Dewey & LeBoeuf LLP
1301 Avenue of the Americas
New York, NY 10019-6092

tel (212) 259-8000
fax (212) 259-6333

DEWEY & LEBOEUF

August 17, 2009

VIA EMAIL: rule-comments@sec.gov

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

Re: Proposed Rule: Facilitating Shareholder Director Nominations
File No. S7-10-09; Release Nos. 33-9046; 34-60089; IC-28765

Ladies and Gentlemen:

We are pleased to submit comments to the Securities and Exchange Commission (the "Commission") concerning the proposed amendments to the proxy rules under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), as set forth in Release Nos. 33-9046; 34-60089; IC-28765 (June 10, 2009) (the "Release").

The Release solicits comments on proposed rules that would:

- require companies, under certain circumstances, to include in their proxy materials shareholder nominees for director (the "Rule 14a-11 Proposal") and
- prevent companies from excluding shareholder proposals that would amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosure related to shareholder nominations (the "Rule 14a-8(i)(8) Proposal").

We do not support direct shareholder access to the proxy statement for director nominations under the Rule 14a-11 Proposal or indirect access under the Rule 14a-8(i)(8) Proposal. We believe that allowing shareholder access would be a serious mistake, disrupting the way governance roles traditionally have been apportioned among boards of directors,

management and shareholders of U.S. corporations[1] as well as shifting the focus to short-term corporate results and special interest group agenda, in the name of reform, best practices and good corporate governance.

Under the governance model of U.S. corporations, the business and affairs of a corporation are managed by or under the direction of the board of directors, with the handling of day-to-day operations delegated to professional management. This governance model has served shareholders well, creating wealth for many through stock price appreciation and dividends. In maximizing value for shareholders, directors, as permitted or required by state law, have balanced the interests of shareholders with those of other non-shareholder constituencies, such as customers, communities and employees.[2] Requiring shareholder access would upset this balance and prioritize the interests of certain shareholders, regardless of whether they seek to pursue special interests or short-term profits, over the interests of other shareholders and non-shareholder constituencies.

We do not believe that shareholder access would result in better-managed corporations or in corporations that will deliver more value over the long-term for shareholders. In particular, the Rule 14a-11 Proposal, which would enable groups of shareholders holding a modest number of shares (1% for large accelerated filers) for a minimal period of time (one year), seems to be designed to result in special interest groups with particular goals and short time horizons being able to promote their particular goals to the potential detriment of other shareholders and long-term shareholder value in general. If elected, directors nominated by special interest groups would almost certainly feel obligated to advance the agenda of such groups. This risk is exacerbated by the absence from Rule 14a-11 of a requirement applicable to shareholder access nominees of independence from their nominating shareholders. Shareholders currently have a number of ways in which to make their voices heard at a corporation. "Withhold" or "against" votes for directors deliver a message, and many shareholders use the current Rule 14a-8 process for their proposals. Shareholder access does not appear to us to be the best way of enhancing their ability to communicate with management or the board.

---

[1] As noted in the August 1, 2009 *Report Of The Task Force Of the ABA Section of Business Law Corporate Governance Committee On Delineating Of Governance Roles & Responsibilities*, "[h]ow the law apportions governance roles among shareholders, boards of directors and managers is central to the success or failure of the corporate form. The way in which these roles are structured in state corporate law is a critical part of the legal fabric of American business, and provides the backdrop for federal regulation of public corporations. Returning to solid economic growth of the long term will depend in part on the ability of policy makers to respond to concerns over corporate governance as a factor in the present crisis while avoiding reforms that are insensitive to positive aspects of the present legal ordering of decision rights and responsibilities within the corporation. Maintaining an appropriate balance between responsibilities for corporate oversight and decision-making is critical to the corporation's capacity to serve as an engine of economic growth, job creation, and innovation" (footnotes omitted).

[2] *See*, for example, Business Roundtable, *Principles of Corporate Governance 2005* (November 2005).

We also believe that the Rule 14a-11 Proposal, if adopted by the Commission, would result in litigation both upon its adoption, with respect to statutory authority, assuming that Congress does not act specifically to grant such authority, and after its implementation, with respect to compliance – e.g., whether a shareholder complied with the rule at the time of proposing a nominee, whether the nomination was done with any intent to effect a change in control, whether the nominee represents any special interest groups and whether all information provided in connection with the nomination was true and correct.

Rule 14a-11 Proposal

A. Statutory authority of the Commission to adopt Rule 14a-11 is questionable

It is questionable whether the Commission has the statutory authority to adopt the Rule 14a-11 Proposal. Pursuant to Section 14(a) of the Exchange Act, the Commission is authorized to prescribe rules and regulations "necessary or appropriate in the public interest or for the protection of investors." While this language on its face seems broad, "Congress's central concern was with disclosure"[3] when it adopted Section 14(a).

The Senate Report on the Exchange Act explained that the purpose of the proxy protections was to ensure that shareholders have "adequate knowledge" about the "financial condition of the corporation . . . [and] the major questions of policy, which are decided at stockholders' meetings."[4] The House Report on the Exchange Act pointed out that the power Section 14(a) intended to give the Commission was the "power to control the conditions under which proxies may be solicited."[5]

In *Business Roundtable v. SEC*, the D.C. Circuit Court invalidated the Commission's "one share, one vote" rule, because it exceeded the Commission's authority under the Exchange Act.[6] In reaching this conclusion, the D.C. Circuit Court specifically rejected the Commission's argument that it is authorized to adopt rules ensuring "fair corporate suffrage."[7] The court explained that "[p]roxy solicitations are, after all, only *communications* with potential absentee voters. The goal of federal proxy regulation was to improve those communications and thereby to enable proxy voters to control the corporation as effectively as they might have by

---

[3] *Business Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990), citing *J. I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964) ("The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.") and *Santa Fe Industries Inc. v. Green*, 430 U.S. 462, 477-78 (1977) ("[T]he court repeatedly has described the 'fundamental purpose' of the [Exchange] Act as implementing a 'philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute.").

[4] S. Rep. No. 792, 73d Cong., 2d Sess., at 12 (1934).

[5] H.R. Rep. No. 1381, 73d Cong., 2d Sess., at 14. Similar language appears in S. Rep. No. 792, 73d Cong., 2d Sess., at 12. See also *Business Roundtable*, 905 F.2d at 410.

[6] 905 F.2d 406 (D.C. Cir. 1990).

[7] *Id.* at 410.

attending a shareholder meeting."[8] The court found that "the Exchange Act cannot be understood to include regulation of an issue that is so far beyond matters of disclosure (such as are regulated under § 14 of the [Exchange] Act) . . . and that is concededly a part of corporate governance traditionally left to the states."[9]

As with the "one share, one vote" rule invalidated by the D.C. Circuit Court, the Rule 14a-11 Proposal would go "far beyond matters of disclosure." The Commission has previously stated that "[p]roposals to require the company to include shareholder nominees in the company's proxy statement would represent a substantial change in the Commission's proxy rules. This would essentially mandate a universal ballot including both management nominees and independent candidates for board seats."[10] By imposing a mandatory form of shareholder access, the Commission infringes on matters that are "part of corporate governance traditionally left to the states,"[11] namely the rights of shareholders and the board of directors to determine the process by which directors are to be elected.[12]

As the Supreme Court has stated, "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."[13]

B. Rule 14a-11 would not improve corporate governance

We believe that any nexus between shareholder access and improved corporate governance is illusory. Rule 14a-11 would hinder good corporate governance by facilitating the election of special interest and short-term-focused directors to the board. We think it is likely that shareholder access nominees would advance the interests of their nominating shareholders to the detriment of the corporation's long-term value, other shareholders and constituencies and "good" corporate governance. Unlike shareholder access advocates, we do not believe that advancing the interests of certain shareholders will always advance those of other shareholders or constituencies, nor do we believe that shareholders, as such, are better-situated to balance the competing interests of a corporation's multiple constituencies.

---

8 *Business Roundtable*, 905 F.2d at 410 (emphasis in original).

9 *Business Roundtable*, 905 F.2d at 408.

10 Regulation of Communications Among Shareholders, Release No. 34-31326 (Oct. 16, 1992).

11 *Business Roundtable*, 905 F.2d at 408.

12 *See* Del. Code Ann. tit. 8, § 112 (2009) (permitting shareholders to adopt bylaw provisions requiring the inclusion of shareholder nominees for director in a corporation's proxy materials and imposing conditions on such inclusion) and comments on the Release submitted by the Delaware State Bar Association dated July 24, 2009.

13 *Santa Fe Industries, Inc.*, 430 U.S. at 479 (emphasis in original).

C. There is no evidence that shareholder access would have prevented or mitigated the recent financial crisis

We agree with Commissioner Casey's statement where she questioned whether there is a legitimate nexus between the current financial crisis and the Rule 14a-11 Proposal and whether it would be responsive to the factors that led to the crisis. The fact that the Rule 14a-11 Proposal would apply equally to all public companies, rather than companies who received federal bailout assistance, tends to weaken any possible connection between the financial crisis and the proposal. It is difficult, as Commissioner Casey pointed out, "to understand how toy manufacturers, grocery stores, beer and candy companies, educational systems, retail clothiers, fast food chains, weight loss companies and health food chains had anything to do with the excessive risk-taking and compensation structures that the Commission cites today as the rationale to propose a federal proxy access rule."[14]

As former Commissioner Joseph A. Grundfest recently observed, "[c]ounterfactual analysis is likely to suggest that, even if proxy access rules were in place prior to the recent economic crisis, the crisis would neither have been averted nor ameliorated to any material degree."[15]

D. If adopted in its current form, Rule 14a-11 would raise serious implementation issues.

If the Commission should adopt Rule 14a-11, we suggest that the Commission consider the following modifications, many of which were included in the letter submitted by the Society of Corporate Secretaries and Governance Professionals (the "Society") dated August 13, 2009.

- Ownership of economic interests and voting rights

Because derivatives in the equity markets are prevalent and economic interests can be decoupled from voting rights, Rule 14a-11 should require possession of the full voting and economic interest in the securities, with the nominating shareholder providing proof of a net long beneficial ownership position for the entire holding period.

---

[14] Commissioner Kathleen L. Casey, Statement at Open Meeting to Propose Amendments Regarding Facilitating Shareholder Director Nominations (May 20, 2009).

[15] Joseph A. Grundfest, *Internal Contradictions in the SEC's Proposed Proxy Access Rules*, The Rock Center for Corporate Governance, Working Paper No. 60, footnote 41 (July 24, 2009).

- Beneficial ownership thresholds

We believe the beneficial ownership thresholds (1% for large accelerated filers, 3% for accelerated filers and 5% for non-accelerated filers) are too low to serve their purpose of ensuring that a nominating shareholder has a substantial economic interest in the company. As the Society pointed out, the proposal does not take into consideration the ease with which shareholders may aggregate their ownership and the impact that having multiple nominating shareholders would have on company resources. Raising the beneficial ownership thresholds to 5% for nominating shareholders and 10% for nominating shareholder groups would limit use of Rule 14a-11 to shareholders with a substantial economic interest and help reduce the expense and diversion of management attention from the general business of the corporation.

- Holding period

The holding period should be extended to two years to ensure that only those with a more long-term view of the company are eligible to use Rule 14a-11. We do not believe that holding shares for one year evidences a long-term interest or that shareholders of one year are as interested in a company's success over time as those who have held their shares for longer periods.

Nominating shareholders should be required to hold their shares through the meeting date. A stated intent not to sell shares is of little value if that intent can be changed at any time and ownership positions reduced below the eligibility threshold. The rule should also require evidence from a broker-dealer or bank shortly before the meeting date to verify continued ownership, with failure to verify resulting in withdrawal of the nominee from consideration at the meeting.

- Membership in one nominating shareholder group

We recommend that shareholders be limited to membership in one nominating group to prevent manipulation of Rule 14a-11. By limiting membership in this way, a shareholder could not form or participate in multiple groups in order to submit different nominees to the board.

- Resubmission

Rule 14a-11 should include a resubmission threshold. If a nominating shareholder's nominee receives less than 25% of the votes cast, the nominating shareholder should be barred from submitting another nominee to the same company for at least two years, and that nominee should be ineligible for nomination at that company for the same period.

- Change in control and certification of intent

Nominating shareholders should certify that they are not seeking control of the company, and Rule 14a-11 should prevent shareholders from subsequently seeking such control. We believe a shareholder's intent can change, and Rule 14a-11 neither discourages nor penalizes shareholders for stating they have no such intent and subsequently seeking control.

We also agree with the Society's comments on limiting all shareholders to one nominee rather than up to 25%, capping shareholder-nominated directors on a board at 15% and prohibiting shareholder nominees in a traditional proxy contest.

- Director qualifications and board service guidelines

Shareholder nominees should be independent of their nominating shareholders and meet a company's director independence and other criteria and board service guidelines. Many companies, especially those in heavily regulated industries such as public utilities and financial institutions, have adopted director qualifications designed to ensure compliance with applicable regulations. To ensure compliance with these requirements, shareholder nominees should be required to complete a company's director and officer questionnaire and not be eligible for nomination if the appropriate criteria are not met.

- Schedule 14N deadlines and "first in time, first in right"

In response to Question F.8 of the Release, we believe that setting a fixed deadline for Schedule 14N submissions of at least 120 calendar days before the anniversary of the mail date is preferable to tying the submission deadline to "the date specified by the registrant's advance notice bylaw provision," if there is one. A deadline tied to a company's advance notice bylaw would in most instances effectively preclude a company from utilizing the Rule 14a-11(f) process, because advance notice bylaw provisions for many Delaware companies now establish deadlines of 90 days prior to the anniversary of the prior year's annual meeting date in response to the Delaware Chancery Court decision in *Jana Master Fund, Ltd. v. CNET Networks, Inc.*[16]

In addition, Rule 14a-18 does not include any limitation as to the earliest point in time a Schedule 14N may be submitted by a nominating shareholder. It is likely that nominating shareholders will submit notices well in advance of the deadline because of proposed Rule 14a-

---

[16] 954 A.2d 335 (Del. Ch. Mar. 13, 2008), *aff'd* 947 A.2d 1120 (Del. May 13, 2008). In *CNET*, the Delaware Chancery Court suggested that an advance notice bylaw provision that sets a date that is earlier than the 90th day before the first anniversary of the prior year's annual meeting would not be acceptable as the date by which a shareholder must give notice to the corporation for a director nomination or other business to be brought before an annual meeting.

11(d)(3), which provides that a company must include in its proxy materials eligible shareholder nominees on a "first in time, first in right" basis. In response to Question F.10, we believe that if the Commission were to adopt a "first in time, first in right" approach, the rules should also establish a window period (e.g., 30 calendar days) during which notices on Schedule 14N may be submitted.

In response to Question E.10, we believe that the "first in time, first in right" approach set forth in proposed Rule 14a-11(d)(3) will not work in practice. It may be difficult, if not impossible, for a company to determine which notice was received first on a given day.

Rule 14a-8(i)(8) Proposal

Because we believe the Rule 14a-8(i)(8) Proposal is an alternative means to effect shareholder access, we do not support its adoption for the same reasons that we do not support the Rule 14a-11 Proposal. As with the Rule 14a-11 Proposal, we believe that shareholder proposals supporting shareholder access will not result in better-managed corporations or corporations that deliver more value over the long-term for shareholders and that in fact such proposals will be detrimental to long-term shareholder value.

Very truly yours,

Elizabeth W. Powers

K. Oliver Rust (emp)

K. Oliver Rust