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July 17, 2009

VIA E-MAIL: rule-comments@sec.gov

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

Re: Proposed Rule – Facilitating Shareholder
Director Nominations -- File No. S7-10-09

Dear Ms. Murphy:

We are submitting this comment letter to the proposed rules set forth in Release Nos. 33-9046; 34-60089; IC-28765, or the Proposing Release, in which the Commission solicits comments on the proposed rules relating to shareholder participation in director nominations.

We are submitting with this letter comments applicable to two requests for comment set forth in the Proposing Release. We have numbered these comments to conform to the Commission's numbering format in the Proposing Release.

Comment Regarding Dual Class Voting Structures

Proposing Release Request:

"C.3. For companies that have more than one class of securities entitled to vote on the election of directors, does the rule provide adequate guidance on how to determine whether a shareholder meets the requisite ownership thresholds? Should the rule specifically address how to make this determination if one class of securities has greater voting rights than another class?

Our Comment:

We believe that the proposed Rule 14a-11 does not provide adequate guidance on how to determine whether a shareholder meets the requisite ownership thresholds for companies that have two outstanding classes of common stock and the classes do not have equal voting rights. Under subsection (b) of proposed Rule 14a-11, a shareholder or group of shareholders nominating a person must satisfy the following ownership percentage requirements:

- For large accelerated filers, "at least 1% of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting);"
- For accelerated filers, "at least 3% of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting);" and
- For non-accelerated filers, "at least 5% of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting)."

The thresholds under the proposed rules do not adequately address how to determine the appropriate level if a class of voting securities has a fraction of a vote per share. For example, if a share of a class of common stock has 1/10th of a vote per share, the ownership of 1% of the class does not represent 1% of the voting power.

Suggested language (see underlined and italicized text) to address this concern is as follows for each type of filer:

"For _____ filers, at least ___% of the total voting power of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting)."

For example, suppose a company has 50,000,000 outstanding shares of Class A common stock and 100,000,000 outstanding shares of Class B common stock and does not permit cumulative voting in the elections of directors. Each share of Class A common stock entitles the holder to cast ten votes on any matter presented to shareholders for a vote, including the election of directors, and each share of Class B common stock entitles the

holder to cast one vote on any matter presented, including the election of directors. Therefore, the total number of votes that could be cast by all holders is 600,000,000 votes. Applying the 1% threshold applicable to a large accelerated filer under the proposed rules, a holder would need to beneficially own shares of either class or a combination of both classes entitling the holder to cast 6,000,000 votes. It is unclear from the current wording of the rule whether under this example a holder of 1,000,000 shares Class B common stock would be entitled to nominate a director, *i.e.*, the shareholder holds 1% of the outstanding Class B common stock but only 0.167% of the total voting power. We believe that for large accelerated filers the holder should own 1% of the total voting power in order to have access to the company's proxy materials and make a director nomination under the proposed rules.

Using the formulation of "total voting power" has the following advantages:

- It provides guidance to issuers who have two outstanding classes of voting securities with disparate voting rights for determining a proponent's level of voting power;
- It coincides with the intent of the proposed rules that proponents hold a certain level of "securities that are entitled to be voted on the election of directors," so that companies that have two or more classes of voting securities would be treated in a manner consistent with those companies that have one class of voting securities and one class of non-voting securities; and
- Only those shareholders who hold voting power sufficient to satisfy the threshold would have nomination rights, *i.e.*, the holder's voting interest in the company should be significant enough to justify the cost of access to the company's proxy materials.

Comment Regarding a Controlled Company Exception

Proposing Release Request:

"E.9. Should Rule 14a-11 provide an exception for controlled companies or companies with a contractual obligation that permits a certain shareholder or group of shareholders to appoint a set number of directors? ..."

Our Comment:

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We believe that Rule 14a-11 should provide an exception for, and not be applicable to, controlled companies. For this purpose, the Commission should consider the definition of "controlled company" adopted by the New York Stock Exchange in its Section 303A Corporate Governance Rules: a "controlled company" is a company of which "more than 50% of the voting power is held by an individual, a group or another company." NASDAQ has similar rules that except companies in which more than 50% of the voting power for the election of directors is held by an individual, a group or another company from a number of corporate governance requirements. Rule 14a-11 should contain an instruction accompanying this exception providing that whether more than 50% of the voting power of a company is held by an individual, group or other company would be determined by reference to any schedules filed under Section 13(d) of the Securities Exchange Act of 1934.

We believe this controlled company exception would benefit controlled companies and its shareholders by keeping costs associated with the new rules to a minimum by preventing nominations that have no chance of success because one person or entity has majority voting control of the issuer and avoid possible investor confusion.

* * * *

We appreciate this opportunity to comment on the proposed rules and would be happy to discuss any questions with respect to this letter. Any such questions may be directed to John W. Kauffman at (215) 979-1227.

Sincerely,

DUANE MORRIS LLP