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August 17, 2009

VIA E-MAIL (rule-comments@sec.gov)

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

Re: *Facilitating Shareholder Director Nominations*
Release Nos. 33-9046; 34-60089
File No. S7-10-09 (June 18, 2009) (the “Release”)

Dear Ms. Murphy:

We are pleased to submit this letter in response to the request of the United States Securities and Exchange Commission (the “Commission”) for comments regarding the Commission’s proposed changes (the “Proposed Rules”) to the federal proxy rules (the “Proxy Rules”) published in the Release.

We note the debate that is currently underway with respect to certain fundamental aspects of the Proposed Rules, including the interplay between state and federal law with respect to the director election process.¹ Indeed, as the Commission notes in the Release, there are “long-held and deeply felt views” on a number of these issues.² We will not join here in a debate of these fundamental issues. Nonetheless, we concur with the sentiments expressed in a number of the previously submitted comment letters recommending that the Commission not adopt (or, at least,

¹ See, e.g., comment letter dated July 24, 2009, submitted by James L. Holzman, Chair, Council of the Corporation Law Section, Delaware State Bar Association, available at: <http://www.sec.gov/comments/s7-10-09/s71009-65.pdf>

² Release at 29027.

defer adoption of) Rule 14a-11.³ We join with these writers and others in expressing our belief that a federal rule mandating a “one-size-fits all” process for shareholder proxy access is inadvisable. Like others, however, we do support the proposed amendment to Rule 14a-8 to narrow the so-called election exclusion in Rule 14a-8(i)(8). In fact, by simply amending Rule 14a-8(i)(8), the Commission could achieve its stated goal of “remov[ing] impediments to the exercise of shareholders’ rights to nominate and elect directors to company boards of directors” and facilitating shareholder director nominations.⁴

At this time, however, on the assumption that some form of the Proposed Rules will likely be adopted, and believing firmly that improvements can and should be made to the Proposed Rules in order to achieve the Commission’s stated goals of (1) balancing the promotion of the “ability of holders of a significant, long-term interest in a company” to nominate directors with the legitimate concerns of public companies that the Proposed Rules not prove to be “costly and disruptive” and (2) not “discourag[ing] some qualified board candidates” from agreeing to serve on public company boards of directors⁵, we have focused below on the following key aspects of the Proposed Rules that, in our judgment, should be revised:⁶

- The Proposed Rules should allow a company’s shareholders to decide that the company should not be subject to Rule 14a-11.
- Certain of the proposed shareholder eligibility requirements should be revised to better achieve the Commission’s stated goals.
 - Consistent with the Commission’s stated goal of promoting the “ability of holders of a significant, long-term interest in a company” to nominate directors, the ownership threshold for all issuers, regardless of size, should be 5% of the company’s issued and outstanding voting securities.

³ See, e.g., comment letter dated August 7, 2009, submitted by Bruce R. Ross, Chairman of the Board, Biogen Idec Inc., available at: <http://www.sec.gov/comments/s7-10-09/s71009-86.pdf>; comment letter dated August 5, 2009, submitted by Michael R. McAleve, Chief Corporate, Securities and Finance Counsel, General Electric Company, available at: <http://www.sec.gov/comments/s7-10-09/s71009-81.pdf>; comment letter dated August 10, 2009, submitted by Thomas F. Larkins, Vice President, Corporate Secretary and Deputy General Counsel, Honeywell, available at: <http://www.sec.gov/comments/s7-10-09/s71009-97.pdf>; comment letter dated August 12, 2009, submitted by Andrew Bonzani, Vice President, Assistant General Counsel and Secretary, IBM, available at: <http://www.sec.gov/comments/s7-10-09/s71009-108.pdf>; comment letter dated August 10, 2009, submitted by Elisa D. Garcia C., Executive Vice President and General Counsel, Office Depot, available at: <http://www.sec.gov/comments/s7-10-09/s71009-104.pdf>; and comment letter dated July 24, 2009, submitted by James L. Holzman, Chair, Council of the Corporation Law Section, Delaware State Bar Association, available at: <http://www.sec.gov/comments/s7-10-09/s71009-65.pdf>

⁴ Release at 29024.

⁵ See Release at 29032 and 29035.

⁶ Our comments are with respect to issuers subject to the Proposed Rules that are not registered investment companies.

- The Proposed Rules should include eligibility requirements applicable to the formation of a nominating group, such as individual minimum holding requirements or a limit on the number of shareholders that can aggregate their holdings in order to satisfy the overall ownership threshold.
- Nominating shareholders should be required to have a “net-long” position and should be required to disclose all derivative instruments related to the company’s voting securities that they own.
- The ownership interest requirement should allow nominating shareholders to designate the size of their “Committed Interest” (defined and discussed below) for purposes of Rule 14a-11 and, in the event a nominating shareholder does not hold its Committed Interest through the meeting, its nominees should be deemed withdrawn.
- The first step of a Rule 14a-11 nomination should be to submit nominations to the company’s nominating committee.
- The “first-filed” approach to multiple nominations should be revised so that the priority is based on level of ownership.
- The proposed safe harbor amendments to Rule 13d-1(b)(1)(i) and 13d-1(c)(1) should be eliminated.
- The notice timing requirements should be revised to avoid a constant cycle of continuous proxy seasons and to ensure all companies have equal opportunity to challenge a nominating shareholder’s or group’s nominee(s) under Rule 14a-11.

I. A company’s shareholders should be able to decide that the company should not be subject to Rule 14a-11

We agree with the Commission that the first priority of the Proxy Rules should be to protect the rights of shareholders under state corporate law.⁷ For that reason, it is our view that Rule 14a-11 should be revised to provide that a company will not be subject to Rule 14a-11 if its shareholders amend the company’s governing documents either to provide for or to prohibit the inclusion of shareholder director nominees in the company’s proxy materials. If a company’s shareholders have duly approved such amendments, the Proxy Rules should respect that decision and not trump the collective will of a company’s shareholder owners either by compelling proxy access where the shareholders have voted to deny it, or by compelling proxy access rights and obligations that differ from those the shareholders have voted to provide. In our view, such deference to the rights of shareholders under state corporate law follows logically from an earnest commitment to shareholder democracy.

We note, for example, that other aspects of director elections are principally within the purview of state law, for example record date, notice, voting and quorum requirements. We also think it important to note that recent amendments to the General Corporation Law of the State of Delaware (the “DGCL”), which governs the conduct of the majority of large, public companies in the United States and their millions of shareholders, are intended to facilitate proxy access for

⁷ Release at 29025.

shareholders of Delaware corporations. New Sections 112 and 113 of the DGCL permit shareholders to adopt bylaws that would require a corporation to include shareholder director nominees in its proxy materials and/or to reimburse expenses incurred by a shareholder in connection with a proxy solicitation in a director election and to impose conditions to such inclusion or reimbursement. The conditions to inclusion or reimbursement ultimately are left to a company's shareholders to decide but may relate to minimum ownership levels or length of share ownership (including, for example, defining ownership to account for derivatives), the submission of specified information, the number or proportion of directors or whether the shareholder previously sought to require inclusion of its nominees, precluding nominations from any shareholder who acquires a specified percentage of shares within a specified period of time prior to the election, and requiring indemnification by the shareholder in respect of losses that might arise as a result of any false or misleading information provided by the shareholder. In short, Section 112 would permit, but not require, proxy access and would leave the framework for determining how to provide proxy access to individual companies and their shareholders. Section 112 thereby facilitates efforts by a Delaware corporation's shareholders to enhance shareholder participation in the nomination process in a manner that such shareholders deem appropriate for the circumstances of the corporation they own.

Consistent with the spirit of these recent Delaware law amendments, the Task Force on Shareholder Proposals of the Committee on the Federal Regulation of Securities, Section of Business Law of the American Bar Association recently published an "exposure draft" Illustrative Access Bylaw with Commentary (the "ABA Draft Access Bylaw") to "assist companies and their counsel who wish to consider a bylaw that provides shareholders with access to corporate proxy materials in connection with the nomination of directors."⁸ Like Section 112, the ABA Draft Access Bylaw provides a framework within which companies can provide shareholders with proxy access in a manner suited to the particular circumstances of such companies and the preferences of their shareholders.

Unless shareholders are able to render proposed Rule 14a-11 inapplicable to their company, companies and their shareholders would be prohibited from adopting their own proxy access provisions to the extent those provisions would limit rights conferred by Rule 14a-11. If shareholders do not have the ability to opt out of Rule 14a-11, the unfortunate result of the Commission's proxy access initiatives would be a stifling of the natural process of private ordering that would otherwise occur. We believe that private ordering has proven to be a very effective mechanism for corporate governance change in recent years—illustrated, for example, by recent movements toward majority voting, board declassification and redemptions, terminations and non-renewals of shareholder rights plans (or "poison pills"). While in each of these areas there has been a widespread and general trend that continues to evolve, each company and its shareholders have been able to consider and adopt specific changes in a manner

⁸ See Illustrative Access Bylaw with Commentary, Task Force on Shareholder Proposals of the Committee on the Federal Regulation of Securities, Section of Business Law of the American Bar Association, available at: http://meetings.abanet.org/webupload/commupload/CL410000/sitesofinterest_files/illustrative_access_bylaw.pdf

that the shareholders have determined to be in their best interests and in light of their company's particular circumstances. We believe that the Commission's one-size fits all approach to proxy access, exemplified by the broad application of Rule 14a-11, runs directly contrary to the stated purpose underlying Rule 14a-11, namely to facilitate shareholder rights. As proposed, Rule 14a-11 would, in fact, deny shareholders the right to choose not to be subject to the Proposed Rules, to implement some alternative form of proxy access or to elect not to provide proxy access at this time.

II. The proposed shareholder eligibility requirements for proxy access should be revised and clarified to better achieve the Commission's goals

We agree with the Commission's stated goal of balancing the desire to facilitate shareholder nominations on the one hand with the desire to minimize cost and disruption to companies on the other hand and the Commission's resulting decision to propose that "only holders of a significant, long-term interest in a company" be able to rely on the new proxy access rule to require that their nominee(s) be included in a company's proxy materials.⁹ In this regard, we support the proposed requirement that, in order to be eligible to require a company to include nominees in its proxy materials, a nominating shareholder or each member of a nominating group must (i) have held the requisite voting securities continuously for at least one year as of the date that the nominating shareholder or group provides notice to the registrant on Schedule 14N and (ii) intend to continue to hold such securities through the date of the election of directors.¹⁰ Such requirements are entirely consistent with the stated goal of facilitating access only for "holders of a significant, long-term interest" in a company.¹¹

We are concerned, however, that some of the other shareholder eligibility requirements fail to strike the appropriate balance between facilitating shareholder nominations and minimizing cost and disruption to companies and, therefore, we would recommend the changes described below.

A. The ownership threshold for all issuers, regardless of size, should be 5% of the company's issued and outstanding voting securities

Proposed Rule 14a-11(b) would impose different ownership requirements for shareholders seeking proxy access depending on whether the issuer is a large accelerated filer, an accelerated filer or a non-accelerated filer (i.e. 1%, 3% or 5%, respectively, of such company's shares entitled to vote on the election of directors). We believe there are a number of flaws with the proposed, three-tiered ownership thresholds. Instead of the three ownership tiers currently contemplated in the Proposed Rules, we would propose that the eligibility threshold for all companies, regardless of size, be 5% of shares entitled to vote on the election of directors.

⁹ Release at 29035.

¹⁰ Proposed Rule 14a-11(b)(2), Release at 29083.

¹¹ Release at 29035.

First, a single threshold would more closely align with the Commission's goal of facilitating proxy access for "only holders of a significant, long-term interest"¹² in a company. With a single threshold of 5%, a nominating shareholder or group would have a significant ownership interest relative to the rest of the shareholders, regardless of the size of that company. In this regard, the proposed 1% threshold for large accelerated filers is inappropriately low in relative terms, as it would give a nominating shareholder or group increased rights vis-à-vis all other shareholders whose ownership equates to 99% of the company's voting interests, a result that is not consistent with the Commission's stated intention to promote proxy access for "only holders of a significant, long-term interest."

Second and with respect to large accelerated filers, the proposed 1% threshold is inappropriately low in absolute terms. Based on a 1% ownership requirement and the minimum global market value or net asset value of \$700 million required to qualify as a large accelerated filer, a nominating shareholder or group holding only \$7 million worth of a large accelerated filer's voting shares could have the right to have its nominees included in a company's proxy materials. While this is not an insignificant amount to many individual investors, we believe this threshold would result in far too many shareholders having proxy access rights, thereby increasing the potential cost and disruption to companies. In fact, a 1% threshold for large accelerated filers would go beyond facilitating shareholder nominations from holders of a "significant, long-term interest" and risk serving as an invitation to activist, short-term shareholders to take up as many 1% positions as possible in order to exercise additional, outsized influence and power in the companies in which they hold securities. Based on the Commission's own data cited in the Release, applying a 1% threshold to large accelerated filers results in (1) at least 98% of them having at least one shareholder that would meet the eligibility threshold and (2) more than 99% having two or more shareholders that each hold at least 0.5% and could thus aggregate their shares to meet the 1% requirement.¹³

Third, it is inevitable that among the thousands of issuers that are subject to the Proxy Rules, a number of such companies regularly move from one category to another as the aggregate worldwide market value of their voting and non-voting common equity changes from fiscal year to fiscal year. Under the proposed, three-tiered ownership, shareholders of such companies will be subject to uncertainty as to the relevant ownership thresholds and the number of shares required in order to submit a Schedule 14N. Furthermore, for the many companies with fiscal years ending in December and spring annual meetings, the advance notice period and the period for determining whether to include or exclude a shareholder's nominees would overlap with the end of the fiscal year and thus shareholders of these companies might not have certainty as to the applicable eligibility requirements on the date by which they need to submit nominations.

¹² Release at 29035.

¹³ Release at 29035-29036.

As a result of these concerns, we would propose that one eligibility threshold be adopted for all companies, regardless of size. In order to submit a nomination on Schedule 14N, we would propose that a nominating shareholder or group must have held at least 5% of the company's shares entitled to vote on the election of directors for the requisite one-year holding period. We note that an equity ownership threshold of more than 5% of a class of any registered equity security is considered to be sufficiently material to trigger reporting requirements under Rule 13d-1. Finally, a 5% requirement would require, in the case of a large accelerated filer, that a nominating shareholder or group have an aggregate investment of at least \$35 million (assuming a company with the minimum global market value or net asset value of \$700 million), an amount that is more appropriately significant given the fundamental nature of the right to nominate directors, the attendant costs and potential disruption to the company and the relative importance of the exercise of such right in the context of a director election at a large, public company that is widely held by a large number of shareholders.

B. The Proposed Rules should include eligibility requirements applicable to the formation of a nominating “group”

Under the Proposed Rules, there are no specific requirements applicable to the individual shareholders that may come together to form a nominating group for purposes of a Rule 14a-11 nomination, apart from the duration of ownership requirements. By allowing an unlimited number of shareholders, regardless of the level of their individual share ownership, to form a nominating group for purposes of Rule 14a-11, the Proposed Rules could lead to nominations from large numbers of shareholders that, individually, have relatively small ownership positions. Not only does this seem inconsistent with the Commission's stated goal of facilitating access for holders with “significant” interests,¹⁴ we are also concerned that, absent a limitation on the number of individual shareholders that can participate in a nominating group, the process of verifying the eligibility of the nominating group (including the underlying holdings of each nominating shareholder within the group) could prove to be unwieldy and burdensome, as well as costly and disruptive. Thus, we believe a minimum ownership requirement applicable to each individual shareholder that participates in forming a group for Rule 14a-11 purposes should be imposed.

We believe the Commission could address this issue in a number of ways. Rule 14a-11 could be revised to require that each shareholder participating in a nominating group satisfy a minimum ownership requirement, e.g. 1%. Alternatively, Rule 14a-11 could be revised to require that each nominating group be able to demonstrate that it satisfies the overall 5% ownership requirement by aggregating the holdings of not more than its 10 largest individual shareholder members. If this alternative is adopted, we would also recommend imposing an upper limit on the number of individual nominating shareholders in a nominating group in order to ensure that the process of verifying the eligibility of the underlying holdings of each nominating shareholder within the group not prove unwieldy, burdensome, costly or disruptive. Whatever revisions are adopted, we believe that refinement of this aspect of the Proposed Rules

¹⁴ Release at 29035.

is necessary to serve the Commission's stated primary goal, namely to ensure that only significant, long-term shareholders are provided an opportunity to make nominations.

In addition, we believe that the Proposed Rules should be revised to clarify that shareholders may participate in multiple nominating groups as long as such groups, in the aggregate, do not seek to nominate more than the number of nominees that would be required by Rule 14a-11 to be included in a company's proxy materials.

C. Nominating shareholders should be required to have a "net-long" position and should be required to disclose all derivative instruments related to a company's voting securities that they own

The Proposed Rules provide for eligibility requirements based on beneficial ownership.¹⁵ In today's marketplace, however, a significant number of shareholders use derivative instruments to hedge economically their beneficial ownership in a company's securities. These derivative instruments, in certain circumstances, allow such shareholders to obtain certain rights akin to beneficial ownership, in particular the power to vote or to direct the voting of the underlying securities to which their derivative instrument relates, while hedging their economic exposure to changes in the value of the company's securities.

In light of these shareholder practices, we believe that nominating shareholders should be required to have both voting power and a "net long" economic interest for the entire requisite holding period in order to satisfy the Rule 14a-11 eligibility requirements. Thus, the proposed Rule 14a-11 should be revised to provide that shares will only count towards satisfying the ownership threshold to the extent the applicable shareholder retains, during the entire eligibility period, both the right to vote and the right to dispose of such shares, and that any shares subject to any "short" positions, whether by hedges or any other derivative instrument related to the company's voting securities, do not count towards satisfying the ownership threshold.

Consistent with determining 14a-11 eligibility on the basis of a shareholder's net-long position, we believe that a nominating shareholder or group should be required to disclose on Schedule 14N all derivative instruments it holds. The use of derivative instruments, in particular total-return swaps or cash-settled swaps, to hedge economically one's beneficial ownership in a company's securities is in tension with a fully committed long-term ownership position and a vested interest in the long-term success of a company. In order to promote the Commission's stated objective of providing shareholders with better information about a nominating shareholder or group so they can make informed voting decisions,¹⁶ shareholders who submit nominations for inclusion in a company's proxy materials should be required to disclose and explain to their fellow shareholders their entire economic interest, including all derivative instruments, in the subject company's securities. Absent such disclosure, shareholders will not have sufficient information to make an informed voting decision with respect to the underlying

¹⁵ Proposed Rule 14a-11(b)(1), Release at 29083.

¹⁶ Release at 29078.

motives and investment strategy of nominating shareholders whose nominees are included in a company's proxy statement.

D. The ownership interest requirements should allow nominating shareholders to designate the size of their "Committed Interest" for purposes of Rule 14a-11

The Proposed Rules provide that, in order to be eligible to require a company to include a nominating shareholder's or group's nominees in its proxy materials, each nominating shareholder must have held "the securities that are used [to determine] the applicable ownership threshold" continuously for at least one year as of the date that the nominating shareholder or group provides notice to the registrant on Schedule 14N and must intend to continue to hold such securities through the date of the subject election of directors.¹⁷ The Proposed Rules do not specify whether the nominating shareholder or group must intend to continue to own its entire interest or simply the shares necessary to meet the applicable ownership threshold.

We do not believe that a nominating shareholder or group should be required automatically to maintain its entire ownership position beyond the minimum number of shares required to satisfy the eligibility requirements.

We would suggest that the Proposed Rules precisely define the ownership level that is used to satisfy the eligibility requirements and that is thus subject to the duration of ownership requirements as each shareholder's "Committed Interest" (or some similar term). A shareholder's "Committed Interest" should be that number of voting securities (equal to or in excess of the applicable ownership threshold) that a shareholder identifies in its notice as having been held for one year (whether such securities constitute all of the shares of such shareholder or only a portion thereof) in order to demonstrate the eligibility of such nominating shareholder or the nominating group in which such shareholder participates. Thus, a shareholder should be able to designate the size of its Committed Interest and any shares held by a shareholder in excess of its Committed Interest should not be subject to the duration of ownership requirements and should be freely tradable.

E. If a nominating shareholder does not hold its Committed Interest through the meeting, its nominees should be deemed withdrawn

The Proposed Rules provide that, as a requirement for eligibility to submit a Rule 14a-11 nomination, a nominating shareholder or group must state its intention to hold the requisite securities through the date of the subject election of directors.¹⁸ The Proposed Rules do not, however, set forth any consequences for a nominating shareholder or group or its nominee(s),

¹⁷ Proposed Rule 14a-11(b)(2), Release at 29083.

¹⁸ Proposed Rule 14a-11(b)(2), Release at 29083. Proposed Rule 14a-18(b) also provides, in connection with the filing of the Schedule 14N, that a shareholder or group provide a representation that the shareholder or group satisfies the requirements of Rule 14a-11(b), Release at 29085.

nor do the Proposed Rules provide for any remedy for the company, in the event that a nominating shareholder (whether acting individually or as a member of a nominating group) fails to hold the requisite securities through the date of the election.

We believe that the eligibility requirements are just as important on the day of the director election as at the time a nominating shareholder or group submits its nomination, and a failure to meet the eligibility requirements at the time of the meeting should result in the nominating shareholder's or nominating group's nominee(s) being ineligible for election. We also believe that there ought to be some penalty imposed on a shareholder (whether acting individually or as a member of a nominating group) whose nominees have been included in a company's proxy statement and who sells shares resulting in the nominating shareholder or group no longer satisfying the eligibility criteria. It is our view that if a nominating shareholder (whether acting individually or as a member of a nominating group) whose nominees have been included in a company's proxy statement does not hold its Committed Interest (as defined above, that number of voting securities that a shareholder designates to satisfy the eligibility requirements) through the date of the election, such nominating shareholder's or group's nominees should be deemed withdrawn and the nominating shareholder or group should be required to (i) notify the Company, (ii) file an amended Schedule 14N withdrawing its nominees; and (iii) reimburse the company for any expenses incurred in connection with such nomination. In addition, such withdrawing, nominating shareholder should be prohibited from submitting a nomination notice to the Company under Rule 14a-11 for three years.

We note that some awkwardness may arise if a shareholder nominee is deemed withdrawn after the company's proxy statement (including that shareholder nominee) has been filed with the Commission. Typically, companies with a majority vote standard for election of directors provide that an election is deemed a "contested election" and subject to a plurality vote standard if there are more nominees than vacancies as of a date designated in the company's bylaws. For such companies, any subsequent withdrawal of 14a-11 nominees after that date should not change the voting standard applicable to that election. Any contrary result could create uncertainty for companies and their shareholders regarding the voting standard.

F. The first step of a Rule 14a-11 nomination should be submitting nominations to the company's nominating committee

The Proposed Rules do not contemplate, much less require, any communication between a company and a potential nominating shareholder or group until such nominating shareholder or group publicly files its Schedule 14N and publicly announces its desire to initiate a contested director election. As such, the Release sets up a potentially contentious posture from the outset, making it unlikely that the Proposed Rules will promote or facilitate better communication between a company and its shareholders. We believe that a company ought to be given an opportunity to consider including a nominating shareholder's or group's nominee(s) voluntarily before being required to do so.

Therefore, we believe that a nominating shareholder or group should be required to submit their nominations to the company's nominating committee prior to filing a Schedule 14N.

As the Commission indicates in the Release, one of the goals of the Proposed Rules is to address the fact that recommendations from shareholders to company nominating committees are rarely accepted by nominating committees.¹⁹ We believe that nominating committees would be more likely to entertain a recommendation from a nominating shareholder or group if doing so could avoid a contested election. The notice requirements to the nominating committee should incorporate whatever information would eventually be required under Rule 14a-11 in order to give the nominating committee sufficient information on which to base its determination of whether to include the proposed nominee(s) as part of the board's recommended slate.

Assuming the Proposed Rules are revised to provide that a Rule 14a-11 nomination must first be submitted to the company's nominating committee, we would suggest that the following additional timetable, setting forth our recommended three additional due dates and actions (required prior to the date a nominating shareholder or group provides its Schedule 14N to a company and files it with the Commission) be added to the timetable set forth in the Release:²⁰

<i>Recommended Additional Due Dates</i>	<i>Recommended Additional Actions Required</i>
<i>No later than 45 days prior to the deadline established pursuant to Rule 14a-18 (the "<u>Schedule 14N Deadline</u>")</i>	<i>Nominating shareholder or group must submit a Rule 14a-11 notice to the company's nominating committee</i>
<i>No later than 15 days prior to the Schedule 14N Deadline.</i>	<i>Company's nominating committee communicates to the nominating shareholder or group its determination of whether it will include any of the proposed nominee(s) as part of the company's board recommended slate</i>
<i>No later than the Schedule 14N Deadline</i>	<i>If the company's nominating committee decides not to include all of the proposed nominee(s) as part of the company's board recommended slate, the nominating shareholder or group will have an opportunity to withdraw its nomination or proceed with a Rule 14a-11 nomination subject to the eligibility requirements of Rule 14a-11</i>

In order to ensure that a company's nominating committee gives appropriate consideration to any nominating shareholder or group proposed nominee, any Rule 14a-11

¹⁹ Release at 29026.

²⁰ Release at 29051.

nominee whom a nominating committee determines to include as part of a board's slate should be counted for purposes of determining the maximum number of nominees required to be included under Rule 14a-11. For example, if a company's board is comprised of 12 members such that the maximum number of nominees that would be required under Rule 14a-11 would be three nominees, a nominating committee's decision to include one nominating shareholder or group nominee would lower the number of other nominees required to be included under Rule 14a-11 to two. Similarly, if the nominating committee determines to include the maximum number required under Rule 14a-11, no additional Rule 14a-11 nominees should be permitted, and such an election should be classified as uncontested.

III. The "first-filed" approach to multiple nominations should be revised so that priority is based on level of ownership

The Proposed Rules provide a company will not be required to include more than the greater of one shareholder nominee or the number of nominees that represents 25 percent of the company's board of directors.²¹ The Proposed Rules also provide that, in the event that more than one nominating shareholder or group is eligible to include nominees under Rule 14a-11, the company is required to include only the nominee or nominees of the first nominating shareholder or group from which the company receives timely notice, up to and including the maximum number required.²²

We believe that the Proposed Rules should be revised to eliminate the "first-filed" approach. The first-filed approach will create a "race to file" mentality and give an arbitrary, undue advantage to the first nominating shareholder or group to submit a nomination without any meaningful basis for providing such an advantage. Consistent with the Release's stated objective of promoting the ability of long-term "holders of a significant, long-term interest in a company" to have their nominee(s) included in a company's proxy materials,²³ we believe that priority should instead be based on level of ownership. Thus, in the event a company receives nominations under Rule 14a-11 for a greater number of nominees than is required by Rule 14a-11 to be included in the company's proxy materials, the priority for determining which nominee(s) to include should be based on the size of the nominating shareholder's or group's Committed Interest (see II.D. above) from largest to smallest (e.g. a nominating shareholder or group holding 6% should have priority over a nominating shareholder or group with 5.9%, regardless of when they filed). Revising the Proposed Rules to put priority on size would be more consistent with an earnest commitment to shareholder democracy and the promotion of the

²¹ Proposed Rule 14a-11(d)(1), Release at 29084.

²² Proposed Rule 14a-11(d)(3), Release at 29084.

²³ Release at 29035.

interests of significant holders while maintaining simplicity in the approach to determining which nominating shareholder's or group's nominees may be included.²⁴

IV. The proposed safe harbor amendments to Rule 13d-1(b)(1)(i) and 13d-1(c)(1) should be eliminated

Currently, Rule 13d-1(b) Rule 13d-1(c) provides that a person who might otherwise be required to file a Schedule 13D may instead file a short-form Schedule 13G, provided that the person “has not acquired the securities with any purpose, or with the effect of, changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect.” The Proposed Rules include amendments to Rule 13d-1 to specify that a nominating shareholder or group would not lose its Schedule 13G eligibility as a result of “activities solely in connection with” a Rule 14a-11 nomination.²⁵

While we agree that a nominating shareholder's or group's activities in connection with a Rule 14a-11 nomination should not automatically result in the nominating shareholder or group losing its Rule 13d-1(b) or Rule 13d-1(c) eligibility to file on Schedule 13G, we are concerned about the breadth of the proposed “safe harbor” in Rule 13d-1(b)(i)(i) and Rule 13d-1(c)(i). It seems to us that since a nominating shareholder or group is required to certify in its Schedule 14N that its securities “are not held for the purpose of or with the effect of changing control of the issuer of the securities or to gain more than a limited number of seats on the board,” then such nominating shareholder or group would likely continue to be eligible to file on Schedule 13G under Rule 13d-1(b) or Rule 13d-1(c). In order to clarify that Rule 13d-1(b)(i)(i) and Rule 13d-1(c)(i) might continue to be available for nominating shareholders or groups who submit a Rule 14a-11 nomination, the Commission might consider adding an additional “Instruction” to these Rule 13d-1 exceptions, explaining that the mere fact of a Rule 14a-11 nomination, by itself, will not be sufficient to cause a Schedule 13G filer to lose its Schedule 13G eligibility under Rule 13d-1(b)(i)(i) and Rule 13d-1(c)(i). However, we do not think that an absolute safe harbor is appropriate, particularly because a nominating shareholder's or group's intent could change following the filing of its Schedule 14N. Just like all other shareholders who file on Schedule 13G under Rule 13d-1(b) or Rule 13d-1(c), nominating shareholders or groups under Rule 14a-11 should be required to evaluate their own eligibility under such rules on an ongoing basis.

V. The notice timing requirements should be revised to avoid a constant cycle of continuous proxy seasons and to ensure all companies have equal opportunity to challenge a nominating shareholder's or group's nominee(s) under Rule 14a-11

The Proposed Rules provide that the Rule 14a-11 Deadline, the date by which a nominating shareholder or group must provide notice to the company of its intent to do so on Schedule 14N and file that notice with the Commission, be one of two possible dates—either

²⁴ We considered also recommending that priority be based on duration of ownership but ultimately determined that requirement to be too complicated and unwieldy.

²⁵ Proposed Rules 13d-1(b)(1)(i) and 13d-1(c)(1), Release at 29081.

(i) no later than the date specified by company's advance notice provision or (ii) in the absence of such a provision, 120 days before the anniversary of the date that the company mailed the prior year's proxy materials (as long as the date of the meeting has not changed by more than 30 calendar days from the prior year).²⁶

A. The Proposed Rules should be revised to provide a limited "window" for providing notice on Schedule 14N, including a "not earlier than" date in addition to a deadline

The Proposed Rules establish the Rule 14a-11 Deadline, however, there is no limit on how far in advance of the Rule 14a-11 Deadline a nominating shareholder or group could provide notice on Schedule 14N and publicly file that notice with the Commission. As a general rule, public company advance notice bylaws include both a deadline (usually, "not later than" a certain number of days, typically ranging from 60 – 120, prior to either the date that the company mailed the prior year's proxy materials or the anniversary date of the prior year's annual meeting) and a "not earlier than" date (usually, a certain number of days, typically ranging from 90 – 180, prior to either the date that the company mailed the prior year's proxy materials or the anniversary date of the prior year's annual meeting). Using these two dates, companies establish a window of time during which nominations (or proposals) may be duly noticed to the company.

By failing to provide a date that is the earliest on which nominations may be submitted pursuant to Rule 14a-11, the Proposed Rules establish a system in which, the day after the nomination window closes for one year's meeting, nominations for the next year's annual meeting could be made. Indeed, if the Proposed Rules' first-filed approach of rewarding shareholders whose nominations are received first is adopted, the likelihood that nominations will be submitted far in advance is even greater. By failing to establish a limited window for nominations, the Proposed Rules have the potential to make a company's proxy season last the entire year. In order to avoid a constant cycle of continuous proxy seasons and to ensure that the Proposed Rules achieve the Commission's intended balance between facilitating the ability of shareholders to nominate directors and minimizing cost and disruption to the company,²⁷ in addition to avoiding potential disruption to the board as a result of the constant possibility of impending board membership changes,²⁸ the Proposed Rules should be revised to provide that, in order to have a nominee included in a company's proxy materials pursuant to Rule 14a-11, a nominating shareholder or group must provide notice to the company of its intent to do so not earlier than a certain number of days (perhaps between 150 – 180) prior to the date that the company mailed the prior year's proxy materials.

²⁶ Proposed Rule 14a-18, Release at 29085.

²⁷ Release at 29035.

²⁸ Release at 29043.

B. The Proposed Rules should be revised to provide that the notice deadline be 120 days prior to the anniversary of the date that the company mailed the prior year's proxy materials for all 14a-11 nominations or, at least, for all 14a-11 nominations for the 2010 proxy season

In addition to the Rule 14a-11 Deadline, the Proposed Rules also set forth specific deadlines for a process by which a company could obtain some assurance on its determination not to include a nominating shareholder's or group's nominee(s), including a timetable for providing the nominating shareholder or group with an opportunity to respond to any deficiencies identified by the company as well as an opportunity for the staff of the Commission (the "Staff"), at its discretion, to provide an informal statement of its views to the company and the nominating shareholder or group, i.e. a Staff no-action relief letter process similar to the process currently used for proposals under Rule 14a-8.

Although this "either/or" approach to defining the Rule 14a-11 Deadline demonstrates the Commission's desire to show deference to state corporate law and the advance notice deadlines established by companies' bylaws, in many cases a company's advance notice bylaw deadline would fall later on the calendar than the date by which the Commission would require notice of a company's intention to exclude a shareholder nominee, thereby effectively depriving a company of its opportunity to challenge a nominating shareholder's or group's nominee(s) under Rule 14a-11. We join with others who have pointed out this conflict and suggest that the Commission revise the Rule 14a-11 Deadline to apply the same timeline to all companies.²⁹

In particular, in light of the current timetable for implementation of the Proposed Rules and the potential for delays in that timetable in the weeks ahead, the Commission should, at the very least, clarify that, with respect to the 2010 proxy season, the Rule 14a-11 Deadline applicable to all Rule 14a-11 nomination proposals, regardless of any differing time periods in a company's bylaws, will be 120 days prior to the anniversary of the date that the company mailed the prior year's proxy materials for all Rule 14a-11 nominations. By making this clarification for 2010, the Commission would provide certainty for shareholders and companies who anticipate meetings early in the 2010 proxy season and where the applicable, advance notice bylaw provisions provide for a shorter time period than 120 days. Companies would then have an opportunity to revisit their bylaws in order to determine whether to revise them to provide for a longer notice period for subsequent proxy seasons. The Commission would have an opportunity to assess the impact of Rule 14a-11 on the 2010 proxy season and make any additional rule proposals that it deemed appropriate.

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²⁹ See, e.g. comment letter dated July 14, 2009, submitted by Derek D. Bork and Jurgita Ashley, Thompson Hine LLP, available at: <http://www.sec.gov/comments/s7-10-09/s71009-22.pdf>

We greatly appreciate the opportunity to comment on the Proposed Rules and would be pleased to discuss any questions the Commission or the Staff may have regarding our comments. Please do not hesitate to contact Christa A. D'Alimonte at (212) 848-7257 or Eliza W. Swann at (212) 848-8073.

Very truly yours,

SHEARMAN & STERLING LLP

cc: Mary L. Shapiro, Chairman
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