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

RE: File Number S7-14-10; Concept Release on the U.S. Proxy System

Dear Ms. Murphy:

We applaud the efforts of the Securities and Exchange Commission (the "Commission") to review the proxy system and are pleased to submit the following comments in response to the comment solicitation of contained in the Commission's Concept Release on the U.S. Proxy System (the "Release").

## I. Introduction

**tw telecom inc.**, headquartered in Littleton, CO, provides managed network services, specializing in Ethernet and data networking, Internet access, local and long distance voice, VPN, VoIP and network security, to enterprise organizations and communications services companies throughout the U.S including our global locations. We have approximately 2,800 employees, our common stock is listed on the Nasdaq Stock Market under the symbol TWTC and we are a large accelerated filer. Our investor base is composed primarily of institutional investors.

We wish to comment on the role of proxy advisory firms in the proxy voting process, addressing the following issues:

- The increasing power of proxy advisory firms to influence a significant percentage of a company's vote despite having no direct economic interest.
- The potential conflicts of interest that arise from the providing voting recommendations to institutions on the one hand while offering consulting services to issuers on the same matters.
- The lack of accountability to issuers for recommendations that may be based on inaccurate information and non-comparable peers.
- The lack of transparency provided into the models used by these advisory services, which is curious given the advisory services' espoused desire for transparency by issuers to the public.

## II. Proxy Advisory Services have significant impact on shareholder voting and are essentially unregulated.

Some institutions have completely outsourced their voting decisions and voting process to proxy advisory firms, while others use the recommendations of the advisory firms as guidelines. Here are our concerns.

- We believe that the influence of the advisory services extends well beyond those institutions that outsource their voting decisions to them. Our experience indicates that even those institutions with in-house compliance departments tasked with proxy voting tend to model their internal guidelines on those of proxy advisory firms or use the proxy advisory service recommendations as a significant input to their decision making process. Furthermore, intuitional shareholders, the major users of proxy advisory services, tend to have larger holdings and thus more voting power than other shareholders.

- As a result of this influence, many issuers feel pressured to conform their governance practices to the standards set by these firms[1] in order to avoid withhold votes for incumbent directors, which standards may be in conflict with the best interests of the issuers or their shareholders generally.

- Moreover, we, like many others, believe that the mandatory say-on-pay provisions of Dodd Frank, the new proxy access rules and the elimination of the broker discretionary vote are likely to magnify the power of institutional shareholders and, correspondingly, the proxy advisory firms.

The cost incentive for proxy advisory services to standardize their voting recommendations[2] and, for at least one firm, the revenue incentive to drive consulting business from its own proxy voting or governance standards suggests that concerns about proxy advisory services are unlikely to be alleviated without the Commission's intervention. We believe that both issuers and investors require additional protection as a result of the influence of and lack of transparency in the proxy advisory service industry. Below we address a number of the specific topics highlighted in the Release.

## II. The Commission should make rule changes to address conflicts of interest.

We believe that when proxy advisory firms sell consulting services to issuers with respect to some of the issues on which they provide recommendations an inherent conflict of interest exists. Ideally, this conflict should be eliminated by regulation that assures that an advisory firm cannot be in both businesses, similar to the NRSRO regulatory scheme applicable to rating agencies. It is clear that many issuers feel a subtle form of pressure to avail themselves of these services to

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[1] *See* Government Accountability Office, GAO-07-765, Corporate Shareholder Meetings: Issues Relating to Firms That Advise Institutional Investors on Proxy Voting (June 2007), available at http://www.gao.gov/new.items/d07765.pdf.

[2] We are particularly concerned about the one-size-fits-all approach employed by the advisory firms which may result in a withhold vote for directors due to the presence or absence of a particular governance practice irrespective of the issuer's rationale for the practice. Similarly, voting recommendations on executive compensation and benefits issues are made on the basis of generic models that do not take into account the specific circumstances of any particular company.

decrease the risk of an adverse recommendation.[3] This is particularly true in the case of equity plans, where an issuer cannot determine whether its plan would meet the criteria for a positive vote recommendation of the most influential firm without purchasing a proprietary model from the consulting arm of the advisory firm. While the firms claim to have structural safeguards to protect against conflicts of interest, there is widespread skepticism regarding the efficacy of those measures. In addition, a conflict of interest affecting all proxy advisory firms may arise when an institutional client of a proxy firm is also the proponent of a specific shareholder proposal that will be subject to a voting recommendation (or an actual vote) by that same proxy advisory firm. At a minimum, the Commission should require more detailed disclosure by the advisory firm of *any* consulting relationship with the issuer as opposed to the limited disclosure currently provided, either through changes to the proxy rule exemptions applicable to proxy advisory services or otherwise. This change alone would not alleviate issuers' concerns that those who fail to purchase the consulting services are at a disadvantage. The Commission should also require each firm to publicly disclose its relationship with any client who is the proponent of a proxy proposal or withhold campaign whenever the proxy advisory firm is issuing a recommendation to other clients in favor of the same proposal or withhold campaign.

## III. Should the Commission require proxy advisory services to disclose publicly their decision models for approval of executive compensation plans?

We believe that the answer to this question should be yes. The failure to disclose these models drives the demand for the consulting business of some of these firms, creating serious potential for conflicts. Even where an advisory firm is not selling consulting services, transparency into the process would provide issuers the opportunity to understand the factors that impact a score or recommendation that is not currently available. It would also allow institutions to evaluate the validity of the criteria being applied and thus the quality of the advice being rendered. We note that voting recommendations on executive compensation and benefit issues are made on the basis of generic models that do not take into account the particular circumstances of any particular company or the array of reasonable choices among compensation policies and practices.

In addition to transparency into decision models for approval of compensation plans, there should be additional transparency into rating or grading systems used to evaluate governance and pay practices. For example, one such service grades public companies on "pay for performance" based on comparisons of those companies to undisclosed peer companies, using undisclosed measurements and weighting. The same firm is unwilling to discuss the comparability of the peer companies or disclose the factors that influenced the outcome. As a result, issuers have no basis for determining whether the grades are based on accurate or valid data and an issuer that wishes to improve its grade has no basis to determine how to do so.

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[3] A June 2007 U.S. Government Accountability Office study identified as a conflict of interest the business model of RiskMetrics, which includes providing consulting services to corporations on their corporate governance and noted the contention of critics of this practice that corporations may feel obligated to obtain these consulting services in order to secure favorable vote recommendations.

## IV. Are existing procedures followed by proxy advisory firms sufficient to ensure that proxy research reports provided to investor clients are materially accurate?

Our answer is no. At a threshold level, the lack of transparency with respect to various models employed by these firms for grading or decision-making, as noted above, makes it impossible to determine whether or not the firms used accurate inputs. Although we recognize that the time period within which the advisory firms must issue their recommendations is short, providing the issuer an opportunity to review and clarify the critical information used and the principal considerations would likely improve the accuracy of proxy research reports. Advisory firms also should disclose to their clients (and publicly) any public company's response to their voting recommendations or analysis.[4]

## V. If additional oversight is needed, should it be in the form of regulatory oversight or issuer involvement?

We believe that both are needed. In our view, the regulatory scheme for proxy advisory services should include a standardized process with prescribed intervals for issuers to review and comment on proxy advisory reports prior to publication and disclosure of issuers' responses if discrepancies in information or critical assumptions are not resolved between the parties, as suggested above. This type of issuer involvement in the research and modeling process is likely to be more effective in addressing accuracy issues than general regulatory oversight of that process because it would be difficult for any regulatory scheme to provide sufficient oversight on a micro level to impact the accuracy of information with respect to individual reports, scores or recommendations.

Additional issuer involvement may also help alleviate the shortcomings of the one-size-fits all approach to corporate governance that the current process has fostered. Although at least one of the proxy advisory services surveys issuers with respect to corporate governance matters, the survey only solicits input on a very limited subset of the topics upon which that firm issues guidelines. The other services appear to have no formal process for soliciting stakeholder input into their voting guidelines.

## VI. Conclusion

While we believe that regulation and oversight of proxy advisory firms is needed to address the shortcomings described above, we also believe that the SEC should also address the way in which institutional investors select and utilize the proxy advisory services. Institutional investors with fiduciary duties to clients, beneficiaries, or shareholders should be required to exercise greater scrutiny with respect to any express or implicit delegation of their voting rights to a proxy advisory firm. The SEC should consider establishing a more robust due diligence process for institutions subject to the Investment Company Act, to encourage institutional

[4] In addition, issuers should also be given the opportunity to review and comment on proxy advisory services' governance ratings or grades prior to their release. In the case of RiskMetrics, the process for issuer verification of data used to calculate their governance risk scores in 2010 did not allow for corrections to be made until *after t*he scores were issued and the annual meeting held.

investors to avoid "one-size-fits-all" or "check the box" methodologies and evaluate the facts and circumstances of each public company, which in turn would impact the manner in which the advisory services would have to perform the voting analysis outsourced to them.

Sincerely,

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