



August 24, 2009

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549

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

Dear Ms. Murphy:

Microsoft Corporation ("Microsoft" or "Company") appreciates the opportunity to comment on the above-referenced release of the Securities and Exchange Commission ("Commission") proposing new rules and rule amendments to facilitate shareholder nominations of director candidates through the medium of corporate proxy statements ("Proxy Access Release"). Microsoft is a Fortune 500 company incorporated in the State of Washington, and our common stock has been listed on the NASDAQ National Market System since our initial public offering in 1986. We currently have a public float of over \$185 billion and approximately 8.9 billion shares of common stock outstanding held by well over 3 million shareholders. We are a global leader in the development and marketing of computer software, services, hardware and solutions, with more than \$58 billion in gross revenues for the fiscal year ended June 30, 2009. We employ approximately 93,000 people in the United States and abroad.

We are writing this letter separately to supplement the points raised in a comment letter recently submitted to the Commission by a group of large public companies that includes Microsoft,¹ in the hope that our perspective as a Washington State-chartered company will be helpful to the Commission as it considers the pending proxy access proposal.

Like the Commission, Microsoft believes it is appropriate to remove federal regulatory impediments to state-created shareholder nomination rights – rights that, under appropriate conditions prescribed by the states where public companies are incorporated, may include shareholder access to corporate proxy statements to present board candidates to a vote. However, we respectfully submit that the most efficient and cost-effective way to achieve this goal is to adopt a federal rule that enables ongoing recognition and refinement of shareholders' proxy access rights under state corporation law rather than prescribing a uniform, one-size-fits-all approach that would interrupt and potentially

¹ Comment Letter submitted by 27 corporate co-signers, dated August 17, 2009 ("Group Letter"), available at <http://www.sec.gov/comments/s7-10-09/s71009-472.pdf>.

undermine existing developments in this area.² We believe that shareholders and public companies would be best served if the Commission proceeds with the proposed amendments to Rule 14a-8 that would allow shareholders themselves to determine the parameters of their emerging state law access rights through the bylaw amendment process. These amendments could be adopted in sufficient time for this process to play out during the 2010 proxy season. In short, we urge the Commission to give shareholder proxy access a chance to develop within the framework of a state-enabled system that fosters, rather than inhibits, meaningful shareholder choice.

We believe that in recent years shareholders have become more sophisticated in advocating reforms that more effectively enhance accountability and shareholder value; at the same time, companies have become more receptive to dialog with shareholders offering thoughtful, responsible governance initiatives. As discussed more fully in the Group Letter (at pages 2-3), there is ample evidence indicating that the evolution of individual company governance practices within the broad, flexible framework of developing state law has been successful in enhancing shareholder voting rights and accountability of boards of directors. With or without prompting by shareholders using the familiar Rule 14a-8 mechanism to bring binding or precatory proposals for governance reform, many companies have adopted a majority voting standard for uncontested director elections that, coupled with director resignation provisions, has significantly strengthened the ability of shareholders to influence board composition through “withhold” or “no” votes. According to a recent ABA Task Force Report, “within a relatively short time span [three years], a significant majority of S&P 500 companies (66%) adopted some form of a majority voting standard for uncontested director elections.”³ States such as Delaware and Washington responded quickly to this development, enacting statutes facilitating a shift to majority voting.⁴

² This point is illustrated by the preemptive effect of the Commission's proposed Rule 14a-11 on North Dakota's statutory shareholder access right, to the extent that North Dakota law sets a higher eligibility bar for nominating shareholders than the Commission's rule would permit. See N.D. Cent. Code Section 10-35-08 (2009).

³ Report of the Task Force of the ABA Section of Business Law Corporate Governance Committee on Delineation of Governance Roles & Responsibilities (Aug. 1, 2009), at p. 13 (citations omitted), available at <http://www.abanet.org/buslaw/committees/CL260000pub/materials/20090801/delineation-final.pdf>. The Commission itself recognizes this noteworthy phenomenon. See Proxy Access Release at n. 69.

⁴ See 8 DGCL Sections 216(3) (expressly permitting shareholder-initiated majority voting bylaws) and 141(b) (allowing directors to tender irrevocable resignations conditioned on failure to receive a specified vote for re-election); RCW 23B.08.070 (allowing directors to tender irrevocable resignations conditioned on failure to receive a specified vote for election) and 23B.10.205 (expressly authorizing adoption of majority voting bylaws).

Microsoft's own experience is not atypical in this regard. Over the years since its initial public offering in 1986, the Company has made significant changes in its governance practices.⁵ We implemented these changes voluntarily, guided by our board's desire to pursue progressive governance practices that are appropriate for Microsoft. We consider factors such as the nexus between good governance and building shareholder value, the evolving practices of our peer companies, changes in state and federal law and exchange listing standards, and the views of our shareholders. These changes include:

1. A shift from plurality to majority voting for uncontested director elections (reinforced by a director resignation policy), once the Washington legislature amended the state's corporate laws to make clear this action was permissible;
2. Adoption of a confidential voting policy to protect our shareholders' voting privacy;
3. Established a commitment to maintaining a substantial majority of independent directors on our Board of Directors;
4. Established the position of lead independent director who among other things leads the independent directors in conducting the chief executive officer's performance review and chairs regular meetings of the independent directors in executive session;
5. Adoption of an executive compensation recovery ("clawback") policy that applies to our executive officers and the chief accounting officer and then expansion of the policy to allow the Company to recoup payments of incentive compensation, regardless of an individual's culpability, if the performance results leading to such payment later are subject to a downward adjustment or restatement;
6. Adoption of a policy for compensation consultant independence, under which any compensation consultant retained by the Compensation Committee of our Board of Directors is independent of the Company and management;
7. Established minimum share ownership requirements for directors and executive officers to reinforce a long-term management horizon by aligning the interests of Microsoft directors and officers more closely with those of the Company's shareholders; and
8. Our Board recently approved an amendment to our Articles of Incorporation that will be presented to shareholders at our 2009 annual meeting that, if adopted, will give shareholders the right to call special shareholder meetings.

⁵ The Company has never had a staggered board, a shareholder rights plan (a so-called "poison pill") or a class of super-voting equity.

Many other companies have adopted similar improvements to establish governance practices that appropriately balance the often unique interests and roles of their own shareholders, boards and management, thus reflecting the continued, non-prescriptive evolution of thinking about corporate governance. At the same time, we have seen a gradual, parallel evolution of more shareholder-centric state corporate laws. The same state-enabled progression is expected to continue and to grow in the area of shareholder proxy access. Delaware has changed its corporate law, effective August 1, 2009, to make clear that both shareholders and companies incorporated in that state are free to amend corporate bylaws to provide a mechanism for shareholder-proposed board nominees to be carried in corporate proxy materials, subject to specified types of lawful conditions that may be set forth in the amended bylaws⁶. Similar amendments to the Model Business Corporation Act ("MBCA") are being proposed by the American Bar Association's Committee on Corporate Laws, and may be adopted in the relatively near future by the more than 30 states (including Washington) that have based their corporate laws in whole or in part on the MBCA.⁷ And we believe that, like Delaware, these states will establish a basic level of protection that will prevent boards of directors from acting unreasonably to subvert or frustrate shareholder access rights through unduly restrictive, company-initiated bylaw amendments.⁸

The Washington Business Corporations Act allows shareholders to propose binding bylaw amendments.⁹ Bylaws may contain any provision not in conflict with law or the articles of incorporation

⁶ See 8 DGCL Section 112(c). The Delaware legislature also acted to permit bylaw amendments that require companies incorporated there to reimburse shareholder proxy expenses incurred in connection with elections of directors. See 8 DGCL Section 113. This apparent legislative preference for non-prescriptive private ordering is consistent with the broader policy underpinnings of the corporate laws of Delaware and other states, such as Washington, with so-called "enabling" regimes: "to enable stockholders and boards to establish their own corporation's internal rules in light of the wide variety of circumstances in which ... [state-chartered] corporations function, rather than to limit their ability to do so." Comment Letter from the Council of the Delaware State Bar Association's Section of Corporate Law, submitted July 24, 2009 ("Delaware Bar Association Comment Letter")(citation omitted), available at <http://www.sec.gov/comments/s7-10-09/s71009-65.pdf>.

⁷ See Proxy Access Release at n. 70 and accompanying text. North Dakota has a somewhat more prescriptive proxy access provision than Delaware that ties shareholder eligibility to a minimum five percent/two-year ownership requirement, but permits companies to opt out. See N.D. Cent. Code Sections 10-35-02(8) and 10-35-08 (2009).

⁸ See Delaware Bar Association Comment Letter at p. 12 (noting that "stockholder-adopted bylaws may include procedural requirements that limit the board's ability to amend or repeal [such a] by law. For example, stockholders have the power [under Delaware law] to adopt bylaws that require a supermajority vote of the board of directors to amend or repeal a bylaw, including one adopted by stockholders.").

⁹ RCW 23B.02.060.

for managing the business and regulating the affairs of the corporation.¹⁰ Thus, Microsoft believes that shareholder nominating proposals are permissible under Washington law.¹¹ Accordingly, it would seem that the only significant remaining barrier to the full exercise of shareholder access rights under applicable state law is current Rule 14a-8(i)(8). The Commission therefore should remove this barrier as quickly as possible. This would allow the evolution in state-law access rights to continue, unfettered by the complexities of a federal standard that applies uniformly to differently situated public companies operating under diverse state law regimes. If the Commission doesn't see substantial progress over the next few proxy seasons, it can revisit the effect of the proxy rules on a much more informed basis with the benefit of an empirical predicate forged under state law.

Even beyond the merits of private ordering under a revised Rule 14a-8, there are many good reasons for the Commission to proceed with narrowing the Rule 14a-8(i)(8) exclusion to facilitate private ordering in the upcoming proxy season, while refraining from acting on proposed Rule 14a-11.¹² The more moderate approach we are suggesting would enable the Commission's staff to gain experience analyzing competing legal opinions about nascent state-law access provisions under the well-established Rule 14a-8 no-action procedure, including the more realistic 120-day timetable fixed in that Rule. This approach would avoid the diversion of staff resources associated with making new and difficult judgments¹³ about the nominating shareholder's eligibility and overcoming all the other workability problems described in detail by other comment letters, including those submitted by The Society of Corporate Secretaries and Governance Professionals,¹⁴ the Association of Corporate Counsel,¹⁵ and the

¹⁰ RCW 23B.10.200.

¹¹ As the Commission itself observed, “[w]e are not aware of any law in any state or the District of Columbia that prohibits shareholders from nominating directors.” Proxy Access Release at n. 99.

¹² As a June 30 fiscal year-end company we are particularly concerned that, even if the Commission were to defer the effective date of Rule 14a-11 for calendar-year companies until the 2011 proxy season, it might not extend this relief for the 2010 proxy season of companies that, like Microsoft, have non-calendar fiscal years.

¹³ To illustrate, the Commission (through its Division of Corporation Finance) has been charged by Congress with the obligation to review the periodic reports of listed companies at least once every three years. See Section 408 of the Sarbanes-Oxley Act of 2002. The Commission also has embarked on an ambitious plan to overhaul and expand its enforcement program in response not only to the ongoing credit crisis. See Remarks by Robert Khuzami, Director, Division of Enforcement, U.S. Securities and Exchange Commission (New York, New York, August 5, 2009), available at <http://www.sec.gov/news/speech/2009/spch080509rk.htm>.

¹⁴ See Comment Letter from the Society of Corporate Secretaries and Governance Professionals, dated August 13, 2009, available at <http://www.sec.gov/comments/s7-10-09/s71009-228.pdf>.

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Group Letter. Finally, we are concerned about the serious risk of unfavorable and unintended consequences that could be triggered by the Commission's proposed piecemeal dilution of the critical "control" concept set forth in Section 13(d) of the Securities Exchange Act of 1934 and implementing Regulation 13D/G. We respectfully urge the Commission to defer its consideration of this ostensibly de-regulatory initiative until it has the benefit of public comment that must be solicited in connection with the proposed Regulation 13D/G rulemaking project, dealing with "empty voting" and other problems under the current regulatory regime, that was mentioned most recently by senior officials of the Division of Corporation Finance at the ABA's annual meeting in Chicago.

In conclusion, we encourage the Commission to adopt solely the proposed amendment to Rule 14a-8 and refrain from adopting Proposed Rule 14a-11.

Microsoft greatly appreciates the Commission's consideration of our views. We would be pleased to provide any additional information that might be helpful to the Commission.

Respectfully submitted,



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Vice President and Deputy General Counsel, Corporate
Microsoft Corporation

cc: Mary L. Schapiro, Chairman
Luis A. Aquilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
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¹⁵ See Comment Letter from the Association of Corporate Counsel, dated August 17, 2009, *available at* <http://www.sec.gov/comments/s7-10-09/s71009-337.pdf>.