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

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

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

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Securities and Exchange Commission's proposed rules entitled "Facilitating Shareholder Director Nominations." We are submitting comments applicable to limited portions of proposed Rule 14a-11, although in general we oppose adoption of the proposed rules.

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1. Maximum Number of Shareholder Nominees to be Included in Company Proxy Materials.

Under proposed Rule 14a-11(d), a company would be required to include no more than the greater of one shareholder nominee or the number of nominees that represents 25% of the company's board of directors. The company could exclude nominees to the extent that it has current directors that were elected as shareholder nominees pursuant to Rule 14a-11 and whose terms extend past the date of the meeting of shareholders for which the company is soliciting proxies for the election of director.

In the proposing release, the Commission requested comment on whether any limitation on shareholder nominees should take into account incumbent directors who were nominated outside of the Rule 14a-11 process, such as pursuant to an applicable state law provision, a company's governing documents, or a proxy contest. The Commission has also requested comment on whether such directors should be counted as "shareholder nominees" for purposes of determining the 25%. (Proposing Release, Question E.7.) The Commission also requested comment on whether any limitation on shareholder nominees should take into account shareholder nominees for director that a company includes in its proxy materials other than pursuant to Rule 14a-11 (e.g., voluntarily). (Proposing Release, Question E.8.)

If the Commission adopts Rule 14a-11, we urge it to provide that incumbent directors who were nominated outside of the Rule 14a-11 process as well as shareholder nominees for director that a company includes in its proxy materials other than pursuant to Rule 14a-11 (e.g., voluntarily) should count against the 25% limitation (or any other limitation the Commission adopts). Said another way, the only directors who should not count against the limitation should be those who were initially and subsequently proposed by the board's normal nomination process, and not as a result of shareholder activism. If at any time a director was nominated through Rule 14a-11, a proxy contest, a settlement with a shareholder, or any other non-incumbent process, that director should be permanently tainted by that nomination for purposes of the proposed limitations in the rule. Thus, even if a shareholder nominee becomes a director and is subsequently nominated for an additional term or terms by the board, that director would continue to count against the maximum number of nominees that could be nominated pursuant to Rule 14a-11. We do not believe that this taint should expire after some period of time, such as three years, as has been suggested by other comment letters.

Without our recommended changes, the Commission's proposed rules would discourage discussion and settlement between existing management or board members and stockholders about board composition. Just as shareholders consider the cost of a contested proxy fight in evaluating whether to contest a director or slate, companies also consider that cost and frequently decide to nominate a shareholder's nominee(s) instead of its incumbent directors. These decisions are frequently reflected in settlement agreements with the shareholder proponent, which under the Commission's proposal would result in shareholder nominated directors not being treated as shareholder nominees under the proposed limitation. If that shareholder or another were then successfully to nominate directors under Rule 14a-11, the company, in the same year, could see a change in a majority of its board. As a result, a company will likely prefer to require the shareholder to nominate directors under Rule 14a-11 rather than enter into agreement with the shareholder. We believe it is preferable to facilitate settlement and that the rule should, therefore, treat such directors as shareholder nominees under Rule 14a-11.

Without our recommended changes, the Commission's proposed rules would also discourage a board from re-nominating a director that was originally proposed by a shareholder. The board would do this in order to avoid cleansing the shareholder-nominee taint from that director and resetting the cap for Rule 14a-11 at the full 25%. Accordingly, the Commission's rules would actually promote a contentious nomination process instead of facilitating a consensual process between shareholders and management.

2. Effect of Prior Shareholder-Nominated Directors on Certifications.

Proposed Rule 14a-19 and Schedule 14N would require nominating shareholders to certify that, to the best of their belief and knowledge, their securities are not held for the purpose of or with the effect of changing control of the issuer of the securities or to gain more than a limited number of seats on the board.

It is unclear to us under the proposed rules how negotiated shareholder-nominated directors would be viewed toward the eligibility of the shareholder that nominated those directors to make these certifications in any subsequent use of Rule 14a-11. We believe that the presence of previously nominated directors on the board is, at a minimum, a fact that may preclude that shareholder from being able to make the certifications for a subsequent use of Rule 14a-11. More usefully, the rules could preclude a shareholder from being able to make that certification if the number of shareholder-nominated directors placed on the board by agreement or contest, plus the number to be proposed under Rule 14a-11, would exceed 25% or such other limit as the Commission may adopt. We also believe that a Schedule 13D filer by definition should not be able to make those certifications and avail itself of Rule 14a-11, regardless of whether its Schedule 13D is specific as to an intent to procure a change of control or change in the board composition or contains the general and vague statements of possible actions that have become customary with corporate raiders and activists.

3. The Proposed Exemption from Schedule 13D.

We believe the proposed exemption from Schedule 13D for activities in connection with a nomination under proposed Rule 14a-11 is inappropriate and may conflict with the mandate of Section 13(d)(1)(C) of the Securities Act of 1934 for disclosure of "any other major change in its business or corporate structure." We believe the intent to change a director is a major change in business and is an intention of which the investing public should receive notice, as in the past, through a 13D or amendment to it. We also believe that any nomination of a director by a nominating shareholder pursuant to proposed Rule 14a-11 is for the purpose or will have the effect of influencing control of the company; accordingly, such a person cannot fairly be viewed as a passive investor.

In our experience, activist shareholders take aggressive and self-serving views about when their Schedule 13G status has ended and they must file a Schedule 13D. It is common, for example, for such shareholders to demand significant and specific corporate actions, including sale of the company or borrowings to fund buybacks, without filing a Schedule 13D. It is also common for them to threaten to announce the possibility of a proxy fight through a Schedule 13D if the board does not acquiesce to their specific transactional demands without their having already filed a Schedule 13D. When a Schedule 13D is filed, it often describes the shareholder's intentions in very general terms, without specificity as to the prior actions requested or the previous threats of a contest for certain limited board positions or a controlling position. None of this seems consistent with the purposes of the Williams Act, yet the Commission proposes to facilitate this approach so that, as long as the activist shareholder can claim to be pursuing only that number of seats afforded by Rule 14a-11, the shareholder can keep the investing public in the dark about its discussions and true intentions. The Commission would not tolerate such a lack of transparency from the company and its management; why will it facilitate it for large owners?

4. Disclosure of Independence from the Nominating Shareholder.

We support the Commission's efforts to foster disclosure that allows shareholders to make informed decisions about director elections. When management or the incumbent board nominates a director, it is sensible to require (as is currently the case) disclosure of the relationships that would affect the director nominee's independence from management. Similarly, when a shareholder nominates a person to serve as a director, it is sensible also to require disclosure about the relationships with the nominating shareholder that could affect the nominee's ability to exercise judgment and fiduciary duties for the benefit of all shareholders.

In our experience, many directors nominated by shareholders in proxy contexts, negotiated settlements, and other processes have been capable, independent directors. Nevertheless, there are many cases where the nominee has significant ties to the nominating institution or a significant owner or manager at the nominating institution. We are aware of, for example, nominations of the shareholder's insurance broker, brother-in-law, service provider or supplier, or board member or executive of a portfolio company of the shareholder. Whatever the other merits of a nominee, these relationships call into question whether the nominee will take instructions from the nominating institution instead of exercising independent judgment for the benefit of all shareholders. Thus, we believe the Commission should require meaningful disclosure of such relationships between the nominee and the nominating shareholder.

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We have provided comments to a few aspects of the proposed rules. In doing so, the Commission should not conclude that we generally support the proposals. We do not.

The Commission seems to assume that a change of a minority of the board will not change control of the board. This is contrary to experience and to the past behavior of activist institutions, who have placed significant value on being able to replace a minority of board members—significant enough value that they have been willing to pay for proxy fights to obtain minority positions. Unlike political bodies, which frequently are contentious and take action with divided votes, the culture of the boardroom is one of consensus. If a shareholder can replace even one director, that director will frequently have a negative veto on corporate action, even if that director does not influence sufficient votes to cause some other action to be taken. When a quarter or a third of the board take a common view about a matter, we have observed that the consensual habit of the board will sometimes allow the minority to dictate the direction of the board in many matters. That is fine if it occurs, but let the activist pay for it instead of using the company's funds to achieve this result.

The Commission also seems to assume that the management nomination process that has been dominant in U.S. publicly-traded companies has somehow limited the quality of directors or the quality of their behavior, and that further empowerment of activist shareholders will result in better quality directors and better management oversight. While we are certainly aware of meaningful problems at some public companies, we are not aware of evidence that there is an unusual concentration of incompetent or dishonest people in public company boards or management, nor of evidence that there is an unusual concentration of virtue, integrity, and competence in the various shareholder activist institutions. We think the purported benefits of the Commission's proposals are unlikely to be realized, but that in fact they will increase the distraction of management from the operation of their company's business and of boards from the oversight of management. We also believe they are likely to result in more single-issue directors or single-constituency directors instead of directors that act in the best interest of all shareholders.

We appreciate the opportunity to comment on the proposed rules and would be happy to discuss any questions with respect to this letter. Any such questions may be directed to Robert L. Kimball at 214.220.7860.

Faithfully yours,

Vinson & Elkins LLP

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