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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

August 12, 2009

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

Re: S7-10-09
Proposed Rule Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

As New York State Comptroller, I am the sole Trustee of the New York State Common Retirement Fund ("Fund") and the administrative head of the New York State and Local Retirement System and the New York State and Local Police and Fire Retirement System (together, "Systems"). I write to provide comments on the Securities and Exchange Commission's ("SEC") proposed rule "Facilitating Shareholder Director Nominations." I strongly support this proposal and I appreciate the opportunity to provide the perspective of a substantial and long-term investor.

Currently, the Fund is valued at approximately $116 billion, 49 percent of which is invested in domestic public equities. As a fiduciary, I am obligated to act for the exclusive benefit of the Systems' more than one million members, beneficiaries and retirees. An important component of fulfilling my fiduciary duty is the protection and enhancement of the Fund's investments. In this regard, this Office historically has been active in monitoring our portfolio companies, including with regard to their corporate governance practices.

As a public institutional investor, the Fund's investment horizon is more than long-term, it is virtually perpetual. We are concerned with not only profitability in the short-term, but with the long-term sustainability of our portfolio companies. We rely on directors, as the shareholders' legal representatives, to be responsive to these concerns. An effective board is composed of intelligent, independent directors who are vigilant in overseeing, and willing to question, management. We rely on strong, independent board committees to, among other things, reign in excessive compensation practices, establish sound risk management policies, and establish robust codes of ethics. In short, the board of directors is the key to dynamic corporate governance practices and, consequently, a sustainable, profitable company.

The importance to shareholders of the composition of a board of directors cannot be overstated. It follows then, that shareholders must be given the ability to fully exercise their rights in the nomination and election of directors. I believe that proxy access as set forth in the proposed rule will provide the appropriate forum for shareholders to exercise their right to nominate director candidates. Currently, while states' laws may grant shareholders the ability to nominate candidates, there is no mechanism to meaningfully facilitate this right. Shareholders wishing to put forth candidates are faced with the prospect of running a proxy contest – an arduous process involving burdensome logistics and exorbitant costs. As a result, few shareholders perceive this option as viable.

The measured approach to provide proxy access set forth in the SEC's proposed rule will finally enable shareholders to exercise the substantive rights provided by state law. It will also boost efforts to enhance boardroom accountability. I believe that once shareholders have a direct voice in nominating director candidates, boards will focus more on and be more responsive to shareholders' concerns and interests.

Opponents of proxy access assert that shareholder-nominated directors will serve narrow, special interests or bring to the boardroom a specific agenda. The argument, however, is questionable. Initially, a shareholder-nominated candidate must still obtain a majority vote in order to obtain a seat on the board, something not easily achieved by a "special interest" candidate. Second, a successful shareholder-nominated candidate will be governed by the same fiduciary duty standards as a management-nominated shareholder. If we are to presume that management-nominated directors are able to fulfill their fiduciary duty to shareholders, including overseeing their nominators, then we should accord the same presumption to shareholder-nominated directors.

I believe that the proposed rule is reasonable and balanced in its approach. It creates no substantive right to nominate, but rather simply facilitates existing rights; it grants proxy access to investors with a meaningful interest in the company; it does not impose "triggering events" that serve only to delay access to the proxy; and it prevents the use of proxy access to attempt to gain control of a board. However, I urge the SEC to reconsider the "first-in" approach for determining which candidates proposed by competing shareholders would be included in a company's proxy materials. I am concerned that a "race to the proxy" may undermine what should be a careful, deliberate consideration of whether to nominate a director candidate and, if so, which candidates to nominate. Instead, I suggest that the SEC consider implementing a process that takes into consideration the size and duration of holdings of the nominating shareholders in the company for which nominations are presented.

Finally, I fully support the SEC's proposal to amend Rule 14a-8(i)(8) to expressly allow the submission of shareholder resolutions proposing or requiring an amendment to by-laws to create a proxy access mechanism that is more expansive than that contained in the proposed rule.

I am gratified that the SEC has proposed a rule granting proxy access to shareholders and I urge the adoption of a final rule in substantially the same form.

Thank you.

Sincerely,

Thomas P. DiNapoli
State Comptroller