



August 17, 2009

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

File No. S7-10-09 (Facilitating Shareholder Director Nominations)

Dear Ms. Murphy,

We are pleased to submit this letter in response to the Commission's request for comments on the proposed reforms to Section 14(a) of the Exchange Act to facilitate shareholder director nominations. We believe that the Commission's proposed rules represent an important step towards the democratization of U.S. public companies and are grateful for your considerable efforts in this regard over the past several years.

As way of background, we are a private investment fund with approximately \$4.0 billion in assets under management. Our strategy involves identifying good businesses that are in need of some fundamental changes in order to turn them into great businesses with improved shareholder value. We tend to buy large positions in our portfolio companies (between 5% and 20%) while working positively and constructively with management to drive long term shareholder value. In many of our portfolio companies we are invited into the board room. Since 2000 we have been members of the board of directors of 27 public companies, gaining access only once through a (settled) proxy contest. Our typical holding period ranges from two to six years. For these reasons, we feel that we are uniquely qualified to understand a shareholder's desire to have a greater voice in the board room on one hand while being sensitive to a corporate board's desire to ensure a well functioning, stable environment from which to provide oversight and guidance of a company in the best interests of its stakeholders.

In general, we are highly supportive of the proposed regulations as drafted. It is clear from the background information and number of questions contained in the proposed regulations that the Staff is considering many shades of grey as it considers these issues.

All of our comments relate to Section III of the proposed regulations, Proposed Changes to the Proxy Rules, and the references in our subheadings refer to the similar sections in the table of contents to your proposing release.

B2. Application of Exchange Act Rule 14a-11

It is our strong opinion that the proposed changes to Exchange Act Rule 14a-11 should apply at the federal level and should pre-empt state law and the ability of any company to adopt bylaws that are inconsistent with their intent. In our opinion, the concept of access for all shareholders of U.S. public companies to director nominations is a major step in the right direction of U.S. corporate governance. Without a mandate at the federal level, the best efforts of the SEC to provide a democratic process available to all shareholders will be eroded by a patchwork of state law and the natural tendency for boards of directors to entrench their positions by implementing “opt out” bylaw provisions. The Rule should be widely available, as proposed, and should not only operate upon triggering events.

B3. Eligibility to Use Exchange Act Rule 14a-11

We believe that the proposed eligibility thresholds are too low. We think that such a low barrier would flood issuers with requests to include nominees (see comment B5. below regarding the “first-in rule”) thereby creating confusion for shareholders, logistical headaches for issuers and opening the door to small special interests who do not share the interests of all shareholders generally. Therefore, we propose that the level be 10% of outstanding shares (calculated in the same method as used for Section 13 filings) for all U.S. issuers regardless of size.

The aggregation proposals would permit smaller groups of shareholders to band together to reach the 10% threshold. By instituting a higher floor, only shareholders who are very serious about corporate governance and have either a very significant financial incentive or who have taken the time and made the effort to establish a coalition of like-minded shareholders would be able to use the issuer’s proxy machinery, at the cost to all shareholders, to propose nominees to the issuer’s board.

We also note that 10% share ownership is a level that is well recognized in the securities laws as being an important threshold. Reaching that level triggers Section 16 short-swing profit obligations under the Securities Exchange Act, the presumption of affiliate status for Rule 144 under the Securities Act, a bar from acting as a purchase representative for Regulation D under the Securities Act, treatment as an associate for Regulation 12B, Regulation 14A and Regulation 14C under the Securities Exchange Act and enhanced filing obligations for Regulation 13D under the Securities Exchange Act. That ownership level also requires filing an initial pre-merger notice with the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 if the value of the holding will be more than approximately \$62 million. The 10% ownership level is also sufficient to thwart a short-form merger without a shareholder vote under many state

laws. Therefore a 10% threshold is well recognized in law, by issuers and shareholders as a point at which share ownership takes on a higher level of responsibility and accountability.

In addition, we believe that eligibility should be conditioned on meeting the ownership threshold by holding a net long position for the required period. It seems fundamentally out of step with the spirit of the proxy access rules to require a certain level of ownership but then trade away the economics of that ownership by permitting the owner to be short against the same security to any meaningful extent. We believe that anyone using these rules should have significant economic “skin in the game,” and maintaining a large short position is tantamount to gaming the system.

Finally, we do not think that a shareholder should be required to hold its securities beyond the relevant annual meeting, especially if it loses in its efforts to have a nominee elected to a company’s board of directors. Investors have many demands on their capital and it is impractical (and in some cases impossible) to require a shareholder to hold an investment for very long periods of time—especially when its goals for the company are not shared by the board. For example, mutual funds must fund redemptions by selling their underlying shares, investment companies will find new investment ideas for their capital and have a fiduciary duty to their investors to put their capital to its highest and best use, and individual shareholders will need liquidity for personal financial obligations and to maintain sensible diversification. From time to time we have agreed to contractual “lock ups” when we have joined the board of directors of a company, but we strongly caution that a lock up rule will not be palatable to most investors and would limit the usefulness of the proposed rule to most shareholders.

Despite our concerns about requiring a long holding period after the election, we believe that both the one year holding period and the requirement to hold the securities through the shareholders meeting are appropriate. These obligations will insure that only investors with a long term financial outlook will participate in this process. Membership on the board of directors of a company is a serious responsibility and the (in effect 18 month) minimum holding period will go a long way to weeding out players looking for a short term pop.

B4. Shareholder Nominee Requirements

We are of the opinion that the requirements of the relevant stock exchange relating to director independence should apply and that the issuer’s requirements should not apply to shareholder nominees. We believe that adding a subjective element that is entirely within the control of the incumbent board would make a mockery of the democratization of the shareholder nomination process. It is all too easy for a nominating committee to come up with criteria that eliminate the candidacy of any person. Our experience leads us to believe that nominating committees are not always impartial and reasonable when considering nominees not sourced by them or their consultants. Therefore we think it most fair that the requirements of the stock exchange for independence be the only barrier

for nomination. It is then up to the company to make an argument against this nominee during the proxy process at the same time as the nominating shareholder or group makes an argument for such person. The shareholders can hear arguments for both sides during this process and then decide with their votes. This is the same type of democracy we see every day in political America and it should apply to corporate America as well.

There should be no prohibition on any affiliation between nominees and nominating shareholders or groups. This would disenfranchise most professional investors and would place an artificial and useless barrier between nominees and nominating shareholders. In most cases a nominating shareholder will propose itself or one of its affiliates (someone it has worked with and knows to be like-minded). It would be unappealing to many shareholders to own a large position in a company, hold its shares for a long period of time and then only be able to propose someone for nomination with whom it has no connection. However, there should be full disclosure of any affiliation between a nominee and nominating shareholder. As long as all shareholders have complete information about any relationship, it should be up to them to vote for or against such nominee with this information in mind.

B5. Maximum Number of Shareholder Nominees to be Included in Company Proxy Materials

We generally support the proposed regulation requiring a company to include in its proxy statement and form of proxy no more than one shareholder nominee or the number of nominees that represent 25% of the board, whichever is greater. We think that this should be a simple rule whereby the company will put forward its nominees and the shareholders can put forward their nominees on an annual basis. A company does not have to put forward nominees who were elected previously by nomination of a shareholder if it does not believe that such a person or persons are the best nominees for the board. In addition, the requirement that any nominating shareholder must represent that it is not attempting to effect a change of control or to gain more than a minority of directors should serve to prevent a creeping change of control- especially where the nominating committee is entirely in control of which nominees it puts forward at each annual meeting. However, for controlled companies or companies with a contractual obligation, we suggest that the 25% rule should only apply to the non-control or contractually appointed directors.

In order to properly provide for access for all shareholders of U.S. public companies with staggered boards, we are of the opinion that the proposed regulation should require a company to include in every proxy statement and form of proxy at least one shareholder nominee, even if the company currently has directors who were elected as shareholder nominees and their terms extend past the date of the applicable shareholder meeting.

We strongly disagree with the Staff's proposal to limit the nominating shareholder or group to the first one that provides notice to the company. First, we are not certain how this would work practically—there are so many methods of delivery and no one would

want to be bound by the reliability (or lack thereof) of the fax machine, the postal service, a private messenger service, etc. This method will set up a race to be first which is not, in our opinion, the best method by which to determine who will be nominated to such an important role as that of a public company director.

Rather, we have stated above that only shareholders or groups of shareholders who own 10% or more of a company's shares should be permitted to submit nominees for directors. Further, we think that every person or group who meets these criteria should be able to propose nominees. If three groups of 10% shareholders wish to propose nominees, then they should all be able to do so. Shareholders may have to sift through a large slate of nominees to choose which nominees to vote for and this may make the process more complex and expensive, but we believe it is a worthwhile tradeoff to promote meaningful choice. However, in practice, with a high threshold of 10% we think it unlikely that a company will be flooded with eligible nominees resulting in a chaotic election process.

D2. Other Rule Changes – Exchange Act Section 16 and Poison Pills

It is important that establishing a group of likeminded shareholders to propose nominees be exempted from Section 16. Shareholders who may see eye-to-eye on the desire to add a nominee to the slate of directors up for election are unlikely to see eye-to-eye on other matters, such as their personal investment decisions regarding the timing of the purchases and dispositions of their securities (short swing profits disgorgement) and will not want to be tied together in any other way. Obligating a group of shareholders who aggregate their holdings solely for the purpose of nominating a director pursuant to the proxy access rules due to Section 16's 10% threshold will considerably chill the usefulness of the proposed rule. The aggregation elements of the proposed rule indicate that there is a public policy benefit in encouraging groups of like-minded shareholders to band together in large groups to raise their voice over the din. Forcing Section 16 liability on such shareholders will have the effect of limiting the number or composition of groups who wish to avail themselves of these rules and runs counter to the public policy elements of encouraging collective action for the limited purpose of director nominations.

Along the same lines, we also suggest that the Commission consider including language in its adopting release of the proposed regulation that it is the Commission's intent that shareholder rights plans will not be triggered upon the formation of a group of shareholders solely for the purposes of nominating a director pursuant to the proposed regulation. Subjecting shareholders who form a group for the purpose of nominating a director pursuant to the proposed regulation to a poison pill will decimate the usefulness of the proposed rule.

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We appreciate this opportunity to comment on the proposed reforms regarding facilitating shareholder director nominations and would be happy to discuss any questions the Commission or its staff may have with respect to this letter. Questions may be directed to the undersigned at abennington@valueact.com or (415) 362-3700.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Allison Bennington", with a long horizontal flourish extending to the right.

Allison Bennington
Partner and General Counsel