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

Re: File No. S7-10-09: Proposed Exchange Act Rule 14a-11

Dear Ms. Murphy:

I submit this letter in response to the request of the Securities and Exchange Commission for comments on its shareholder access rule proposal. Under the proposed rule, certain shareholders would be entitled to include their nominees for director in the company's proxy materials unless shareholders are otherwise prohibited. File No. S7-10-09.

I believe that the proposed rule should not be adopted for four primary reasons: (1) the threshold for proxy access is too low and will allow single issue shareholders to too easily nominate a candidate, thereby triggering an expensive corporate response; (2) nominating shareholders are not required to maintain the requisite percentage of ownership of the company following nomination; (3) the proposed rules violate the First Amendment; and (4) the proposed SEC review process is inefficient and ineffective.

I. The threshold for proxy access is too low

In the proposed rule, a shareholder would be eligible to have its nominees included in a company's proxy materials if they own at least one percent of the voting securities of a large accelerated filer; at least three percent of the voting securities of an accelerated filer; or at least five percent of the voting securities of a nonaccelerated filer. In the Release, the Commission argues that the threshold level is low in order to "address the possibility that certain companies could be impacted disproportionately based on their size."

The proposed ownership thresholds for proxy access are entirely too low. One of the main premises behind the Release is to restore investor confidence. With these low thresholds, single issue shareholders – e.g. unions and religious groups that represent only a small portion of the outstanding shares – will be able to nominate candidates that, based upon individual merit, would have little chance of being elected. However, because proxy advisors have begun recommending punitive votes against board members who do not act in accordance with the advisors' recommendations in areas such as compensation, in order to insure that the most

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qualified candidates are elected, boards will be requested to take seriously even the most unqualified candidates – and mobilize to defeat them – as the board will not know the proxy advisors’ recommendations until the eve of the election. Enhancing the possibility that unqualified directors may be elected directly conflicts with the Commission’s agenda of restoring investor confidence.

In most situations, it is highly unlikely that a nominee who does not start with a 10% level of support can be elected. Moreover, a 10% or higher threshold will allow groups of security holders to form alliances that would effectively represent a meaningful portion of all security holders, instead of single issue investors who most likely will pursue an individual agenda. As a result, we recommend that a 10% or higher threshold for proxy access is more appropriate.

II. The holding period by a shareholder who makes a nomination should extend for a period beyond the nomination

The Commission proposes an eligibility requirement based on duration of ownership that requires a shareholder to be an owner for at least one year. Additionally, the Commission also proposes rule 14a-18(f) that requires disclosure of the shareholder’s intent to continue ownership after the election. The Commission does not propose any post-election holding period.

We believe that continued ownership after the election is crucial. Otherwise, shareholders will be saddled with a director nominated by a shareholder or group of shareholders – and presumably reflects their views and agenda – after they have disposed of their requisite economic interest. This would be highly unfair to the remaining shareholders.

Companies should be able to disregard a nominee where the shareholder has disposed in the requisite shares prior to the vote. More importantly, a nominee should have to agree (where state law permits) to resign if, after the vote, the shareholder disposes of the requisite shares. These requirements will help ensure that short-term speculators are not able to make decisions with potentially enormous consequences.

III. Proxy statements are a form of speech that deserve First Amendment protection

A proxy statement is a form of speech that is entitled to First Amendment protection, and the Commission’s proposal poses significant constitutional concerns. Compelling a corporation to include nominations of directors by shareholders in the corporation’s proxy materials infringes on the corporation’s right of free speech in that the Commission’s proposed rule does not distinguish between expressive and non-expressive content. *See Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (holding that speech “does not lose its protection because of the corporate identity of the speaker”). Thus, absent this distinction, a requirement that third-parties’ “speech” be included in a corporation’s proxy statement is overbroad and therefore unconstitutional.

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Under the proposed rules, a shareholder has the ability to request that a corporation's proxy statements include "political" as well as nonpolitical speech as a shareholder's nomination of directors is capable of expressive content. Yet, it is paramount in constitutional law that regulation of political speech must withstand the most rigorous scrutiny. *See Id.* at 776 (reasoning that the First Amendment protects speech related to matters of "public concern"). The Commission's proposed rule, however, would force a corporation to include expressive speech that it disagrees with, a direct violation of the First Amendment. *See Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 12 (1986) (holding that the "state is not free either to restrict ... speech to certain topics or views or force [a response] to views that others may hold"). Thus, the proposed rule regulates protected and unprotected speech and is overbroad.

Alternatively, to the extent that the Commission is legally able to require the inclusion of supporting statements in proxy materials, a proxy statement is still a form of speech that is entitled to at least limited First Amendment scrutiny. *See SEC v. Wall Street Publishing*, 851 F.2d 365, 373 (D.C. Cir. 1998) (reasoning that "regulation of the exchange of securities is subject ... to limited First Amendment scrutiny"). The Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564-65 (1980), outlined the four requirements that must be met in order to regulate commercial speech: (1) the communication must be "lawful" and not "misleading;" (2) the government interest must be substantial; (3) the regulation "must directly advance the state's interest;" and (4) the regulation must not be more extensive than is necessary to serve the government's purpose.

It is this fourth requirement that deserves particular attention in two regards. First, under the proposed rule, shareholders would be eligible to have their nominee included in the proxy materials even if they own only a relatively small number of shares – as low as 1%. It is constitutionally unreasonable to require a company to include a supporting statement regarding a non-board supported nominee at such a low level of ownership. Second, the proposed rule does not contain any limitations of the content of the supporting statement. At a minimum, the rules need to limit what a company is required to include to substantive, factual statements regarding the nominee's qualifications and his or her perceived superiority relative to other candidates. Requiring the inclusion of anything else offends the First Amendment.

IV. This is not the proper system to control the selection of directors

During the period that the Commission has been the arbitrator over the inclusion of proxy proposals under Rule 14a-8, it has established that it is an inefficient and imperfect system. The time period for review is too long (and disruptive), critical positions have changed, companies have been required to include single-purpose proposals at no benefit to the shareholders, and the cost and inconvenience to the Commission and corporations has been significant. And rather than reform the existing system, the Commission now proposes to further insert itself into corporate governance. The Rule 14a-8 system simply is not the proper system to control

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something as important as the selection of directors at the 13,000+ public companies in the United States.

* * *

I appreciate the opportunity to participate in this process. I would be happy to discuss any of our concerns addressed above, or any other matters relating to this process.

Sincerely,

A handwritten signature in black ink that reads "W Brinkley Dickerson, Jr." with a stylized flourish at the end.

W. Brinkley Dickerson, Jr.