplied by that nominating shareholder and without the benefit of the assurances that proper vetting can bring. Even if the timeline allowed (which it doesn't), there is nothing in the proposed rules that provides the nominating committee the access or consents

(such as are required by the Federal Fair Credit Reporting Act prior to commencing a background check) to allow some due diligence by the committee, even if only to inform its own voting recommendation on the nominee.

By default, a responsible nominating committee would have to recommend a vote against the shareholder-nominated nominee because “we don’t know enough about the nominee”, at least by the standards of due diligence that responsible nominating committees usually exercise.

Proposal Provides for Insufficient Disclosure About the Nominee and the Nominating Shareholder:

The proposal exhibits a remarkable lack of skepticism about a shareholder-nominated nominee’s willingness or ability or act independently once s/he is on the board. Why isn’t it logical to wonder whether, once elected, the nominee will exercise the duties of director with a perspective broader than that of the 1% shareholder that nominated him or her? I do not see in the proposal any meaningful requirements to disclose relevant relationships or transactions between the nominee and the nominating shareholder group which parallel the requirements to disclose relationships and transactions between a nominee and the company and its management. And it may be that the particular interests of the nominating shareholder or group (such as short term capital appreciation, income maximization, or single issues like social concerns) are not shared by most shareholders, yet there appears to be no provision in the proposal for these agendas to be disclosed. Finally, I note that the nominating shareholder is not even required to submit a supporting statement, much less defend why the nominee is qualified¹ or why the nominee better represents the interests of shareholders than those nominees put forward by the nominating committee.

The proposed rules have an extraordinary lack of curiosity about the relationship between the nominee and the nominating shareholder, the nominating shareholder’s objectives in imposing the nominee, and the nominee’s qualifications to be a director (or why the nominee will better serve the shareholders’ interests than the nominating committee nominees), and do not even provide for relevant disclosures so as to allow shareholders to make their own judgments on this score.

Proposal Ignores an Existing, Viable (once it is strengthened) Route to Proxy Access for Shareholders:

In its discussion of existing options, the proposing release gives short shrift to the much simpler option of proposing candidates to the nominating committee (see, e.g., Section IB1b of the proposing release, second paragraph beginning at page 18). Rather than

¹ I do note that separately proposed new disclosure rules (Release No. 34-60280, July 10, 2009, Proxy Disclosure and Solicitation Enhancements) do require disclosures of the qualifications of nominees to be directors of the company. Presumably, if adopted, these enhanced Reg SK Item 401 disclosures would also be required for shareholder-nominated nominees by incorporation into Item 7(b) of Schedule 14A. This would be helpful but not sufficient to address the concerns raised here.

attempting to totally remake the entire proxy and governance process around director elections with all the attendant complications and consequences (both intended and unintended) that issuers will no doubt point out in their comments, the Commission could have instead proposed to strengthen this avenue, making it more meaningful and effective by

(1) building on its earlier efforts to improve disclosure of nominating committee functions and communications between shareholders and boards (see, e.g., Release No. 33-8340, December 11, 2003, Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors and SK Item 407(c)(2)(ix)), and

(2) forcing at least a structured dialogue between the nominating shareholder and the nominating committee.

The nominating committee best knows the company, the Board and their needs. Indeed, a core function of the nominating committee is to build an effective Board with a portfolio of skills, background and personalities best suited to the oversight (as well as the advice and counsel) needs of the particular company given its strategy, business, market, geographic and regulatory environments, while at the same time balancing various regulatory requirements regarding independence and expertise. No doubt some nominating committees take these responsibilities less seriously than others **but the rules should not assume *a priori* that all public company nominating committees are incapable of performing this function.** Let the shareholders decide, on the basis of more robust disclosure as suggested below whether the nominating committee is performing its duties.

This would be consistent with the traditional SEC-enabled approach by which, for example, compensation committee performance is now being measured by shareholders; on the basis of more robust compensation disclosures. The SEC does not dictate, or impose on compensation committees or boards, any particular compensation practices; rather it requires issuers to disclose and explain the practices the committee has adopted so that shareholders may make their own judgments as to whether the committee members have acted in the best interest of shareholders. So too, instead of imposing on a nominating committee or board a director nominee, the SEC could require issuers to disclose and explain the committee's choice of nominees (or the rejection of a shareholder candidate) so that shareholders may make their own judgments as to whether that committee members have acted in the best interest of shareholders.

Proposed Alternative

Access to the issuer's proxy materials for a shareholder-nominated candidate for election as a director shall be at the discretion of the issuer's nominating committee, provided that (1) such committee is comprised entirely of independent directors according to applicable standards of independence (such as the those of the exchange on which the issuer's stock is listed), and

(2) the board has adopted a majority vote standard for uncontested director elections.

However, if a qualified shareholder or group of shareholders submits an eligible candidate for nomination and the nominating committee rejects such nomination, the committee must disclose in the proxy materials for that meeting its reasons for rejecting the nomination and must disclose the rejected candidate's name, background, relation to submitting shareholder, and supporting statement (all as provided by the submitting shareholder or group) and the identity and interests of the submitting shareholder or group.

Whether or not a candidate submitted by a shareholder has been rejected, the nominating committee shall disclose in the proxy materials for each actual nominee endorsed by the committee, the nominee's specific experience, qualifications or skills that qualify that person to serve as a director or committee member. (see, e.g., Release No. 34-60280, July 10, 2009, Proxy Disclosure and Solicitation Enhancements).

The submission of a candidate shall be directed to the Chair of the issuer's nominating committee in writing and shall include certain disclosures and certifications such as by filing a Schedule 14N (enhanced, as discussed above, with nominee's consent to perform a background check and to submit to an interview, and disclosures about the relationship between the nominee and the nominating shareholder, the nominating shareholder's purposes in presenting a nominee, and the nominee's qualifications). In this regard, the submitting shareholder will be required to include a supporting statement which describes why the nominee has been proposed and how the nominee will benefit the company or serve the interests of shareholders. The Chair shall personally acknowledge in writing the committee's receipt of such submission. The Chair shall also subsequently inform the submitting shareholder of the committee's decision. If the committee rejects the nomination, such written notice shall include the reasons for such rejection and shall be given by such a time as to allow the submitting shareholder to prepare and send to the committee a written rebuttal or request to reconsider prior to finalization and printing of the proxy materials. The issuer would have no obligation to reverse its decision or include the rebuttal in the proxy statement but the submitting shareholder would have the right to complain to the Commission that the issuer's rejection disclosures were misleading or slanderous.

The nominating committee's nomination of a shareholder-proposed candidate, if it chose to do so, would not necessarily indicate that committee's endorsement of the nominee vis-à-vis other nominees on the slate (nor would it require of the nominating committee any due diligence on the nominee beyond the information submitted by the nominating shareholder in accordance with the rules). The board would be free in the proxy materials to recommend a vote against that nominee notwithstanding the committee's discretionary decision to include the nominee.

I appreciate the Commission's invitation to submit these comments. I am grateful for the opportunity to provide my views as an interested investor for the Commission's consideration as it completes its evaluation of the proposed proxy access rules.

Very truly yours,



ROBERT A. BASSETT

Addendum:

Broader concerns about the premises underlying recent governance reform proposals:

I disagree with the assertion in Senator Schumer's proposed Shareholder Bill of Rights Act that "among the central causes of the financial and economic crises that the United States faces today has been a widespread failure of corporate governance". This assertion seems to be echoed in various forms and degrees in all of the governance reform proposals being floated in Washington today, including in the rhetoric surrounding the present proxy access proposal. I believe that 95% (if not more) of the boards of companies in which I invest make a diligent, good faith effort to oversee and advise the management of those companies for the best interests of shareholders in the long run. In my judgment, the recent financial breakdowns do not justify imposing on all public companies the radical restructuring proposed here with all the attendant distractions, risks and consequences (both intended and unintended) that I am sure many other commenters will detail. **While well-intended, this proposal represents a significant overreaction, especially when simpler solutions are available to accomplish the stated objective.**

Another philosophical point that motivates these comments is that the line between accountability/responsiveness and pandering/campaigning is getting fainter in the rhetoric standing behind these proposals. Much of the discussion of accountability and responsiveness to shareholder concerns, particularly in the context of this proposal on director elections, begs the question of which shareholders? and which concerns? and comes perilously close to setting up a conflict with a director's core fiduciary duty to all shareholders. Indeed, the Commission cites commentary about the benefits of competition for board elections (e.g., at page 11 and 12, notes 36 and 42 of the proposing release), the logical extension of which is a campaign for election to a board in which the process is politicized and candidates seek to ingratiate themselves to key (or noisy) constituencies. Maybe this is appropriate in a classic proxy contest in which control of the board is sought for specific disclosed purposes of effecting changes in the direction or policies of the corporation. **But it seems inappropriate to set up this campaign or competition dynamic where only one or two directors are proffered and where the company is paying the cost.**

Finally, **I am not certain that average professional investors, including the thoughtful managed mutual fund companies, are clamoring for, or even welcome, these reforms.** The Commission should consider that all but a very small number of shareholder governance proposals attract far less than a majority of the votes cast, much less a majority of the shares outstanding. This is some measure or evidence of the lack of broad shareholder intensity behind many of the governance ideas and theories that are promoted. Professional investors, by-and-large, are willing to defer to the judgments of their representatives, the Board, unless there is a clear company performance problem. It appears to me that too much weight is being given in the current atmosphere to the noisy views of activist investors who each have their own governance reform wishlists based mostly on theory or conviction, as opposed to the largely silent views of clear-eyed, pragmatic, private fund portfolio managers. It is predicted by many that the first people who will take advantage of these proxy access rules will be the groups with particular agendas, independent of substantive company performance issues. This will result in significant management and board distraction, time and resources with no clear benefit to shareholders overall.

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