xerox

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August 17, 2009

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: **File No. S7-10-09**
Release Nos. 33-9046, 34-60089, IC-28765 (the "Proposing Release")
Proposed Rule: Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

The Securities and Exchange Commission has recently proposed sweeping changes to proxy access rules in the form of the Proposing Release regarding Facilitating Shareholder Director Nominations. We welcome the opportunity to comment on the Proposing Release and to share our thoughts on Xerox's relationship with its shareholders.

Introduction

Xerox is a $17.6 billion (2008) technology and services enterprise and a leader in the global document market. We currently have over 54,700 employees and approximately 46,000 registered shareholders. We are keenly aware that we are accountable to our shareholders and we strive to maintain a constructive, ongoing dialogue with our shareholders. At Xerox, we have taken a number of steps to enhance communication with shareholders and ensure that their voices are heard, including the following:

- We annually publish our Global Citizenship Report, which discusses our corporate social responsibility principles, policies and practices, including governance and ethics, customer privacy and satisfaction, employee diversity and development and environmental sustainability initiatives;
- We maintain a website (www.xerox.com), where we post extensive information about Xerox, including our certificate of incorporation, by-laws, ethics and human rights policies, corporate governance documents, management and director biographies, environmental information and much more;
- We annually meet face to face with shareholders that represent at least 75% of our outstanding shares and we meet quarterly with our five largest shareholders;
- We conduct shareholder surveys;
- We hold an annual investor conference; and

- Shareholders have access to independent directors via direct access to the chairman of Corporate Governance Committee.

There is strong evidence that our shareholders believe they currently have an adequate voice in director elections, as 88.79% of our outstanding shares were voted at our May 2009 annual meeting of shareholders and each of our director nominees received at least 89% of the votes cast for his/her election. Further, over the course of many years, we have received very few shareholder recommendations for director nominees.

In addition to enhanced communication opportunities, our shareholders have numerous safeguards to ensure that their voices are heard, including the following:

a. Xerox does not have a classified Board and instead provides for annual elections of directors;
b. There is majority voting for directors in uncontested elections;
c. Our shareholders have the right to recommend candidates for nomination as directors, which are evaluated by our Corporate Governance Committee;
d. Our Corporate Governance Guidelines require that a substantial majority of the Board should consist of independent directors and our Board is currently 80% independent;
e. We have a lead independent director;
f. Our directors meet in executive session, without management representatives, at every regular board meeting;
g. We routinely receive shareholder proposals under Rule 14a-8(i)(8) and actively engage with the proponents in an attempt to arrive at a mutually acceptable resolution of the issues presented;
h. We have never failed to adopt a shareholder proposal that was approved by a majority of our company's shareholders;
i. Our Corporate Governance Committee, composed entirely of independent directors, selects and nominates only the most qualified directors with the highest level of integrity, independence of judgment, diversity, and willingness to devote adequate time and effort to Board responsibilities, as well as the particular skills, expertise and experience necessary to guide Xerox forward; and
j. Shareholders may communicate with non-management directors by directly contacting the chairman of the Corporate Governance Committee.

These opportunities for dialogue, as well as the related structural safeguards, are effective tools for ensuring that shareholder concerns are both heard and appropriately addressed. In light of our experience at Xerox, and for the reasons discussed above, we do not believe that a mandatory, universal "one size fits all" proxy access system, as has been proposed in the Proposing Release, is necessary or appropriate. We urge the Commission to refrain from adopting the federal proxy access system of proposed Rule 14a-11.

A. Proposed New Rule 14a-11

As we have explained in this first part of this letter, we do not believe that a mandatory, universal "one size fits all" proxy access system is necessary or appropriate. To the extent, however, that the Commissions determines to adopt all or a portion of proposed Rule 14a-11, we believe substantial changes to the Rule are needed in order for it to be workable and adequately balance the attendant costs against the potential benefits.

1. The proposed ownership requirements need to be revised to ensure that proposing shareholders have a significant, long-term interest in the Corporation – both before and after submitting a director nominee – to justify the considerable cost and disruption to the corporation and the other shareholders of proxy contests with remote chances of success.

(a) Raise the minimum ownership threshold at large accelerated filers to 5% for shareholders acting alone and 10%, aggregated, for shareholders acting in concert.

Under proposed Rule 14a-11, the ownership thresholds for a shareholder to qualify to name a director nominee for inclusion in a corporation's proxy statement pursuant to the rule would be 1%, 3% or 5% of the outstanding shares eligible to vote, depending on the market capitalization of the corporation. The Commission notes that these thresholds would ensure that at least one shareholder at each corporation qualifies to use Rule 14a-11 without the need to form a group. However, in recognition of the cost and disruption to companies faced with a contested election, we believe that it would be better to create thresholds designed to ensure a minimum level of *broad-based* support for director nominees nominated in reliance on Rule 14a-11. Accordingly, we believe that the minimum ownership percentage thresholds for large accelerated filers should be raised to 5% for shareholders acting alone and 10% in the aggregate for shareholders acting in concert (though no one shareholder should be permitted to be a part of more than one group of nominating shareholders). These higher thresholds would ensure that a reasonably significant percentage of shareholders is supporting a Rule 14a-11 nominee and would provide the appropriate balance to protect against Rule 14a-11 proxy contests that place significant cost burdens on other shareholders while having little chance of actual success.

(b) Raise the minimum required holding period to two or three years.

Proposed Rule 14a-11 would require the minimum ownership position to have been held for a minimum of one year. We believe that the proposed one year holding period is too short and fails to meet the Commission's stated desire that "only holders of a significant, long-term interest in a company be able to rely in Rule 14a-11." Accordingly, we believe that a two or three year holding period would be a more appropriate indication of long-term interest to trigger the significant entitlement to have nominees included in a corporation's proxy statement.

(c) Require that the minimum ownership be of a net long position and disclosure of all positions.

The Commission's recent action against Perry Corp. illustrates that shareholders have in the past amassed significant voting stakes in companies, while at the same time hedging the financial exposure from such ownership, for the sole purpose of influencing specific shareholder votes.[1] Given the demonstrated ease and effectiveness of this practice, shareholders can be expected to replicate this in the future and the Commission should act to provide sufficient assurance that this practice will not distort the director election process.

Proposed Rule 14a-11 would require nominating shareholders to disclose the amount of securities owned and the duration of ownership. However, in order to ensure that proposing shareholders in fact have a true, long-term interest, we believe the Commission should require that each nominating shareholder represent that it has not hedged or otherwise divested itself of economic interest in the requisite shares during the holding period. Additionally, we believe the Commission should require that each nominating shareholder disclose its *total* position in the corporation's stock rather than just long positions. Disclosure should also be required of any arrangement that affects the proponent's voting or economic rights. Given the possibility of the de-coupling of economic interests from voting rights, we believe other shareholders need to be aware of this information about the proponent in order to have a clear and complete understanding of each nominating shareholder's interest in the corporation.

(d) Require that the minimum shareholding be held for a period after a Schedule 14N is filed.

Proposed Rule 14a-11 would require a nominating shareholder to state its intent to hold the securities through the date of the annual meeting at which the directors are to be elected. However, the economic interest may be divested once the service of the director commences. We believe proposed Rule 14a-11 does not go far enough in protecting a corporation and its shareholders from the election of directors with a "single issue" goal and instead incents a short term focus by enabling nominating shareholders to nominate "special interest" directors and then walk away from the corporation once the nominee is elected. Accordingly, we believe proposed Rule 14a-11 should require each nominating shareholder to continue to hold the corporation's securities for some minimum period beyond election if its nominee is elected – such as the initial term of service of the director (*i.e.*, one year for a director elected annually, or three years for a director on a classified board). A holding requirement beyond election would discourage the nomination of "special interest" directors who would focus on single issues and not the broader, long-term interests of the corporation.

[1] *In the Matter of Perry Corp.*, Securities Exchange Act of 1934 Release 60351, July 21, 2009.

2. The "first in" rule has significant shortcomings that need to be addressed.

(a) When multiple nominations can claim "first in" status, priority should be given to shareholders who have held shares for the longest continuous period of time

Proposed Rule 14a-11 would give priority to nominating shareholders according to the order in which nominations are received. For a corporation with no defined start date for the Rule 14a-11 nomination period, shareholders would be able send in nominations at a time arbitrarily far in advance of the meeting to "lock in" their nomination right, which may not be in the best interests of all shareholders. For a corporation with a defined start date for the nomination period, the "first in" priority approach will likely result in multiple nominations being received by the corporation on the start date, and, due to the uncertain process of determining time of "receipt", it may well be impossible for a corporation to determine which nomination was actually the "first in" for purposes of Rule 14a-11. The Proposing Release provides no guidance on how corporations might determine priority in this very likely situation. To address this significant issue, we believe that the Commission should grant priority to the shareholders who have held the corporation's shares for the longest continuous period of time.

(b) If the "first in" nomination is later withdrawn, the "second in" nomination cannot step into its place because there would be insufficient time to process the second nomination.

Proposed Rule 14a-11 is not sufficiently clear as to whether the elimination or withdrawal of the "first in" nomination would cause the "second in" nomination, which would otherwise be ineligible, to later become eligible. We believe that the answer must be that withdrawal of a "first in" nomination would not then allow the "second in" nomination to become eligible for "first in" status under Rule 14a-11. As a purely practical matter, the timing provisions of the rule would not allow for multiple successive elimination processes to occur in a single proxy season – once a corporation has gone through the process of confirming with the Commission staff that a nominee can be excluded, there would be insufficient time to evaluate and, if necessary, raise eligibility issues with the Commission about the next candidate.

3. Federal proxy access rights should arise only after specified triggering events have occurred.

We believe that triggering events are essential so that the federal proxy access right applies only to companies with a demonstrated need for greater director accountability, for example, when a shareholder proposal receives a majority of votes cast and the board does not act on the proposal, or where a director fails to receive a majority of votes cast or receives a majority of withhold votes and the director either does not re-sign or the board does not accept the director's offer to resign.

The Proposing Release explains that the Commission's decision not to include trigger-ing events in the current proposal reflects its concern that "the federal proxy rules may be impeding the exercise of shareholders' ability under state law to nominate directors at all companies, not just those with demonstrated governance issues." However, we are concerned that this decision not to include triggering events overlooks the importance of, and misses an opportunity to ensure a constructive role for, a board's independent nominating or governance committee which, unlike shareholders, has a legal fiduciary obligation to the corporation's shareholders as a whole.

4. Absence of a role for the board nominating or governance committee presents significant concerns and may result in the election of special interest directors.

The absence of a prescribed role for the independent nominating or governance committee in a Rule 14a-11 contest could adversely impact the diversity, quality and overall composition of a corporation's board and serve to promote special interest directors who may not necessarily represent the best interests of all shareholders. As noted by the New York Stock Exchange, "[a] nominating/corporate governance committee is central to the effective functioning of the board. New director and board committee nominations are among a board's most important functions. Placing this responsibility in the hands of an independent nominating/corporate governance committee can enhance the independence and quality of nominees."[2] Eliminating a corporation's nominating or governance committee from the director selection and nomination process removes the oversight and judgment provided by the members of the committee and eliminates any comprehensive board-endorsed review process for shareholder-nominated director candidates. Accordingly, if adopted, Rule 14a-11 should require that a Rule 14a-11 nominee submit the same information to the corporation's independent nominating or governance committee as would be required from any other director nominee. We believe that the judgment of the nominating or governance committee is needed for it to make a recommendation to all the corporation's shareholders as to the election and qualifications of a Rule 14a-11 nominee.

5. Nominee qualification requirements focus primarily on independence and are not broad enough to encompass other regulatory requirements applicable to some corporations.

Proposed Rule 14a-11 addresses independence considerations under national securities exchange listing rules, but does not consider other legal requirements that are applicable to some, but not all, corporations. For example, under Section 8 of the Clayton Act, companies are required to conduct a comprehensive analysis of potential competitive concerns prior to nominating a director for election. Such an analysis can involve a detailed review of the corporation's businesses and the businesses where the potential director is an officer or a director, including completion of questionnaires by the potential director; gathering revenue information for any competing businesses; quantifying potential revenue overlap areas; working with legal counsel of each of the

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[2] New York Stock Exchange, Listed Company Manual, commentary on Rule 303A.04.

businesses with which the potential director nominee is associated to gather corresponding information for each of those businesses; and aggregating and compiling the information for analysis by antitrust counsel. This process must be conducted for each director candidate and the considerable time necessary to complete this process does not fit within the timeframe contemplated by proposed Rule 14a-11. Similar issues can arise with respect to Department of Defense and Department of Energy certification requirements, among others.

6. The proposed rules do not allow adequate time for corporations to review and evaluate Schedule 14N and to challenge the inclusion of shareholder nominees where appropriate.

(a) The rules should establish a uniform federal requirement providing a minimum of 150 days prior to the date of the prior year's proxy statement for submission of Schedule 14N.

Under proposed Rule 14a-11, the filing of Schedule 14N would trigger the time period during which a corporation must evaluate a shareholder nominee, discuss the nominee with senior management and all of the members of the board of directors, determine whether to accept or challenge the inclusion of the individual in the corporation's proxy materials, send communications to and receive communications from the Commission as needed, notify the proposing shareholder of the corporation's decision and then prepare and deliver its proxy materials. A corporation must have adequate time to complete this process and it is not clear to us that the timeline in proposed Rule 14a-11 is of sufficient length. Some corporations submitting comments on the proposed Rule have suggested that a minimum period of 150 days prior to the date of the proxy for the preceding year would be a reasonable period of time, and we concur.

(b) The rules must provide both a beginning date and an end date for submission of Schedule 14N.

We believe the time period for submission of Schedule 14N to a corporation should be limited both as to the first date for submission as well as the last date for submission, thereby creating a "window period" rather than simply a deadline for submission. The limit on the first date for submission is essential in order to clarify that a corporation is not required to treat late submissions from the prior year as submissions for the current year and to allow the corporation to have adequate controls for determining the sequence of submissions. The rules also need to establish, or allow corporations to adopt, ordering rules to determine both what constitutes "receipt" and priority of receipt where more than one Schedule 14N is received on the same date.

7. Proxy access under Rule 14a-11 must be subject to reasonable restrictions on resubmission.

We believe that proposed Rule 14a-11 lacks adequate safeguards to ensure that unsuccessful nominees are not repeatedly resubmitted to the detriment of better qualified potential nominees who are more likely to receive broader shareholder support and actually be elected to the board. A. shareholder director nominee who does not receive at least 25% of the vote should be barred from being nominated again, by any shareholder or the corporation, for a period of three years following the meeting at which the director nominee was defeated. Similarly, a shareholder who either (i) nominates a director who does not receive at least 25% of the vote or (ii) nominates a director who is actually elected to the board, should be barred from being able to nominate the same individual, or any other individual, as the case may be, for a period of three years.

There are several reasons supporting this position. First, a director nominee who does not receive at least 25% of the vote clearly has not received the support of the shareholders and another shareholder should have the opportunity to propose a director nominee who may be more acceptable to the other shareholders. Second, assuming the proposed "first in" rule is adopted, a shareholder who nominates an unsuccessful director candidate could keep re-nominating that individual year after year and, if that shareholder is the first to nominate a director each year, this would effectively "lock out" other shareholders from proposing other director nominees. Third, preventing an unsuccessful director nominee from being re-nominated would avoid the situation where a "special interest" shareholder, whether an individual holding sufficient shares or a special interest group holding sufficient shares, keeps nominating the same person again and again when that person does not have sufficient support from the other shareholders to actually be elected. Finally, if a shareholder is successful in having his/her nominee elected to the board, then that shareholder has obtained representation on the board and another shareholder should have an opportunity to attempt to gain representation on the board without competition from the first shareholder. This would help prevent the board from being over-weighted in favor of any one special interest group, particularly in the situation where a corporation has a handful of shareholders who own large blocks of shares (and thus would be able to easily nominate directors), and the remaining shares are held by a large number of individuals who each hold a small amount of shares and would have a more difficult time aggregating a block of shares sufficient to nominate a director.

B. Proposed Amendment of Rule 14a-8(i)(8)

In addition to adoption of new Rule 14a-11, the Proposing Release discusses amendment of current Rule 14a-8 to remove federal impediments to the rights of shareholders created under state law. Amending Rule 14a-8 would allow corporations and their shareholders to determine whether shareholders possess an adequate voice in corporate governance, depending on their particular situations and circumstances.

1. Shareholders currently have a significant, effective voice in governance, both at Xerox and at other corporations.

The Proposing Release reflects the Commission's belief that shareholders should have a "greater voice" in the director nomination process specifically, and in the governance of corporations generally. As discussed at the beginning of this letter, we believe that Xerox shareholders currently *do* have a significant, effective voice and *do* have the ability to effectuate change.

At Xerox, as at other corporations, the recent history of corporate governance provides numerous examples of governance reforms promoted by retail and institutional shareholders through dialogue with companies, including the current Rule 14a-8 shareholder proposal process. Some of the most significant recent examples relevant to Xerox include:

- appointment of an independent lead director;
- movement of the voting standard in uncontested director elections from plurality to majority; and
- amendments to New York Stock Exchange ("NYSE") Rule 452 to eliminate broker discretionary voting in uncontested director elections.

These and other corporate governance reforms were adopted at companies of all industries and sizes voluntarily and within a relatively short period of time through existing processes. More importantly, the impetus for these reforms came from shareholders. Further, market practices for these reforms emerged through existing avenues of communication available to shareholders -- without the need for federally-mandated standards. If adopted as proposed, Rule 14a-11 could actually have an adverse effect on some of these reforms that shareholders worked so hard to achieve and incent short term-ism. For example, proposed Rule 14a-11 could cause majority voting provisions to default back to a plurality standard in certain circumstances.

2. Removing federal impediments to the rights of shareholders created under state law would properly permit states, shareholders and corporations working together – not the SEC -- to determine whether shareholder proxy access rights are needed on a case-by-case basis.

The Proposing Release seeks to remove federal impediments to state law rights to nominate directors. Corporations are created and exist under state law, and we agree that federal law should not adversely affect the rights of shareholders given to them by state law. Further, we believe that states should be allowed to exercise their rightful authority and adopt their own provisions regarding shareholder proxy access, should they determine that such provisions are necessary.

Several states have recently expressly addressed the issue of proxy access, including Delaware and North Dakota. Xerox is a New York corporation. Although New York has not specifically addressed the issue of shareholder proxy access, New York could nonetheless elect to do so in the future if it determined that such action was warranted. Adoption of Rule 14a-11 is, therefore, unnecessary and would adversely affect the ability of the State of New York, Xerox shareholders and Xerox to work together to establish governance structures tailored to their specific circumstances by imposing a specific "one size fits all" proxy access structure.

3. The Commission's "eProxy" rules have significantly lowered the potential costs to shareholders of running proxy contests.

Rule 14a-16, which allows shareholders who wish to run a proxy contest to take advantage of the "notice and access" model of delivery of proxy materials, has only been in effect since 2007. Although to date few shareholders have made use of this model of delivery, it is expected to dramatically lower the potential costs to shareholders of running a proxy contest – previously one of the most significant limitations on shareholder proxy contests. The Commission should allow the process it has established to work – particularly since notice and access does not change state law rights, but rather complements existing state regulatory schemes and makes it easier for shareholders to exercise their state law rights.

4. The proposed amendment to Rule 14a-8(i)(8) should be revised to increase the threshold for proxy access shareholder proposals to at least 1% of a corporation's stock.

Director elections is an area of fundamental significance to a corporation that can have far-reaching and long-lasting impacts. Accordingly, the threshold required for submitting proxy access shareholder proposals should be higher than the threshold for submitting shareholder proposals relating to other matters. We believe that the eligibility threshold for submitting proxy access shareholder proposals should be increased to at least 1%, of a corporation's outstanding shares.

Conclusion

Shareholders must have a significant, effective voice in their corporation, as they are the corporation's owners. At Xerox, we believe that our shareholders currently *do* have a significant, effective voice. The proposed amendment to Rule 14a-8(i)(8) would properly reserve to the State of New York, our shareholders and Xerox -- working together -- the right to determine whether shareholder proxy access rights are needed and the extent of any such rights. Adoption of proposed Rule 14a-11 is, therefore, unnecessary and we urge the Commission to refrain from adopting the "one size fits all" federal proxy access system described in proposed Rule 14a-11.

Sincerely,

Ursula M. Burns

Ursula M. Burns
Chief Executive Officer

Anne M. Mulcahy

Anne M. Mulcahy
Chairman of the Board

cc: Hon. Mary L. Schapiro, Chairman
Hon. Luis A. Aguilar, Commissioner
Hon. Kathleen L. Casey, Commissioner
Hon. Troy A. Paredes, Commissioner
Hon. Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
Kayla J. Gillan, Deputy Chief of Staff