



UnitedHealth Group<sup>SM</sup>

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VIA ELECTRONIC MAIL: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

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

Re: *File No. S7-10-09*  
*Release No. 34-60089*  
*Facilitating Shareholder Director Nominations*

Dear Ms. Murphy:

The Securities and Exchange Commission (the "Commission") recently proposed rules that would require all public companies to include in their proxy materials shareholder nominees for election as directors (the "Proxy Access Proposal"). The Commission published the Proxy Access Proposal in Release No. 34-60089 (the "Proposing Release"). UnitedHealth Group appreciates the opportunity to respond to the request for comments in the Proposing Release.

UnitedHealth Group is a diversified health and well-being company dedicated to making health care work better. UnitedHealth Group offers a broad spectrum of products and services through six operating businesses: UnitedHealthcare, Ovations, AmeriChoice, OptumHealth, Ingenix, and Prescription Solutions. Through its family of businesses, UnitedHealth Group serves more than 70 million individuals nationwide. UnitedHealth Group is incorporated in Minnesota and has over 1.1 billion shares outstanding.

### **Introduction**

The Proxy Access Proposal would require, under specified circumstances, each company that is subject to the Commission's proxy rules to include a shareholder's, or group of shareholders', nominees for directors in its proxy materials. The Proposing Release indicates that the Commission's decision to publish this proposal was made in response to concerns about the exercise of appropriate oversight of management, focus on shareholder interests, and accountability for decisions regarding issues such as compensation structures and risk management by the boards of directors of public companies.<sup>1</sup> UnitedHealth Group fully supports the Commission's broad goals of strong corporate governance and board accountability. We believe communications with shareholders should be a priority for all boards and management teams and we have a very positive performance record in shareholder communications. However, we respectfully disagree with the Commission's view that the Proxy Access Proposal is a necessary element for effective corporate governance.

<sup>1</sup> Proposing Release at page 7.

### ***Comments Regarding the Proxy Access Proposal***

Substantive regulation of shareholder rights and director elections fall squarely within the purview of state corporation law and pre-empt action by the Commission. The Proxy Access Proposal also does not give adequate consideration to the current corporate governance processes in place at UnitedHealth Group (and other similarly situated companies). Further, the Proxy Access Proposal fails to give proper consideration to the difference in state law duties that are applicable to the Board of Directors and a nominating shareholder. As a result, it is our concern that the Proxy Access Proposal would:

- Create a “one-size-fits-all” mandate that would ignore the important role of our Nominating and Corporate Governance Committee to ensure that all nominees presented to a shareholder vote – both those put forward originally by the board and those put forward originally by shareholders – possess skills and characteristics that are in the long-term interest of a company and its shareholders;
- Create a standard that discourages companies from imposing heightened independence standards on its directors; and
- Create a shareholder nomination process that:
  - does not appropriately limit access to the proxy to shareholders with a significant long-term economic interest in the Company;
  - fails to reveal whether a nominating shareholder is proposing action that is in the long-term best interest of the Company and its shareholders or is motivated by an effort to increase short-term results; and
  - fails to provide shareholders with all of the information that is material to an informed voting decision.

We discuss these concerns in greater detail below.

#### ***Shareholder Access is a Matter of State Law.***

Director elections and shareholder rights have been under the control of state law since the inception of the corporate structure well over 100 years ago. Because of this longstanding responsibility and the lack of authority by the Commission to act in this area of corporate governance, UnitedHealth Group believes the Commission should leave the rules and methods of electing directors, in the proper venue, the States.

No compelling reason exists to overturn the long-standing state law role in controlling the substantive rules regarding director election and that role should in fact be preserved and protected. Experience shows that the state law route is more likely to preserve flexibility for companies and shareholders to define the right approach given the circumstances at hand. The Commission can and should play a pivotal role by exercising its jurisdiction over disclosure to ensure that shareholders are fully informed about their rights and that there are transparent procedures for the exercise of such rights. Moreover, such a role is in accord with the Commission’s limited authority under Section 14(a) of the Securities Exchange Act of 1934.

The pursuit of a federal right to access will lead to a one size fits all rule. It means that all companies will be viewed similarly in determining access design features. However, it is obvious

that no one approach can respond to the diversity in business strategy, profit model, size, scope and ownership structure that characterizes corporate America.

If, in the alternative, states are allowed to exercise their rightful authority, companies will be able to work with shareholders to determine the features that are meaningful and workable for them. By preserving flexibility in design and implementation, the competitiveness of American businesses will be enhanced. Currently, this is the model being used for majority voting of directors, staggered boards and the right of shareholders to call special meetings, among others. These changes have occurred through a dialogue between directors and shareholders, all without government mandates. This flexibility has served American companies and shareholders well and preserving and even fostering it should be the touchstone for corporate governance reform. Accordingly, the thousands of public companies, through their boards of directors and millions of shareholders should be allowed to foster a structure that best fits their needs.

*The Proxy Access Proposal Would Mandate a One-Size-Fits-All Process that Bypasses the Responsibility of our Nominating and Corporate Governance Committee to Ensure that Director Nominees Possess the Experience, Skills, and Characteristics that are in the Long-Term Interest of the Company and our Shareholders.*

UnitedHealth Group believes our Nominating and Corporate Governance Committee plays a vital role in the evaluation of director nominees. The Proxy Access Proposal would eliminate this role unnecessarily and without compelling justification. Our Nominating and Corporate Governance Committee is comprised entirely of independent directors, each of whom owes fiduciary duties to all of the Company's shareholders. Consistent with their fiduciary duties, the independent directors that comprise the Nominating and Corporate Governance Committee have spent considerable time to formally develop a "director skills matrix" that identifies the appropriate balance of experience, skills, and characteristics required of each director, as well as the mix of experience, skills, and characteristics that are necessary for the optimal functioning of the Board as a whole.

In an effort to increase shareholder input in the selection of director nominees, UnitedHealth Group has formed a Nominating Advisory Committee (the "Advisory Committee") that is composed of five individuals – four that are affiliated with long-term shareholders and one who is a member of the medical community. The Advisory Committee allows shareholders to:

- Provide input on the desired skills to be represented on the Board of Directors as a whole and of individual director nominees;
- Suggest director nominees for consideration by the Nominating and Corporate Governance Committee; and
- Provide feedback on the skills and characteristics of potential director candidates under consideration by the Nominating and Corporate Governance Committee.

Our Board of Directors has added four new independent directors since April 2007. The Advisory Committee has provided valuable input to our Nominating and Corporate Governance Committee throughout that time period. The Chair of our Nominating and Corporate Governance Committee and our Chairman of the Board attend meetings of the Advisory Committee. At the beginning of this process, the Advisory Committee spent considerable time discussing the desired skills to be represented on the Board and this input was taken into

account in the development of the director skills matrix. The Advisory Committee has also provided the Nominating and Corporate Governance with an additional channel to identify well-qualified director candidates.

The process for identifying director nominees requires a critical evaluation of the experience, skills, and qualifications of each potential director nominee as compared with the skills possessed by current board members and other skills desired to be represented on our Board as identified in the director skills matrix. It typically takes our Nominating and Corporate Governance Committee months to identify, evaluate and screen potential director nominees. This process includes a discussion of the types of skills that the Nominating and Corporate Governance Committee believes should be held by a potential director candidate, initial discussions with potential candidates, conducting and consideration of background and independence screens, interviews with the Chair of our Nominating and Corporate Governance Committee and Chairman of the Board, and consideration of input from our Advisory Committee.

The Commission has recognized the significance of a complete evaluation of these characteristics in its recent proposals seeking to require enhanced disclosure regarding nominees for director.<sup>2</sup> However, under the Proxy Access Proposal, a nominating shareholder could propose a director nominee without regard to either the nominee's particular experience or skills, the balance of experience and skills on the board as a whole, or any company- or industry-specific director skills that are important to the growth and success of the company.

In addition to establishing a process that provides no formal role for a company's nominating committee, the Proxy Access Proposal would prohibit a shareholder nominee from being included in a company's proxy materials if the nominating shareholder had any agreement with the company with regard to the inclusion of that nominee in the company's proxy materials. We are concerned that this prohibition would have the unfortunate effect of eliminating any informal role of the nominating committee by discouraging conversations between shareholders and a company regarding potential individuals who may be qualified to serve as director candidates.

Given the essential shareholder-protection role played by nominating committees (and UnitedHealth Group's Nominating and Corporate Governance Committee specifically) in reviewing the qualifications of potential director nominees, it is not in the best interest of shareholders for the Proxy Access Proposal to establish a process that precludes any involvement of that committee – whether formal or informal – in the director nomination process when a nominee originates from a shareholder.

*The Absence of a Requirement that Shareholder Nominees Meet Any Company-Adopted Heightened Standards for Director Independence is Not in the Best Interest of Shareholders.*

UnitedHealth Group has adopted director independence and qualification standards that exceed those required by either the Commission or the New York Stock Exchange, the exchange on which our shares are listed. For example, our Standards for Director Independence apply the heightened independence standards for audit committee members to all directors; include a category of relationships between a director or his or her immediate family members and a executive officer that if present, would preclude the director from being considered independent; and we do not allow our directors to serve on more than three other public company boards.

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<sup>2</sup> See Release No. 34-60280.

Under the Proxy Access Proposal, shareholder nominees would not be required to meet any of these heightened objective standards. The absence of such a requirement would undermine the intent and benefit to our shareholders of such heightened standards.

As presently proposed, the Proxy Access Proposal could result in the election of additional directors constituting up to 25% of our Board that would not be considered independent if they did not meet our heightened objective independence standards. Any Commission-mandated proxy access process should require that shareholder nominees be considered eligible for inclusion in our proxy statement only if they comply with our heightened objective standards for independence and other objective director qualifications— only through the inclusion of such a requirement can a proxy access process maintain the benefits to shareholders that are provided by our heightened independence and director qualification standards.

If the Commission determines to proceed with proxy access, the process must contain procedural safeguards to ensure that shareholder-nominated directors will be independent under the Company's generally applicable independence standards. These safeguards should require, at a minimum, that shareholder nominees have an obligation, if requested, to complete standard director questionnaires and submit to background checks and other procedures customarily completed by our Nominating and Corporate Governance Committee for potential nominees. A shareholder nominee should not be eligible for inclusion in our proxy statement if that nominee could not serve as an independent director because of his or her failure to meet objective standards generally applicable to all UnitedHealth Group directors.

*The Proposed Nominating Shareholder Eligibility Requirements Do Not Properly Balance Proxy Access against its Potential Disruptive Effect.*

UnitedHealth Group is a "large accelerated filer" under the Commission's categorization of filers. Accordingly, under the Proxy Access Proposal, a shareholder or shareholder group would be eligible to submit a nominee if it had owned 1% of our stock for one year and had hedged away all of its economic interest in those shares.

In our view, the 1% threshold in proposed Rule 14a-11 is significantly too low to establish the obligation of a company to include a shareholder's or shareholder group's nominee in a company's proxy materials. We have a large number of shareholders that could individually meet this threshold and an even larger number that could easily form a small group of two or three to meet this threshold. Our view in this regard is informed by the following shareholding data obtained in connection with our 2009 annual meeting of shareholders:

- 60 shareholders hold at least 0.25% of our outstanding shares;
- 51 shareholders hold at least 0.30% of our outstanding shares;
- 40 shareholders hold at least 0.40% of our outstanding shares;
- 35 shareholders hold at least 0.50% of our outstanding shares;
- 15 shareholders hold at least 1.00% of our outstanding shares;
- 11 shareholders hold at least 2.00% of our outstanding shares;
- 8 shareholders hold at least 3.00% of our outstanding shares; and
- 1 shareholder holds at least 5.00% of our outstanding shares.<sup>3</sup>

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<sup>3</sup> Data based on 1,181,338,477 shares of our common stock issued, outstanding and entitled to vote at the Company's 2009 annual meeting of shareholders.

Under the Proxy Access Proposal, there would be a one-year holding period prior to submission of a shareholder nominee, no requirement that the nominating shareholder be at economic risk with regard to its ownership of a company's stock during that period, and no requirement that the nominating shareholder hold the company's stock beyond the date of the election of directors. We are of the view that the holding period in proposed Rule 14a-11 would not adequately protect a company's shareholders against the potentially disruptive efforts of shareholders who – while not interested in forcing a change in control – intend to create pressure to increase short-term results or advocate other interests (at the potential expense of the long-term interests of a company and its shareholders). The concerns presented by the proposed one-year holding period are exacerbated by the absence of any requirement for the nominating shareholder to continue to own shares past the date of the meeting at which the directors (including, possibly, the shareholder's nominees) are elected.

If the holding requirement was expanded to 2 years, instead of the 1 year period currently proposed, UnitedHealth Group would continue to have a large number of shareholders that could individually meet, or form a group to meet, the threshold proposed in the Proxy Access Proposal, as follows<sup>4</sup>:

- 32 shareholders have held at least 0.25% of our outstanding shares for 2 years;
- 29 shareholders have held at least 0.30% of our outstanding shares for 2 years;
- 24 shareholders have held at least 0.40% of our outstanding shares for 2 years;
- 20 shareholders have held at least 0.50% of our outstanding shares for 2 years;
- 9 shareholders have held at least 1.0% of our outstanding shares for 2 years;
- 6 shareholders have held at least 2.0% of our outstanding shares for 2 years; and
- 4 shareholders have held at least 3.0% of our outstanding shares for 2 years.

Finally, the Proxy Access Proposal would not require a nominating shareholder to have been at economic risk with regard to its ownership of the company's securities during the required holding period. The absence of such a "net-long" requirement further encourages the use of proxy access by shareholders who are motivated by short-term economic interests rather than the growth and long-term success of the Company.

We also question the necessity of providing shareholders with the ability to form groups to meet the ownership threshold. The ability to form a group to meet an ownership threshold further unnecessarily exacerbates the potential for shareholders who do not have a significant long-term ownership stake in the Company to use proxy access to create pressure to increase short-term results.

As such the Proxy Access Proposal would put shareholders at significant risk by failing to limit proxy access appropriately to those shareholders with a sufficient stake in the long-term interest in the company. At a minimum, we believe that any Commission-mandated proxy access process should require any nominating shareholder to:

- Hold a minimum of 5% of a company's outstanding stock;
- Hold the required amount of a company's stock on a "net-long" basis;
- Hold the required amount of a company's stock for a period of at least 2 years; and

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<sup>4</sup> Data based on Forms 13F filed with the Commission for the period ending March 31, 2009.

- Commit to maintaining ownership at least through the first two years of the shareholder nominee's directorship, if elected.

*The Proxy Access Proposal would not provide Investors with Sufficient Information to Make an Informed Voting Decision.*

Any Commission-mandated proxy access process should require sufficient disclosure for shareholders to make an informed voting decision regarding all nominees for director. In our view, the minimal disclosure regarding nominating shareholders and their nominees under the Proxy Access Proposal would not provide shareholders with sufficient information to make an informed voting decision. The potential use of proxy access by a shareholder who – while not interested in forcing a change in control – intends to create pressure to increase short-term results or advocate other interests (at the potential expense of the long-term interests of a company and its shareholders) must be balanced by additional disclosure of important facts pertaining to nominating shareholders and shareholder nominees:

- The same information regarding shareholder nominees as would be required for company nominees under the Commission's proposal in Release No. 34-60280;
- Complete share ownership information, including any share lending, hedge, derivative, synthetic, or similar securities in the company, for the past 3 years in order to allow other shareholders to assess the nominating shareholder's interests in the long-term health of the company;
- Any direct or indirect relationship (whether familial, employment, or other) between the nominating shareholder and the director nominee;
- Any direct or indirect material interest that the nominating shareholder or director nominee has in any transaction or series of transactions in which the company is a participant, including without limitation any interest that could reasonably be viewed to be a conflict of interest under applicable state law; and
- A representation that there are no material misstatements or omissions in the materials submitted by the nominating shareholder for inclusion in the company's proxy statement.

*Rule 14a-11, if Adopted, Should Apply to Companies Only Upon the Occurrence of Certain Triggers.*

The "one-size-fits-all" nature of the Proxy Access Proposal fails to differentiate between those companies that suffer from the issues the Commission indicates its intent to address and those companies where those issues are not present. The Commission's discussion in the Proposing Release regarding the issues at public companies that give rise to the Proxy Access Proposal does not explain why it is appropriate or necessary to mandate proxy access at all companies that are subject to the Commission's proxy rules. There are many improvements that can be made to strengthen corporate governance and board accountability that do not involve shareholder access to the proxy.

UnitedHealth Group has taken extensive steps to focus on shareholder interests and strengthen the accountability of its directors to the Company's shareholders. In this regard, the following is

a partial list of the Company's recent efforts to strengthen governance practices that address the concerns discussed by the Commission in the Proposing Release:

- Amending our Articles of Incorporation to provide for majority voting;
- Declassifying the Board of Directors so that all directors are elected annually;
- Removing supermajority shareholder approval rights from our articles of incorporation and bylaws;
- Adopting heightened standards for director independence;<sup>5</sup>
- Adopting a formal Board/shareholder communication policy;
- Having no poison pill or other anti-takeover devices;
- Establishing an independent Board Chair; and
- Developing a formal outreach program to ensure that our Nominating and Corporate Governance Committee is aware of shareholder viewpoints on corporate governance topics.

In its 2003 proposal regarding proxy access, the Commission proposed limiting the mandated proxy access process to those companies whose actions had demonstrated the issues that were intended to be addressed by the proxy access process. The inclusion of such a "trigger" on the operation of the mandated proxy access process was intended to limit the disruptive effect of that process to those companies where that process was appropriate. Consistent with the reasoning expressed by the Commission in 2003, we believe that any proxy access process mandated by the Commission should require some "triggering" event, such as:

- A majority withhold vote against one or more directors that is not followed by the Board's acceptance of that director's resignation; or
- A majority vote in favor of a shareholder proposal that is not followed by the board's implementation of that proposal or other, appropriate responsive action.

*Technical Implementation Concerns with Proposed Rule 14a-11.*

Given the timeframe for preparing the proxy statement for the annual meeting, companies will not have the time, nor should they be required, to fully investigate the statements made by a nominating shareholder. In this regard, the provision regarding liability in proposed Rule 14a-11(e) (and the corresponding proposed amendment to Rule 14a-9) should be revised to state unequivocally that nominating shareholders bear full responsibility for information provided

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<sup>5</sup> UnitedHealth Group has adopted corporate governance principles that require directors to meet independence standards that exceed the requirements of the Commission and the NYSE. Further, a UnitedHealth Group director may not serve on more than four public company boards of directors (including UnitedHealth Group). See UnitedHealth Group's "Standards for Director Independence" and "Principles of Governance" at [www.unitedhealthgroup.com/AboutUs/CorporateGovernance.aspx](http://www.unitedhealthgroup.com/AboutUs/CorporateGovernance.aspx).

to a company for inclusion in its proxy materials, rather than attempting to shift this burden to the company in certain situations. This is of particular importance, as proposed Rule 14a-11 provides no means for a company to seek to exclude statements that it believes to be false or misleading. Therefore, any access proposal adopted by the Commission should specify that liability for any false or misleading statements resides solely and unconditionally with the nominating shareholder.

Proposed Rule 14a-11 sets forth a number of specific deadlines applicable to the proposed proxy access process including a requirement to provide notice to the proposing shareholder of an intent to exclude a director nominee within 14 days of receipt of the nominating shareholder's notice. Based on UnitedHealth Group's 2009 annual meeting schedule, the deadline for receipt of shareholder nominations for the 2010 proxy season would be December 24, 2009 and the deadline for notice of intent to exclude would be required to be sent by UnitedHealth Group by January 7, 2010. This short time period, made worse by its occurrence at the end of the calendar and fiscal year, make it unlikely that UnitedHealth Group would be able to meet this deadline. In addition, as currently proposed, UnitedHealth Group will not have sufficient information to make a determination whether the proposed director nominee meets the objective independence standards of the NYSE or the heightened objective independence standards of the Company. For example, the proposed rules do not require the nominating shareholder to provide the Company with any information about employment relationships of immediate family members of the proposed director nominee. As a result, the Company would be unable to confirm that there was no employment relationship that impaired the independence of its public auditor or impaired the independence of the director nominee under the NYSE's 2% test for independence.<sup>6</sup> It typically takes the Company 45 to 60 days to verify this information with respect to director nominees proposed by the Nominating and Corporate Governance Committee. This time period is necessary for the director nominee to complete the Company's standard director questionnaire, a background check to be ordered and the Company to review and verify the information obtained, including by conducting a search of 44 separate internal payment systems to determine whether there were any payments made by the Company or received from another company that would violate the NYSE's 2% test.

As a result, we believe that the initial 14 day response period should be lengthened to 14 business days. We also believe that shareholder nominees should be required to complete our standard director questionnaire and submit to a customary background check within 14 business days of a request to do so. Finally, given the length of time that it takes to confirm compliance with our objective independence standards, we should be able to notify a shareholder of the exclusion of a shareholder nominee at any time prior to the mailing of the Company's proxy statement, if it is determined that the shareholder nominee fails to meet our generally applicable Standards for Director Independence and limits on service on other boards.

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<sup>6</sup> The NYSE's 2% test provides that a director will not be considered independent if the director is a current employee, or his or her immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues.

**Conclusion**

We appreciate this opportunity to comment on the Proxy Access Proposal and would be happy to discuss any questions with respect to our comments. Any such questions may be directed to me at 952-936-1316.

Sincerely,



Dannette L. Smith  
Secretary to the Board

cc: Hon. Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission  
Hon. Kathleen L. Casey, Commissioner  
Hon. Elisse B. Walter, Commissioner  
Hon. Luis A. Aguilar, Commissioner  
Hon. Troy A. Paredes, Commissioner  
Meredith B. Cross, Director, Division of Corporation Finance

Stephen J. Hemsley, President and Chief Executive Officer  
Michele J. Hooper, Chair, Nominating and Corporate Governance Committee