August 17, 2009

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 Nos. 33-9046, 34-60089, IC-28765 (the "Proposing Release")
Proposed Rule: Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

We are corporate secretaries and governance professionals writing on behalf of our respective companies[1]. Together, our companies represent over $1.2 trillion in market capitalization as of July 31, 2009 and over $880 billion in revenues for fiscal 2008[2]. We respectfully submit these comments for the Commission's consideration during its further review of the proposed rule on Facilitating Shareholder Director Nominations.

Introduction

We, our directors and our companies take very seriously our responsibilities to act in the best interests of, and be accountable to, all shareholders. Our companies:

- Have boards with well over a majority of independent directors.
- Receive shareholder proposals under Rule 14a-8 and actively engage with the proponents to find common ground where possible.
- Routinely adopt corporate governance reforms—both those proposed by our shareholders and by our boards.
- Have nominating or governance committees[3] composed entirely of independent directors. These committees take very seriously their responsibilities to nominate boards of diverse directors with the highest level of integrity focused on accountability to shareholders; the skills, expertise, experience and judgment necessary to guide our corporations; and the ability, objectivity, commitment and inclination to work in a collegial environment for the benefit of all shareholders.

We can attest that being a director at any of our companies is difficult and demanding. We know that board effectiveness depends upon trust among directors. This trust fosters openness, candor, healthy debate, constructive skepticism, and differences of opinion, all to the benefit of management and shareholders.

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[1] As some of our companies may submit individual comment letters on the Proposing Release, this letter is meant to supplement those letters. While such individual letters may include comments that differ in some respects from those expressed in this letter, we generally endorse the basic concepts presented herein.

[2] Each company's fiscal year may start and end on different dates than the others.

[3] For convenience, throughout this letter we refer generically to board nominating committees and corporate governance committees as "nominating committees."

From our perspective, the mandatory, universal "proxy access" system proposed in the Proposing Release is unnecessary at this time. For the reasons we provide below, we:

- Support amending Rule 14a-8(i)(8) to permit shareholder proposals relating to director nominations and elections, including proxy access.
- Urge the Commission to defer adopting the federal proxy access system embodied in proposed Rule 14a-11.
- Believe that the Commission, should it nevertheless determine to adopt Rule 14a-11, must make substantial changes to the proposed rule for it to be workable and to appropriately balance the costs and benefits.

General Discussion on the Proposed Reforms

We support efforts to remove federal impediments to the rights of shareholders created under state law.

The Proposing Release is clear: one of the Commission's primary objectives is to remove federal impediments to state law rights to nominate directors.[4] We agree that federal law should not adversely affect the state law rights of shareholders. Accordingly, we support the proposed amendments to Rule 14a-8(i)(8) to remove those federal impediments. However, we believe that proposed Rule 14a-11 goes far beyond removing federal impediments to state law rights in that, among other things, it unnecessarily curtails state law shareholder rights to adopt company-specific proxy access by-laws.

Recently, several states have expressly addressed proxy access, including Delaware[5] and North Dakota[6]. We anticipate that many states that generally follow the Model Business Corporation Act also will similarly amend their statutes to facilitate proxy access. Even jurisdictions that do not have express enabling provisions allow for the adoption of access by-laws via more general enabling provisions.[7] Proposed Rule 14a-11 would impose a specific proxy access structure on every public company, regardless of its state of incorporation or its specific circumstances and priorities.

In sum, we believe that the adoption of the proposed amendments to Rule 14a-8(i)(8) would sufficiently remove existing federal impediments to allowing corporations and shareholders the proper level of self-determination.

Shareholders currently have a significant voice in the governance of corporations.

The Proposing Release also makes clear: the Commission believes shareholders should have a "greater voice" in the director nomination process specifically and corporate governance generally.[8] In

[4] Proposing Release at p. 10.

[5] Section 112 of the Delaware General Corporation Law expressly allows companies and shareholders to adopt their own company-specific access procedures.

[6] Section 10-35-08 of North Dakota's Publicly Traded Corporations Act expressly allows for proxy access for shareholders owning a 5% voting stake for two years, which public companies incorporated in North Dakota must opt into.

[7] For example, under Section 601(b) of New York's Business Corporation Law ("BCL") by-laws can contain any provision relating to the rights or powers of shareholders not inconsistent with the BCL, state law or the certificate of incorporation.

[8] Proposing Release at p. 27.

our experience, shareholders do have a significant voice over a corporation's corporate governance; their concerns are heard, and they can and do effect change.

Recent history provides numerous examples of governance changes promoted by retail and institutional shareholders through dialogue with companies, including the Rule 14a-8 shareholder proposal process. Some of the most significant recent examples include widespread:

- Elimination of classified boards, super-majority voting requirements, "poison pills" and other anti-takeover measures.
- Appointment of independent board chairmen and/or lead or presiding directors (with these structures varying to suit individual company circumstances).
- Adoption of majority voting in uncontested director elections.

Companies across industries and of varied sizes and histories have adopted these and other corporate governance changes within a relatively short period at shareholder urging. Further, these changes emerged through existing communication avenues available to shareholders. For each of the examples listed above, some shareholders urged the Commission to intervene to accelerate the pace of change. We believe that the Commission's restraint ultimately benefitted the marketplace, allowing generally-accepted practices to develop over a reasonable time period.

As to whether shareholders currently have an adequate voice in director elections, we see that directors who are viewed as unresponsive increasingly face:

- "Just Vote No" and "Withhold Vote" campaigns, used effectively by both small retail and large institutional investors.
- Proxy advisory services with significant market share and influence recommending "Withhold" or "Against" votes.
- Heightened media scrutiny.
- Public protests.
- Failed elections.

In addition, the recent amendments to New York Stock Exchange ("NYSE") Rule 452 (eliminating broker discretionary voting in uncontested director elections)[9], other proxy reforms proposed by the Commission[10], and shareholders' increased use of the Internet in "Just Vote No" campaigns will increase the ease and effectiveness of shareholder communications.

The "private ordering" approach will be the most effective way for companies and their shareholders to devise proxy access solutions for diverse circumstances at different companies.

A universal federal proxy access right could have a serious unintended negative consequence: increased, but unproductive, proxy contests. Proxy contests should not be undertaken lightly. They are costly and disruptive to companies. They pose threats of divided boards and narrow or single-interest directors. Shareholders could misuse proxy contests to seek corporate action with a short-term focus. Precisely for these reasons, the Commission's previous proxy access proposals elicited cautions that the unbridled right of proxy access should contain substantial triggers or thresholds and sufficient disclosure. The cautions are no less relevant now.

[9] SEC Release No. 34-60215; File No. SR-NYSE-2006-92 (Jul. 1, 2009).

[10] SEC Release Nos. 33-9052; 34-60280; IC-28817; File No. S7-13-09 (Jul. 10, 2009).

Depending on a company's specific circumstances, the board and the shareholders may feel more or less strongly about the need for, and contours of, proxy access. Accordingly, companies, boards and shareholders should be allowed to determine the proxy access regime at their companies (*i.e.*, "private ordering"). Removing federal impediments to state law rights to nominate directors (by adopting amendments to Rule 14a-8(i)(8)) will, over time, show the private ordering approach to:

- Be the most effective way for companies and their boards and shareholders to resolve issues related to proxy access.
- Allow individual companies and their boards and shareholders to adapt proxy access to their changing needs and circumstances.
- Avoid unintended negative consequences, including distraction from critical business and strategic priorities, likely to result from a "one size fits all" approach.

The Commission's "eProxy" rules significantly lowered the potential costs to shareholders wishing to run proxy contests.

One of the stated potential benefits of proxy access in the Proposing Release is the "Reduction in Costs Related to Shareholder Nominations." The Proposing Release states: "The costs can make it prohibitively expensive for shareholders to exercise their state law rights to nominate and elect directors."[11] The Proposing Release includes an estimate of the average cost of a proxy contest.[12] However, this estimate does not take into account Rule 14a-16, which allows shareholders to use a "notice and access" model to deliver proxy materials (also known as "eProxy"). Notice and access dramatically lowers the costs to shareholders of running a proxy contest.[13] Because notice and access has only been in effect since 2007, companies and shareholders alike are still learning how best to make use of it.[14] The Commission should wait to see if eProxy relieves shareholders of the high cost of proxy contests.

Practical Considerations for the Proposed New Rule 14a-11

For the reasons discussed above, we do not support the Commission's adoption of a mandatory, universal proxy access system at this time. However, if the Commission nevertheless decides to adopt proposed Rule 14a-11, we have the following concerns with the rule as proposed.

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[11] Proposing Release at p. 183.

[12] Proposing Release at pp. 184-185.

[13] The Proposing Release does, however, note that notice and access could help mitigate the *company's* costs resulting from the use of proxy access by a shareholder. See footnote 365 to the Proposing Release at p. 195.

[14] Further, proposed modifications to eProxy, if adopted, would likely make its use easier and more prevalent than has been the case to date.

The proposed share ownership requirements do not balance the Commission's stated goal to give shareholders the "ability to participate more fully in the nomination and election process against the potential cost and disruption to companies."[15]

The minimum share ownership threshold for large accelerated filers should be 5% for shareholders acting alone and 10%, aggregated, for shareholders acting in concert.

Under proposed Rule 14a-11, the ownership thresholds for a shareholder to qualify to name a director nominee for inclusion in a company's proxy statement would be, depending on the company's market capitalization, 1%, 3%, or 5% of the outstanding shares eligible to vote. In the Proposing Release, the Commission notes that it intends these thresholds to ensure that at least one shareholder at each company would qualify to use Rule 14a-11 without forming a group.[16] However, because of the cost and disruption to companies of a contested election, we believe the better approach is to use thresholds designed to ensure a minimum level of broad-based support for Rule 14a-11 nominees. Accordingly, we recommend that the minimum ownership percentage thresholds for large accelerated filers be raised to 5% for shareholders acting alone and 10% for shareholders acting in concert. These higher thresholds would ensure that a reasonably significant, but still attainable, percentage of shareholders support a Rule 14a-11 nominee and would protect all shareholders from the costs associated with a Rule 14a-11 proxy contest initiated by a small percentage of shareholders with little chance of actual success.[17]

The minimum required share holding period should be two or three years.

The Proposing Release is clear: the Commission desires that "only holders of a significant, long-term interest in a company be able to rely on Rule 14a-11."[18] We agree. Nonetheless, proposed Rule 14a-11 would require that nominating shareholders have held the minimum ownership position for only one year. We believe that the proposed one-year holding period is too short to achieve our common goal and that a two- or three-year holding period would be more appropriate.

The minimum share ownership should be of a net long position. Nominating shareholders should disclose <u>all</u> positions.

The Proposing Release sets forth the Commission's desire that Rule 14a-11 be available to shareholders with a long-term interest in the company. We agree. However, proposed Rule 14a-11 would require only that nominating shareholders disclose the amount of voting securities owned and ownership duration.

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[15] Proposing Release at p. 42.

[16] Proposing Release at pp. 45-48.

[17] A company will incur significant costs even for a nomination by an eligible shareholder of a nominee who has little chance of gaining meaningful support in an election and who the company chooses not to actively campaign against. These costs include time spent by the board and management to examine the eligibility of both the nominee and the nominating shareholder, time spent by the board and management in potential meetings with the nominee and the nominating shareholder, and the time and printing and distribution costs associated with including the required information in the proxy statement and proxy card.

[18] Proposing Release at pp. 42-43.

As the Commission's recent action against Perry Corp.[19] illustrates, shareholders can and have amassed significant voting stakes in companies while simultaneously hedging the financial exposure from their ownership in order to influence specific shareholder votes. We believe that in a Rule 14a-11 contest, a nominating shareholder's hedged positions will be material to the company's other shareholders to assess the nominating shareholder's interest in the company when making voting decisions on all director nominees. The Commission should require that each nominating shareholder:

- Represent that, during the required holding period, it has not hedged or otherwise divested its economic interest in the requisite shares.
- Disclose its total position—both short and long—in all forms of the company's securities—both debt and equity.
- Disclose any arrangement that affects the nominating shareholder's voting or economic rights.

Nominating shareholders should hold the minimum shareholding for a reasonable period after they file a Schedule 14N.

Proposed Rule 14a-11 would require nominating shareholders to state their intent to hold the shares through the date of the annual meeting at which the company's shareholders will elect the directors. However, the proposed rule permits nominating shareholders to divest their economic interest once the director they nominated begins his or her term. We believe proposed Rule 14a-11 does not sufficiently protect the company and its shareholders because it enables nominating shareholders to nominate and achieve the election of "special interest" directors, then sell their shares (for any number of reasons) and just walk away from the company. Accordingly, Rule 14a-11 should require nominating shareholders to hold their shares for a minimum period beyond the election of their nominee. We recommend that the period be the initial term of service of the director (*i.e.*, one year for a director elected annually, or three years for a director on a classified board). Such a requirement would discourage the nomination of special interest directors focused on single issues rather than the company's broader, long-term interests.

The "first in" rule has significant shortcomings that need to be addressed.

When multiple nominations can claim "first in" status, the largest shareholder should have priority.

Proposed Rule 14a-11 would give priority to nominating shareholders according to the order in which nominations are received by companies. If there is no defined start date for the Rule 14a-11 nomination period, shareholders will be able send in nominations at a time arbitrarily far in advance of the meeting to "lock in" their nomination right, which may not be in the best interests of all shareholders. Even if there is a defined start date for the nomination period, the "first in" priority approach may still result in the receipt of multiple nominations on the start date. In that case, it may be impossible for a company to determine which nomination was "first in" for purposes of Rule 14a-11. The Proposing Release provides no guidance for companies to determine priority in this very likely situation. To address this significant issue, the Commission should revert to the priority mechanism included in the Commission's 2003 proxy access proposals, which would have granted priority to the largest shareholder (aggregated for shareholders acting in concert) to submit an eligible nomination.[20]

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[19] *In the Matter of Perry Corp.*, Securities Exchange Act of 1934 Release No. 60351; Investment Advisers Act of 1940 Release No. 2907; Administrative Proceeding File No. 3-13561 (Jul. 21, 2009).

[20] SEC Release Nos. 34-48301; IC-26145; File No. S7-14-03 (Oct. 8, 2003).

If the "first in" nomination is later withdrawn or excluded after the deadline, the "second in" cannot step into its place.

Furthermore, proposed Rule 14a-11 is not sufficiently clear as to whether the withdrawal or exclusion of the "first in" nomination after the submission deadline will cause the "second in" nomination, which would otherwise be ineligible, to later become eligible. We believe that a withdrawal or exclusion of a "first in" nomination after the deadline should not then allow the "second in" nomination to become eligible for "first in" status under Rule 14a-11. As a purely practical matter, the timing provisions of the rule would not allow for multiple successive elimination processes to occur in a single proxy season – once a company has gone through the process of confirming with the Commission staff that a nominee can be excluded, there would be no time to evaluate and, if necessary, raise eligibility issues with the Commission about the next candidate. Companies need clarity as to the universe of potentially eligible shareholders by the Rule 14a-11 nomination deadline. If adopted, Rule 14a-11 should explicitly clarify this point.

Absence of a role for the board nominating committee presents significant concerns.

The Proposing Release explains that the Commission's "decision not to include triggering events in the current proposal reflects our concern that the federal proxy rules may be impeding the exercise of shareholders' ability under state law to nominate directors at all companies, not just those with demonstrated governance issues," and states that "in light of our concerns about restoring investor confidence to the greatest number of shareholders as quickly as possible, we do not want to add a layer of complexity and delay to the operation of the proposed rule that would frustrate our stated objectives."[21] However, we are concerned that this decision not to include triggering events does not adequately acknowledge the importance of, and misses an opportunity to ensure a constructive role for, the boards' independent nominating committees. Unlike shareholders, these nominating committees have legal fiduciary obligations to the company's shareholders as a whole.

The absence of a prescribed role for the independent nominating committee in a Rule 14a-11 contest could adversely affect the diversity, quality, and overall composition of a company's board and serve to promote special interest directors who may not necessarily represent the best interests of all shareholders. As noted by the NYSE, "[a] nominating/corporate governance committee is central to the effective functioning of the board. New director and board committee nominations are among a board's most important functions. Placing this responsibility in the hands of an independent nominating/corporate governance committee can enhance the independence and quality of nominees."[22] Eliminating a company's board nominating committee from the director selection and nomination process removes the oversight and judgment provided by the members of the committee and eliminates any comprehensive board-endorsed review process for shareholder-nominated director candidates. Rule 14a-11 should require Rule 14a-11 nominees to submit the same information to the company's independent nominating committee as would be required of other director nominees, such as answers to the company's standard director questionnaire form.[23] Without this information, nominating committees and boards cannot evaluate these nominees and determine the appropriate responses. Boards necessarily rely on the

[21] Proposing Release at p. 34.

[22] NYSE Listed Company Manual, commentary on Rule 303A.04.

[23] However, neither the company nor the nominating committee should be liable for proxy statement disclosures made in reliance on information provided by nominating shareholders.

judgment of their nominating committees to make recommendations to the shareholders on the election and qualifications of director nominees.

Nominee qualification requirements and disclosure pose significant workability issues.

The Commission's proposed Rule 14a-11 poses numerous workability issues with respect to the qualification of director candidates under a range of U.S. laws and regulations. In certain cases, a federally mandated prescriptive proxy access rule could result in violation of such laws and regulations that could be avoided if companies were permitted to tailor their proxy access by-laws, including disclosures required of shareholder nominees, to their particular circumstances.

While proposed Rule 14a-11 addresses independence considerations under national securities exchange listing rules, there are a number of other potential legal impediments to electing a director that are not covered by the proposed Rule 14a-11 disclosure requirements. For example, companies are required to conduct a comprehensive analysis of potential competitive concerns prior to nominating a director for election. Under Section 8 of the Clayton Act[24], candidates are prohibited from serving as a director or officer of two competing companies if they exceed certain *de minimis* safe harbors. In order to determine whether a potential director meets the safe harbor, companies conduct, on behalf of the nominating committees of their boards, an antitrust analysis that involves a detailed review of the company's businesses and the businesses where the potential director is an officer or a director.[25] We know that this process alone can easily take from four to eight weeks for each director candidate.

In addition, there are other areas where companies may be required to make certifications regarding its directors, which require similar company-specific analyses, including:

- U.S. government procurement regulations
- Department of Defense facility security clearance procedures
- Department of State export licensing certification requirements
- Federal Communication Commission rules
- Bank holding company laws
- Financial institution interlocks[26]

These regulatory compliance reviews are time-consuming undertakings that do not fit within the timeframe contemplated under proposed Rule 14a-11. In order to allow for appropriate regulatory review to avoid potential violations of law, we believe each company needs to be allowed to craft specific timing, disclosure, and certification requirements that will address legal requirements applicable to that company's directors.

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[24] Clayton Antitrust Act of 1914, 15 U.S.C. § 8.

[25] Specifically, this process may involve the completion of questionnaires by the potential director; gathering information with respect to the revenues in the competing businesses; quantifying any potential revenue overlap areas; working with company counsel of each of the businesses with which the potential director nominee is associated to gather corresponding information for each of those businesses; and aggregating and compiling the information for analysis by antitrust counsel.

[26] *E.g.*, compliance with the Depository Institution Management Interlocks Act of 1978, 12 U.S.C. § 3201 et seq.

The proposed timing and advance notice requirements are inadequate to maintain the integrity of the nomination process.

Based on our experience, we believe proposed Rule 14a-11 does not allow adequate time for companies to review and evaluate Schedule 14N and to challenge the inclusion of shareholder nominees, where appropriate.[27]

The rules should establish a uniform federal requirement providing a minimum of 150 days prior to the date of the prior year's proxy statement for submission of Schedule 14N.

Proposed Rule 14a-11 would require a nominating shareholder to provide notice to the company on Schedule 14N by the date specified in the company's advance notice by-law provision or, where no such provision is in place, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting. The procedure established by the proposed rules for companies to accept or challenge the inclusion of the shareholder nominees in their proxy materials based on compliance with the eligibility and procedural requirements (the "determination procedure") would be initiated by the filing of Schedule 14N and terminate 30 days prior to the filing of the definitive proxy, when the company would have to notify the shareholder of its final determination whether to include the nominees.

For the benefit of all shareholders, the determination procedure timeline should allow the company to perform the due diligence required to evaluate seriously the qualifications of a nominee, have informational discussions with the nominating shareholders and the nominee, seek Commission staff guidance, and prepare, print and distribute the proxy materials. Based on our first-hand experience with this process, we believe a minimum period of 150 days prior to the date of the distribution of the proxy materials for the preceding year is needed to allow the company's management and board time to review and evaluate the shareholder nominees, receive background information from the nominee, discuss the nominee's qualifications with the nominating shareholders, the nominating committee and the board, and prepare submissions to the Commission where needed; to allow time for the Commission to respond to a notice of intent to exclude a candidate; and to allow the company to prepare and distribute proxy materials.

The 150-day period should include a minimum 30-day period for the company to notify the nominating shareholders that eligibility requirements have not been met. The proposed 14-day period for this notification would not allow time for thoughtful review and investigation of the eligibility of the nominating shareholders and the nominee, including dialogue with the nominating shareholders and the nominee where needed.

The rules must provide a beginning date for submission of Schedule 14N.

We believe the period for submission of Schedule 14N to the company should be limited as to the first date for submission as well as the last date, thereby creating a "window period" rather than simply a deadline for submission. The limit on the first date for submission is necessary to: (i) avoid turning "proxy season" into a year-round event; (ii) clarify that a company is not required to treat late submissions from the prior year as submissions for the current year; and (iii) allow the company to have

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[27] In 2006, the Commission's Advisory Committee on Smaller Public Companies urged the Commission to "field test" proposed rules, a step which we recommend the Commission take before finalizing Rule 14a-11. *See*, "Final Report of the Advisory Committee on Smaller Public Companies to the United States Securities and Exchange Commission" (Apr. 23, 2006), at pp. 123 and 129.

adequate controls for determining the sequence of submissions. The rules also need to establish or allow companies to adopt ordering rules to determine priority where more than one Schedule 14N is received on the same date.[28]

A company's advance notice by-law is not an appropriate reference for determining the deadline for submitting Schedule 14N.

The 150-day minimum notice period should apply uniformly because we believe advance notice by-law provisions are not an appropriate standard to govern the timing of submission under proposed Rule 14a-11. While companies' advance notice by-laws vary, they usually provide for a notice period shorter than the 120 days prior to the prior year's proxy statement date, due to state law restrictions, that would be the default under the proposed rules or the period needed to perform the steps in the determination procedure. These by-laws are generally understood to provide a framework for shareholders to propose business or nominees outside of the company proxy materials[29]; accordingly, they are typically drafted to require less notice than proposals submitted for inclusion in the company proxy under Rule 14a-8 since management does not need the additional time needed to prepare, print, and distribute the proxy material. It is not unusual for advance notice provisions to require notice only 60 or 90 days prior to the annual meeting. If the final rules include the reference to advance notice provisions to establish the deadline for submission for Schedule 14N, many companies may amend their by-laws to adopt longer advance notice periods, which could pose a problem under state law.

Companies must have flexibility to structure proxy cards and "notices" to minimize the risk of inadvertent shareholder disenfranchisement and miscounting.

Issuers devote many resources to ensuring that shareholders receive timely and clear proxy materials and that shareholder votes are collected and properly counted. However, for myriad reasons, the distribution and vote gathering and counting systems are imperfect. We believe that those imperfections are more likely to disenfranchise retail rather than institutional investors.

For example, "notice and access" can yield great outcomes, including significant cost-savings. However, we are in general agreement that companies are too constrained regarding shareholder education about "notice and access" and that the form of "notice" could be more "user friendly," especially for retail shareholders.

Broker votes accounted for about 19% of votes cast for directors during the 2009 proxy season.[30] The recent amendment to NYSE Rule 452 (eliminating broker discretionary voting in uncontested director elections) will further change the voting process for future director elections. Retail shareholders who previously relied on their brokers to vote their shares may not realize that the rule has changed. Consequently, we anticipate that the amendment to Rule 452 will make attaining quorum and "majority" votes for directors harder and increase the risk of failed director elections at corporations with majority voting.

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[28] See discussion in the section above entitled, "Practical Considerations for the Proposed New Rule 14a-11—The 'first in' rule has significant shortcomings that need to be addressed."

[29] *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, No. 3447-cc, slip op. at p. 12 (Del. Ch. Mar. 13, 2008).

[30] Broadridge Financial Solutions, Inc., "2009 Proxy Season: Key Statistics & Performance Ratings," at p. 3 (available at http://www.broadridge.com/investor-communications/us/2009ProxyStats.pdf).

We anticipate that if the Commission adopts proposed changes to Rule 14a-8(i)(8), companies will begin to adopt proxy access by-laws. Then, both companies and shareholders will face new questions about the "universal proxy card" that will include both management and shareholder nominees – and hence, more nominees than open board seats. We are concerned that the mandated format will risk significant retail voter confusion and errors when voting, whether they are using physical proxy cards, the telephone, or the Internet.

To reduce the risk of shareholder confusion and vote nullification, we recommend that:

- Companies have flexibility to design "user friendly" universal proxy cards and "notices."
- Shareholders who want to vote in accordance with management's recommendations for directors should be able to do so easily, using mechanisms such as checking a box for that purpose. Including such an option, clearly identified, will reduce the risk of shareholder error, but not impede shareholders who wish to vote for the shareholder-nominated candidates.
- Companies have greater freedom to include educational materials with "notice" mailings regarding 14a-11 elections.

Otherwise, we believe there is a real risk of unnecessarily disenfranchising retail shareholders.

Proxy access under Rule 14a-11 must be subject to reasonable restrictions on resubmission.

We believe that proposed Rule 14a-11 lacks adequate safeguards to ensure that unsuccessful nominees are not repeatedly resubmitted, shutting out better-qualified potential nominees who are more likely to receive broader shareholder support.

We believe a shareholder director nominee who does not receive at least 30% of the votes cast in the election should be barred from being nominated again, by any shareholder or the company, for a period of three years following the meeting at which the director nominee was defeated. In addition, a shareholder who either (i) nominates a director who does not receive at least 30% of the votes cast in the election, or (ii) nominates a director who is actually elected to the board, should be barred from being able to nominate the same individual, or any other individual, as the case may be, for a period of three years.

There are several factors supporting this position. First, a director nominee who does not receive at least 30% of the vote clearly has not received the support of the shareholders, and another shareholder should have the opportunity to propose a director nominee who may be more acceptable to the other shareholders. Second, assuming the proposed "first in" rule is adopted, a shareholder who nominates an unsuccessful director candidate could keep re-nominating that individual year after year. If that shareholder is the first to nominate a director each year, other eligible shareholders would be effectively "locked out" from proposing other director nominees who have greater potential for broad support. Finally, if a shareholder is successful in having his/her nominee elected to the board, then that shareholder has obtained representation on the board and another shareholder should have an opportunity to attempt to gain representation on the board without competition from the first shareholder. This would help prevent the board from being over-weighted in favor of any one special interest group.

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We thank the Commission for undertaking this important work and for the opportunity to contribute to this dialogue. We hope that our comments are helpful to your deliberations. In closing, we again urge the Commission to amend Rule 14a-8(i)(8) to allow for a private ordering approach to proxy access. Then, after companies and shareholders have had an opportunity to test market-based proxy access solutions under an amended Rule 14a-8(i)(8) framework, the Commission can determine whether a federal mandatory proxy access rule is needed. At that point, should the Commission find that federal mandatory proxy access necessary, the vast experience gleaned from a private ordering approach can inform and enrich any eventual federal solution.

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[Signatures appear starting on the following page.]

Mary T. Afflerbach
Corporate Secretary & Chief Governance Officer
Air Products and Chemicals, Inc.

Donna Dabney
Vice President, Secretary & Corporate
Governance Counsel
Alcoa Inc.

Mary J. McGinn
Secretary
The Allstate Corporation

Carole Sobin
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Consolidated Edison, Inc.

Janice A. Dobbs
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Devon Energy Corporation

Mary E. Bowler
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Honeywell International Inc.

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Dannette L. Smith
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Senior Vice President, Deputy General Counsel
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Verizon Communications Inc.

Don H. Liu
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Xerox Corporation

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