January 19, 2010

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

Re: Facilitating Shareholder Director Nominations (File Number S7-10-09)

Dear Ms. Murphy:

The Nathan Cummings Foundation is a private grant making foundation with an endowment of approximately $415 million, a significant portion of which is invested in publicly traded U.S. equities. As a long-term institutional investor, the Foundation takes an active approach to ownership, voting its proxies and filing numerous shareholder proposals each year. We have long taken a keen interest in the facilitation of shareholder director nominations and have submitted various comments in support of the facilitation of this fundamental shareholder right over the last decade, most recently with respect to the proposed rule *Facilitating Shareholder Director Nominations* ("Proposed Rule").

We submit the following supplementary comments in response to additional data and related analyses received after the close of the original comment period for the Proposed Rule on August 17, 2009. Specifically, our comments will focus on three additional pieces of material; two submitted by the Business Roundtable and one submitted jointly by the Shareowner Education Network and the Council of Institutional Investors.

Why Did Some Banks Perform Better During the Credit Crisis? A Cross-Country Study of the Impact of Governance and Regulation[1]

This study by Andrea Beltratti and René Stulz seems to have been submitted in an effort to suggest that shareholder-friendly boards, which would presumably include boards with shareholder-nominated directors, will achieve worse performance than less shareholder-friendly boards.

The study concludes that banks with more shareholder-friendly boards performed worse during the period from July 2007 to the end of December 2008. From this conclusion, one should presumably infer that providing shareholders with access to the proxy for the purpose of director nominations will result in poorly

[1] Submitted on September 11, 2009 by the Business Roundtable

performing companies. We find this logic unconvincing for several reasons. While this particular study concludes that large banks with pro-shareholder boards, which Beltratti and Stulz equate with better governance, performed worse during the crisis, there are plenty of studies that suggest companies with better governance perform better. A 2003 study by Gompers, Ishii and Metrick entitled *Corporate Governance and Equity Prices* found that firms with stronger shareholder rights had, among other things, higher firm value and higher sales growth.[2] Similarly, a 2004 study by Brown and Caylor found that better-governed firms are relatively more profitable, more valuable and pay out more cash to their shareholders.[3] And then there's the Kirkpatrick study cited by the authors themselves.[4] The list goes on. Even the authors of this particular study point out that, "Such a result does not mean that good governance is bad."

We also find unpersuasive the study's suggestion that shareholder-friendly boards are associated with greater risk taking and the presumably attendant implication that shareholder-nominated directors will take more risks. The study's authors state that, "...banks that were pushed by their boards to maximize shareholder wealth before the crisis took risks that were understood to create shareholder wealth, but were costly ex post because of outcomes that were not expected when the risks were taken." They then suggest that banks with more shareholder-friendly boards took more risks.

We would argue that the markets in general seem to be much more focused on the short-term (and often transitory) maximization of "shareholder wealth" than the type of long-term institutional investors that the Proposed Rule would allow to gain access to the proxy for the purpose of nominating directors. We believe, in fact, that the type of director that would conceivably be nominated by long-term shareholders under the Proposed Rule would be far less likely to base decisions on the short-term maximization of shareholder wealth and more likely to take a longer-term outlook.

We believe that the concerns raised in this study are unfounded. The SEC should not consider Beltratti and Stulz's study as providing legitimate reasons to prevent shareholders from having access to managements' proxies for the purposes of nominating directors.

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[2] Gompers, Paul A., Ishii, Joy L. and Metrick, Andrew, Corporate Governance and Equity Prices. Quarterly Journal of Economics, Vol. 118, No. 1, pp. 107-155, February 2003. Available at SSRN: http://ssrn.com/abstract=278920

[3] Brown, Lawrence D. and Caylor, Marcus L., Corporate Governance and Firm Performance (December 7, 2004). Available at SSRN: http://ssrn.com/abstract=586423 or doi:10.2139/ssrn.586423

[4] Kirkpatrick, Grant, The Corporate Governance Lessons from the Financial Crisis. Report, OECD, Paris, France, 2008.

Report on Effects of Proposed SEC Rule 14a-11 on Efficiency, Competitiveness and Capital Formation, in Support of Comments by Business Roundtable[5]

This report, authored by Elaine Buckberg and Jonathan Macey, trots out the same tired arguments that the Business Roundtable continually relies on when changes are proposed to strengthen oversight of the corporate community or limit the power of corporate management, i.e. the regulation or rule in question, if implemented, would have disastrous results for U.S. businesses and the domestic economy in general. Many of the arguments outlined in this report are, in our view, flimsy at best. Some are downright nonsensical.

The report notes that key risks of the Proposed Rule include less qualified boards of directors, directors whose interests diverge from the goal of maximizing shareholder wealth and the creation of a disincentive for U.S. companies to go public. The report also contends that the Proposed Rule is, "likely to undermine the ability of boards of directors to serve the interests of shareholders." These arguments have a number of flaws and tend to overlook certain key facts.

With respect to the report's contention that the implementation of the Proposed Rule could lead to less qualified boards of directors that do not achieve the experience and skill mix required to meet the challenges facing companies today, we would point out that there are real questions as to whether current boards are doing a good job of meeting these challenges. The Council of Institutional Investors, an association of institutional investors with combined assets of over $3 trillion, noted that the financial crisis highlighted longstanding concerns about directors' willingness and ability to do the job expected of them by their employers, the shareowners.

The report goes on to state that the authors' analysis leads them to conclude that the Proposed Rules, "...are likely to undermine the ability of boards of directors to serve the interests of shareholders." Once again, we would point out that there are questions as to the ability of current board members to serve the interests of shareholders. At the moment, it frequently appears that boards of directors are not operating with shareholders' interests in mind, but rather those of corporate executives and management. Take for example compensation decisions that reward executives even under circumstances in which they have failed to enhance shareholder value. We would also point out that shareholder nominated director candidates will still need to be elected by shareholders in order to serve on the board and will presumably have to accumulate more votes than management's nominees in order to actually gain a seat on a board.

This fact seems to have escaped the authors, who also contend that, "Board members will be selected whose interests diverge from the goal of maximization of shareholder value." While it is conceivable that shareholders might nominate candidates whose focus is on something other than the maximization of shareholder value, it is useful to remember that it is long-term shareholders with

[5] Submitted on August 17, 2009 by the Business Roundtable

sizeable stakes in the company that the Proposed Rule would allow to nominate directors. Presumably, any directors nominated by these types of shareholders would certainly have a focus on maximizing shareholder value. And then there is, once again, the fact that any shareholder-nominated candidate would need to be voted into office.

Furthermore, while this piece claims that shareholder-nominated candidates will be focused on agendas other than the maximization of shareholder value, another piece submitted in support of the Business Roundtable's comments actually makes an argument to the contrary. According to *Why Did Some Banks Perform Better During the Credit Crisis? A Cross-Country Study of the Impact of Governance and Regulation*, banks with more shareholder-friendly boards fared worse during the financial crises in part because their boards had pushed to maximize shareholder value in the months and years leading up to the crisis. On the one hand, it is argued that shareholder nominees will be less focused on maximizing shareholder value. On the other hand, it is suggested that shareholder nominees might actually be *too* focused on maximizing shareholder value. Which is it?

We believe that these and other main points in this submission in support of comments by the Business Roundtable are flawed and should not be considered to constitute adequate arguments as to why shareholders should not, finally, be given access to the proxy. We would also point out that the Business Roundtable is not particularly noted for representing the views of institutional shareholders.

The Limits of Private Ordering: Restrictions on Shareholders' Ability to Initiate Governance Changes and Distortions of the Shareholder Voting Process[6]

As a member of the Council of Institutional Investors and a funder of the Shareowner Education Network, it is probably not surprising that we agree with the premise of this particular piece of analysis. The issues raised in *The Limits of Private Ordering* are important ones and the SEC would do well to consider them carefully.

Private ordering is an ill-conceived idea at best. As the author of *The Limits of Private Ordering* points out, the validity of private ordering as a substitute for a uniform federal access procedure rests on the assumptions that shareholders can easily propose appropriate access procedures on a company-by-company basis and that the shareholder voting process is not impacted by significant distortions. Both of these assumptions are faulty.

As an active investor, the Nathan Cummings Foundation has seen first-hand that the shareholder voting process often suffers from significant distortions. For example, identical shareholder proposals submitted by the Foundation to different

[6] Submitted on November 18, 2009 by the Shareowner Education Network and the Council of Institutional Investors

companies in the same industry have had vastly different voting outcomes in large part due to the ownership structures of the companies to which we submitted the proposals. In 2009, for instance, we submitted identical proposals calling for the adoption of voluntary emission reduction goals to Lennar Corporation and the Ryland Group. Both proposals received identical vote recommendations from the major U.S. proxy voting advisory services, yet the voting outcomes were vastly different, due at least in part to the capital structures of the companies in question. The proposal at Lennar Corporation, which has a dual class capital structure with disparate voting rights, received only 9.8% of the vote while the proposal at Ryland, which does not have this kind of capital structure, received 29.9% of the vote.

In addition to the almost 10% of Russell 1000 companies that, according to *The Limits of Private Ordering*, have multiple class capital structures with disparate voting rights, a significant percentage of companies restrict in some way shareholders' ability to amend bylaws. In fact, it is estimated that 46.4% of companies in the Russell 1000 have some form of limiting governance arrangement that would impact shareholders' ability to implement access procedures. Clearly, private ordering is no substitute for a uniform federal access procedure.

The Nathan Cummings Foundation believes that as the ultimate owners of a corporation, shareholders should have a meaningful say in the election of directors as well as an opportunity to nominate their own candidates for election where circumstances warrant it. Providing long-term shareholders with a reasonable mechanism for exercising their rights to nominate and elect directors to corporate boards, such as that outlined in the Security and Exchange Commission's proposed rule *Facilitating Shareholder Director Nominations* continues to be vitally important. We urge the SEC to implement the Proposed Rule and provide shareholders with a truly meaningful voice in the election of corporate directors.

We thank you for the chance to comment on these additional pieces of data and analysis. Please do not hesitate to contact us at 212-787-7300 with any questions you might have.

Sincerely,

Lance E. Lindblom
President and CEO

Laura J. Shaffer
Director of Shareholder Activities