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January 19, 2010

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Attention: Ms. Elizabeth M. Murphy, Secretary

Re: File No. S7-10-09
Release No. 34-61161
Facilitating Shareholder Director Nominations

Dear Ladies and Gentlemen:

The Corporate and Securities Law Committee (the "Committee") of the Association of Corporate Counsel (the "ACC") appreciates the opportunity to submit this comment letter to the Securities and Exchange Commission (the "Commission") during the re-opened comment period to address the additional data and related analyses that have been included in the public comment file with respect to the Commission's Proposed Rulemaking, "Facilitating Shareholder Director Nominations" (the "Proposed Rules"). This letter supplements the comments that the Committee submitted to the Commission on August 17, 2009.

ACC is the world's largest bar association, serving the professional needs of attorneys who practice in the legal departments of corporations, associations and other private sector organizations around the world. It has more than 25,000 members in over 80 countries, and these members are employed by more than 10,000 organizations. As one of ACC's largest committees, the Committee consists of more than 7,200 members at over 4,600 organizations in the United States. However, the views expressed in this letter represent the views only of a majority of the constituent members of the Committee, and not necessarily the views of the ACC as a whole.

We applaud the Commission's efforts to examine and update the fundamental corporate and securities law principles that underpin the federal regulation of public companies. Further, we have long supported the state and federal regulatory frameworks that promote good corporate governance and appropriate board accountability, and many of our members have offered constructive suggestions to support the Commission's efforts in this regard.

However, as much of the additional data and related analyses already submitted in the public comment file indicate, the more the details of the Proposed Rules are examined, the more evident it becomes that it is exceedingly difficult to craft a standard that furthers the goals that the Commission values without also creating major legal and practical problems, as well as adverse unintended consequences.

We respectfully submit this letter to the Commission to express one simple, but extraordinarily important, point: the data and related analyses included in the public comment file regarding the Proposed Rules provide significant evidence that adoption of the Proposed Rules in their current form may fundamentally harm, rather than incrementally assist, long-term

company shareholders, particularly those whose investment in a particular company (while significant in terms of economics and commitment) is small in terms of percentage ownership.

In support of our views regarding the Proposed Rules, we note the following facts (based on a conservative definition of the term "hedge fund") regarding the current hedge fund ownership of companies within the S&P 500:

- Average hedge fund ownership -- 7.15%;
- Number of companies with hedge fund ownership at or above 5% -- 273 (or over half of the companies within the S&P 500); and
- Number of companies with hedge fund ownership at or above 10% -- 104 (or over 20% of the companies within the S&P 500).[1]

These facts are fundamental to the consideration of the Proposed Rules, as hedge funds often seek to direct the operations of a company with only the short-term profitability of the company in mind.[2]

The Proposed Rules would, as proposed, encourage "proxy fights" by enabling eligible shareholders to wage them at a significantly reduced cost. Further, the Proposed Rules, as with any principles-based rule, would not -- and could not -- discriminate between those shareholders who hope to build the value of a company over time and those who merely endeavor to gain control of a company to maximize short-term wealth opportunities at the expense of the company's long-term viability. Unfortunately, the recent Division of Risk, Strategy, and Financial Innovation survey of Section 13(f) data, which focuses on percentage ownership, does not sufficiently reflect this key point.

Further, empirical data demonstrate that a one- or two-year holding period would not deter short-sighted shareholders from seeking to gain control of America's public companies for immediate gain.[3] As data and experience reflect, hedge funds -- likely to be the primary

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1 This information is based on public company institutional ownership data from Bloomberg L.P. for the period from July 2009 through September 2009.

2 It is widely recognized that activist hedge funds and private equity funds often "push for changes the activists believe will boost the stock's value in the short-term." *See* "Short Term Shareholder Activists Degrade Creditworthiness of Rated Companies," Moody's Investors Service: Global Credit Research (June 2007) (the "Moody's 2007 Report"). In the Moody's 2007 Report, Moody's discloses that short-term shareholder activists often pressure companies to adopt aggressive financial policies, such as increases in share buy-back programs and dividend payouts, and, as a result, Moody's often downgrades the credit ratings of these companies. Recent examples support Moody's observation that the management activities of shareholder activists are often not in the long-term interests of the company. *See also* "Profits for Buyout Firms as Company Debt Soared," New York Times (Oct. 5, 2009); "New Law Gives Shareholders More Power," *BusinessWeek* (July 30, 2009).

3 As Moody's explains in the Moody's 2007 Report, short-term shareholder activists often begin by purchasing relatively small positions in a company -- usually less than 2% -- and usually hold their shares only for 18-24 months. Although the percentage held is small, and the time the shares are held is not long, the threshold ownership requirements and holding period in the Proposed Rules would permit such a short-term shareholder activist to use the rule to its advantage. One of the "high pressure tactics" employed by shareholder activists when pushing for a company to adopt a new business or financial strategy is to threaten a proxy fight. The Proposed Rules would provide these short-term shareholder activists - including those who own as little as 1% - with a powerful new tool to pressure the company to adopt changes that

beneficiaries of the Proposed Rules -- regularly hold shares for relatively short periods of time before waging proxy fights. The Proposed Rules would not help to ensure that shareholders are able to hold boards of directors accountable through the exercise of their fundamental right to nominate and elect directors, but would merely make proxy contests significantly less expensive for those without a long-term interest in a given company.

As practitioners in the field of corporate and securities law, we recognize that it is essential to the health of U.S. companies that there is an appropriate balance between directors' accountability to shareholders and other key stakeholders such as customers, employees and communities, and directors' ability to exercise their business judgment most effectively and efficiently to provide for a company's proper functioning over the short- and long-term. We are concerned that the Proposed Rules would disrupt this delicate balance.

In light of the data provided to the Commission in response to the Proposed Rules, and the data set forth in this comment letter, we respectfully submit that the enactment of the Proposed Rules would expose an inappropriately large number of public companies to significant additional pressure by short-term investors seeking immediate or near-term actions that are counter to the longer-term interests of the company's shareholders and the most effective and efficient functioning of the board. Accordingly, we believe that, at a minimum, it is necessary to make one or both of the following revisions to the Proposed Rules should they be adopted and implemented:

- include "triggers" that would allow for company-sponsored shareholder proxy contests in only those situations where a company's board of directors has demonstrated a lack of accountability to shareholders (such as by nominating directors who shareholders subsequently reject); and/or

- allow only significant, long-term shareholders to wage company-sponsored shareholder proxy contests.

In closing, we submit that a federally-mandated right of short-term shareholders to initiate a company-sponsored proxy contest, in cases where the interests of those shareholders are not aligned with the interests of the company's long-term shareholders, could significantly hinder a board's ability to recommend initiatives that are not immediately popular and instantly profitable, but are otherwise in a company's best interests.

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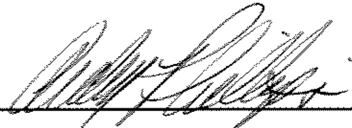
may boost value in the short-term, but have negative effects in the long-term. The Proposed Rules do not account for the fact that activist hedge funds are often successful in gaining board seats or pressuring the company to adopt alternative business strategies despite owning a relatively small percentage of the company. *See, e.g.*, "Attack of the Hungry Hedge Funds," *BusinessWeek* (Feb. 20, 2006); "Genzyme Names Director After Hedge-Fund Pressure," *The Wall Street Journal* (Dec. 10, 2009).

The Committee thanks you for the opportunity to submit our views regarding the Proposed Rules.

Respectfully submitted,

THE ASSOCIATION OF CORPORATE COUNSEL
CORPORATE AND SECURITIES LAW COMMITTEE

By: 
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