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VIA E-MAIL: rule-comments@sec.gov

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

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

Dear Ms. Murphy:

This letter is submitted by Burlington Northern Santa Fe Corporation (BNSF), a Fortune 200 company that through its subsidiaries is primarily engaged in freight rail transportation. Our principal operating subsidiary operates one of the largest North American rail networks, with about 32,000 route miles in 28 states and two Canadian provinces. We appreciate the opportunity to again provide our views on rulemaking proposals to require companies to include shareholder-nominated director candidates in company proxy materials under certain circumstances.

The Securities and Exchange Commission (the "Commission") recently published proposed rules that would require companies to include in their proxy materials shareholder nominees for election as corporate directors and amend the Commission's shareholder proposal rules to permit shareholder proposals related to such nominations (the "Proposed Rules"). See Facilitating Shareholder Director Nominations; Proposed Rule; Release No. 34-60089, 74 Fed. Reg. 29,024 (2009) (the "Release"). We respectfully submit these comments for the Commission's consideration.

Proposed Rule 14a-11

Proposed Rule 14a-11 would give a shareholder or group of shareholders that owns a certain percentage of a company's stock and satisfies a one-year holding period a right to nominate directors through the company's proxy statement provided certain limited conditions are satisfied. The issue of proxy access is a complicated and difficult one as evidenced by the Commission's two previous efforts in recent years to issue proposed rules addressing the ability of shareholders to place information about their director nominees in company proxy statements. On each of those prior occasions,

commentators raised substantial concerns about the proposals, and the Commission did not move forward with its proposals. The Commission's current proposals are its most expansive approach to proxy access yet. The Commission attempts to justify its proposals because of the current economic crisis and indicates that its proposed proxy access changes will improve corporate governance and that both businesses and society will benefit as a result. As acknowledged in the Commission's release, mandatory proxy access could result in large numbers of shareholder meetings being contested and possibly not even because there are issues with Board performance. The result of more contested director elections could lead to lower quality Boards, depending upon the qualifications of the nominees, with gaps in requisite expertise or experience needed for a specific Board. It could also lead to the election of "special interest directors" who will disrupt Boardroom dynamics and harm the Board's decision-making process, and who may put forward their special issues instead of focusing on the long term viability of the company. Ironically, this special issue focus could also cause boards to follow a more short-term view rather than focusing on long-term, sustainable growth. In addition, subjecting directors to a perpetual proxy contest may make it more difficult for companies to attract and retain qualified Board members.

BNSF's Corporate Governance Guidelines state that the Board "seeks members from diverse business and professional backgrounds with outstanding integrity, achievements, judgment and such other skills and experience as will enhance the Board's ability to serve the long-term interests of the shareholders" and that it "seeks diversity in age, race and gender." The Board is also to "evaluate each individual in the context of the entire Board of Directors with the objective of assembling a Board of Directors that can best fulfill the Company's goals and promote the interests of shareholders." Mandatory proxy access could frustrate the Board's ability to achieve those goals (which are consistent with the spirit of the Commission's proposed new disclosure rules regarding director qualifications set forth in its July 10, 2009 proposal on proxy disclosure and solicitation enhancements) and to plan for the future because the shareholder nomination process could force a change in the mix of skills, experience, diversity and independence of directors from year-to-year.

Further, we believe that the one percent stock ownership threshold for companies of our size is much too low and could encourage certain activists and others to pursue their special interest issues. The five percent threshold that triggers reporting under Regulation 13D-G would be more appropriate for a single shareholder, or ten percent for a group of shareholders acting together. Moreover, shareholders that nominate directors should be required to have owned their shares for a period of two years or more and have a "net long" interest in those shares. The concept that the first to file will determine whose candidates to be included in the company's proxy statement could in practice allow all available shareholder slots to be taken by one eligible shareholder or group of shareholders. In addition, the 25 percent cap on the number of shareholder nominees is too high and could result in a significant turnover of the Board in just a few years. Also, there is no concomitant requirement for the shareholder or shareholder group to hold an economic stake in the company after the shareholders meeting. The Commission should consider requiring a holding period of the nominating party's shares for a period after the election—one year at a minimum—to ensure there is no incentive to seek short-term economic gain through the new composition of the Board to the detriment of long-time holders. We suggest that the Commission also consider

imposing related eligibility requirements such as prohibiting any nominating party that sells earlier than such minimum period from making future Rule 14a-11 nominations at the relevant company or requiring the director nominated by such party to resign if provided for in the company's corporate governance guidelines or governing documents.

Ultimately, proxy access is an area which should be left for state law rather than being federally prescribed. The Release suggests that proposed Rule 14a-11 is intended to remove impediments to shareholders exercising their state law rights. The Commission's authority to grant shareholders a federal right to nominate directors in a company's proxy statement is debatable. State law governs the internal affairs of a corporation, including voting rights, annual meeting mechanics, the power to vote by proxy and the validity of a proxy and its execution and revocation. The Commission's authority is limited to disclosure and the solicitation of proxies. The proposal would instead impose a new federal regime that would deny shareholders and their companies the ability to exercise their rights under state law to vary the terms of any proxy access procedure. This federal mandate would trump the shareholder choice that is provided under state law. State law, as evidenced by the recent amendments to Delaware law addressing proxy access and proxy reimbursement, provides shareholders and boards of directors with the opportunity to deal effectively with the particular circumstances applicable to their companies in designing a proxy access or reimbursement model. This enabling approach of state law has worked well in recent years as hundreds of companies, including BNSF, have amended their by-laws to adopt a majority voting standard in uncontested director elections. We advocate that a similar approach be taken here, rather than have the Commission impose a "one size fits all" federal mandate.

Rather than adopting a mandatory, federal rule permitting shareholder access to the proxy statement, we urge the Commission to consider an amendment to Rule 14a-8(i)(8) to allow proposed by-law amendments by shareholders to permit access as long as it is allowed under state law. Because companies differ in their capital structures, shareholder bases, and director composition and committee structures, attempts to draft a federal access rule that addresses all relevant issues to all sizes and types of companies is a difficult if not impossible task. The recent amendments to the Delaware General Corporation law and amendments anticipated to be made to the Model Business Corporation Act will expressly enable shareholders to amend a corporation's governing documents to provide a process for the use of the corporation's proxy materials to both nominate directors and solicit support for candidates. This approach enables companies and their shareholders to adopt access measures that suit the particular corporation rather than trying to prescribe a "one size fits all" mandatory federal rule. The effectiveness of an enabling approach is reflected in the significant corporate governance changes that have been made in the last several years, including the movement to a majority voting standard in uncontested director elections by two-thirds or more of Fortune 500 companies and the adoption of by-law amendments by an increasing number of companies to permit shareholders to request special meetings. We advocate that a similar approach be taken here as opposed to a federal mandate that is fraught with difficulties.

Should the Commission decide to proceed with adopting proposed Rule 14a-11 despite the problems discussed above, any final rule should not preempt the proxy

access procedures established or authorized by state law or a company's governing documents. Accordingly, proposed Rule 14a-11 should not apply where a company's shareholders or board have adopted a proxy access or proxy reimbursement by-law or where a company is incorporated in a state whose law includes a proxy access right or the right to reimbursement of expenses that shareholders incur in connection with proxy contests. In addition, companies who have adopted majority voting in uncontested director elections should be exempted from proposed Rule 14a-11. Any final rule also must contain: (1) triggers such that proposed Rule 14a-11 would only be applicable when certain events have occurred indicating that greater director accountability is necessary at a particular company such as not acting on a shareholder proposal that received a majority shareholder vote; (2) revised ownership and holdings thresholds as discussed above that satisfy the Commission's objective of limiting the proposed rules to "holders of a significant, long-term interest;" and (3) limits on shareholders being able to nominate proxy access directors for a period of time (such as three years) where the proxy access nominee fails to attract a significant measure of support (such as 25 percent of the votes cast) and limits on that nominee being re-nominated when he or she has not received that measure of votes cast. Such measures are necessary to balance the significant cost and disruption that will result from proposed Rule 14a-11. Although we strongly oppose adoption of Rule 14a-11, there should be at least a one-year transition period before the effective date of any rule creating a federal proxy access mandate, as there is only a short time before 2010 proxy season. In addition, any final rule should include increased disclosure requirements regarding the independence of the nominees and relationships between the nominating shareholders and the nominees and should respect director eligibility requirements in the company's governing documents.

In conclusion, we believe that a federal proxy access right is unnecessary, would result in expensive, highly contentious, and distracting proxy contests, and is beyond the Commission's authority to adopt. Instead, the Commission should adopt revised amendments to Rule 14a-8(i)(8) to provide shareholders and Boards of Directors the opportunity to develop company-specific approaches to proxy access. In addition, it should adopt proposed Rule 14a-19 to provide shareholders with essential disclosures if a shareholder nomination is included in a company's proxy material pursuant to state law or the company's governing documents.

Thank you for considering our views on this subject. We would be happy to discuss our comments or any other matters that you believe would be helpful.

Very truly yours,

James H. Gallegos

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner