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August 18, 2009

VIA ELECTRONIC MAIL

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

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

Dear Ms. Murphy:

The Securities and Exchange Commission (the "Commission") recently published Release No. 34-60089 (the "Proposing Release") to propose rules that would require all public companies to include shareholder nominees for election as director in their proxy materials (the "Proxy Access Proposal"). We are writing to raise issues that we believe are of fundamental significance to both our clients and public companies as a whole.

Proposed Rule 14a-11

We understand that the Commission's decision to publish the Proxy Access Proposal was made in response to concerns about the exercise of appropriate oversight of management, focus on shareholder interests, and accountability for decisions regarding issues such as compensation structures and risk management by the boards of directors of public companies.[1] We fully support the Commission's promotion of board accountability and share a commitment to assist our clients in implementing and maintaining good corporate governance practices. We respectfully disagree, however, with the Commission's view that the Proxy Access Proposal is a necessary element for effective corporate governance and have significant concerns about the Commission's proposal to mandate a uniform proxy access process for all public companies.

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1 Proposing Release at p. 7.

The Proxy Access Proposal Ignores Significant Corporate Governance Improvements Implemented by Many Public Companies Since 2003

Since the Commission last proposed a federally-mandated proxy access process in 2003,[2] there have been significant improvements in public company corporate governance practices. Public companies today regularly update their corporate governance standards to reflect the current best practices, the practices of their peer companies, and the concerns expressed by their shareholders. The recent evolution in corporate governance practices is reflected in the following statistics:

- 90% of the company boards of directors surveyed by the Business Roundtable in December 2008 are at least 80% independent;[3]
- 92 of the 100-largest exchange-listed US public companies (as determined by revenue) (the "Top 100 Companies") addressed the issue of service by directors on other public company boards — including 55 that placed a limit on the number of public company boards on which a director may serve — at of the end of fiscal 2007;[4]
- 73 of the Top 100 Companies had a declassified board of directors at the end of fiscal 2007;[5] and
- 88 of the Top 100 Companies had no poison pill provision at the end of fiscal 2007.[6]

Moreover, numerous companies have taken steps to increase their boards of directors' responsiveness to shareholders through the implementation of majority voting standards in the election of directors:

- 66% of the companies in the S&P 500 had adopted a form of majority voting at the end of 2007, up from 16% in February 2006;[7]
- Over 57% of the companies in the Fortune 500 had adopted a form of majority voting at the end of fiscal 2007;[8]

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2 "Security Holder Director Nominations," SEC Release No. 34-48626 (October 14, 2003).

3 Statistics from the "Business Roundtable Corporate Governance Survey Trends" prepared by Business Roundtable, December 2008.

4 Statistics from "2008 Trends in Corporate Governance of the Largest US Public Companies: General Governance Practices" prepared by Shearman & Sterling LLP, 2008.

5 *Id.*

6 *Id.*

7 Statistics from the "Survey of Majority Voting in Director Elections" prepared by Neal Gerber & Eisenberg, November 2007.

- 71 of the Top 100 Companies required directors to be elected by a majority of the votes cast at the end of fiscal 2007;[9] and
- 75% of the company boards of directors surveyed by the Business Roundtable in December 2008 had voluntarily adopted some form of majority voting for directors. [10]

The Proxy Access Proposal does not give proper consideration to these widespread improvements in corporate governance processes. Instead, the Proxy Access Proposal seeks to create a "one-size-fits-all" mandate that fails to differentiate between those companies who have demonstrated good corporate governance practices and those companies that suffer from the issues the Commission proposal intends to address. In this regard, we note that the discussion in the Proposing Release regarding the issues that gave rise to the Proxy Access Proposal does not address why it is appropriate or necessary to mandate proxy access at any particular company, much less all companies that are subject to the Commission's proxy rules.

In its 2003 proposal regarding proxy access,[11] the Commission proposed limiting the mandated proxy access process to those companies who met certain criteria indicating that their corporate governance processes might be ineffective. The inclusion of such a "trigger" on the operation of the mandated proxy access process was intended to limit the disruptive effect of that process to only those companies where certain actions had evidenced the possible appropriateness of proxy access. Consistent with the reasoning expressed by the Commission in 2003, we believe that Commission-mandated proxy access should be effective only upon some "triggering" event, for example:

- Where a shareholder proposal receives majority support and a company does not implement the proposal or take other responsive action; or
- At least one of the company's nominees for the board of directors for whom the company solicited proxies receives "withhold" votes from more than 35% of the votes cast at an annual meeting of shareholders.

The Proxy Access Proposal's Failure to Address a Nominating Shareholder's Lack of State-Law Imposed Fiduciary Duties Jeopardizes the Quality of Director Nominees and Leaves Companies Vulnerable to Interested Shareholder Pressure

A company's directors are subject to state law fiduciary duties and their decisions on behalf of the company must be made in the best interest of the company and its shareholders –

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8 *Id.*

9 Statistics from "2008 Trends in Corporate Governance," *supra* n. 4.

10 Statistics from the "Business Roundtable Corporate Governance Survey Trends," *supra* n. 3.

11 SEC Release No. 34-48626.

including the selection of nominees to the board of directors. The Proposing Release discusses fiduciary duties and notes that, once a nominee is elected to a company's board of directors, the new director will have state-law fiduciary duties and owe the same duty to the company as any other director on the board.[12] However, the Proposing Release does not adequately address the fact that a nominating shareholder or shareholder group would not be subject to fiduciary duties in selecting its director nominee.

Any Commission-mandated proxy access process should include safeguards to ensure that, once elected, the shareholder nominee will discharge his or her fiduciary duties to all shareholders. In particular, any Commission-mandated proxy access process should:

- *Preserve the nominating committee's vital role in maintaining the quality and diversity of the board as a whole.* Boards of directors and their standing nominating committees are required to consider all qualifications of all nominees in determining the appropriate manner to form the full board and populate all board committees.[13] Under the Proxy Access Proposal, a nominating shareholder or shareholder group could propose a director nominee outside the review of the nominating committee and without regard to either the nominee's particular experience or skills, the balance of experience and skills on the board of directors as a whole, or any company- or industry-specific director skills that are important to the growth and success of the company. The preservation of the role of the nominating committee in the proxy access process requires, at a minimum, that shareholder nominees have an obligation, if requested, to complete standard director questionnaires and submit to background checks and other procedures customarily completed by a company's nominating committee for potential nominees. Any nominating shareholder should also be required to represent (and provide adequate supporting information to demonstrate) that each nominee satisfies any additional non-discriminatory director qualification standards set forth in a company's governing documents.

- *Require that any nominee is independent of the nominating shareholder or shareholder group.* The Proposing Release indicates clearly that it is not intended that proposed Rule 14a-11 be used by those shareholders who are seeking to affect control of a company. Consistent with this intent, Rule 14a-11 should provide that the nominee may not be (i) a nominating shareholder, (ii) a member of the immediate family of any nominating shareholder or member of a shareholder group, or (iii) any employee of a nominating shareholder or member of a shareholder group. Requiring the nominee to be independent of the nominating shareholder or shareholder group would make it less likely that Rule 14a-11 will be used by those shareholders who are seeking to affect control of the company.

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12 Proposing Release at p. 69.

13 The Commission has recognized the significance of a complete evaluation of these characteristics in its recent proposals seeking to require enhanced disclosure regarding nominees for director. *See* "Proxy Disclosure and Solicitation Enhancements," SEC Release No. 34-60280 (July 10, 2009).

- *Provide shareholders with sufficient information relating to all director nominees to allow them to make an informed decision with their company vote.* Given the nominating shareholder's lack of fiduciary duties, any Commission-mandated proxy access process should require sufficient disclosure for shareholders to make an informed voting decision regarding all nominees for director. In our view, the minimal disclosure regarding nominating shareholders and their director nominees under the Proxy Access Proposal would not provide shareholders with sufficient information to make an informed voting decision. Any Commission-mandated proxy access process should also require the following disclosure regarding nominating shareholders and shareholder nominees:

  - The same information regarding shareholder nominees as would be required for company nominees under the Commission's recent proposals seeking to require enhanced disclosure regarding nominees for director;[14]
  - Complete stock ownership information, including any stock lending, hedge, derivative, synthetic, or similar securities in the company, for the past three years in order to allow other shareholders to assess the nominating shareholder's interests in the long-term health of the company;
  - Any direct or indirect relationship (whether familial, employment, or other) between the nominating shareholder and the director nominee;
  - Any direct or indirect material interest of the nominating shareholder or director nominee in any transaction or series of transactions in which the company is a participant, including without limitation, any interest that could reasonably be viewed to be a conflict of interest under applicable state law or a company's code of conduct;
  - A statement that there are no material misstatements or omissions in the materials submitted by the nominating shareholder for inclusion in the company's proxy statement;
  - The number of times in the last three years that the nominating shareholder has proposed director nominees under the Commission-mandated proxy access process to other companies, the names of those companies, and the outcomes of those elections;
  - A completed standard company director and officer questionnaire to aid the company's ability to duly vet the nominee prior to his or her inclusion in the company's proxy statement; and
  - A statement that the director nominee meets all non-discriminatory director qualifications that are set forth in the company's governing documents (*e.g.*, US citizenship or specific licensing or national security requirements for companies in regulated industries) and the company's board service guidelines (*e.g.*, mandatory retirement age, stock ownership requirements, and the maximum number of boards of directors on which a director may serve).

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14 *Id.*

The Proxy Access Proposal Fails to Recognize the Timing Constraints Faced by Public Companies with Advance Notice Bylaws

The Proxy Access Proposal sets forth specific deadlines applicable to the Proxy Access Proposal and states that a shareholder must file a notice on Schedule 14N of an intent to require a company to include a shareholder's nominee in the company's proxy materials by either (a) the date specified in the company's advance notice bylaw provisions, or (b) where there is no such provision, no later than 120 calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting.

As a result of the Delaware Chancery Court's decision in *JANA Master Fund, Ltd. v. CNET Networks, Inc.*,[15] many public companies have amended their bylaws to provide that shareholders must submit director nominees 90 to 120 days prior to the first anniversary of the previous year's meeting, which would equate to 50 to 80 days prior to the date that the company filed its definitive proxy materials for the previous year's meeting (assuming the proxy was filed 40 days before the annual meeting to comply with the Commission's notice and access delivery procedures). Companies that adopted advance notice bylaws have specifically chosen to time the submission of director nominees to the date of the prior year's annual meeting, rather than to the filing date of definitive proxy materials, in response to the Delaware Chancery Court's statement that it could not find "a single example of a permissible advance notice bylaw that has set the notice required by reference to the release of the company's proxy statement."[16]

Due to the timing requirements for shareholder nominations under the Proxy Access Proposal, companies that have adopted advance notice bylaws in response to the *JANA* decision will likely be precluded from seeking no-action relief to exclude a shareholder nominee under proposed Rule 14a-11. This is a result of the Proxy Access Proposal's no-action request procedures which appear to require at least 120 days between submission of a shareholder nominee and the filing of definitive proxy materials. In particular, the Proxy Access Proposal requires that:

- A company notify nominating shareholders of any determination not to include the nominee(s) within 14 days of receipt of the notice on Schedule 14N and provide nominating shareholders an additional 14 days to cure any procedural defects;
- No-action requests be submitted 80 days prior to filing a definitive proxy statement; and
- A company provide nominating shareholders with notice as to exclusion of the shareholder nominees at least 30 days before filing its definitive proxy statement.

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15 *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, Civil Action No. 3447-CC (Del. Ch. Mar. 13, 2008).

16 *Id.* at p. 15.

We believe that it would be extremely difficult for a company to avail itself of the no-action process if it receives shareholder nominees 50 to 80 days prior to the date that the company filed its definitive proxy materials for the previous year's annual meeting.

We also believe that the interplay between the Proxy Access Proposal and advance notice bylaws adopted by companies in the wake of the *JANA* decision would cause great uncertainty with respect to the proxy solicitation process. In contrast, the deadline for submitting a Rule 14a-8 proposal is 120 calendar days before the date the company's proxy statement was released to shareholders in connection with the previous year's annual meeting. Therefore, to ensure that companies that have acted pursuant to the *JANA* decision have sufficient time to comply with the procedures for excluding a shareholder director nominee that does not comply with the requirements of proposed Rule 14a-11, we recommend that the Commission provide that the deadline for submitting a nominee pursuant to Rule 14a-11 be universally the same as the deadline for submitting a proposal pursuant to Rule 14a-8(d), regardless of whether the company has an advance notice bylaw.

The Proxy Access Proposal Leaves Companies Vulnerable to a Change in Control by Allowing Shareholders to Nominate up to 25% of a Board of Directors and to Participate in More Than One Nominating Group

As discussed in the Proposing Release, it is not intended that proposed Rule 14a-11 be used by shareholders seeking to affect control of the issuer. The Proxy Access Proposal, however, would allow a shareholder owning as little as 1% of a company to nominate candidates who would comprise one-fourth of a company's board of directors.

We also note that the integration of multiple new directors each year would be disruptive to companies and, potentially, to the operation and membership of a board of director's standing committees. Further, as the Proxy Access Proposal does not require a nominating shareholder to certify that a nominee meets any additional standards aside from the applicable exchange's director independence standards (for example, qualifying as an "outside director" under the requirements of Section 162(m) of the Internal Revenue Code of 1986, and therefore being eligible to serve on the compensation committee), proposed Rule 14a-11 may decrease the number of qualified directors available to populate a company's committees.

As such, it is our view that Rule 14a-11 should permit each nominating shareholder or shareholder group to nominate only one director candidate, rather than up to 25% of the board of directors as currently proposed. In addition, we recommend that the Commission specifically prohibit a shareholder from being a member of more than one "group" that is nominating director candidates.

Proposed Revisions to Rule 14a-8(i)(8)

In 2007, the Commission revised Rule 14a-8(i)(8) to expressly permit the exclusion of a proposal that would result in an immediate election contest or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings.[17] The Commission is now seeking comments on proposed revisions to Rule 14a-8(i)(8) to require companies to include in company proxy materials proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a-11.

The Language in the Proposed Amendment to Rule 14a-8(i)(8) Is Not Consistent with the Proposing Release's Discussion of the Intended Operation of that Proposed Amendment

The Commission proposes to revise Rule 14a-8(i)(8) to state:

"(8) Director elections: If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Nominates a specific individual for election to the board of directors, other than pursuant to §240.14a-11, an applicable state law provision, or the company's governing documents; or

(v) Otherwise could affect the outcome of the upcoming election of directors."

The discussion in the Proposing Release states that the revisions to Rule 14a-8(i)(8) would require companies to include in company proxy materials proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a-11.[18] However, this discussion of the application of the proposed amendments to Rule 14a-8(i)(8) to shareholder proposals that would limit the operation of proposed Rule 14a-11 is not reflected in the language quoted above (*i.e.*, the language is silent on the ability of a shareholder proposal to expand or restrict any Commission-mandated proxy access process set forth in Rule 14a-11). To provide certainty regarding the operation of Rule

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17 "Shareholder Proposals Relating to the Election of Directors," SEC Release 34-56913 (December 6, 2007).

18 *See* Proposing Release at p. 122.

14a-8(i)(8), the language of that rule should address specifically its interaction with any Commission-mandated proxy access process.

Moreover, the proposed codification of the Division of Corporation Finance's (the "Division's") application of existing Rule 14a-8(i)(8) does not reflect accurately the Division's positions in one fundamental manner that would result in an inappropriate and unintended expansion of Rule 14a-8(i)(8). Specifically, proposed Rule 14a-8(i)(8) would permit a company to exclude a proposal that "nominates a specific individual for election to the board of directors, other than pursuant to §240.14a-11, an applicable state law provision, or the company's governing documents." Should the Commission determine that it is appropriate to amend Rule 14a-8(i)(8), it should revise this language, as it focuses improperly on a shareholder's right to *nominate* a candidate for election to the board of directors, rather than a shareholder's right to have a nominated candidate *included in the company's proxy materials*.

In this regard, the Commission's 2007 proposing release noted the Division's view that a shareholder proposal could be excluded under Rule 14a-8(i)(8) if it could have the effect of, among others, "requiring companies to include shareholder nominees for director in the companies' proxy materials or otherwise resulting in a solicitation on behalf of shareholder nominees in opposition to management-chosen nominees."[19] The language in the proposed amendment to Rule 14a-8(i)(8) would permit a company to exclude a shareholder proposal where a shareholder "[n]ominates a specific individual for election to the board of directors, other than pursuant to . . . an applicable state law provision[] or the company's governing documents." This proposed language is a significant expansion of the staff's longstanding position, as it premises exclusion improperly upon whether or not the *nomination* is pursuant to state law or a company's governing documents, rather than upon whether or not *the inclusion of that nominee* in the company's proxy materials is pursuant to state law or a company's governing documents. As the Commission notes in the Proposing Release, it is common for state law and companies' governing documents to provide shareholders with the right to nominate candidates for election to the board of directors – it is the inclusion of those nominees in a company's proxy materials that is generally beyond the rights provided to shareholders by state law or a company's governing documents.

If Rule 14a-8(i)(8) is amended as proposed, the language of proposed Rule 14a-8(i)(8) should be revised to recognize this fundamental difference and require the inclusion of a shareholder nominee for the election of directors only where the inclusion of that nominee in the company's proxy materials is pursuant to a Commission-mandated proxy access process, an applicable state law requirement to include that nominee in the company's proxy materials, or a provision in the company's governing documents that requires the inclusion of that nominee in the company's proxy materials.

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[19] *See* SEC Release 34-56913 at p. 19, fn. 56.

Revised Rule 14a-8(i)(8) Should Not Limit the Ability of a Company's Shareholders to Establish a Proxy Access Process at Their Company – Revised Rule 14a-8(i)(8) Should Allow Shareholders to Propose Both Expansions to, or Restrictions on, any Commission-Mandated Proxy Access Process

The Proposing Release indicates that proposed Rule 14a-11 is premised upon the state law right of a shareholder to nominate a candidate for election as a director. Despite this premise, the Commission's proposed amendment to Rule 14a-8(i)(8) would not allow shareholders to determine the appropriate level of proxy access for those nominees at their companies – whether that level of proxy access would be more or less restrictive than under proposed Rule 14a-11 – through the shareholder proposal process. We believe that any Commission-mandated proxy access process should provide shareholders with complete authority regarding the nature of proxy access at their companies and, as such, the requirement to include those proposals should not be limited to only those proposals that would expand a Commission-mandated proxy access process.

Revised Rule 14a-8(i)(8) Should Not Require the Inclusion of Proposals that Seek to Allow a Change In Control Outside of the Procedures Currently Available for Election Contests

Should the Commission require companies to include proxy access shareholder proposals, as well as adopt a Commission-mandated proxy access process, the Commission should specifically permit companies to exclude from their proxy materials any shareholder proposal that would create a proxy access process that could result in the election of shareholder nominees to more than a majority of a company's board of directors. Such limitation to Rule 14a-8(i)(8) would be consistent with the stated purpose of proposed Rule 14a-11, which would not apply where shareholders are seeking to change the control of the issuer, and with the Commission's stated view that shareholders who are seeking such a change should continue to use the procedures currently available for election contests.[20]

The Commission Should Provide Clear Guidance Regarding the Operation of Revised Rule 14a-8(i)(8), Particularly With Regard to its Interaction with Proposed Rule 14a-11 and Other Provisions in Rule 14a-8

The interaction of proposed Rule 14a-11 and a company-specific proxy access process established pursuant to a shareholder proposal under Rule 14a-8 is not clear from the Proposing Release. If the Commission amends Rule 14a-8(i)(8), it should include clear guidance that provides each company with certainty as to its compliance with Rule 14a-11 where there has been a company-specific proxy access process adopted at that company.

A Commission requirement that companies must include proxy access shareholder proposals, particularly where a company has an existing proxy access process (either pursuant to

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[20] *See* Proposing Release at p. 32.

state law or a Commission-mandated proxy access process), would subject companies to annual uncertainty as to the specific nature of their director-election process. If the Commission adopts proposed Rule 14a-11 and/or a company adopts a company-specific proxy access process, it would be inappropriately disruptive to require companies to include shareholder proposals that seek incremental changes to that process. Accordingly, any Rule 14a-8 requirement to include shareholder proposals relating to the inclusion of shareholder nominees for the election of directors should be accompanied by clear guidance from the Commission regarding the application of the "substantially implemented" standard in Rule 14a-8(i)(10). Further, it is our view that the "substantially implemented" standard should appropriately balance a company's proxy access process against the potential disruption of yearly shareholder proxy access proposals.

Revisions to the Procedural Requirements of Rule 14a-8 Should Be Adopted as a Procedural Safeguard to Ensure Only Shareholders Concerned in the Long-Term Interest of a Company and its Shareholders Are Eligible to Use Any Proxy Access Process

A proxy access shareholder proposal will impact a company's long-term operations significantly. We believe that the existing $2,000 standard fails to require an interest in the company that is commensurate with this potential impact. As such, the ownership of a shareholder that may require the company to include such a proposal should be significantly beyond the ownership standard for other proposals under Rule 14a-8. It is our view that the ownership standard for a proxy access proposal under Rule 14a-8(i)(8) should be at least 1% of the company's voting stock. Although not the subject of a request for comment in the Proposing Release, we also recommend that the Commission consider the need to increase the *de minimis* $2,000 standard for all shareholder proposals.

A Shareholder Proposing a Proxy Access Process Under Rule 14a-8 Should be Required to Provide Additional Information to Shareholders to Ensure a Fully Informed Shareholder Vote

The expense of increased proxy disclosure merits the continued limitation of supporting statements to 500 words. However, the range of information that is material to a shareholder's vote with regard to a shareholder proposal relating to proxy access process is beyond that currently provided in a shareholder proponent's statement in support of the proposal and a company's statement in opposition. Specifically, it is necessary to an informed shareholder vote that a shareholder proponent of a proxy access proposal be required to include information regarding its long-term interest in the company and its intentions regarding the shareholder proposal. In the Proposing Release, the Commission indicates that disclosure only at the time shareholders are asked to vote with regard to a specific shareholder nominee would be sufficient. We disagree. Disclosure at that later time would relate to the election of particular directors only; it would not provide shareholders with the information necessary to make an informed voting decision regarding a particular shareholder proposal relating to a proxy access process and its potential effect. If the Commission requires the inclusion of shareholder proposals relating to a proxy access process, the failure to mandate additional disclosure regarding the shareholder

proponent would require companies to present shareholders with a voting decision regarding a proposal of fundamental significance without providing them with all of the information that is material to that voting decision.

Conclusion

Thank you for the opportunity to comment on the Commission's Proxy Access Proposal and the proposed revisions to Rule 14a-8.

Sincerely,

/s/ O'Melveny & Myers LLP
O'Melveny & Myers LLP

cc: Hon. Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission
Hon. Kathleen L. Casey, Commissioner
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance