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

Re: Facilitating Shareholder Director Nominations
Releases 33-9046, 34-60089, IC 28765
File No. S7-10-09 (June 10, 2009)

Via e-mail to rule-comments@sec.gov

Dear Ms. Murphy:

I am submitting these comments on behalf of the Interfaith Center on Corporate Responsibility ("ICCR"), which is an association of faith-based institutional investors, including national denominations, religious communities, pension funds, foundations, hospital corporations, economic development funds, asset management companies and colleges. These members, along with associates and affiliates of ICCR, number some 275 and have portfolios approximating $100 billion. For more than thirty-seven years ICCR has been a leader of the corporate social responsibility movement, and each year its religious institutional investors sponsor numerous shareholder resolutions and engage in dialogue with their portfolio companies both on major social and environmental issues and on corporate governance issues. We are pleased to have the opportunity to submit our views and comments on the proposals set forth in File S7-10-09 (Release 34-60089) (Facilitating Shareholder Director Nominations) (the "Proposals" or the "Release").

In general we are extremely supportive of the Proposals and believe that they will greatly enhance the operation of our capital markets and economic system. We will not comment on all of the details set forth in the Proposals nor attempt to respond to each and every one of the 161 requests for comment, but rather we will comment on those aspects of the Proposals that we feel are most crucial or where we believe that we can provide significant insight.

In this connection, we firmly believe that the sixty day comment period is not only legally sufficient, but adequate as a practical matter as well. We are puzzled by the argument that sixty days is inadequate under the Administrative Procedure Act (the "APA") when that Act is quite specific in setting thirty days as the minimum period for comments on a proposed rule. 5 USC 303(d). Surely a comment period twice as long as that mandated by the statute cannot violate that Act. Nor are the cases cited by those making the argument in the least persuasive. The letter in File S7-10-09 jointly submitted by the Business Roundtable, the U.S. Chamber of Commerce, the Society of Corporate Secretaries and several similar institutions (the "Business Roundtable Letter") cites a number of cases in support of their argument that a sixty day comment period fails to comply with the requirements of the APA. Most prominent among the cases cited by the Business Roundtable Letter in support of its argument is *Florida Light & Power Co. v. U.S.*, 846 F.2d 765 (D.C. Cir. 1988), a case that held that a fifteen day comment period was reasonable and sufficient under the APA. Hardly persuasive support for the Business Roundtable Letter's contentions. Most of the other citations simply take quotes out of context in a vain attempt to support a specious argument. Thus, in two of the other cases cited by the Business Roundtable Letter, the adequacy of the time for comment is neither at issue nor discussed by the court. See *American Radio Relay League v. FCC*, 524 F.3d 227 (D.C. Cir 2008); *MCI Telecomm. Corp v. FCC,* 57 F.3d 1136 (D.C. Cir 1995). Indeed, the quotes taken from these cases are themselves inaccurate paraphrases of 5 USC 303(c) (a section that requires the opportunity for public input into rule-making proceedings, a requirement separate and apart from that set forth in 5 USC 303(d) which sets the thirty day requirement) in that they add words that are not in the statute. Finally, *Estate of Smith v. Bowen,* 656 F. Supp. 1093 (D Colo. 1987) did actually discuss the adequacy of the length of a comment period, but only in the context of a rule-making that was mandated by, and conducted in accordance with the requirements of, an order of the Tenth Circuit Court of Appeals; where the key study on which the rule was based was not released to the public until after the conclusion of the comment period; and where the actual actions required to be taken by the proposed rules were not set forth in the notice of the rulemaking, but had to be obtained individually by mail by prospective commentators. In that context, any time period for public comment could hardly have been deemed to have commenced on the publication of the defective notice and therefore counting the adequacy of the comment period from that date would have been fallacious.

Thus, the argument that the instant 60 day comment period violates the APA is wholly without legal support.

As a policy matter, the Business Roundtable Letter argues that there is inadequate time to respond to the complexities of the Proposals and cites the fact that there is a long history of discussion of the issues under review in many prior SEC rule-making proceedings. One would have thought that this would prove the opposite point, namely that since the underlying policy issues had been so thoroughly vetted that an extensive new comment period was unneeded. The proposals are essentially re-proposals. Indeed, we note that in the 2007 rule-making proceeding the Business Roundtable, the U.S. Chamber of Commerce and the Society of Corporate Secretaries all managed to submit their comments within the sixty day comment period then provided, despite the fact that the 2007 proposal was far more complex than are the Proposals. Indeed, the Business Roundtable submitted 38 pages of comments, the U.S. Chamber of Commerce submitted 16 pages of comments and the Corporate Secretaries submitted 10 pages of comments. None of those submissions contended that sixty days was too short a time for them to comment on the more complex proposal. (We note in passing that other commentators with, like the Business Roundtable and the U.S. Chamber of Commerce, extensive past work in the field have had no difficulty in responding to the Proposal and that at least one, the Council of Institutional Investors, provided a detailed response within three weeks to each and every one of the 161 requests for comment.) In a like manner the Business Roundtable had no difficulty in submitting, within the 60 day comment period for the highly complex 2003 proposal, a 76 page comment letter. In essence, the current proposal is simply a re-proposal of the 2003 and 2007 proposals and therefore needs no extraordinary time period for consideration.

In short, the argument that the sixty day comment period violates the APA would appear to be wholly without merit.

I PROXY ACCESS

A. Overview

The policies underlying the Proposals are set forth in excellent fashion on pages 7-12 of the Release and it is therefore unnecessary to rehearse them here. Suffice it to say that the underlying premise, which seems undeniable as a matter of state corporation law, is that shareholders have the right to nominate and elect directors and that therefore "the federal proxy rules should not impose unnecessary barriers to the exercise of this right". (Release in text at footnote 46.)

The arguments against this position (summarized on pages 12-13 of the Release) appear to have little substance. It is unclear why a director nominated in accordance with the procedures of Rule 14a-11 would be any more "beholden" to the shareholders who nominated her/him than would a director chosen by the nominating committee be beholden to the Chair of the Nominating Committee (or, more likely, to the Chair/CEO). It is of course possible that the director elected under 14a-11 would feel warmly to the shareholders who nominated him/her, but what is wrong with feeling warmly toward the shareholders? The only time when there could be a problem is if there is a conflict of interest and those nominating the director had an interest not shared by the shareholders at large. We believe that this matter is possibly adequately addressed by proposed Rules 14a-18 and 14a-19 and proposed Schedule 14N, but, as noted below, we believe that such disclosures should be strengthened, e.g. by explicitly requiring more disclosure of any relationships between the nominee and the nominating group (as opposed to the disclosure of relationships between the nominee and the registrant), together with a description of any "agenda" of the nominating group other than an agenda of increasing shareholder value. For example, language analogous to that which appears in Rule 14a-8(i)(4) might be appropriate in this context (i.e. disclosure of any interest "which is not shared by the other shareholders at large"). We emphasize that we are talking about disclosure and not, as was the case in prior access proposals, prohibitions.

If there is adequate disclosure, we do not believe that there is any legitimate concern that a small group of shareholders could impose their selfish concerns on the corporation. The safeguard is that regardless of any deficiencies in the nominee, that person must still be elected by the shareholders and there is no reason to believe that shareholders would abandon their own self-interest just because someone is nominated under Rule 14a-11. Unqualified or conflicted nominees will simply not be elected by the shareholders. We believe that there was some illustration of this point when, several years ago, in connection with some concessions from the auto workers union, the head of that union became, for several years, a nominee of management. He consistently received millions of fewer votes than the rest of management's slate, despite the absence of any "vote no" campaign. A non-management nominee who is perceived to be a union nominee would, we submit, be highly unlikely ever to be elected by the shareholders of the company. Similarly, someone perceived as a corporate raider (for example Carl Ichan) might find it very difficult to have a slate elected (n.b. his recent withdrawal at Yahoo!). The entire SEC regulatory regime is based on the premise that shareholders (or prospective shareholders) will, if given the facts, act in their own self interest and there appears to be no reason to believe that this underlying premise would be inapplicable in a 14a-11 election.

Another objection that is frequently raised to a proposal such as 14a-11 is that it will lead to dissention on the Board which in turn could impede its proper functioning or lead to inefficiencies in its operation. Aside from the questionable (in light of recent economic history) assumption that the present operation of Boards is optimal, the principal research that has been done on the matter refutes this objection. Before addressing that research, permit us to bring a more historical example to the attention of the Commission. In 1971 the Episcopal Church introduced a shareholder proposal at General Motors requesting that registrant to cease operations in South Africa, a nation then enforcing a very strict apartheid, including total separation by race in the workplace (jobs, pay, drinking fountains etc). The registrant's proxy statement revealed that one of GM's directors, the Rev Leon Sullivan, had voted against the Board's decision to oppose the shareholder proposal. At the annual meeting Rev. Sullivan came down from the dais and spoke in favor of the shareholder proposal. The upshot of the "conflict" on GM's Board was the creation, by a coalition led by General Motors but consisting of almost all of the major US corporations operating in South Africa, of the "Sullivan Principles", a code of conduct to abolish apartheid in their South African workplaces. Thus, the need for GM's Board to adopt a *modus vivendi* between the conflicting views on the Board brought real progress not only at GM, but at virtually all American companies operating in South Africa.

More recent detailed research on the matter confirms that the GM example is not *sui generis* and that differing views on the Board can lead to real progress at the corporation. As the Staff is undoubtedly aware, for several decades IRRC (formerly the Investor Responsibility Research Center and now in the form of the IRRC Institute) has been a leading provider of objective research on shareholder issues. In May, 2009, it published a report entitled "Effectiveness of Hybrid Boards" (cited at footnote 349 of the Release and which also can be found in full as an attachment to the submission to File S7-10-09 dated June 16, 2009, by Jon Lukomnik, director of the IRRC Institute). We commend the report to the Commission and Staff, since it is the first attempt to provide rigorous, objective research that examines the economic effectiveness of "hybrid boards', i.e. ones where insurgents have gained representation on the board but have not obtained control. The study examines 120 such instances (where dissidents achieved board representation either through contested elections or by negotiated compromise) in the years 2005-2008 and found, as stated in the second paragraph of the Executive Summary of the study, the following:

> On average, the study found that total shareholder returns at ongoing companies with hybrid boards were 19.1% - 16.6 percentage points better than peers – from the beginning of the contest period through the board's one year anniversary.

It would seem to follow that concerns that the election of dissidents under 14a-11 would be disastrous for the operations of the registrant are overblown at best, and totally erroneous at worst.

Another concern that is often raised is that proposed rule 14a-11 would usurp state law. In this connection, it should be noted that Section 14 of the '34 Act was placed in the statute precisely because state law was deemed to be inadequate in the proxy arena. (See the footnotes 22-26 in the Release and the related text.) Thus, unlike almost all of the other provisions in the '33 and '34 Acts, Section 14 is not a disclosure section, but rather is a grant of power to make substantive rules. (See, e.g., Release 34-56161 (August 3, 2007), at footnotes 10-12 and especially footnote 12 itself); this proposition was also acknowledged by the Court in *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990), although that case held that the rule under consideration was not sufficiently related to the proxy solicitation process to be valid.) We believe that rather than usurping state law, Rule 14a-11 would simply establish minimum standards under which state law would operate. Thus, states would be free to permit corporations to expand access rights of shareholders if they so desired. Minimum standards, by definition, obviously preclude some state law choices that would otherwise be available under state law (e.g. it would limit how high the requirement for stock ownership or duration of that ownership could be set by a registrant under a permissive state law regime; see the comprehensive list on pages 6-9 of the letter submitted to File No. S7-10-09 by the Delaware State Bar Association). However, 14a-11, like 14a-8, is based on the underlying state law rights of shareholders and simply attempts to replicate as nearly as feasible the situation that would exist if all shareholders were able to convene at an actual meeting (rather than vote by proxy). (See the quotation from the testimony of Chairman Purcell set forth in footnote 32 of the Release.) Like 14a-8, although the rights of shareholders at such a meeting would be absolute (e.g. no holding period or minimum number of shares), some reasonable limitations are appropriate under the proxy rules to prevent possible abuses of the proxy system. Thus, rather than usurping state law, proposed rule 14a-11 would give reality to the rights that shareholders already have (in theory) under state law.

The argument for leaving the matter to the states is really based on two theories. First, that corporations would voluntarily adopt some form of shareholder access on their own. We know of no basis for such a belief, especially in light of the vehement opposition that has been expressed in the past by the corporate community. Furthermore, an analogy to the adoption by boards of majority voting requirements is without probative value since any such adoption would be far more threatening to incumbent directors than would be the adoption of a majority voting requirement, especially since the latter usually merely requires that a resignation be submitted to the entire board which might then not accept it. Indeed, the need for minimum standards is well illustrated by the fact that although shareholder access has been discussed since at least 1942, as far as is known only one American corporation (RiskMetrics Group, Inc.) has adopted an access by-law, and that registrant undoubtedly did so in light of the business (advice to institutional shareholders) that it is in. Furthermore, no state law dealt with the matter prior to the enactment of a statute by North Dakota in 2007. (Delaware acted in 2009.) Nor would there be any comfort in the fact that, if the proposed amendments to Rule 14a-8(i)(8) are adopted, shareholders could propose access by-laws since any meaningful proposal would presumably be opposed by management with all of the resources at its command. The second theory is that states provide better dispute resolution mechanisms because the there are so many US District Courts (or even Courts of Appeal) that there could be conflicting rulings under 14a-11. It is unclear why this is a worse horror (at least it can be mitigated at the Court of Appeal level) than 50 different state courts each interpreting differently the same or similar language in, say, any access provision placed in the Model Business Corporations Act (a version of which forms the basis for the corporation code in some thirty states).

Related to the state law argument is the argument that the nominating process should not be made mandatory by a Federal rule, but rather that shareholders should be given a choice as to what nominating regime they would prefer and that therefore the decision as to the parameters of the nominating procedures, or whether there be one at all, should be left to the decision of each registrant and its shareholders (presumably via proposed 14a-8(i)(8)). We believe that there would be considerable weight to this argument if we had any confidence that in the typical case the decision would really be made by the shareholders and not by the management and incumbent board. The argument assumes that people with power will normally be willing to give up that power to others because it is the right thing to do. Frankly, we do not have such a benign view of human nature. Rather, we expect that the board would adopt a procedure so strict that it would be impossible for shareholders to successfully nominate someone under that procedure and then use as much corporate funds as may be necessary to defeat any attempt by shareholders under the new 14a-8(i)(8) to change the restrictive practices. Indeed, one might expect that boards might (as they did some years ago with respect to anti-takeover defenses) propose (at a time when there is no organized opposition to management) the adoption by the shareholders of a by-law (or amendment to the articles) that no only sets up an access procedure that as a practical matter precludes access but also contains provisions preventing amendment of the by-law (or article) without a super-majority (80%) vote by the shareholders, thus freezing out forever whatever theoretical rights a shareholder might have under a revised 14a-8(i)(8). Similarly, when corporations go public we would expect that these restrictive provisions would be placed in the articles where the shareholders would be unable to change them. (Since amendments to the articles require approval by the board, any (i)(8) proposal would of necessity be precatory). In short, this argument against proposed rule 14a-11 requires a leap of faith that we are unable to take.

Furthermore, some of those advocating reliance on private ordering are really engaging in the old bait and switch by suggesting that 14a-11 not be adopted but that the matter be left to individual corporate decision making under a revised 14a-8(i)(8), but then advocating that when 14a-8(i)(8) is revised it should be limited to shareholder proposals that are precatory rather than permitting by-law amendments. In other words, leave access wholly under the control of the incumbent management and directors, which, of course is basically the situation as it exists today when no (or only one) corporations permit access. Also bruited about are alternative access proposals that would permit broad parameters for proposals under 14a-11 rather than the stricter minimum standard proposed in the Release (e.g. one to three year holding period; up to 5% holdings for nominations). There are two reasons why we oppose such proposals. First, as indicated at various points in this letter, we believe that many of the minimum requirements set forth in the Release are set at an appropriate level. Second, and more important, while these parameters would appear to be applicable to all shareholder proposals under rule 14a-11 they would not be applicable to by-laws adopted by the board, thus permitting the board to adopt proposals that are far stricter than the suggested parameters and leaving the shareholders with the task of struggling to amend the board's by-laws to conform them to the parameters.

Finally, there do not appear to be adequate alternatives outside the proxy process. As discussed on page 18 of the Release, a Wall Street Walk is not a viable alternative for shareholders who believe that the current management is ruining the registrant and that, if properly run, the company would be far more valuable. If it exercises its Wall Street Walk, not only will that shareholder be deprived of a profitable investment, but if the remedy will eventually arise only from an increase in the cost of capital to the registrant, that cost will be incurred by the other shareholders long before there will be any spurring of management changes (presumably by bankruptcy or a hostile takeover). Nor is the prospect of dialogue necessarily the answer, despite the fact that it should be the first resort. This is illustrated by an experience that the undersigned had a few years ago when representing a large institutional investor that had instituted an "active shareholder" program and had become a member of the Council of Institutional Investors (the "CIC"). Despite the fact that the institutional investor held 9.9% of the stock of a NYSE company, that registrant refused to meet with it. About that time the undersigned attended an ABA meeting which included a panel discussion on shareholder activism put on by the ABA's Corporate Counsel Committee (in the Section of Business Law), and had as one of the panel members the General Counsel of the registrant in which the institutional investor owned 9.9%. Apparently believing that there were only friends present, he referred to the institutional investor, as this year's [CIC's] "designated tormentor".

Similarly, suggesting qualified nominees is no guarantee that a corporation will be responsive or give the suggestion serious consideration. Again, a personal example in a slightly different context. Several years ago the undersigned entered into dialogue with a prominent high tech company that had no women on its board and, on behalf of a shareholder, proposed that they move away from having an all white male board. Their response was that they knew of no qualified woman and asked (doubting that it could be true) whether I could suggest someone who was qualified. With her consent, I suggested the chair of the Board of the Massachusetts Institute of Technology (who had a PhD from MIT) and sent them her CV. Neither the company nor any "headhunter" on behalf of the company ever contacted her to inquire further as to her qualifications.

In short, options outside the proxy process are quite often simply not available.

B. Specific Issues

A.1,2,8 and 10: As indicated in the previous section, we strongly believe that the adoption of proposed Rule 14a-11 is necessary and appropriate. As far as recent trends in corporate governance are concerned, the adoption of majority voting (by those who do so adopt) has no impact on the ability of shareholders to place shareholder nominees on the proxy. Furthermore, statistics on adoption of majority voting normally include the large number of registrants that require submission of a resignation letter but permit the other directors to reject that letter. One does not know how effective that regime will be if it is ever put to the test. Similarly, the adoption by Delaware of a cost reimbursement statute makes no substantive change in the law since the ability to reimburse has generally been recognized in corporation law. *Rosenfeld v. Fairchild Engine & Airplane Corp*., 309 N.Y. 168, 128 N.E. 2d 291 (1955). In a like manner, statutes permitting by-laws concerning proxy access merely recognize a right that has always existed. Cf. *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008).

A.3: We believe that proxy access would be used infrequently, but when utilized it would probably be in instances where it is most needed for director accountability.

A.4: Out of pocket costs are possibly quantifiable, but the real benefits of enhanced value to the corporation (and to the economic system) are less easy to quantify. These benefits would include not only enhanced shareholder value from hybrid boards (see the previous section of this letter), but also the value arising from the fact that all directors may become more alert to their duties.

A.5: We believe that the new rules would make the nominating committee more open to shareholder suggestions.

A.9 and 10: Both are needed. Proposed Rule 14a-11 would set the minimum standard, but the corporation or its shareholders could go beyond that minimum.

B.1: We believe that the SEC has authority under Section 14 to promulgate the proposed rule. See the discussion in the prior section of this letter concerning the fact that Section 14 is not limited to disclosure. Aside from the fact that Section 14 is not limited to disclosure, like 14a-8 the rule is actually one of disclosure since it informs shareholders that there will be a nomination at the annual meeting and then provides a means for shareholders to express their preference on the matter that will be voted on at the annual meeting.

As far as registrants incorporated in foreign jurisdictions who do not meet the definition of a foreign private investor are concerned, there may be some concern that such registrants might be incorporated in a jurisdiction where they are able, in effect, to dictate the content of the local laws, as the Stanford Group was able to do in Antigua.

B.2: The limitation is appropriate. If the shareholders have no right to nominate directors under state law or the registrant's governing documents, the entire rationale for the rule is absent.

B.7, 13-18: We oppose any opt-out mechanisms and any triggering requirements. These are inconsistent with the underlying theory of the Proposals (replication of rights that would be available if all shareholders physically attended the meeting).

B.8: We applaud the amendments to Rule 452, but do not see how they would impact proposed Rule 14a-11.

B.9 We understand that most majority voting by-laws permit plurality voting in the event that there is a "contest", thus obviating any problem.

We are concerned, however, with the fact that the proposed rule does not directly address the fact that there may be a variety of voting regimes, including "super-voting" stock (e.g. 10 votes per share) or other forms of Class voting (e.g., Class A Common elects five directors and Class B Common (or a Preferred Class) elects two directors). The Release seems to contemplate that there will simply be a counting of shares, regardless of the relative voting rights of each class. (See proposed rule 14a-11(b): "at least [1%] of the registrant's securities entitled to be voted") This is confused by Instruction 3(a) to proposed rule 14a-11(b) which singles out investment companies which are series companies for special disclosure in the required 8-K filing by requesting disclosure of the relative voting power of each series. Yet nothing in the instructions or text states that the requisite percentage needed to nominate should be determined in accordance with the relative voting power as disclosed. Simply put, the problem in these class situations is that the control (voting) rights of ownership have been divorced from the economic rights of ownership. Since rule 14a-11 sets requirements based both on voting rights and on economic rights, the question is: which should prevail when they are divorced and not allocated in the same proportion. We believe that the simplest and fairest method to determine whether the requisite percentage has been achieved is simply to count each share without reference to relative voting power. This is likely to approximate the economic ownership of the nominating shareholder. However, whether or not the Commission decides to count voting power this way, we believe that the matter should be discussed in the adopting release and the ultimate decision made clear in the adopted rule and/or instructions.

There are other, more minor problems. The first is that, quite properly, the nominating shareholders can rely on the most recent 10Q for the number of voting shares with the caveat in Instruction 1 to paragraph (b) that they may not do so if the nominating shareholders "knows or has reason to know that the information contained therein is inaccurate". This seems quite reasonable (e.g. they know that there was a large public offering subsequent to the 10Q), but does not cover (because the number in the 10Q remains *accurate*) the far more likely situation of when there are non-public classes of stock (e.g. privately placed preferred or a family owned class of stock). If the number in the 10Q is accurate but there are other classes of stock not there mentioned, what is the appropriate number of voting shares? In addition, it might be desirable to make a statement in the adopting release (or elsewhere) to the effect that contingent voting rights in a preferred stock do not count until the contingency occurs.

It would also be desirable for there to be a statement in the adopting release to the effect that the fact that a registrant has adopted cumulative voting is not relevant. Indeed, the theory underlying cumulative voting is wholly consonant with the proposed rule since its objective is to permit representation by non-management groups.

B.10 and 12: As noted in our answer to B.7, we oppose any opt-out provisions. However, we do believe that the rule should recognize the applicability of pre-existing by-law restrictions that apply to all directors (e.g. age restrictions, restrictions on the number of boards that the director can serve on, screening for anti-trust problems etc) provided they are objective standards and not subjective (e.g. nominating committee approval).

B.11 We fail to see any reason why the adoption of Rule 14a-11 should lead to any limitations in the right of other shareholders to submit proposals under 14a-8. Indeed, we strongly support the proposal in the Release to correct the present unfortunate limitation in Rule 14a-8(i)(8)

B.20, 21: The effect of a simultaneous contest for control obviously necessitates careful consideration. We worry that any mechanism to deal with the problem might be more complex than the issue warrants. However, even absent initial collusion there are serious problems if the 14a-12 contestant or the access nominee support one another's candidates or if the 14a-12 nominees use a short slate and fill it in with the access nominees. There is also the risk of confusion among the shareholders if there are in effect several slates with differing means of voting for them. Finally, there is the possibility that the election of the access nominees might actually result in a change in control. We would therefore support any reasonable limitation of 14a-11 nominations if there is a simultaneous contest for control.

C.1 and 19: We endorse the notion that nominations should be restricted to situations where the nominating shareholder(s) are "long term" and have a significant economic interest in the registrant. Although in theory any shareholder can nominate a director, as a practical matter some limitation is needed to prevent abuse of the rule, just as there are limitations under Rule 14a-8 to prevent such abuses. Because the consequences to the registrant of an election of a director under 14a-11 are so much greater than they are under 14a-8 (where almost all proposals are precatory), we believe that the eligibility requirements should be greater under 14a-11 than they are under 14a-8. That said, we believe quite strongly that the one year holding period prior to the filing of a Schedule 14N is sufficient to guarantee that the nominating shareholders are "long term" holders. Indeed, as a practical matter the nominating shareholders will have to maintain their ownership level for almost a year and a half when the holding period subsequent to the filing of Schedule 14N until the annual meeting is added to the one year requirement.

There obviously is a range of reasonable requirements that could be imposed as far as ownership is concerned, as long as the rule requires a significant ownership stake. We oppose setting the ownership stake at an unreasonably small sum (e.g. $2,000.) or at a prohibitively high sum (e.g. in excess of 5%). The proposed ownership requirements are within that realm of reasonableness and the use of tiers makes some sense. Our only quibble is that the "first sample" seems to show almost no difference in ownership characteristics between smaller accelerated filers and non-accelerated filers. This is counter-intuitive since one would expect greater concentrations of ownership in smaller companies. If true, however, it suggests that there is no need for a three tier system and that it might be advisable to establish a two tier system, with the second tier set at 3% and encompassing both smaller accelerated filers and non-accelerated filers.

Indeed, if a uniform percentage requirement is to be adopted (rather than the proposed 1%, 3%, 5%), we believe that it should be no higher than either 2% or 3%.

Needless to say, we believe that permitting aggregation of ownership is essential since even investors like CALPERS seldom own 1% of a company. The fact that the samples suggest that SOMEONE, SOMEWHERE owns 1% of most accelerated filers is not helpful since that one percent owner may be aligned with (or be) management or have no interest in a contest. It is therefore essential that holdings be permitted to be aggregated. Furthermore, there should be no higher percentage requirement when share holdings are aggregated since we assume that in virtually all situations they will have to be and therefore any higher requirement in aggregation situations is really a subterfuge for simply raising the threshold requirement.

More significant, we believe, is how the ownership is to be calculated, a matter inadequately addressed in the Release. See our comments to C.2 and 15.

Finally, we believe that a shareholder should not be permitted to join more than one nominating group per registrant per year.

C.2, 15 and 21: The term beneficial owner as used in proposed Rule 14a-11 is undefined. There is a definition of the term in Rule 13d-3, but that definition specifically says that it is for purposes of sections 13(d) and 13(g) of the '34 Act. There is a slightly different definition in Rule 14d-1(g) which is specifically applicable to sections 14(d) and 14(e) of the '34 Act (as well as to Regulations 14D and 14E). These definitions basically define beneficial ownership as having either voting or investment power. Are they the criteria that should be applied in the 14a-11 context? What is the definition for purposes of 14a-11? Is it voting power or either voting power or investment power? Or is it something else? In the instant situation, where the shareholder's ability to nominate is surely tied to the ability to vote, and where there is (and should be) some indication that the nominating shareholder has a long term economic interest in the registrant, the definition of beneficial interest should be tied both to voting and to the ownership of an economic interest.

Under any definition of beneficial ownership, there are numerous unanswered questions. For example:

a) The underlying theory, as set forth in the Release, is that the nominating shareholders "have a significant economic interest in the company". We agree, but believe that the rule, and/or the instructions to Schedule 14N, should make it clear that if the economic risks of ownership have been externalized, as by hedging or by the use of derivatives, that retention of the "ownership" of the underlying stock will not satisfy the economic test. Cf. *In the Matter of Perry Corp.*, Release No. 60351 (July 27, 2009). Indeed, the whole issue of "empty voting" is implicated in any requirement that the nominating shareholders have an economic stake in the registrant and should therefore be dealt with in the release, Rule and Schedule. The goal should be that a "net" position should be required. Cf. *CSX Corp. v. Children's Investment Fund Management (UK) LLP*, 562 F. Supp. 2d

511 (S.D.N.Y. 2008), *affirmed without opinion*, 2008 U.S.App.Lexis 19788.

b) Another technique older than derivatives is going "short against the box" whereby a shareholder who owns 1,000 shares of a company sells 1,000 shares and borrows a thousand shares to make the delivery on the sale while maintaining its original 1,000 share position in a company. The shareholder has retained nominal ownership but has no economic interest in the company.

Similarly, if the holder has granted an option on the shares owned, it may no longer meet the economic test.

Because the possibility exists that actions such as those described in this paragraph and the previous one, as well as other similar actions, that could be taken, we strongly urge that the nominating shareholder be required to maintain the requisite percentage as measured by a "net" position.

c) Another problem not addressed is "stock lending". In this case, although technically the voting power has been temporarily transferred to the borrower, we believe that the lent stock should be counted toward the economic (and voting) requirement since normally the lender has retained the ability to recall the stock at any time.

d) A definition of beneficial ownership should also address the problem that institutions will normally have appointed a (revocable) voting agent (e.g. Risk Metrics, formerly ISS), either with or without guidelines as to how that agent will vote the shares. Therefore any definition will need to be phrased so as to recognize this reality.

e) Item 5 of Schedule 14N requires "a written statement from the "record" holder of the nominating shareholder's shares (usually a broker or bank) verifying" ownership. Although this tracks the requirements under Rule 14a-8, technically this does not reflect how shares are actually held. The record owner is most certainly Cede & Co., a nominee of The Depository Trust Company. Cede holds shares for other intermediaries but since those other intermediaries themselves normally hold shares for many customers, Cede will have no idea how many shares are held for each customer of the intermediary. Indeed, there can be a chain of intermediaries. See Rules 14b-1 and 14b-2. Therefore the certification should be by anyone (broker, bank, investment advisor or custodian) who has *actual* knowledge of the holdings of the institution. In addition, as noted in subparagraph (a) above, beneficial ownership should be defined in terms of the "net" position held by the shareholder. However, the certifying bank, broker etc will be unaware of the *net* position since derivatives are likely bought or sold in transactions that do not involve that intermediary. Therefore, the nominating shareholder, which is likely to be the only one in possession of such information, should be required to certify its net position.

f) If the shareholder holds (currently exercisable) options, do they satisfy the voting or economic tests? (No, as they have made no investment to satisfy the economic interest test.) What about pledged stock? (Probably OK until the pledge is foreclosed.) What about holding securities (bond or preferred) convertible into common stock? (An economic investment has been made, but no power to nominate and vote.)

g) Holdings may fluctuate during the one year holding period and the several months between the filing of Schedule 14N and the date of the meeting. It should be made clear that it is the lowest *net* holding at any time during the one year period that will be counted and also that sales subsequent to the filing of Schedule 14N of any holdings in excess of the required minimum are permitted (but should be disclosed via an amendment to Schedule 14N).

C.17: We do not believe that it is appropriate to tie an investors' hands by requiring any holding period that extends beyond the date of the shareholder meeting.

C.18. Repeat contests present a dilemma. On the one hand, it is undesirable to have the same contest repeated year after year and a meaningful disincentive to such actions would seem desirable. On the other hand, the underlying theory of the proposed rule is that it should replicate, as near as may be, what would happen if all the shareholders were actually able to meet together. On balance, we believe that as a practical matter the eligibility requirements (1%, 3% etc.) will usually be sufficient to protect against abuse in this area but that the Commission should seriously consider a one year ban on the same nominee being re-nominated or the principal (however defined) nominating shareholders nominating again upon a failure to obtain 10% or 15% of the vote (whether by virtue of a small vote at the meeting or because the nomination became disqualified because of a failure of the nominating shareholder to maintain either the requisite share ownership or the denial of control intent).

C.23: It is our experience under Rule 14a-8 that the requirement that a broker/bank submit proof of beneficial ownership by the proponent has been unnecessarily technical since, as a practical matter, it is difficult if not impossible to obtain a letter from the bank/broker on the same day that the proposal is submitted. Thus it is often necessary to submit the letter at a subsequent date or to obtain two letters. We hope that such difficulties can be avoided under Rule 14a-11 and suggest that a letter from the bank/broker be acceptable if it is dated some short period (week or ten days) before the filing of the Schedule 14N. Since the nominating shareholders must keep their shares through the date of the shareholder meeting it is hard to see how a "gap" of a week or ten days can possibly cause any harm.

C.24: We strongly believe that the use of 14a-11 should be restricted to non-control contests. We are uncertain as to the adequacy of a remedy if the statement re control is false, but understand why courts are reluctant to bar violators from holding office (or voting their shares). Cf. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); . *CSX Corp. v. Children's Investment Fund Management (UK) LLP*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008), *affirmed without opinion*, 2008 U.S.App.Lexis 19788. In any event, a violation of the Act is a violation of Rule 14a-9 and is a criminal offense. See Section 32 of the '34 Act.

D.2: We believe that the rule should recognize the applicability of pre- existing by-law restrictions that apply to all directors (e.g. age restrictions, restrictions on the number of boards that the director can serve on, screening for anti-trust problems etc) provided they are objective standards and not subjective (e.g. nominating committee approval). This appears to be the position taken in the Release, but there is an ambiguity. Thus, we note that proposed rule 14a-11(a)(2) requires that the election of the candidate must not violate "the registrant's governing documents" (i.e. its by-laws and articles), which presumably might include "subjective" requirements while, on the other hand, the description of proposed rule 14a-11(a)(2) set forth in the opening sentence of Section III.B.4 of the Release makes no reference to the registrant's governing documents.

D.13: We feel strongly that there should not be any restrictions on the relationship of the nominee to the nominating shareholder(s), as was suggested in 2003. However, as indicated in the prior section of this letter, we believe that there is a solution to the concern that the nominee might be representing "special interest" groups. This could happen when there is a conflict of interest and those nominating the director have an interest not shared by the shareholders at large. We believe that this matter is possibly adequately addressed by proposed Rules 14a-18 and 14a-19 and proposed Schedule 14N, but we believe that such disclosures should be strengthened, e.g. by explicitly requiring more disclosure of any relationships between the nominee and the nominating group (as opposed to the disclosure of relationships between the nominee and the registrant), together with a description of any "agenda" of the nominating group. For example, language analogous to that which appears in Rule 14a-8(i)(4) might be appropriate in this context (i.e. disclosure of any interest "which is not shared by the other shareholders at large"). See also both the present and proposed versions of Rule 14a-2(b)(1)(ix). It is not the exact language of these sections that we point to, but rather the concept behind them.

E.1-3, and 5-8: In light of the fact that 14a-11 should not be used in control contests (a position with which we wholeheartedly agree), there needs to be some limitation on the number of seats that can be occupied by 14a-11 nominees and that limitation should be cumulative. The proposed limitation to 25% of the board is a reasonable and desirable one and we endorse it, as well as the method of counting by rounding down to the nearest integer. We also endorse, in a staggered board situation, counting those previously elected under 14a-11 against the 25% limitation but, as a mirror provision, believe that in the case of a staggered board that the 25% limitation be applied by counting all the board seats, not simply those up for election. Only those nominated under 14a-11 should be counted in this calculation, otherwise ascertaining how many seats are available for nomination would become both confusing and contentious. We would not oppose a provision (in a non-staggered board case) that an access director be counted against the 25% limit when re-nominated by the nominating committee, provided that such counting was limited to the first annual meeting after that director's election as an access director. Nor would we oppose counting a as an access director a person who had actually been nominated on Schedule 14N, but then had been voluntarily placed on the board as a result of some compromise between the registrant and the nominating shareholders.

We oppose suggestions that any one nominating shareholder or group be limited to a single nominee.

It should be specified that the number of board members used in making the 25% determination should be the number in office on the date of the filing of the Schedule 14N, or, if a "window" period is established, as of the commencement of the window period.

E.9: There are three separate problems. First, should a contractual right to nominate cause the 25% to be applied against only those seats that are not subject to a contractual right. Even if contractual rights do not extend to shareholder agreements and voting trusts, but only to contracts of which the registrant is the party in interest, we emphatically believe that contractual rights should have no bearing on the right of shareholders to nominate and choose their own representatives. Furthermore, if there were a contractual exception, there would be a major incentive for registrants to enter into contractual agreements in order to evade the application of rule 14a-11. The second problem is when there are different classes of stock, each class being entitled to elect a specified portion of the board. This is a much closer question and, as indicated in our response to B.9, the matter needs to be clarified. On balance we believe that the 25% should still be applied to the entire board. Finally, it could be argued that if someone has absolute control (50% plus one share, without counting cross ownership which might not be able to vote under state law), rather than practical control, there is no point in applying rule 14a-11 to the situation. We believe, however, that in that situation there could be an even greater need for outside shareholders to express their concerns. Therefore, even though there is no mathematical possibility of the nominee being elected, a large (majority) vote by the outside shareholders might send an important message to the board. In any event, the complication of defining control, especially when there is cross ownership, suggests that an exception would be more complicated than it could possibly be worth.

E.10-13: We do not endorse the first in time approach. Rather, we believe that the largest shareholder group should receive priority and that if there remain additional slots not spoken for by the largest shareholder group, then these should go to the next largest etc. We believe that the analogous situation with respect to allocating plaintiff and counsel in class action lawsuits is an appropriate model. There should be no "race to the courthouse [or SEC's] door". The rules should not encourage potential dissents to file a Schedule 14N for next year's annual meeting the day after the conclusion of this year's meeting. More fundamentally, tying priority to the size of holdings is more consonant with the policies underlying 14a-11 than is speed of filing. Finally, we do not feel that it would be practical to substitute a rule based on length of ownership rather than size of ownership since that criterion would be difficult or impossible to apply when the nominating group consists of a number of different shareholders with varying holding periods. For example, what if the group owned 10,000,100 shares and the owner of 100 shares had owned them ten years longer than the next longest holder: should the 100 share owner's holding period be determinative?

In addition, we note a technical difficulty with proposed Rule 14a-11(d)(3) which appears to assume that there could be no more than two shareholder groups proposing nominees. In a situation with a twelve person board, there could be three (or even 4) shareholder groups each making a single nomination. As drafted, the rule fails to say what would happen after the first two nominees are designated. It needs to be amended to state that additional "slots" will be filled in the identical manner.

F.5: See C.24.

F.8: We recognize that the Commission is trying to minimize overruling internal corporate ordering by giving preference to advance notice by-laws over the 120 day period otherwise provided by the proposed rule. We note that under 14a-8 the uniform 120 day rule overrides any advance notice by-law that would otherwise apply to the shareholder proposal. This is the better rule since it may be impossible to make the deadlines of an advance notice by-law mesh with the deadlines for notice, filing objections with the Commission etc. Thus, if the advance notice by-law has a 60 (or even 75) day advance notice provision it may not be possible to achieve two successive 14 day periods followed by an 80 day period even though the 60 day period is counted from the meeting date rather than the date that the proxy statement is distributed. We therefore prefer a uniform 120 day rule. We also suggest that the Commission institute a "window" period of, say, 120 days to 180 days in order to prevent filings (but not 14a-2(b)(7) communications) that are closer to the last annual meeting than the upcoming one.

G.2 and 20: Once the deadline for submitting nominees has passed, we do not believe that there should be any ability to submit substitutes for disqualified nominees or shareholder groups except that if the disqualification occurs as a result of a Staff determination (see G.17-18) the next shareholder group in line should (assuming all qualifications have been met) have its access nominees placed on the proxy. We believe that it should be made clear that the nominating group must maintain only the minimum required percentage through the annual meeting, not the full amount that they held at the time of filing the Schedule 14N, but changes of ownership need to be disclosed via amendments to Schedule 14N.

G.4: In the context of a ballot containing more names than there are slots to fill it would be highly inappropriate for there to be included a box by which one can vote for one slate. Non-profit organizations (e.g. Harvard University's Board of Overseers and TIAA-CREF's boards) have long had insurgents nominated whose names appear alongside those of the "official" nominees and it is easy to discern and vote for the official nominees without any need of a special box. To permit such a box would be to slant the election process since there could be no alternative box for the insurgents since they constitute a short slate. Thus, the proxy card would not be "impartial" as presently required by Rule 14a-4(a)(1). On the other hand, we would not object to the proxy card impartially specifying which nominees were management nominees and which were not.

G.5: We have had considerable experience with the 500 word limitation contained in Rule 14a-8 and believe that a limitation of similar size in 14a-11 would be unwarranted. Our experience is that it is difficult in the extreme to explain cogently the merits of the proposal in 500 words, despite the fact that the proposal deals with only one topic. It would be considerably harder to try to explain in 500 words not one small proposal but rather the need for fresh direction on the board. We therefore urge that the word limitation be expanded to at least 1,000 words.

G.13: We believe that the deadline should be extended to the next regular federal working day if the deadline falls on a Saturday, Sunday or federal holiday. The failure under Rule 14a-8 to observe this practice has resulted in considerable confusion.

G.17-18: We believe that Staff review, as suggested, is the proper way to go. It has worked reasonably well under 14a-8 where litigation has almost always been avoided. Indeed, it is our experience that even when the proponent or the company views the Staff decision as wholly without foundation that there is virtually no consideration of litigation. The proof is that over the past forty years there have only been a handful of cases litigated despite the fact that the Staff decides hundreds of no-action requests per year. Although there might be a greater willingness to sue under 14a-11 because the stakes are higher, we believe that almost all Staff decisions will be accepted by the parties. Obviously, therefore, Staff determination as an initial matter is a better means of dispute resolution for all concerned than is dashing to the Federal courthouse.

H.1-3: We believe that an exemption of the type set forth in proposed rule 14a-2(b)(7) is essential in order to make rule 14a-11 work as a practical matter. If a potential nominating shareholder must comply with the full panoply of the proxy rules in order to form its nominating group much of the relief from impediments to exercise shareholder rights will, in reality, not be available. No existing exemption from the full proxy rules will be applicable to the formation of the group. Rule 14a-2(b)(1) is inapplicable because subsection (iv) negates using the section in connection with the election of directors. Rule 14a-2(b)(2) will be inapplicable because there can be little doubt that more than ten persons will have to be solicited in order to form a group (note that that exemption refers to the number solicited, not the number that ultimately join the nominating group) that is comprised of one to five percent of the voting stock. A requirement that there be exclusive reliance on Rule 14a-2(b)(2) would, we believe, effectively render rule 14a-11 a total nullity. Finally, Rule 14a-2(b)(6) is inapplicable because the registrant may or may not have a shareholder forum and even if it does there is certainly no guarantee that anyone (except management) monitors it. Finally, as a related matter, we do not believe that there should be any limit placed on the size of the nominating group. Aside from the fact that it is hardly apparent what the appropriate size limit should be, we believe that there will be inherent limitations on size due to the necessity for policing the group by updating the Schedule 14N for any changes that occur among the group and that therefore a large will become too unwieldy.

The question is: what safeguards, if any, are needed when shareholders communicate with each other in an attempt to form a group that will have the requisite 1%, 3% or 5% in order to place a nominee on the proxy card? The safeguards might be of two types: either those intended to protect the recipient of the communication from fraud or those intended to protect third parties (markets, the company, other shareholders) by making the actions a matter of public record. First, on the question of whether the recipient of the communication is likely to need governmental protection from fraud before the fact. We submit that the answer is no, and that there should be an opportunity to "test the waters". Who will be contacted to join the nominee group? Surely not retail investors who own 100 or even 5,000 shares since it would probably take hundreds, or more likely thousands, of such persons to reach the 1% or 5% level. The most likely investors to be contacted (other than friends) are large institutional investors, and the most likely source of data on who owns large blocs of stocks in the target company are the filings under Section 13(f) of the '34 Act. Who are 13(f) filers? Essentially they are investors running $100,000,000. or more. Do they need the government's protection against fraud? Simply as a matter of common sense, probably not. But even aside from common sense, the securities acts themselves suggest that such institutional investors do not need protection. Thus, although the definitions differ somewhat, a similar $100,000,000. test exists not only under 13(f), but also the same dollar amount is used under Rule 144A of the '33 Act to define QIBs, who are institutional investors not deemed to need the registration requirements of either the '33 Act or the '34 Act. If they can fend for themselves when actually making investment decisions surely they can fend for themselves when reviewing materials asking them to join a nominating group, especially since, unlike an investment decision, in the later case the decision is not final and they can withdraw later when they see a draft of the Schedule 14N. Therefore, although there is no guarantee that communications will be made only to 13(f) filers, the overwhelming likelihood is that they will be the target group when an investor is attempting to achieve the 1%, 3% or 5% goal. Thus, we do not believe that there is any need to protect such persons by invoking the full panoply of the proxy rules at this stage of the nominating process. Indeed, invoking the full panoply of the proxy rules, involving the filing and sending of a full proxy statement, would totally undermine the objectives of proxy access, which is to permit shareholders to nominate candidates without going through the full proxy soliciting process mandated by the proxy rules. Thus, since, as a practical matter, neither the forum contemplated by Rule 14a-2(b)(6) nor the ten person exemption of Rule 14a-2(b)(2) will be sufficient to permit a shareholder to obtain the 1% or 5% level needed for the nomination, we believe that an additional exemption is needed. We therefore support the proposed exemption of 14a-2(b) (7). Furthermore, the information permitted to be included in a communication under that provision is so limited that there is little opportunity for false information of the type that might "poison the well" and influence the eventual decision as to how to vote or whether to sign the Schedule 14N. Finally, on the question of oral solicitations, the case is even stronger. Even if the only written communication permitted is that described in the proposed 14a-2(b)(7), it is inevitable that there will be follow up oral communications. Indeed, we cannot image that a nominating group could be formed without oral solicitations. We note that because it is almost impossible to police oral solicitations, they are exempt from filing under Rule 14a-6(g)(2) even in the context of an actual solicitation requesting shareholders to vote a certain way. Surely there should be an exemption for oral solicitations at this earlier stage in the process. Thus we believe that if a filing is to be required under proposed 14a-2(b)(7) that there be no restrictions on oral communications, which is how we read the rule as proposed. Finally, we do believe that the Commission should explore the possibility of extending the tombstone type exemption of 14a-2(b)(7) to nominations under state law.

Additionally, we doubt that there is any need to protect the public (company, markets etc.) by filing the communication with the Commission as contemplated by proposed Rule 14a-2(b)(7)(ii). Here the analogy is to the tender offer regulations. No public disclosure is required by persons who are contemplating an actual change of control (something forbidden to users of 14a-11) until their activities have reached a critical level, namely a group owning 5% of the stock of the company. Similarly, no public disclosure should be required of those contemplating proposing a nominee until their activities have reached a critical level, which we believe is when they are ready to file a Schedule 14N actually nominating someone. At that point they will file the Schedule 14N, thus publically disclosing their intentions. In addition, as a practical matter, we believe that most attempts to achieve the requisite 1% or 5% level will fail, in which case the number of filings pertaining to failed attempts will overwhelm those filings that will actually matter. We therefore urge that proposed Rule 14a-2(b)(7)(ii) not be adopted. In this connection, we note that the communication will still be subject to Rule 14a-9.

On the other hand, the Commission might consider expanding the bare bones disclosures of proposed rule 14a-2(b)(7) to include (i) disclosure of the net position rather than the shares "owned" (which may be accomplished via a definition of beneficial ownership); (ii) length of share ownership; (iii) some description of potential plans or proposals, probably less detailed than that required by Item 4 of Schedule 13D.

We also support proposed Rule 14a-2(b)(8). Since management will undoubtedly solicit against the access nominees, the latter should equally have the right to solicit, so long as they do not request proxy authority, as specified in the proposed rule. In this case, however, we believe that the filing requirement with the Commission is appropriate. We do believe that, as a filed document, the reasons for the nomination should be permitted in the communication, just as they are in Rule 14a-2(b)(1). Absent permitting such reasons, the communication would simply be a tombstone ad. We therefore support the rule as proposed.

H.7and 12: We believe that similar exemptions for nominations under state law but outside of Rule 14a-11 would be appropriate.

J.1 and 2: The underlying question is whether the filing of a Schedule 14N is sufficient notification to the markets, the registrant and the other shareholders or whether a 13D filing is appropriate at an earlier stage. If the filing requirement of 14a-2(7) is retained, that should give sufficient notification. Even if that filing requirement is not retained, because the underlying assumption of the proposed rule is that the formation of the group is not for the purpose of exercising control, and because the proposed rule itself has as a prerequisite that groups have relatively large holdings to take advantage of the rule, we do not believe that a 13D filing should be required. This is especially true with respect to non-accelerated registrants since nominating shareholders of such registrants are *required* to have a 5% ownership position and therefore filing of a 13D would always be triggered. If the threshold for such filers were to be lowered to 3%, so that all groups would not automatically have to be 5% owners, the balance of considerations might well change.

II REVISION OF RULE 14a-8(i)(8)

In general, we are extremely supportive of this proposal. We, as have most people, have always viewed the 2007 amendments to Rule 14a-8(i)(8) as a temporary expedient in response to the decision in *American Federation of State, County and*

Municipal Employees Pension Plan v. American International Group, Inc., 462 F.3d 131 (2d Cir. 2006), pending final solution of the whole access issue and providing sufficient time for careful examination of the related 14a-8 issue. If the substance of the access proposal is adopted, there will no longer be a need for the 2007 holding action and we believe that, in general, the proposed solution under 14a-8 is the correct one. Indeed, a review of the early submissions in this (S7-10-09) rule making proceeding suggests that the Commission's proposals with respect to Rule 14a-8 are relatively non-controversial. However, that does not mean that they cannot be improved upon.

In particular, we believe quite strongly that the Commission's determination, as set forth in the Release, not to impose any requirements on proponents other than the standard 14a-8 requirements applicable to all shareholder proposals is the correct decision. Any additional limitations and disclosures are appropriate at the time of the actual nomination, not at the time when general procedures for nomination are proposed. If, in connection with a 14a-8 access proposal, there are instances when a conflict of interest exists, such a conflict can be handled pursuant to Rule 14a-8(i)(4) or, if it does not reach that level, discussed in the registrant's statement in opposition to the proposal, a forum unconstrained by 500 word limitations. Therefore, we see no reason why proposals concerning the nomination process, or, indeed, any proposal to amend or request amending the by-laws or the articles, should be subject to any special treatment or require any special safeguards under Rule 14a-8.

In response to the question raised in I.8, we believe that the present requirements for submitting proposals under Rule 14a-8 are wholly appropriate as they stand and are not in need of amendment. Although we would not oppose indexing the $2,000. ownership requirement at some point, doing so at a time when the markets have plunged would be inappropriate. (For example, despite the rise in the markets over the past five months, the NASDAQ index remains at only about 40% of its level of ten years ago.) Furthermore, the analogy to the European requirements (which tend to have much higher ownership thresholds) is inapposite. The European philosophy is that there should be a high threshold, but no substantive grounds for exclusion (no 14a-8(i)) and very little in the way of procedural requirements. The American philosophy is more democratic and has a low threshold but barriers based on the content of the proposal (rule 14a-8(i)) and greater procedural hurdles. We do not believe that it would be desirable to combine the European high thresholds with the American exclusion system. (Nor would it be desirable to combine the American low threshold system with the European lack of substantive exclusions.)

In response to I.11, we believe that as a matter of good policy the disclosures should generally be the same, since the purpose of disclosure is to inform the shareholders prior to the vote. Therefore, there is no good reason to provide lesser disclosure simply because the method of nomination is established under state law rather than Federal law. Similarly, in response to I.12 the same principles should apply. If the requested disclosure is relevant, it will be relevant regardless of the method of nomination. If it is not relevant it should not be required regardless of the method of nomination.

In connection with these comments, we draw attention to the fact that the required disclosures under proposed rules 14a-18 and 14a-19 do not meet these criteria. In particular, if it is material under 14a-18 to know whether the nominating shareholders intend to keep their shares subsequent to the election, why is it not material with respect to nominees under state law provisions? Similarly, if it is so important (material) that the shareholders keep their shares through the date of the meeting that an affirmation of that intent is a prerequisite to utilizing 14a-11, it is hard to know why information on that topic is not required under 14a-19. In this connection, we note a contradiction in the rules in that although the information on retention is specifically excluded from 14a-19, it is nevertheless required in Item 5(b) of Schedule 14 and therefore still required in state law situations. Therefore, if the Commission does not accept our position that the disclosures under 14a-18 and 14a-19 should be virtually identical, the inconsistency between proposed rule 14a-19 and proposed Item 5(b) of Schedule 14N needs to be resolved.

Less important but also unclear is why the remaining items (proposed rule 14a-18 (a), (b), (c) and (d)) are not relevant, *mutatis mutandi*, to nominations under state law.

There is an additional anomaly when comparing proposed rules 14a-18 and 14a-19. The latter has a Note concerning liability following subparagraph (f). No such Note appears in proposed rule 14a-18. Furthermore, the Note is rather strange as it does not track the exculpatory language to be found in Rule 14a-8(l)(2), but rather contains an exception including "reason to know" that the access group's statement was false. This seems excessively harsh in light of the fact that the registrant undoubtedly would have no choice in the matter if under the state provisions it is compelled to place the statement in its proxy statement. We therefore believe that the Note should track the 14a-8 language and be placed in both Rules 14a-18 and 14a-19.

Although in general we think it desirable that there be greater specificity as to what is excluded by virtue of Rule 14a-8(i)(8), we do not believe that certain of the Staff determinations should be written in stone because we believe that they were incorrectly decided. In particular, we believe that proposed Rule 14a-8(i)(8)(iii) is undesirable, overbroad and inconsistent with the rationale for (i)(8) as stated in the Release.

We fear that the new codification of the Staff position with respect to Rule 14a-8(i)(8)(iii) will result in the exclusion of many legitimate shareholder proposals that call for the separation of the roles of chairman of the board and CEO. Both of the Staff letters cited in the Release (footnote 275) involved shareholder proposals that called for the separation of the two roles/functions. Neither referred to the fact that the CEO was up for election or in any way implied that he should not be re-elected. Although we can imagine that there could be shareholder proposals concerning the separation of these roles which are, in reality, nothing but disguised attempts to defeat the CEO's reelection, this hardly seems to have been the objective of the proposals. In the case of the *Exxon* letter (full disclosure: the undersigned was counsel to the proponent) a long-time campaigner for better corporate governance (dating to his service under President Reagan) submitted a shareholder proposal to separate the roles at Exxon and, in addition to general policy arguments, attempted to say why the need for separation was especially strong at Exxon. His example was the registrant's position on climate change and since the CEO was the company's chief spokesman on that issue (and indeed a lightning rod for criticism of a policy that Exxon has changed subsequent to his retirement) inevitably the shareholder proposal made reference to him and quoted publically available sources that criticized him. If that cannot be done, it will be well neigh impossible to draft a shareholder proposal on separation of the two functions that goes beyond general principles and attempts to say why this separation is particularly applicable to, or needed by, the registrant. We believe that such a restriction on separation proposals is unnecessary and unwarranted.

Furthermore, such a restriction does not fall within the rationale for the (i)(8) exclusion as that rationale is described in the Release. That rationale (as set forth in the first sentence of Section III.C.4. of the Release) is that registrants should be able "to exclude proposals related to particular elections and nominations for director from company proxy materials where those proposals could result in an *election contest* between the company and shareholder nominees without the important protections . . . provided for in the proxy rules". (Emphasis supplied.) We submit that shareholder proposals of the Exxon type do not result in an election contest either as that term is used in the proxy rules (Cf. Rule 14a-12(c); proposed Note 3 to Rule 14a-6.) or as is generally understood in the investment world. Indeed, the repeal of NYSE Rule 452 is largely motivated by the fact that "just say no" campaigns were not considered contested matters for purposes of that rule, thus allowing brokers to vote for the incumbent board without the owner's authorization. To treat Exxon type proposals on separation of functions as falling within the notion of "an election contest" (Release wording quoted above) is wholly without merit or policy foundation. Finally, let us point out what seems to be an anomaly that is more than passing strange. Perhaps Kafkaesque or Orwellian would better describe it. If Exxon had had a staggered board, the identically worded resolution calling for the separation of the offices of chairman and CEO would have passed muster under (i)(8) in each of the following two years after the year that it was excluded. We therefore strongly urge that proposed Rule 14a-8(i)(8)(iii) should be deleted. Any true abuse (where a shareholder proposal clearly is merely a personal attack) can be addressed under some version of proposed Rule 14a-8(i)(8)(v) or under other 14a-8 exclusions.

Rule 14a-8(i)(8)(v) seems overbroad as written. If a shareholder proposal is critical of a registrant's policies, that criticism could lead shareholders to vote against the incumbents who instituted or support the criticized policies. We think that the rule should be restricted to situations involving actual election contests, as specified in the rationale for the rule set forth in the Release. If there is no contest, (i)(8) should be inapplicable. Even if the Commission believes that (i)(8) should be expanded beyond its rationale, at the very least the word "materially" should be inserted before the word "affect".

On the other hand, we think that proposed 14a-8(i)(8)(iv) may be permitting too much. Does it mean that a shareholder can introduce a shareholder proposal under Rule

14a-8 to the effect that "we endorse the election of X" because X has been nominated under a 14a-11 proceeding? Or that one can actually nominate someone using the procedures of Rule 14a-8? If neither, what does the exception mean since one would have thought that a nomination under Rule 14a-11 was not a shareholder proposal subject to the requirements of Rule 14a-8.

We appreciate the opportunity to convey to you the views of ICCR on the Release. If you have any questions, please do not hesitate to get in touch with the undersigned at the above listed numbers and addresses, or with Laura Berry, the Executive Director of ICCR, at 212-870-2294 or lberry@iccr.org.

Very truly yours,

Paul M. Neuhauser

cc: Laura Berry