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October 19, 2010

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Comments on Release No. 34-62495; IA-3052; IC-29340; File No. S7-14-10

Dear Ms. Murphy:

We are pleased to submit the following comments with respect to certain of the questions posed by the Securities and Exchange Commission in the Commission's Concept Release on the U.S. Proxy System, Release No. 34-62495; IA-3052; IC-29340 (the "Release"). We commend the Commission for undertaking the important exercise of exploring ways to improve our proxy voting system. We believe that, despite some imperfections, the mechanisms that developed historically to facilitate shareholder voting in U.S. companies have performed admirably. However, recent developments that have had the effect of decoupling the economic consequences of share ownership from the associated voting and control powers (whether through innovations in derivatives, the increasing speed with which shares change hands, or the emergence of powerful intermediaries with great influence over corporate policy but no equivalent economic interest or "skin in the game") call for certain changes in order to restore the proper functioning of the proxy system.

In this letter, we limit our comments to a select number of fundamental questions posed in the Release:

- In Part I, we describe how "empty voting" and other methods of separating the economic and voting components of share ownership fundamentally threaten the effective operation of the federal securities laws and the interests of shareholders in our public companies.

- In Part II, we discuss the need for greater regulation of proxy advisory firms in order to address concerns arising from their extraordinary influence on corporate governance.

- In Part III, we discuss certain other procedural changes that the Commission has proposed as part of the review of the proxy "plumbing" process.

I. Decoupling and Empty Voting

Questions posed: Are there circumstances (such as empty voting while holding a negative economic interest) where debt, equity and hybrid decoupling appear to be fundamentally detrimental to the shareholders, debtholders, or the issuer itself? Are existing disclosure requirements, or changes to existing disclosure requirements, sufficient to address any such concerns? Should the Commission consider additional remedial actions? What role should federal law, state law and individual corporate actions play in addressing any such concerns?

Empty voting, in all of its forms and in any size, is detrimental to the corporate franchise and to the interests of securityholders. The fundamental basis for giving shareholders the right to vote on corporate matters is that those shareholders have an economic interest in the corporation and will vote their shares in accordance with that interest. This, in turn, is posited to be in the corporation's interest, because well-informed shareholders will make decisions that they believe enhance the value of the corporation and their economic interest in it. When those voting or controlling the vote have no economic interest in the corporation, or, worse yet, an economic interest in the corporation's failure rather than its success (as may occur if a holder has a net short position or has an economic interest in another company that would benefit from the corporation's failure), the basis for giving shareholders the right to vote is eviscerated. We believe that the Commission should explore all available avenues to more closely align voting power and economic interest. Enhanced disclosure requirements are an important step towards discouraging empty voting, but not a sufficient one. We urge the Commission to prohibit actions taken for the primary purpose of obtaining voting rights without holding a corresponding economic interest.

The Commission and the United States Congress have committed to a dramatic regulatory shift designed to "empower shareholders." The recent adoption of Rule 14a-11 implementing proxy access (now stayed pending resolution of a court challenge), and the myriad additional voting and disclosure requirements to be implemented by the Dodd-Frank Act, will expand shareholder influence over corporate management and elections to an unprecedented degree. Putting aside the issue of whether this paradigm shift is founded on accurate assumptions about long-term value maximization for the benefit of corporate shareholders and the nation or about what leads corporations to take undue risks, the entire experiment is hollow if the fundamental premise – that voting shareholders hold an economic interest in the corporation – does not hold true. The prevalence of empty voting, and the increasingly sophisticated and manipulative ways in which it is employed, risks allowing voters who are not economically aligned with a corporation and its economic shareholders to subvert the corporate machinery to the detriment of those shareholders, the corporations that they own and, ultimately, the American economy.

The decoupling of economic and voting interests in voting stock allows sophisticated investors the opportunity to accumulate large blocks of voting rights at a low cost, without assuming economic exposure and without disclosing their actions to regulators, issuers, or the marketplace. At its most extreme, investors may specifically seek voting rights with the express goal of adversely affecting one issuer for the benefit of another in which such investor does have an economic interest. Such actions have no societal benefit, and subvert the integrity of the shareholder vote and the fair and efficient operation of the capital markets.

We have long supported expanded disclosure requirements relating to synthetic and derivative ownership arrangements, and continue to do so. In particular, we support amendments to the beneficial ownership reporting rules so as to encompass all forms of ownership and other economic arrangements that have substantial effects on the markets for publicly traded securities and the corporate governance of their issuers, and all arrangements that create a direct or indirect pecuniary interest in the relevant security.[1] Indeed, Section 766(e) of the Dodd-Frank Act expressly provides the Commission with the opportunity to adopt rules to clarify that the purchase or sale of security-based swaps, or classes of security-based swaps, shall be deemed the acquisition of beneficial ownership of the equity security, and we believe it is essential for the Commission to adopt such rules.

We urge the Commission to prohibit actions taken for the primary purpose of accumulating voting power without the corresponding economic interest. We recognize that establishing a person's purpose may be a complex endeavor; however, there is value in a strong statement from the Commission that such practices are unacceptable as a policy matter. A prohibition on manipulative decoupling practices (such as those attempted in the well-documented case involving the proposed merger between Mylan Laboratories and King Pharmaceuticals), which would be consistent with the existing use of broad "anti-evasion" language elsewhere in the federal securities laws,[2] would provide a regulatory standard which could be used to separate permissible from impermissible practices.

Decoupling of voting power and economic interest also occurs in other, more subtle, forms. The equity ownership market is increasingly an institutional one, with the majority of shares under the control of professional money managers of all types. It is common practice within these institutions to separate the investment function from the voting and governance function. Because the individuals making investment decisions are generally not the individuals who decide how those shares will be voted, voting decisions are often made not with a view to enhancing the economic performance of the corporation, but instead for some extraneous political or other purpose (or just to follow a prescribed policy). An even more extreme decoupling occurs where the voting decisions of institutional holders are effectively

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[1] *See* Theodore N. Mirvis, Adam O. Emmerich and Adam M. Gogolak, *Beneficial Ownership of Equity Derivatives and Short Positions – A Modest Proposal to Bring the 13D Reporting System into the 21st Century* (2008), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.15395.08.pdf.

[2] *See, e.g.*, 17 CFR 240.13d-3.

determined by outside proxy advisory firms, which have no economic interest in the shares being voted. While some institutional investors who subscribe to these services theoretically make their own voting decisions, it is commonplace for them not only to rely on the recommendations of the service, but to turn the actual voting of the shares over to the service with instructions to vote the shares in accordance with the service's recommendations. Internal policies of these institutions generally require a special internal exemption before they may depart from the recommendations of their proxy advisor, and for institutions that have turned over the actual voting of the shares, there are also logistical hurdles to voting other than in accordance with the recommendations.

Because internal decoupling within investment firms and the use of outside proxy advisors are cost-efficient means by which institutional investors attempt to discharge their obligations to exercise their voting power, too often large numbers of shares are voted in accordance with pre-determined, "one-size-fits-all" policies rather than on an individually considered basis taking into account specific facts and circumstances. As recent changes in law and regulation put the burden of more and more decisions before shareholders, this trend is likely to continue. Moreover, these decoupled votes are wielding greater power due to a continued decline in the participation of individual investors in the corporate voting process, both as a result of increasing intermediated ownership and the decline in the types of shareholder decisions on which brokers may vote uninstructed shares.

We believe these subtle forms of decoupling require regulation of proxy advisors, which we discuss below in Section II, as well as a reconsideration of the means by which individual investors can direct intermediary votes, discussed in Section III.

II. Proxy Advisory Firms

Questions posed: Do proxy advisory firms control or significantly influence shareholder voting without appropriate oversight? If such proxy advisory firms do control or significantly influence shareholder voting, is that inappropriate, and if so, should the Commission take action to address it? If so, what specific action should the Commission take?

Proxy advisory firms wield enormous influence, both in setting general shareholder voting policies and over the outcome of individual votes, while holding no economic interest in issuers. Despite this enormous influence, they currently operate outside of the realm of most of the federal securities laws. Over the last two decades, this small hegemony of for-profit firms (which, as the Staff has noted, are not free of conflicts of interest) have proclaimed themselves the arbiters of corporate governance practices, and have become so without accountability or regulation. This is to the detriment of both issuers and shareholders.

Recent changes to the corporate elections process have amplified the influence of the proxy advisory firms. Voting power is increasingly in the hands of large institutional investors, which are more likely than retail holders to subscribe to and follow the recommendations of proxy advisory firms. The amendment of New York Stock Exchange Rule 452 to prohibit broker discretionary voting in director elections, coupled with individual investor apathy in corporate elections, has enhanced the relative voting power of institutional votes. The increased prevalence of majority voting standards in director elections (adopted by many issuers due to pressures exerted by the proxy advisory firms and other activists) makes it more difficult for nominated candidates to secure the votes needed for their election, even in the absence of alternative nominees. "Withhold" or "vote no" campaigns are therefore an increasingly potent means by which activist investors advance narrow interest agendas. Proxy access, if upheld following court challenge, will make it significantly easier and less costly for institutional shareholders to run election contests. Furthermore, the ever-growing influence of the proxy advisory firms, which often recommend voting in favor of dissident nominees, will increase the likelihood of dissident success.

This problem is compounded each year as additional matters become subject to shareholder votes, and are increasingly classified as discretionary proposals on which brokers may not vote retail shares without specific instructions from the beneficial owners. The Dodd-Frank Act, when fully implemented, will require shareholder votes on a host of compensation-related issues for which broker discretionary voting is prohibited. All of these changes will further empower the proxy advisors, due both to the higher frequency of votes (such as say-on-pay) and the fact that the demands imposed by an increased number of votes each season are likely to cause institutional investors to outsource even more voting responsibility to the proxy advisory firms.

Proxy advisory firms have taken it upon themselves to hold issuers to a narrow, one-size-fits-all set of practices. This has led and continues to lead to widespread adoption of practices without case-by-case consideration of whether the practices are warranted or beneficial to the individual company.[3] As the proxy advisory firms have grown stronger, they have used their influence to cause issuers to dismantle their takeover defenses, despite evidence that strong defenses in the hands of a responsible board tend to produce better outcomes for shareholders. The rise of the proxy advisory firms has been accompanied (and this is not merely coincidental) by a marked drop in the number of corporations with classified boards or shareholder rights plans. This creates a vicious cycle in which issuers, increasingly vulnerable to unsolicited bidders or activist investors, feel pressured to accept advisory firm governance policies and activist shareholders' economic proposals, regardless of whether those policies or proposals are in the best interests of the corporation or its shareholders generally.

It is also important to recognize that the influence of proxy advisory firms extends far beyond their particular client base. The recommendations of proxy advisors with respect to individual matters voted on by an issuer's shareholders tend to be widely publicized. Issuers and dissident shareholders in contested elections typically issue press releases trumpeting recommendations in their favor, and such recommendations are considered significant enough to be reported in the news media.[4] The Commission's analogy to statistical rating organizations is

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[3] *Cf.* Sanjai Bhagat, Brian Bolton & Roberta Romano, *The Promise and Peril of Corporate Governance Indices*, 108 Colum. L. Rev. 1803, 1862 (2008) ("[S]hoehorning firms into a uniform set of governance institutions could generate substantial costs for investors without any appreciable benefit.")

[4] For recent examples of the attention paid to the recommendations of proxy advisory firms in contested elections, *see* Gina Chon, *Proxy Firm Sides With Burkle in Barnes & Noble Fight*, Wall St. J., Sept. 20, 2010; Dealbook,

an apt one, as both sets of organizations intentionally carry great influence in the market without transparency as to their methods.

The outsized influence of the proxy advisory firms, and of RiskMetrics in particular, has also been acknowledged by the courts. Vice Chancellor Strine recently based a finding that a shareholder rights plan was not preclusive of a proxy fight on the likelihood that a positive recommendation from RiskMetrics could enable a dissident to win an election despite the presence of over 30% insider ownership.[5] The fact that the incumbents eventually prevailed, despite RiskMetrics' endorsement of the dissident slate, was considered unusual enough to warrant media reports.[6]

The singular role that proxy advisory firms play in the field of corporate governance and elections, and the broad reach of their influence, calls for comprehensive and particularized regulation by the Commission for the protection of all investors. We discuss more specific suggestions below, including requiring registration of proxy advisory firms under the Investment Advisers Act, creating a regulatory regime for proxy advisory firms that brings them within the reach of more of the federal proxy rules, providing issuers with the opportunity to review and rebut the proxy advisory firms' reports on them, and enhancing regulation of conflicts of interest.

Question posed: Is additional regulation of proxy advisory firms necessary or appropriate for the protection of investors?

Yes. By their own decree (and in the case of RiskMetrics in particular, by virtue of the market dominance it has obtained), proxy advisory firms have become de facto corporate governance regulators – issuers are pressured into falling in line to avoid facing disruptive "vote no" or withhold campaigns. This trend will only be exacerbated by the recently adopted proxy access rules, if they survive court challenge. However, under current law, these advisory firms are not accountable to either issuers or investors for their actions short of actionable fraud under Rule 14a-9. Unlike the issuer's board of directors, the proxy advisory firms owe no fiduciary duty to the issuer's shareholders or its other constituencies. This is a dangerous gap in the securities laws which should be corrected. It is appropriate for proxy advisory firms to be regulated as investment advisers under the federal securities laws, and for their recommendations to be treated as soliciting material subject to the federal proxy rules.

The Commission should amend the rules on federal registration of investment advisers to allow and require proxy advisory firms to register with the Commission. As noted in the Release, the services provided by proxy advisory firms (issuing reports analyzing particular

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Proxy Advisors Split on Airgas Board Candidates, N.Y. Times, Sept. 9, 2010, http://dealbook.blogs.nytimes.com/2010/09/09/airgas-gets-mixed-bag-from-proxy-advisers/.

[5] *See Yucaipa American Alliance Fund II, L.P.* v. *Riggio*, 1 A.3d 310, 357 (Del. Ch. 2010) (noting that expert testimony at trial unanimously agreed that RiskMetrics' recommendation would be a key factor in the outcome of a proxy contest).

[6] *See* Michael J. de la Merced, Dealbook, *With Barnes & Noble Win, I.S.S. Takes a Ding*, N.Y. Times, Sept. 29, 2010, http://dealbook.blogs.nytimes.com/2010/09/29/with-barnes-noble-win-i-s-s-takes-a-ding/?scp=6&sq=%22barnes%20&%20noble%22%20&st=cse.

securities and providing advice to their clients regarding the value of securities) fall squarely into the categories of activity the Advisers Act is designed to regulate, but not all proxy advisory firms register with the Commission because they do not technically meet the $25 million minimum level of assets "under management." While proxy advisory firms lack the formal power to buy or sell the assets of their clients, they effectively direct voting decisions over a vast portfolio of assets that dwarfs the $25 million test. The policy reasons for the $25 million threshold exemption simply do not apply. Further, the harms which the Advisers Act is designed to regulate are directly implicated, as proxy advisory firms exert the sort of influence over their clients' management of their assets that requires the utmost care for fiduciary duty[7] and minimizing conflicts of interest.

Proxy advisory firms should also be brought more squarely within the regulatory constraints of the proxy rules themselves, through a requirement to file recommendations as soliciting material. The exemption currently available to proxy advisory firms under Exchange Act Rule 14a-2(b)(3) is inappropriate as applied to their business model, which fundamentally relies on the ability to speak to and influence the market beyond their immediate clientele. Proxy advisory firms characterize themselves for regulatory purposes as being in the business of giving individualized advice to those investors who subscribe to their services. This is inaccurate in practice, as the recommendations have broad influence, and the regulatory regime to which proxy advisory firms are subject should reflect this. The proxy advisory firms are able to function as they do because the market listens to them; having made themselves an integral part of the proxy and election process, they should now be required to abide by the same rules as other participants.

Another issue that we believe should be addressed is the concern expressed by many companies that the reports of proxy advisory firms may reflect a lack of understanding of the particular company and include key factual errors. The "cookie-cutter" approach that the proxy advisory firms often use, combined with their limited staffing and the burden of issuing many reports at the height of the proxy season, means that the firms may not spend an appropriate amount of time reviewing issues in the context of the specific company or engaging in substantive dialogue with the company. As part of bringing the proxy advisory firms into the investment adviser and proxy regulatory framework, we believe issuers should be given the chance to review and comment on advisory reports prior to publication, and to have the option to present a response within the report itself. To this end, we recommend the institution of a standardized process for issuer review of proxy advisory reports during the drafting process, on a timetable that allows for meaningful dialogue between the issuer and the proxy advisory firm regarding any alleged factual mistakes or other disagreements over the objective components of the report. This process should alleviate the risk that these influential reports will be based on, or will contain, underlying factual errors or incomplete sets of assumptions. To the extent all such issues are not resolved through this channel, issuers should be given the right to include their response to the report within the final report itself. We recommend the adoption of a regime analogous to the provisions of Rule 14a-8 under the Exchange Act, which would establish a set period of time that the issuer must be given to prepare its response after receiving a copy of the

[7] See *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963) (interpreting the Advisers Act to impose a fiduciary duty to clients).

report, and would require the relevant proxy advisory firm to include the issuer's response in the final published version of its report. [8] This presentation method would permit shareholders to better contextualize the proxy advisory firm's recommendation, and facilitate their ability to make voting decisions based on a full understanding of the relevant viewpoints.

Additionally, proxy rules should require proxy advisory firm recommendations to disclose whether their recommendations are based in whole or in part on their pre-published voting policies and the manner in which the those policies are applied, both generally and with regard to the specific vote that is the subject of the recommendation.

Questions posed: Is the disclosure that proxy advisory firms currently provide to investor clients regarding conflicts of interest adequate? Would specific disclosure of potential conflicts and conflict of interest policies be sufficient, or is some other form of regulation necessary (e.g., prohibiting such conflicts)?

Are there conflicts of interest (other than those described above) when a proxy advisory firm provides services to both investors, including shareholder proponents, and issuers? If so, are those conflicts appropriately addressed by current laws, regulations, and industry practices?

The Commission correctly notes the inherent conflicts of interest that arise when the proxy advisory firms both counsel issuers on the governance standards they should adopt and advise shareholders as to how they should vote, sometimes with respect to the same matter. Current practice is for minimal and vague disclosure, sometimes in the form of blanket statements that simply note that conflicts may generally exist. More specific disclosure is needed. At a minimum, proxy advisory firms should be required to disclose in their recommendations whether the advisor has, currently or within the recent past, been engaged by any participant in the relevant proxy contest, whether any of the interested parties in a contest subscribe to the proxy advisory firm's services, and the aggregate fees paid by the interested parties to the proxy advisory firm.

Another potential source of conflict is that large customers of the proxy advisers, namely institutional investors, are often directly involved in, or otherwise have a significant financial interest in the outcome of, important shareholder votes, such as votes on merger transactions or takeover proposals, and may exert influence on the proxy advisers to make a recommendation that is favorable to their position. Disclosure of any contact from such parties seeking to influence a recommendation would also be appropriate.

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[8] *See* Report of the New York Stock Exchange Commission on Corporate Governance 8 (Sept. 23, 2010), http://www.nyse.com/pdfs/CCGReport.pdf (suggesting that proxy advisory firms should be required to disclose issuer responses to their analysis and conclusions) (the "NYSE Report"). We also agree with the conclusions of the NYSE Report that "[proxy advisory] firms should be held to appropriate standards of transparency and accountability," and with their recommendation that the SEC "engage in a study of the role of proxy advisory firms," require them "to disclose the policies and methodologies that the firms use to formulate specific voting recommendations, as well as all material conflicts of interest," and "hold them[] to a high degree of care, accuracy and fairness in dealing with both shareholders and companies." *Id.*

Proxy advisory firms are subject to a pervasive, inherent structural conflict, which goes to the core of the proxy advisory firm business model – that is, that the advisory firms have a constant need to create new voting policies to justify their continued advisory role.[9] The proxy advisory firms continue to create and inflict on issuers an ever-evolving set of standards, despite evidence that their favored policies are not correlated with any improvement in corporate performance.[10] Even so, issuers disregard these recommendations at their peril, and risk being targeted by the advisory firms as noncompliant despite compelling reasons issuers may have for making their decisions. This conflict raises important questions which should be examined by the Commission, including whether institutional investors properly discharge their duties to their own clients when relying on the recommendations of proxy advisory firms.

III. Procedural Changes

Question posed: Should we consider allowing securities intermediaries to solicit voting instructions in advance of distribution of proxy material pursuant to an exemption from the proxy solicitation rules?

Yes. Permitting shareholders to give revocable voting instructions to their securities intermediaries in advance could expand retail investor participation in the proxy process, without further shifting decision-making authority away from beneficial owners. Prior to the amendment of NYSE Rule 452, broker discretionary votes accounted for between 15% and 20% of votes cast at many companies during recent proxy seasons. Many of these shares will likely not be voted in upcoming proxy seasons if no changes are made to the current system. Use of the "e-proxy" rules has also resulted in decreased voting participation of smaller shareholders.[11] The persistent failure of such a large block of similarly situated shareowners to participate in the election process calls for an alternate approach.

In the Release, the Commission posed the question of whether additional investor education initiatives could improve retail participation. We doubt that would be an effective use of resources, as it is unlikely to overcome the "rational apathy" of small investors who do not wish to devote the time required to vote in each election related to their shareholdings. This effect is likely to be magnified as the number of proposals presented by each issuer and for which broker discretionary voting is prohibited increases in accordance with governance trends and the requirements of the Dodd-Frank Act.

As an alternative, shareholders should be permitted to instruct that their shares be voted in accordance with a pre-set principle that they determine, such as voting their shares as

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[9] *See* Leo E. Strine, Jr., Keynote Address at the Journal of Corporation Law Spring Banquet: Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance (Mar. 1, 2007) ("For many of these 'corporate governance' experts, the peaceful generation of profits by public corporations would be disconcerting, as it would make their reason for existence suspect.").

[10] *See* Bhagat, Bolton & Romano at 1803 ("Our core conclusion is that there is no consistent relation between governance indices and measures of corporate performance").

[11] Notice and Access: Statistical Overview of use with Beneficial Shareholders, Broadridge Financial Solutions, Inc. (June 30, 2008), http://broadridge.com/notice-and-access/NAStatsStory.pdf.

recommended by the issuer's board of directors on all proposals or in accordance with other specified policies. The board of directors, unlike any other participant in the proxy process, owes a fiduciary duty to the issuer's shareholders, and must make its recommendations accordingly. Shareholders who wish to rely on this duty in making their voting decisions should be allowed to do so. This is consistent with the generally observed wishes of retail shareholders who do vote. It has been reported than more than 98% of retail shareholders who instructed brokers in 2007 voted in favor of the board's nominees.[12]

In order to be effective, however, an advance voting construct will need to be accessible and uncomplicated. A process requiring shareholders to make particularized determinations with respect to a laundry list of proposal types is unlikely to succeed, as it would suffer from the same complexities that cause many shareholders to forgo voting currently (although of course shareholders should be entitled to fashion specific instructions if they so choose). Shareholders should also be able to, at any time and with respect to any election, override their advance voting instructions. They should receive a ballot from their securities intermediary, with clear accompanying language instructing them how to override their instructions should they choose to do so.

Question posed: The Delaware amendment [permitting dual record dates] became effective on August 1, 2009. Should we first see how popular the dual-record-date provision is before providing a regulatory response?

Yes. The effect that a significant lag time between record dates and meeting dates has on the alignment of economic ownership and the population of voting shareholders is a question worthy of examination. It does not, however, present the same urgent need for regulatory reform as the problems of empty voting and insufficient regulation of proxy advisory firms. Furthermore, as the Commission thoroughly describes in the release, instituting a dual record date standard would raise a host of practical difficulties that caution against any mandated change in practice at this time. We recommend that the Commission adopt a "wait-and-see" approach with respect to the Delaware amendment and, when resources allow, consider conducting a study (including industry participants like Broadridge Financial Solutions who will be able to speak to implementation issues) on the feasibility and desirability of altering current practices.

Questions posed: Are there any other new rules or revisions to existing rules that would facilitate communications among investors? If so, what would those revisions be?

We believe the existing rules to facilitate investor communications in the context of voting or proxy contests are sufficient. Investors enjoy broad rights permitting them to form groups and run proxy contests, which rights will be dramatically expanded upon the effectiveness of proxy access and the related solicitation exemptions. In view of the recent adoption of proxy access (should it survive legal challenge), we believe the Commission should

[12] Letter to SEC Re: Proposed Amendment to New York Stock Exchange Rule 452 (Release No. 34-59464; File No. SR-NYSE-2006-92), Society of Corporate Secretaries and Governance Professionals 2 Mar. 20, 2009.

avoid taking additional steps to unsettle corporate elections until the full effects of proxy access are more widely understood.

Question posed: Should the Commission propose a rule to require issuers to disclose publicly the meeting agenda specifically in advance of the record date to permit securities lenders to determine whether any of the matters warrant a termination of the loan so that they may vote the proxies?

No. Issuers need to maintain flexibility in conducting their shareholder meetings, and it would be an unwarranted and detrimental infringement on this ability to require issuers to set their agendas in advance of the record date. Shareholders who choose to lend their securities do so at their own risk. There is no compelling justification to implement a significant and burdensome new restriction on all issuers, which would prevent them from using their judgment to address later-arising items at their shareholder meetings, for the benefit of this portion of the shareholder population.

IV. Conclusion

We believe that the recent trend of shifting power away from the board of directors and towards shareholders, which has dramatically accelerated in recent months with the passage of the Dodd-Frank Act and the adoption of the proxy access rules, makes it crucial for the Commission to address the troubling ways in which shareholder votes can be manipulated for the benefit of particular constituencies. Allowing short-term, activist shareholders to bend the corporate franchise to their will through the threat of proxy contests, while allowing them to disguise their true interest (or lack thereof) in the long-term economic health of a corporation, benefits no one. Other shareholders, issuers, employees, corporate counterparties and the American economy may all suffer as a result. The questions posed in the Release raise a wide variety of insightful and important issues, which if addressed properly could do much to promote the effective functioning of public corporations in this time of continued economic unrest. We urge the Commission to take bold steps to combat empty voting, to encourage the alignment of economic interest and voting power, and to stem the tide of shifting power from the board of directors and the broad shareholder base to a small number of institutional and activist shareholders and unaccountable intermediaries.

We appreciate this opportunity to submit, and the Commission's consideration of, our comments on the Release. We ask the Commission to contact any of Andrew R. Brownstein, Steven A. Rosenblum, Eric S. Robinson, Adam O. Emmerich, Trevor S. Norwitz or David C. Karp at (212) 403-1000 should they have any questions.

Wachtell, Lipton, Rosen & Katz