THE FINANCIAL SERVICES ROUNDTABLE
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August 14, 2009

VIA EMAIL

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

RE: File No. S7-10-09: Proposed Rules on Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

The Financial Services Roundtable[1] ("Roundtable") appreciates this opportunity to comment on the Securities and Exchange Commission's ("Commission") proposed rules on facilitating shareholder director nomination. The following are our initial comments on the Commission's proposed proxy access rules:

A. We Support the Proposed Rule 14a-8 Amendments and Strongly Urge the Commission to Allow Shareholders to Adopt Their Own Proxy Access By-Laws.

We wholeheartedly support the goal of opening new avenues for shareholders to nominate director candidates and, in appropriate circumstances, to require issuers to include their nominees' names on the issuers' proxy cards and information about their nominees in the issuers' proxy statements. To this end, we support the proposed amendment of Rule 14a-8, under which issuers would no longer be able to exclude shareholder proxy-access proposals under Rule 14a-8(i)(8). This would provide an opportunity for shareholders to submit proposals to adopt proxy access bylaws (as specifically provided, for example, under the recently adopted section 112 of the Delaware General Corporation Law), and for issuers to adopt proxy access proposals with such procedures as their shareholders may, by a majority of the shares voted, deem

[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $85.2 trillion in managed assets, $980 billion in revenue, and 2.3 million jobs.

appropriate.[2] In addition, by adopting this change and deferring to state law, the jurisdictional issue of state *versus* the federal government can be avoided.

If the proposed amendments to Rule 14a-8 are adopted, we submit that there would not be a practical need for new Rule 14a-11. The Commission should not mandate a rule of access for all, but instead should facilitate shareholder adoption of a form of proxy access in accordance with applicable state law. Moreover, the Commission should allow for private ordering, rather than mandating a federal "one-size-fits-all" rule for proxy access. Imposing a "one-size-fits-all" mandate on all 13,000 U.S. public companies may result in unintended consequences. The proposed rule could deter qualified candidates from seeking to serve on a board of directors because of the likelihood of an uncontested election and the one-size-fits-all approach does not allow a corporation's shareholders to address this concern in a meaningful way.

B. <u>If the Commission Were to Adopt Proposed Rule 14a-11, We Strongly Urge Adjustments to Avoid Unintended Consequences That Would Undermine the Interests of Shareholders.</u>

If, however, the Commission were to adopt some version of the proposed new Rule 14a-11 (and assuming that Congress authorizes the SEC to do so), we believe that several adjustments should be made to avoid unintended consequences that would undermine the interests of shareholders. The adjustments that we urge would not in any way hinder proxy access generally, but they would provide protections to promote the continued orderly governance of public companies and prevent special interest shareholders that do not represent the broad shareholder base from misusing the new rules for their own private purposes.

- <u>Allow Shareholders, by Majority Vote, to Adopt Conditions or Procedural Protections</u>. Rather than making the federal rule the single and invariable proxy access procedure for all U.S. public companies, the Commission should allow companies, by a majority of the shares voted, to adopt different conditions and requirements (including any of the protections proposed below if the Commission were to proceed with federal rulemaking without incorporating them in the final rule).

[2] The majority of U.S. public companies, and over 60 percent of the Fortune 500 companies, are incorporated in Delaware. See http://www.corp.delaware.gov. As to issuers incorporated in other states, (a) we believe that the Commission should give such states time to determine whether to follow Delaware's lead by adopting proxy access rules modeled on Delaware General Corporation Law § 212, on the proxy access provisions of ABA Model Business Corporations Act ("MBCA or of their own design, and (b) while, in support of no-action requests to exclude proposed proxy access bylaw amendments for companies incorporated in states that do not adopt such statutes, issuers could make the argument, under Rule 14a-(i)(1), that the subject of such proposals is not a proper subject for action by shareholders, (i) as a legal matter, the argument's chances of success seem doubtful in the case of a purely procedural bylaw amendment, and (ii) as a practical matter, shareholders and proxy advisory services would undoubtedly put significant pressure on companies not to seek exclusion of proposed proxy access by law amendments, including through campaigns to withhold votes in favor of, or to vote against, incumbent directors.

- Increase the Ownership Threshold for Nominations for Large Accelerated Filers from 1 percent (as recommended) to 5 percent. We believe that the proposed ownership threshold of one percent (1 percent) for large accelerated filers and registered investment companies with net assets of $700 million or more is so low that it will encourage special interest holders to run their candidates – or, as many of our members have experienced with shareholder proposals promulgated by special interest shareholders to offer to withdraw their nominations if the issuer accedes to unrelated demands.[3]

  Likewise, the SEC's proposed low threshold gives undue and disproportionate power to institutional investors. For example, individually some institutions will be able to nominate up to 25 percent of directors at almost every issuer included in the S&P 500 Index. Further, the ratio of 1 percent economic interests to 25 percent nominating power creates a potential disconnect between ownership and rights. Anecdotally speaking, even private equity firms which invest up to 10 percent in a company, rarely obtain board seat privileges.

  If the Commission proceeds with federal substantive rulemaking in this area, we urge the Commission to return to the more appropriate threshold of five percent (5 percent) ownership included in its 2003 proxy access proposal.

  The Commission should consider the unintended consequences that could impede the proper functioning of a board of directors. For example, it is likely that a shareholder-nominated director may focus his or her concerns on issues that are most important to that particular nominating shareholder, as opposed to all of the shareholders as a group. As a result, many qualified directors may be unseated, causing the letter of resignation to become a significant issue. Other unintended consequences include the risk that financial experts may fail to be re-elected to the audit the committee. Accordingly, adopting such a low threshold increases these risks.

- Restore the Independence Requirement from the 2003 Proposal, and Require Nominees to Meet All of the Company's Independence Standards (Not Just the NYSE Objective Standards). Implicitly recognizing the universal corporate law principle that directors have a duty to serve the interests of *all* shareholders, rather than the special interests of any one of them, the 2003 proposal wisely would have precluded nominees (or their family members) who have been employed during

[3] The number of companies that would immediately be faced with such risks is high. According to the Staff's own analysis, over 99 percent of all large accelerated filers, for example, currently have at least one shareholder that would qualify under the one-percent threshold test, and an even larger number have two or more shareholders that have held at least 0.5 percent of voting securities over the holding period and therefore could easily aggregate their holdings to meet the threshold.

the then-current or immediately preceding calendar year by a nominee or a member of a nominating security holder group. While we think the independence definition can and should be refined (for example, the restriction should not be limited to nominating shareholders that are entities), we believe it is important to include provisions ensuring the independence of nominees from special interest shareholder groups. In addition to the disclosure, nominating shareholders or groups would be required to make Schedule 14N declarations that the nominating shareholder or group or the nominee has no relationships or agreements with the company and its management, thereby preventing management from manipulating the process to block other nominating groups, the same standard of care should be applied between the nominating shareholder or groups and the nominees themselves to ensure that the nominees are fully independent of the shareholders or groups that nominate them.

In addition, if the SEC decides to adopt a substantive proxy access rule (which we oppose): we advocate for the following:

- Replace the Proposed First-in-Time Regime with One that Gives Nominating Priority to Larger Shareholders. We believe that the proposed first-in standard will encourage special interest holders to submit nominations at the earliest possible moment, thus creating a "race to the proxy statement." A more rational and representative procedure would allocate the number of slots available for shareholder nomination according to the respective ownership stakes of competing nominating shareholders.

- Allow the Board's Independent Nominating and Corporate Governance Committee (or, in the Case of NASDAQ-Listed Companies with No Such Committees, the Board's Independent Directors) to Interview and Comment on (But Not to Veto) Any Shareholder Nominees. We strongly urge that shareholder nominees be required to submit to an interview by the same independent directors who are responsible for board nominations generally (the Nominating/Corporate Governance Committee in the case of NYSE-listed companies and either the nominations committee or the independent directors as a group in the case of NASDAQ-listed companies). The important purpose of such an interview would be to allow such independent directors to form an opinion on the proposed nominees, which might be based on a variety of tangible and intangible factors beyond those that can be assessed solely on the basis of the information included in the proposed Schedule 14N. We do not propose that such independent directors have a veto right, but only the same opportunity to interview director candidates that they would have in the case of company-nominated candidates, and a chance to express their views to the shareholders. The timetable for such an interview could easily be accommodated within the proposed timetable set forth by the proposed rule.

I would be pleased to meet with the Commission and Staff, along with representatives of our member companies, to discuss these comments. Thank you again for the opportunity to share our views with you on this subject. If you have any questions, please feel free to contact me or Irving Daniels at 202-289-4322.

Respectfully submitted,

Richard M. Whiting

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