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Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549  
Attention: Nancy M. Morris, Secretary

Re: File No. S7-16-07  
Release No. 34-56160 (Shareholder Proposals)

Ladies and Gentlemen:

I am writing to you on behalf of the Interfaith Center on Corporate Responsibility (hereinafter "ICCR") in response to the request for comments set forth in Release 34-56160 (the "Release").

## A. INTRODUCTION

ICCR is a coalition of faith-based institutional investors, Catholic, Protestant and Jewish, who believe in integrating social values into corporate and investor decisions. It has 182 faith-based members, and approximately 120 institutional member "associates" and "affiliates"; altogether these faith-based and non faith-based institutions have approximately \$110,000,000,000 under management. In addition, it has more than 500 individual "advocates" and others who support its work. Its members have been active for 36 years in dialogues with corporations about their activities and in submitting shareholder proposals, primarily on matters of social responsibility, but also on matters of corporate governance. ICCR's experience over the years is that a significant number of shareholder proposals are withdrawn each year following dialogue with the corporate recipients of those proposals. For example, during the past twelve years, the Episcopal Church has submitted shareholder proposals concerning the composition of the Board of Directors to 40 corporations and has withdrawn all but one of them after reaching a satisfactory agreement with the recipient. All or virtually all of the Social Responsibility

in Investments ("SRI") shareholder proposals submitted by ICCR members or others have been in precatory, not mandatory, form.

ICCR is part of a much broader movement of investors concerned about the social responsibility of the corporations in which they invest. The Social Investment Forum (an association of SRI investors) estimates that institutional investors with \$2,300,000,000,000. under management are "active" investors which promote social responsibility in investments ("SRI") by submitting (precatory) shareholder SRI proposals and/or dialogue with corporations on such matters and/or screen their portfolios on SRI criteria. This is estimated to be close to one-tenth of institutional assets under management in this country. In addition, there are many institutional investors who are not "active" investors but who vote to support at least some of the shareholder proposals submitted by the "active" shareholders. For example, in 2004 a precatory shareholder proposal concerning discrimination in the workforce submitted to Fifth Third Bancorp received 63% of the votes, while in 2006 a precatory shareholder proposal concerning political contributions received 76% of the vote at Amgen and a similar precatory political contributions resolution to Plum Creek in 2005 received 56% of the vote. This past spring a precatory shareholder proposal submitted to HCC Insurance concerning discrimination in the workforce received 52% of the vote; one to Unisys on political contributions received 51% of the vote and a similar resolution submitted to Clear Channel received 46% of the vote; one to Dillard's requesting that company to prepare a "sustainability" report received 46% of the vote and similar resolutions submitted to Comerica and to Hasbro each received 45% of the vote. Last year, in addition to the Amgen vote, a precatory proposal at Micron concerning discrimination in the workforce received 56% of the vote; one to Lear asking for monitoring of its supply chain received 50% of the vote and one to Terex requesting a sustainability report received 48% of the vote. Since not all institutional investors hold stock in these companies, and since their individual policies vary as to what they will support, it seems reasonable to assume that institutions holding a majority of assets under management will vote for at least some SRI shareholder proposals in the belief that precatory SRI shareholder proposals have a role to play in making corporations more accountable to their owners. It has been the experience of ICCR that individuals support precatory SRI proposals at as least as high a rate as do institutional investors.

It is also worth noting that this past spring a precatory proposal concerning impacts and relations with the communities in which it operates was submitted to Newmont Mining and received 95% of the vote when the company advised shareholders to vote for it. Similarly, in the 2004 proxy season a precatory proposal submitted to Coca Cola received a favorable vote of 98% when the company endorsed the proposal, while that same year precatory proposals were supported by management and received 92% of the vote at Tyco (environmental issue) and at Cintas (supply chain proposal).

The history of SRI involvement in climate change is instructive. The first climate change shareholder proposal was submitted in 1991 to Exxon and asked Exxon to reduce its carbon dioxide emissions. It received 6.2% of the votes cast. In the spring of 2007 a shareholder proposal was submitted to Exxon requesting the corporation to set goals for reduction in greenhouse gas emissions and received 31.12% of the vote. Although

shareholder activism via precatory proposals has certainly not been the sole factor in influencing companies to disclose data about, or curb, their carbon impacts on global warming, it surely was the spark that set such actions in motion. And that motion has most recently culminated in the announcement by the Carbon Disclosure Project that worldwide institutional investors with a combined \$41 trillion of assets under management (compared with a total market value of \$25 trillion for all companies listed on the New York Stock Exchange as of December 31, 2006) seek information from 2,400 companies worldwide on climate change and their greenhouse gas emissions. See [www.cdproject.net](http://www.cdproject.net). We do not believe that such marked change in society's expectations about what constitutes good corporate performance would have occurred without the tool of precatory shareholder proposals.

Similar impacts have been seen in other areas of SRI concern, most notably the campaign some years back to get American corporations to cease doing business in South Africa. The initial spark was a precatory shareholder proposal submitted by the Episcopal Church in 1971 asking General Motors to divest itself of its South African operations. Although that shareholder proposal received less than 3% of the vote, it resulted in the establishment of the Sullivan Principles which set minimum standards for the conduct of those American corporations that chose to retain their South African operations. Within a few years the shareholder resolution campaign had resulted in almost all American companies withdrawing from South Africa and also had sparked a broader campaign for, inter alia, state and local legislation. Although Apartheid was undoubtedly doomed to eventual extinction, we believe, on good grounds, that the precatory shareholder campaign not only speeded its demise, but also ensured that that demise was accomplished without any significant bloodshed or violence.

As can be seen from the climate change and South Africa examples, the submission of precatory proposals on topics by SRI investors has frequently been an "early warning" system to the corporate community of important societal issues that they will soon face, and thus has been a valuable tool for the corporate community. Another example of that early warning system can be found in the history of SRI precatory shareholder proposals concerning predatory subprime lending and the securitization of such subprime loans. The first shareholder proposals concerning predatory subprime lending were submitted in 2000 and the first asking securitizers to police the loan pool were submitted in 2003, in each case years before subprime lending became recognized as a major problem. The shareholder proposals constituted an early warning system for those who heeded them. Although these proposals were submitted to a number of companies and survived company challenges at the SEC, they never appeared on any proxy statement because the recipients in each case agreed to a change of policy with regard to predatory lending to subprime borrowers (in one case the securitizer called the proponent the day after it lost its no-action request at the SEC to request a meeting and dialogue on the matter and at the meeting agreed to alter its due diligence process with respect to loans purchased for securitization). Notably, the securitizers that received the precatory proposals and changed their practices have not been among those who have suffered during the recent unpleasantness.

Another SRI concern that might be seen as an early warning message has been the concern over registrants' supply chains and the conditions under which goods were being made abroad, especially in China. The large number of recalls in recent months of goods produced for many industries is, we believe, a vindication of the concerns that SRI investors have expressed for a number of years.

We believe that Mr. McNerney, the CEO of Boeing was correct when he stated: "Today, good business is generated by good corporate citizenship – your stance on the environment, your stance on governance, your stance on CEO pay." (*The Wall Street Journal*, May 5-6, 2007, page 10)

It is also worth noting that the SEC itself has given indirect backing to one major SRI concern, namely that of corporations operating in nations that grossly abuse human rights. Although it has apparently not as yet worked out the technical details, it has undertaken to provide a web site that would list companies doing business in the worst offending nations.

In addition to SRI precatory shareholder proposals, it should be remembered that corporate governance shareholder proposals have almost invariably been in precatory form. Indeed, it has only been in the last couple of years that there have been more than a handful of attempts to amend the by-laws via 14a-8, and examples of such attempts have been few and far between. In recent years, at least four precatory governance proposals received at least 93% of the vote when the registrant endorsed them. Even without company endorsement, precatory corporate governance shareholder proposals this spring received 87% of the vote at KB Home (restrict golden parachutes); 86% of the vote at International Paper (elect directors by majority vote); 81% of the vote at Kimberly-Clark (eliminate supermajority voting); 81% of the vote at Newell Rubbermaid (elect directors by majority vote); 79% of the vote at MeadWestvaco (restrict poison pill); 74% of the vote at Honeywell (shareholders to be able to call special meeting); 73% of the vote at Hewlett-Packard (restrict poison pills); 69% of the vote at PPG (restrict golden parachutes); and 67% of the vote at Kellwood (repeal classified board structure).

It is safe to conclude that not only have precatory SRI shareholder proposals served a useful corporate and societal purpose, but also that had a ban on precatory proposals been in effect during the past quarter century, it would have eliminated not only all SRI proposals, but probably also close to 100% of corporate governance shareholder proposals.

Although shareholder proposals serve a useful purpose, is there anything to be said on the other side? Some (but certainly not all) companies view precatory proposals as a distraction, but we believe that Chairman Cox effectively answered that argument in his June 26, 2007, appearance before the House Committee on Financial Services when he said "they're non-binding, and therefore there is a limit to the distraction that [they] can provide".

We therefore conclude that there is no justification for depriving both shareholders and corporations of a communication vehicle that has proven beneficial to both.

## B. LEGALITY OF PRECATORY PROPOSALS

Precatory proposals are not the creation of Rule 14a-8. Rather they have independent existence under state law and derive from the common law of corporations.

Section II C.1. of the Release (pages 50-57) is ultimately premised on the assertion by "several participants" that "Rule 14a-8 expands rather than vindicates the framework of shareholder rights under state law". We submit that this underlying premise is false. We note in passing that the footnote supporting this premise cites only the views expressed at the SEC's May 7, 2007 Proxy Roundtable by Vice-Chancellor Strine. Vice Chancellor Strine cited no decisions by the Delaware courts which would lead one to believe that his conclusion is correct. Indeed, his sole explanation as to why precatory proposals are bad was as follows: "We do not have imaginary voting. . . . That is precatory proposals. In fact I could have a proposal, I wish we could cure male pattern baldness . . . We do not authorize votes on that." (See page 18 of the unofficial transcript.) We submit that the view expressed by the Vice Chancellor is worth considerably less than well reasoned dicta and that his "reasoning" is totally irrelevant to the types of precatory SRI and precatory corporate governance shareholder proposals that have actually been voted on by shareholders during the 65 years that Rule 14a-8 and its predecessors have been in existence.

It is not surprising that the Vice Chancellor cited no Delaware case or statutory law in support of the proposition that precatory proposals are impermissible in Delaware, since there are none. The Delaware General Corporation Law, Section 211 (b), states that at the annual meeting of shareholders, in addition to the election of directors, "[a]ny other proper business may be transacted". Neither the statute nor Delaware case law defines "proper business". Nevertheless, that precatory proposals are proper, even in Delaware, can be seen from (i) the fact that legal precedents for precatory proposals exist outside Delaware; (ii) the fact that Delaware practice with respect to advance notice by-laws contemplates that matters other than election of directors and by law amendments can be brought before the meeting by shareholders; (iii) the fact that Rule 14a-4 contemplates that precatory proposals are permissible under state law; and (iv) the fact that the assumption was made at the time that the predecessor of 14a-8 was first adopted that precatory proposals were permissible at common law at annual meetings of shareholders, and that this assumption has remained unchallenged for 65 years. These precedents suggest that "proper business" under the Delaware statute includes precatory proposals of the type (SRI and corporate governance) that have appeared on corporate proxy statements during the past 65 years.

(i)

One leading authority that supports the proposition that precatory proposals are permissible at shareholder meetings is *Matter of Auer v. Dressel*, 306 NY 427, 118 NE 2d 590 (1954) where the highest court in New York deemed proper to be voted on a proposal to endorse the regime of the former president and ask that he be restored to office. The Court of Appeals stated "it is not an improper purpose [for the shareholders]

so to express themselves and thus put on notice the directors who will stand for office at the next election."

At least as persuasive as to the right of shareholders to present precatory proposals is the holding of the Third Circuit, interpreting Delaware law, in the landmark case of *SEC v. Transamerica Corporation*, 163 F.2d 511 (3d Cir 1947), *cert. denied* 322 U.S. 847 (1948). That case was the first to test the validity of the predecessor of Rule 14a-8 and was litigated five years after the initial version of the rule was enacted by the Commission. The case arose from the refusal of Transamerica Corporation to include three proposals submitted to it by John Gilbert. Two were by-law amendments and the third was a "resolution" to have a report of the annual meeting sent to all stockholders. When Transamerica refused to include any of the three Gilbert proposals, the Commission sued Transamerica. The Third Circuit, upholding the Commission's position, held that Transamerica must resolicit for the annual meeting in a new proxy statement containing the three proposals since all three proposals, including the one which was not a by-law amendment, are "subjects in respect to which stockholders have the right to act under the General Corporation Law of Delaware".

There is not a scintilla of evidence that any court, in Delaware or elsewhere, has deemed precatory proposals proposed by shareholders to be impermissible as a matter of state law. Indeed, at the SEC's May 7 Proxy Roundtable, R. Franklin Balotti, the dean of the Delaware corporate bar, publicly disagreed with the Vice Chancellor and stated that precatory proposals can be brought before the annual meeting:

I think precatory resolutions are authorized by [Section] 211 [of the General Corporation Law of Delaware], which says that a stockholder can bring before a meeting anything that is proper for a stockholder to act on. I believe that it is proper for stockholders to *ask* directors to do whatever, as opposed to *telling* directors to do whatever. (Emphasis supplied) (Unofficial transcript, pages 34-35).

Furthermore, even if the Vice Chancellor is correct with respect to Delaware corporations, according to the Secretary of State of Delaware ([www.corp.delaware.gov/corpsosbio](http://www.corp.delaware.gov/corpsosbio)) Delaware corporations constitute only about 50% of publicly traded companies and there is no reason to believe that the states of incorporation of the remaining 50% of public companies (which include the three companies with the highest market cap, namely, ExxonMobil, General Electric and Microsoft) would follow the Vice Chancellor's male baldness approach rather than the *Auer* and *Transamerica* decisions.

(ii)

That the Vice Chancellor's position that the only matters that shareholders may initiate are director nominations and by-law changes is inconsistent with common Delaware practice is illustrated by the fact that the leading Delaware corporate treatises consistently refer to the shareholders' right to submit "resolutions" or "proposals" (either of which would encompass, but not be limited to, bylaw amendments), rather than the much narrower right to submit bylaw amendments. Thus, in Balotti and Finkelstein,

*Delaware Law of Corporations and Business Organizations*, Section 7.9 (available on Lexis) the authors state that, in addition to advance notice of nominations, advance notice by-law provisions commonly "require the submission of information regarding shareholder proposals or resolutions". The position taken by this treatise is also supported by Drexler, Black and Sparks, *Delaware Corporation Law and Practice*, Section 24.05(3) (available on Lexis), which states that advance notice requirements imposed "upon stockholders intending to nominate prospective directors or bring other issues up for consideration" are valid. This phraseology is inconsistent with the Vice Chancellor's notion that the sole matter other than election of directors that shareholders may initiate is the amendment of the by-laws. A similar description of advance notice provisions, equally inconsistent with the Vice Chancellor's position, can be found in 1 *Corporate Governance: Law and Practice* [edited by Bart Schwartz and Amy Goodman], Section 3.05(4) [Stockholder Proposals] (a)[State Law] (available on Lexis):

“Delaware law does not expressly address substantive requirements for proposals submitted by stockholders for consideration at an upcoming meeting. Nevertheless many corporations have procedural requirements that must be complied with before a proposal may be considered at an annual meeting.”

It is generally recognized that shareholders could, at common law, bring up at the annual meeting (but not at a special meeting) any matter pertaining to the company. The language of the Delaware statute and other state statutes generally reflect this approach by providing that the any matter that is "proper" can be brought before the meeting. In adopting advance notice provisions, corporations, including Delaware corporations, have reflected this common law position.

The lack of substantive requirements for matters to be presented to the meeting and the acknowledgement that precatory proposals are proper for shareholder consideration at Delaware corporations can be seen from the actual wording of advance by-law provisions. For example, at AT&T Inc. (the largest corporation (by market capitalization) of any corporation incorporated in Delaware) the advance notification provision is found in Article I section 8 of the company's bylaws. Section 8 does not apply to nominations for election to the Board since they are covered in Section 7 of Article I. If the only matter other than nominations that shareholders could bring before the meeting for a vote was an amendment to the By-laws, one would have thought that Section 8 would refer exclusively to bylaw amendments, just as Section 7 refers exclusively to nominations for director. Instead it refers to "each matter" that shall be brought before the meeting (and makes reference to matters brought before the meeting under Rule 14a-8).

In summary, the Vice Chancellor's position is wholly inconsistent with Delaware practice.

(iii)

In 1998 the Securities and Exchange Commission (the "Commission") adopted

amendments to Rule 14a-4, the rule that deals with discretionary voting by proxy holders. The adoption of those amendments, which deal with the procedures for introducing shareholder proposals outside Rule 14a-8, is inconsistent with the notion that shareholders cannot bring precatory proposals before the annual meeting. The problem that was addressed by the rule change was that shareholders were bringing precatory proposals before the annual meeting outside the confines of Rule 14a-8. The difficulty was not that such proposals were invalid as a matter of state law, but rather whether management could use the discretionary authority granted by the proxy to vote against those proposals when they were properly brought before the meeting. Thus, in Section H of the proposing release (Release 34-39093) (September 26, 1997), the Commission stated:

Rule 14a-4 does not, however, clearly address the exercise of discretionary voting authority if the shareholder chooses not use rule 14a-8's procedures for placing a proposal in the company's proxy materials. This may occur if the proponent notifies the company of his or her intention to present the proposal from the floor of the meeting, or commences his or her proxy solicitation, without ever invoking rule 14a-8's procedures. . . . We accordingly propose to amend rule 14a-4(c) in part to clarify when a company may exercise discretionary voting authority on a shareholder proposal where the proponent has not invoked rule 14a-8's procedures. . . . Proposed new paragraph 14a-4(c)(2) would address a company's ability to exercise discretionary voting authority after it has received timely notice of a non-14a-8 proposal for the purpose of paragraph (c)(1).

The Commission did not limit its discussion to bylaw proposals and its failure to so limit 14a-4 is indicative of the fact that the Commission did not believe that precatory proposals are impermissible under state law and are merely the creation of Rule 14a-8. As far as one can tell, not one commentator suggested during the comment period that there were in fact no precatory proposals outside 14a-8 and that they were merely the creation of that rule. Furthermore, it is clear that precatory proposals, as well as by-law amendments, were at issue in the rule-making proceeding. Cf. *Union of Needletrades, Industrial and Textiles Employees v. The May Department Stores Company*, 26 F. Supp. 2d 577 (S.D.N.Y. 1997).

In the adopting release (Release 34-40018) (May 28, 1998) the Commission repeated verbatim the sentences quoted above and then went on, without any indication that the rule applied only to attempts to amend company by-laws, to adopt the proposal in slightly modified form.

(iv)

Similarly, the genesis of, and history of practice under, Rule 14a-8 are instructive. The current rule can be traced to the Commission's response in 1938 to a situation where the registrant was aware that a proposal was to be made at the annual meeting by a shareholder and the Commission believed that it would be fraudulent for the company to solicit proxies without disclosing that fact. Some time later, the Commission

promulgated the predecessor of what is now Rule 14a-8. See Release (January 12, 1940). (Item 16 in the proxy statement required the disclosure of “matters” “to be acted upon” (not merely bylaw amendments) that the registrant was aware would be brought up at the meeting.) Two years later the Commission first used the phrase “proposals” when it permitted any stockholder “making proposals for action” [not bylaw amendments] to have a 100 word statement included in the management proxy statement. As the Release notes (page 7), Chairman Purcell explained these actions to Congress in 1943 stating that the proxy rules attempt to replicate under the proxy system the rights that a shareholder would have if she/he actually attended the annual meeting, including the right “to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted upon.”

The current Chairman, Charles Cox, has equally affirmed that the Commission’s proxy rules are intended to replicate, as near as may be, under a proxy voting system the concept of the annual meeting as a meeting where all shareholders could exchange their views and exercise their voting rights:

The system that Congress authorized the SEC to devise was meant to replicate as nearly as possible the opportunity that shareholders would have to exercise their voting rights at a meeting of shareholders if they were personally present. (SEC’s May 7 Proxy Panel, unofficial transcript, pp. 7-8.)

Four years after Chairman Purcell’s testimony, as noted above, the Third Circuit affirmed the Commission’s position that a precatory proposal concerning post-meeting reports was a subject with respect to which shareholders “have the right to act” under Delaware Law. In the ensuing 60 years this conclusion has never been challenged and the uniform practice under Rule 14a-8 has been that shareholders may properly submit precatory proposals. Indeed, virtually all SRI proposals as well as most corporate governance proposals have been in precatory form over the past 70 years. Additionally, and perhaps most tellingly, for more than 30 years the Commission itself has explicitly recognized that precatory proposals are not merely proper, but perhaps the preferred form of proposal. In Release 34-12,999 (November 22, 1976) it instituted the predecessor of the NOTE that now appears in Rule 14a-8(i)(1) and now reads:

. . .some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as *recommendations or requests that the board take specified action are proper under state law*. Accordingly, we will assume that a proposal drafted as a recommendation or request is proper unless the company demonstrates otherwise. (Emphasis supplied.)

Furthermore, it is well to bear in mind that certain types of corporate governance proposals, in Delaware and most other states, cannot be put in the by-laws, but **MUST** be in precatory form. That would be true if the shareholder wished to have the registrant’s Articles of Incorporation amended, as for example to eliminate a provision for a

classified Board. In that circumstance, a bylaw purporting to end classification would be invalid as in conflict with the company's Articles. Additionally, since amending the Articles in Delaware (and probably in all states) is a two-step process that only the Board itself can initiate, all that a shareholder can do is make a precatory request that the Board itself commence the process to repeal the Article provision. Thus, a ban on precatory proposals would remove entirely from shareholder purview a number of classic corporate governance concerns that traditionally have been available for shareholder consideration, such as to end dual classes of common stock, where one class has super voting rights (voted on at 24 companies this past spring and received 62% of the vote at Blockbuster; 31% at Comcast; 28% at Ford); to end supermajority voting provisions (received 80% at Staples this year, whereupon the Board agreed to institute the change; averaged 68% at 20 companies this year); require a majority vote to elect directors (permissible by bylaw in some, but not all states; there have been dozens of these proposals in recent years, and this type of proposal received an average of more than 49% of the vote this spring when it was voted on at 46 companies); end classified boards (received an average favorable vote of 69% this year and was voted on at 44 companies); and requiring cumulative voting (average favorable vote of 34% this spring when it was voted on at 21 companies). [Foregoing data derived from ISS (Risk Metrics)'s Corporate Governance Bulletin for June, 2007.] It is thus abundantly clear that eliminating precatory proposals would not only have a major adverse impact on shareholder attempts to improve corporate governance, but would also completely prohibit whole categories of corporate governance proposals from appearing in the proxy statement.

Finally, the Release itself recognizes that Rule 14a-8 is designed to permit precatory proposals. Immediately following a discussion of the fact that the proxy rules are designed to protect rights that shareholders have under state law, the Release itself goes on to state (page 9) that under Rule 14a-8 shareholders can present "a broad range of non-binding and non-binding proposals, including non-binding proposals that traditionally are within the province of the board and management".

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In conclusion, legal precedent, Delaware practice and 14a-8 practice all support the common law right of shareholders to present precatory proposals at annual meetings. Precatory proposals are most definitely NOT the creation of Rule 14a-8. Rather, they both predate that Rule and, as Rule 14a-4 recognizes, currently exist outside it.

### C. Two Suggestions that Would Emascuate 14a-8

Section II C.1. of the Release appears to be in the nature of a concept release or trial balloon. (No reference to such possible changes appears in either Section VII A. of the Release ("Reasons for, and Objectives of, Proposed Action") or, other than proposed Rule 14a-18, in Section IX of the Release ("Text of Proposed Amendments")). The concept makes little sense and the trial balloon should be shot down.

Two alternatives are brought up in the Release: (i) permitting registrants to adopt by-laws modifying Rule 14a-8, or opting out of it entirely; and (ii) substituting a chat room for the state law voting procedures of Rule 14a-8.

Each of these alternatives is a solution in search of a problem.

(i)

In the immortal words of Yogi Berra, proposal (i) (and really proposal (ii) as well) are “*deja vue* all over again”. Similar proposals were made in 1982 and again were considered in 1997. Each time they were soundly rejected by both commentators and the Commission itself.

As the Commission has noted in the Release (at page 51), a proposal was made in 1982 that would have permitted a process whereby companies could opt out of Rule 14a-8 and, subject to certain minimum requirements, formulate their own alternative rule (which could not have been adopted without shareholder consent). See Release 34-19135 (October 14, 1982). In adopting final rule changes, this proposal was abandoned as undesirable and/or unworkable. In its Executive Summary in the adopting release (34-20091) (August 16, 1983), the Commission stated:

While there was some limited support, mostly from issuers, for the approach proposed in Proposal II, most commentators were concerned that Proposal II would create serious problems of administration as there would be no uniformity or consistency in determining the inclusion of security holder proposals. Exacerbating the problem generated by provisions individual to each issuer would be the effect of the fifty state judicial systems administering the process.

Footnote three reveals that of the 393 letters received in response to the request for comment, only 24 supported Proposal II (and another 18 who indicated some interest in the concept). The Commission then concluded:

After review of the constructive and detailed views of the commentators and after consideration of the issues presented in the Proposing Release, the Commission has determined that shareholder access to issuers' proxy materials is appropriate and that federal provision of that access is in the best interests of shareholders and issuers alike.

Moreover, based on the overwhelming support of the commentators and the Commission's own experience, the Commission has determined that the basic framework of current Rule 14a-8 provides a fair and efficient mechanism for the security holder proposal process, and that with the modifications to the rule and interpretations thereunder discussed in this Release, Proposal I should serve the interests of shareholders and issuers well.

There is nothing in the 1983 Release, or in the record made by the commentators on the 1982 proposal, that would support the assertion in the Release (page 51) that the reason for the Commission's failure to adopt the opt out proposal was its recognition of a collective action problem. On the contrary, the reasons the 1982 proposal was not adopted are set above.

A similar conclusion was reached in 1997 in Release 34-39039 (September 18, 1997). In response to a Congressional mandate that the Commission conduct a comprehensive study of the shareholder proposal process, the Commission began its study with the distribution, in February, 1997, of a questionnaire on shareholder proposals. (The Congressional mandate was the result of the uproar created by the Commission's exclusion of a shareholder proposal submitted to *Cracker Barrel Old Country Store, Inc.*, and its refusal to follow a Federal Court decision holding that similar proposals concerning discrimination in the workforce were not excludable under the "ordinary business" rubric.) After briefly discussing the possibilities of adopting a system that simply left it to the states to establish shareholder proposal rules, or a system that allowed, as proposed in 1982, each company to adopt its own rules, the Commission stated:

Despite these considerations, the results of the Questionnaire appear to support the view that most participants would prefer that we maintain the current system, possibly with modifications. The Questionnaire sought views on a number of different alternatives to the existing system, none of which appeared to receive strong support from respondents. For instance, the Questionnaire asked about a system like that discussed above where states would be urged to adopt their own shareholder proposal rules in place of rule 14a-8; and about a system where each company would be permitted to adopt its own shareholder proposal rule, subject to shareholder approval. Neither shareholders nor companies appeared to favor these approaches. n28

Footnote 28 indicated that almost 90% of both corporations and shareholders opposed leaving the matter to the states; that slightly more corporations opposed than favored letting each corporation set its own rules, and that over 93% of shareholders opposed such a scheme. Even more dramatically, footnote 30 indicated that approximately 75% of both shareholders and corporations preferred the existing system, either with or without some modifications. Instead of proposing either of those broad alternatives to Rule 14a-8, the Commission proposed to adopt an "override" provision that would have allowed shareholders to override Rules (i)(5) ("relevance) and (i)(7) ("ordinary business"), provided they could demonstrate that at least 3% of the shares wished to have a vote on the matter. In other words, in addition to the normal 14a-8 procedures, shareholders could, in effect, petition to have certain other matters, otherwise excludable under (i)(5) or (i)(7), included in the registrant's proxy statement. Ultimately, this attempt to broaden the rights of shareholders under Rule 14a-8 was not adopted. See Release 34-40018 (May 21, 1998).

In lieu of the carefully calibrated study which preceded the 1997 proposals, the Release cites a number of supposed justifications for again considering letting each corporation make up its own rules. The Commission, without citing a scintilla of evidence, asserts that there have been a number of developments since the matter was considered in 1982 (ignoring the careful consideration, including surveys, in 1997). The Release makes no attempt to explain how these so-called “developments” warrant the substitution of an entirely new system for 14a-8. For example, why does the “importance of institutional investors in contemporary capital markets” justify taking away the rights of small shareholders, the group intended to be the primary beneficiary of the Rule? (See Release 34-40018 (May 21, 1998) where the share ownership requirement was not raised in excess of \$2000 “in light of rule 14a-8's goal of providing an avenue of communication for small investors”.) Similarly, why does the existence of organizations that provide “information to institutional investors concerning corporate governance issues assist these same small shareholders? Indeed, the existence of such information, and even more especially the “prevalence of widely published voting guidelines” are of absolutely no value whatsoever (and the providers will go out of business) if there are few corporate governance issues to be voted upon because the corporation has either opted out of the 14a-8 process for precatory proposals or has so restricted it as to make it meaningless. Finally, although “collaborative discussion and decision making” among shareholders has been enhanced by the internet, it will do investors little good if, in the absence of a viable 14a-8, their only recourse will be to wage a proxy fight with the full paraphernalia of filing and delivering proxy statements and the related restrictions on communication with respect to whatever issue that such shareholder wishes to bring before the meeting. Indeed, Rules 14a-2(b)(1) and 14a-1(1)(2)(iv), which were adopted in 1992 specifically to enhance communication among shareholders, will be unavailable because the proponent will have to wage a proxy battle and solicit proxies. See Release 34-31326 (October 22, 1992).

Thus, none of the purported justifications for permitting registrants to opt out of Rule 14a-8 appear to be meritorious. And it is abundantly clear that, given the opportunity, most registrants will opt out of the Rule for everything other than bylaw amendments. In most states, the Board can adopt bylaws without consulting the shareholders. Why would a corporation, if given the opportunity to substantially opt out of Rule 14a-8, not take advantage of that opportunity? Indeed, the suggestion in the Release goes far beyond what was proposed, and overwhelmingly rejected, in 1982, since in 1982 the Board itself could not opt out, but rather the proposal required that shareholders give their assent. No such requirement appears in the trial balloon. In addition, the 1982 proposal contemplated that there would be considerable restrictions placed on the ability of a corporation to opt out of Rule 14a-8. The plan would not only have had to be approved by shareholders and would have had to require periodic reapproval by them, but it was also contemplated that “the [SEC’s] rule providing for the plan would contain some minimum limitations on the eligibility criteria and the bases for exclusion of proposals that could be incorporated in the plan.” No such restrictions on the registrant’s discretion appear in the trial balloon. In short, the registrant could propose for shareholder approval a very restrictive bylaw year after year until, campaigning using the corporations own resources, it finally receives a favorable vote. That bylaw would be in place forever.

Alternatively, the Board would just adopt a restrictive bylaw on its own motion. It is difficult to imagine why such a regime would be deemed preferable to the one that has existed for 65 years.

We also note that the trial balloon has other failings in logic. On page 55 of the Release it is asserted that “most state corporation laws provide that a corporation’s charter or bylaws can specify the types of binding or non-binding proposals that are permitted to be brought before the shareholders”. No citation is given for this assertion. That is not surprising since statutes do not so provide. A typical statute is like Section 211 of the Delaware statute that, as noted above, provides that at an annual meeting any “proper business can be transacted”. It is far from clear that this statutory provision can be overturned by a bylaw (and surely not by one adopted by the Board), or even by a charter amendment.

Perhaps the most pernicious aspect of the Release is the implication on page 55 of the Release that corporations may already have the ability to have their Boards adopt bylaws that restrict the ability of shareholders to present precatory proposals. The ability of a registrant to effectively opt out of Rule 14a-8 via internal maneuverings was considered in the *Transamerica* case cited above. The Third Circuit rejected that attempt, stating:

But assuming *arguendo* that this was not so, we think that we have demonstrated that Gilbert’s proposals are within the reach of security-holder action were it not for the insulation afforded management by the notice provision of By-Law 47. If this minor provision may be employed as Transamerica seeks to employ it, it will serve to circumvent the intent of Congress in enacting the Securities Exchange Act of 1934. It was the intent of Congress to require fair opportunity for the operation of corporate suffrage. The control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a). We entertain no doubt that Proxy Rule X-14A-7 [now 14a-8] represents a proper exercise of the authority conferred by Congress on the Commission under Section 14(a). This seems to us to end the matter. The power conferred upon the Commission by Congress cannot be frustrated by a corporate by-law.

It is also worth noting that one registrant claimed that a shareholder proposal was excludable under Rule 14a-8(i)(1) because the laws of the issuer’s domicile required that proposals be submitted either by shareholders owning 5% of the stock or by 100 shareholders acting together. The proponent of the shareholder proposal met neither requirement. Nevertheless, the no-action request was denied. *Tyco International Ltd.* (August 6, 1999)

We urge the Commission in the release adopting or rejecting “proxy access” to slam the door on possible claims that Boards can validly adopt bylaws more restrictive than 14a-8 and to state unequivocally that, absent authorization by an amendment to Rule 14a-8, Boards have no such power. Otherwise, the Commission can expect that in the 2008 or 2009 proxy season virtually every registrant will claim that power, have their Board

adopt the requisite bylaw and then claim that all precatory shareholder proposals, whether of the SRI type or the corporate governance type (e.g. ending dual classes of stock or classified boards) are excludable pursuant to Rule 14a-8(i)(1). The Commission Staff would then have to make determinations as to the validity of each and every bylaw, recognizing that the validity, or invalidity, of a bylaw might well vary from state to state, and that there are virtually no state statutes or case law to assist the Staff in its determination.

Equally appalling would be the practical consequences of the Commission actually adopting some sort of opt out procedure. Confusion would reign supreme. Each corporation would have its own separate procedure, differing from the provisions of other corporations. Furthermore, there would not be any uniformity of result or applicable law as between different states. Would the courts of California, Massachusetts or New York necessarily adopt the same position on the legality of such bylaws as would the courts in Delaware? As noted above, these types of problems influenced the Commission to reject in 1982 a similar proposal. Nothing has changed in the interim that would in any way ameliorate these difficulties.

In addition to litigation over the validity of any opt out bylaw under state law, one has to understand the probable reaction of shareholder proponents. If they are unable to submit precatory shareholder proposals, one can expect that such proposals will be reframed as mandatory, i.e. as amendments to the bylaws. Three consequences would flow from this. One, as a matter of good corporate governance, it would usually be far superior to have proposals in precatory, rather than mandatory, form and to permit the Board and management to mold the proposal, if they adopt it, to fit the corporation's needs. Instead, shareholders would dictate the details of corporate policy via bylaw amendments. This is the very horror that Mr. Balotti, in his testimony at the May 7 Proxy Roundtable, thought was so pernicious (in contrast to his lack of horror at precatory proposals). Second, there is virtually no case or statutory law as to what matters may be included in bylaws. For example, a comparison of the wording of Delaware Section 211 (setting forth what can be included in bylaws) with the wording of Section 141 (setting forth what can be included in the Articles of incorporation) reveals that the wording of the two sections is almost identical. It would seem to follow that almost any restriction on the business of the corporation can be placed in the bylaws rather than in the Articles. This would lead to considerable confusion and the Commission's Staff would be called upon to decide whether each and every of the innumerable bylaw amendment proposals is valid in each and every state (i.e. in the absence of state statutes or cases defining the matter, the staff would have to imagine what a court would hold, recognizing that courts might decide differently in, e.g., Delaware and California). Which leads to the third consequence. There would be a tremendous amount of litigation over attempts to make all matters mandatory (e.g. regular preparation of sustainability reports). Over the years, there has been relatively little litigation over 14a-8 in comparison to the frequency with which it has been used both for SRI matters and for corporate governance matters. In part, this has been because of the general confidence in both the corporate and shareholder communities in the competence of the Staff. In lieu of reliance on a professional and well trained staff, the local trial courts in the various states will be called

on to determine whether, e.g., mandates on the publishing of sustainability reports may be placed in the bylaws of e.g. Montana corporations. The adoption of opt out provisions by the Commission will mark a very happy day for the plaintiff bar.

In summary, the Release fails to present any valid reasons for contemplating such a drastic change in Rule 14a-8. And, as a policy matter, not only have both shareholders and corporations rejected such schemes in the past, the adoption of such a scheme would lead to confusion, chaos and massive litigation.

We note that some have suggested that dialogues between shareholders and management are somehow evil. It seems more than a little strange that there should be something wrong with the owners of a business discussing that business with the fiduciaries that run the business on behalf of the owners. To suggest that a non-public meeting with shareholders would lead to the management or the board to take any action whatsoever that was not in the best interests of the corporation is to suggest that the directors or officers of a registrant are willing to breach their fiduciary duties. Our 36 years of experience in such dialogues is exactly to the contrary

Finally, by limiting shareholders to either a proxy fight or a mandatory bylaw, the Commission will have effectively shut the door to viable communication between corporations and their shareholders since in the absence of Rule 14a-8 we do not believe that corporations will engage in constructive dialogue with their shareholders. Such dialogues result in the withdrawal of 35-40% of shareholder proposals. According to ISS (Risk Metrics), in the first six months of 2007, some 109 social responsibility shareholder proposals were withdrawn and 174 voted on (a 38% withdrawal rate). And as noted above, significant changes were made by a number of subprime lenders and securitizers without any shareholder resolution ever being voted on at any company, and in one case the securitizer requested the dialogue only after it had lost its no-action request at the SEC. In addition, John Cheveden, a frequent filer of corporate governance proposals, has compiled a list of some 20 companies that submitted for shareholder approval in 2007 their own proposals arising out of non-binding proposals that shareholders had submitted on those topics in either 2006 or 2007. It is therefore clear that precatory shareholder proposals do, in fact, bring to the attention of management and boards issues that the company might not otherwise focus on, but that once focused on are seen by the company to be in need of being addressed.

#### (ii) The Chat Room

The chat room proposal contemplates the total abolition of Rule 14a-8 and substituting some type of electronic chat room. This is a bad idea.

As noted on pages 6 of the Release, when Congress enacted the '34 Act, it did so "from a Congressional belief that 'fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange'". (Quoting the Senate Report.) This is reinforced on page 7 of the Release, which quotes from *Roosevelt v. E.I*

*du Pont de Namours & Co.*, 958 F.2d 416 (D.C.Cir. 1992) that Congress intended “to bolster the intelligent exercise of shareholder rights granted by state corporate law”, and then quotes from Chairman Purcell’s 1943 testimony before Congress that what is intended is “to assure” the traditional state law rights “to appear at a meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on.” This is precisely what 14a-8 does by providing such an opportunity to shareholders despite the difficulties that would otherwise obtain under the proxy system. This is recognized on page 8 of the Release where the Commission states (quoting *Business Roundtable v. SEC*, 905 F.2d 406 (D.C.Cir. 1990):

Most shareholders, however, vote through the grant of a proxy before the meeting instead of attending the meeting to vote in person. Therefore, an important function of the proxy rules is to provide a mechanism for shareholders to present their proposals to other shareholders, and to permit shareholders to instruct their proxy how to vote on these proposals. Our regulations have been designed to facilitate the corporate proxy process so that it functions, as nearly as possible, as a replacement for an actual, in-person gathering of security holders, thus enabling security holders "to control the corporation as effectively as they might have by attending a shareholder meeting."

The chat room proposal is diametrically opposed to this explanation of the function of the proxy rules since it would abolish Regulation 14A’s goal of replicating under the proxy rules the state rights of shareholders to present proposals to be voted on at the annual meeting.

This portion of the Release (page 57) contains no elucidation as to why such a drastic and radical departure from the traditional function (recognized by the Congress, the Courts and the Commission itself) of the proxy rules is either necessary or desirable. Even the earlier portions of the Release (page 51) dealing with changes since the 1982 proposal to let corporations adopt their own alternatives to 14a-8 seem wildly inapplicable to the chat room proposal. For example, voting guidelines are meaningless if there is nothing to vote on. In a like manner, “significantly enhanced opportunities for collaborative discussion and decision making afforded by the Internet” are meaningless if there are no longer any opportunities for decision making. Similarly, the connection between the rise in the importance of institutional investors and the dissemination of information on corporate governance issues on the one hand and the abolition of the ability to bring issues to a vote at shareholder meetings (at least in the absence of a full fledged proxy fight) is unexplained in the Release. This is not surprising since these changes are unrelated to the classic purpose of the proxy rules, namely to replicate as close as may be, in a setting where virtually all votes are by proxy, the situation that would prevail at a meeting where all shareholders could be present. As Commissioner Purcell explained:

The rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law to appear at the

meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on.

We agree that the Internet and other electronic communication have changed the ability of shareholders to communicate among themselves. Indeed, the objective of the reforms in 1992 that promulgated Rules 14a-2(b)(1) and 14a-1(l)(2)(iv) was specifically to enhance such communication among shareholders. No suggestion was made that such enhanced communications would be a justification for ending the ability of these communicating shareholders to place precatory proposals on the proxy statement and thus to be relegated to a proxy fight with the attendant full panoply of speech regulation that exists under the proxy rules in connection with the solicitation of proxies. That would indeed be a very perverse result from the adoption of a measure designed to enhance shareholder communication.

In addition to the facts that (i) there was no credible justification advanced in the Release for substituting a chat room for the substantive right to place proposals on the proxy statement and (ii) the inconsistency of such a proposal with the 1992 reforms in shareholder communication, at least two other reasons exist for rejecting the chat room idea.

First of all, we doubt that the Commission has the authority to promulgate any rules related to establishing or regulating chat rooms. The Commission has authority under Section 14 of the '34 Act to regulate the solicitation of proxies. That is a limited grant of power for a specific purpose. But the chat room would be for communications about matters as to which there was no opportunity to solicit proxies since, by definition, there would be no proposal at issue, the chat room having been substituted for precatory 14a-8 proposals. Indeed, even if, rather than there being a total abolition of 14a-8, such abolition were to be conditioned in individual cases on the registrant having established a chat room, there would still be no authority for the SEC to establish rules or regulations for such chat rooms. See *Business Roundtable v. SEC.*, supra.

Secondly, there are insuperable practical difficulties with the chat room idea. There are almost 15,000 publicly held companies. (See page 13 of the SEC's annual report for 2006.) Who would have oversight of these 15,000 chat rooms? Surely not the SEC staff itself which would have neither the time nor the resources, and even if it did, there would be higher priorities for such resources and staff time. In addition there would be serious Constitutional questions related to government censorship and free speech if a government agency undertook to police chat room activity. One alternative would be oversight by the registrant itself. But no shareholder would trust the registrant to be impartial in its oversight of a chat room devoted to possible criticism of the registrant itself. Another alternative would be one or more shareholders themselves. Which shareholders would believe that it would be in their interest to expend the time and money to undertake such a task? We submit that none would. Finally, a third party could be hired to do the oversight, but then the question would be who would pay the third party? The only likely candidate would be the registrant itself, but that would raise exactly the same issues that arise if the registrant does the oversight itself. The third

party, being paid by the registrant, would hardly be perceived by shareholders as impartial since there would be a clear conflict of interest between the oversight role and the fact that the third party was being paid by the registrant. (Cf. the current controversy, including an SEC investigation and Congressional Hearings, over the perceived conflicts of interest surrounding the bond rating organizations, even though, unlike such hired third party, they are subject to SEC regulation and oversight in Section 15E of the '34 Act.)

Since there is no feasible oversight authority to regulate these contemplated chat rooms, what would an unregulated chat room look like? At the May 7 Proxy Roundtable, the undersigned testified to what he had discovered by visiting, at 10:45 pm on the evening of May 5, the web site <http://finance.yahoo.com> and looking at the message board for General Electric. The message board's initial page provided the opening words for the 20 most recent postings (all posted within the prior five hours), and those 20 headnotes were as follows (in order of most recent postings):

- 1) "Friday: 6 GIs, 71 Iraqis Killed; 89 Wounded"
- 2) "Enemy surges in Iraq"
- 3) "The fatal flaw in zionism's deceit"
- 4) "Bush getting his chimpanzee loving ass kicked"
- 5) "Islam/Morons STONE innocent girl to DEATH"
- 6) "Market Intelligence"
- 7) "Low Risk High Return"
- 8) "Sold GE bought PLXS"
- 9) "XSNS – the new Microsoft"
- 10) "10% DOWNSIDE THIS WEEK GLOBALLY"
- 11) "LET ME ASK YOU NEO-CLOWNS WITH INDOOR PLUMBING"
- 12) "Whatever happened to that Stupid Iraq War Funding"
- 13) "ARE ALL YOU REPUBLICANS STUPID PUSH OVERS?"
- 14) "Blind loyalty to Bush isn't patriotism"
- 15) "FLORIDA NEEDS TO ANSWER WHY THE IRAQ WAR SUPPORTER..."
- 16) "Why Are There No Black People at the Kentucky Derby?"
- 17) "SOUTH AMERICA BURNS WHILE BUSH PLAYS IN IRAQ"
- 18) "SWEET BABY JESUS! BUSH SINKS TO 28% APPROVAL"
- 19) "Who is buying this overbought market??"
- 20) "Will FOX Fake News Ever Get to Host a Presidential. . ."

It is evident that 14 of these 20 postings are overtly political rants that were totally unrelated to any aspect of investment in General Electric. Three posting (numbers 7, 8 and 9) are there to push some other investment that the poster either owned or was selling and three give the authors views, for whatever they may have been worth, of general market conditions (numbers 10, 19 and 6, the latter having a title that seems totally at odds with the other contents at the site).

It is also worth remembering that message board sites with anonymous postings can be used for ulterior motives, as was proven by postings on the Yahoo message board by

the CEO of Whole Foods who lauded the company's stock. One also has to wonder whether such postings, if they say anything new or material, would violate Regulation FD.

The question is, why would any rational investor bother to go to this web site to discuss matters pertaining to GE? We submit that no rational investor would do so, especially since the web site recorded that it had more than 210,000 postings. In other words, if there is no oversight of the chat room, it would be utterly useless as a forum for promoting rational discourse among shareholders as to matters of common concern with respect to their investment. The facts effectively reject the idea that it would be possible to have an intelligent discussion about company policy on an unregulated web site. Put another way, in return for losing their ability to submit shareholder proposals under Rule 14a-8, the shareholders would receive absolutely nothing of value. This is especially true since shareholders already have the ability to communicate on the internet, or anyplace else, as long as they don't solicit proxies and, indeed, can even effectively solicit proxies (but not agency authority) under Rules 14a-2(b)(1) and 14a-1(l)(2)(iv). The suggested chat room would add nothing to the communication rights that shareholders already have.

Yet another problem presents itself with respect to chat rooms, whether regulated or unregulated, namely why would any management/board pay any attention to the activity in the chat room when there would be no formal structure to address any concerns that welled up in the chat room. In contrast, Rule 14a-8 focuses the mind of many companies on any shareholder concerns that are the subject of precatory proposals or could become the subject of such proposals. Yet even under the 14a-8 regime, many companies will not even acknowledge the existence of shareholder concerns even when brought to their attention. For example, it has been the experience of the Episcopal Church over the past 10-12 years that when it writes as a shareholder to companies about some matter of concern that it receives a reply only about 30% of the time, but that when such a letter is accompanied by a shareholder proposal, almost all companies are pleased to arrange a meeting or otherwise respond to the expressed concern. Our fear is that if registrants are sheltered from most 14a-8 proposals that their attitudes will revert to those prevalent 15-20 years ago when, as an example, the undersigned represented (for "shareholder activity" purposes) a very large institutional investor (not a hedge fund, but a long term investor) which held 9.9% of a registrant which refused all attempts to meet with its largest shareholder. (At an American Bar Association meeting, at which the undersigned was present, the general counsel of the company, who was on a panel about shareholder activities, referred to my client, a member of the Council of Institutional Investors, as "its designated tormentor"). A return to such days would not be in the interests of American capitalism or capital markets. Yet, we fear that that would be the result of substituting a chat room for precatory proposals under Rule 14a-8.

Another result would be the conversion of many of what are now precatory proposals into attempts to mandate such proposals in the form of bylaw amendments. As noted in the prior section (dealing with the opt out concept) there would be considerable litigation around the question of what matters, if any, are not permitted under state law to be included in a company's bylaws. However, it seems highly undesirable to force

shareholders to deny management all discretion by presenting concerns as mandatory bylaws. For example, this past spring, according to ISS (Risk Metrics), shareholder proposals seeking an annual shareholder vote on compensation (so-called “say on pay” proposals) were presented at 28 shareholder meetings. The average favorable vote was 42.6% and four of the proposals received majority support (including 57% at Ingersoll Rand). The Ingersoll Rand proposal, as is typical of other proposals of this type, was in precatory form, urging the directors to “adopt a policy” on shareholder ratification of corporate pay. If precatory proposals were to be barred under the chat room proposal (or, for that matter, under the opt out proposal), one could expect “say on pay” proposals to be recast as mandatory bylaws, setting forth in minute detail how, if the shareholders approve the bylaw, the “say on pay” program would be implemented, in contrast to asking the directors to adopt a policy and leaving the implementation of that policy to the directors and management. We believe that having the shareholders become involved in setting minute details would be a highly undesirable development, yet that would be the inevitable result of denying shareholders the ability to submit precatory proposals under Rule 14a-8. Nor is this an isolated example. Many other types of shareholder proposals, both of the SRI type and the corporate governance type, would be recast as bylaw amendments. We believe that that would be a highly undesirable development. Why set up a system that will replace a fly swatter with an elephant gun?

It is possible that the trial balloon does not have in mind a chat room where any shareholder could post his or her thoughts, but a far more limited concept where no thoughts *at all* could be posted, but rather one could only post a petition and other shareholders would be limited to signing the petition or not signing it. There would be no cross communication, which would obviate some, but far from all, of the difficulties described above but would deprive shareholders of voting rights without substituting anything meaningful in return. Why would anyone post such a petition, since the shareholder would have no confidence (1) that other shareholders would access the site and read the petition; (2) that other shareholders, even if they agreed with the petition, would sign on since (3) there would be no reason to believe that the registrant would respond in any manner, shape or form to such a meaningless petition (note the statistic quoted above to the effect that, absent a shareholder proposal under Rule 14a-8, registrants respond to non-frivolous shareholder letters from significant shareholders less than one-third of the time)? Thus, the only effect would be to substitute a non-binding petition that almost everyone would ignore for actual shareholder voting. No reason has been advanced in the Release as to why this would be desirable. Such an unwarranted substitution of a meaningless petition for actual voting rights would be directly contrary to the Congressional mandate to the SEC to “replicate as nearly as possible the opportunity that shareholders would have to exercise their voting rights at a meeting of shareholders if they were personally present” (Quotation from Chairman Cox at the May 7 Proxy Panel, unofficial transcript, pp. 7-8; see also the 1943 testimony of Chairman Purcell quoted above.)

Two other serious consequences would arise from substituting a petition for Rule 14a-8. First, since voting is a fiduciary duty and an “asset” of the investment fund (not only for pension trustees, but, as evidenced by the SEC’s own rules, for mutual fund

trustees as well), fiduciaries take their voting responsibilities seriously. No such serious consideration would attach to a “petition”. Secondly, Rule 14a-8 forces the board, not management, to confront the issue presented in order to recommend to the shareholders of the company how they should vote on the proposal. A petition, on the other hand, would be considered, if at all, by management and there would be little assurance that the matter would ever rise to the board level.

In addition, there are numerous technical questions raised by the chat room proposal, including:

- (i) would it be limited to investors who hold their stock in street name, thereby precluding many individual shareholders from participation? (There is a reference to electronic control numbers.)
- (i) would petitions have to comply with the present requirements of Rule 14a-8? If so, would the Staff have to continue to referee whether they were excludable as ordinary business matters, thereby defeating any attempt to reduce Staff resources devoted to 14a-8.
- (ii) Would the shareholder list of those eligible to participate in the forum be up to a year old and therefore out of date?

Finally, for some shareholders, the demise of the safety valve of Rule 14a-8 (whether by opt out or by chat room) might unfortunately lead them to pursue other less desirable methods of bringing issues to the attention of the registrant, such as picketing corporate headquarters or the annual meeting, disrupting the annual meeting, or even picketing the homes of the CEO and board members.

#### D. Proposed Rules 14a-18 and 14a-2(b)(6)

Unlike the petition/chat room suggestion, this proposal makes sense. Even without this proposed Rule, we have little doubt that shareholders could establish such a forum which would in most cases be exempt from the proxy solicitation filing requirements by virtue of Rule 14a-2(b)(1). What the Rule does is permit the company, as well as shareholders, to engage in communications outside the time when the company makes an actual, formal, solicitation of agency proxies as well as stating that if any type of chat room (“forum”) is developed the persons running the forum are not responsible for postings by others that violate Rule 14a-9. This latter provision is quite sensible and merely is a mirror of the exemption applicable to issuers under Rule 14a-8(1)(2). We also believe that a limited exemption for communications by registrants, which is not unlike the exemption provided to shareholders under Rule 14a-2(b)(1), and thus evens the playing field between registrants and shareholders, is warranted. In summary, we believe that the proposed fora, as a supplement to, not a replacement of, Rule 14a-8 are useful devices but that they will probably seldom be actually be used by shareholders.

### E. Submission Threshold under Rule 14a-8

The Release also asks whether the SEC should propose to increase the present \$2,000 threshold for submission of a proposal to some indefinite higher figure. We do not believe that any significant increase is called for at this time.

The American securities regulation system has always been aimed at protecting the small investor. The Commission's 2006 annual report (Chairman Cox's Message, page 2) states that "some 57 million Americans now own stocks". The vast bulk of these 57 million are small investors. Rule 14a-8 is intended to let all shareholders, including small investors, communicate with the other shareholders. Reflecting these goals, Rule 14a-8 permits small investors (via the low threshold of \$2,000) to participate in company affairs. However, this broad, democratic approach means that there needs to be some sort of screening to keep unimportant or inappropriate matters off the proxy statement. In the American system, this is accomplished both by setting numerous procedural rules (e.g. stock ownership for a year and holding the stock thru the meeting) and by the thirteen substantive screens in Rule 14a-8(i). In contrast, in continental Europe, where there has been less historical concern for "shareholder democracy" and the small shareholder, the threshold has historically been set rather high, but with absolutely no screening on the substantive content of the proposal (an approach carried forward in the EU Directive "*Fostering an Appropriate Regime for Shareholder' Rights*", adopted by the European Council on June 12, 2007). We believe that the more democratic approach of current Rule 14a-8 is consistent with American traditions and that it would be extremely undesirable to combine a European high threshold with the intensive screening of Rule 14a-8(i). As the Commission noted in the Release that raised the threshold to \$2,000. (from \$1,000.), it was limiting the increase to that amount "in light of Rule 14a-8's goal of providing an avenue of communication for small investors". (See Release 34- 40018 (May 21, 1998).)

With that basic principle of protecting the small share investor in mind, what criteria (as opposed to some arbitrarily arrived at number) could be applied to determine whether this would be an appropriate time to raise the \$2,000 threshold of Rule 14a-8? Two possible criteria come to mind: the amount of inflation that has occurred since the \$2,000 threshold was established in May, 1998 or the rise in the markets over the same time period. As far as inflation is concerned, prices today are about 28% higher than they were in May, 1998. That would justify an increase in the threshold of about \$500. The 1998 Release mentioned the increase in the stock prices in setting the higher threshold. We doubt that this criterion would warrant an increase in the threshold. The broader averages (S&P, Dow) are trading about where they were seven years ago while the NASDAQ is trading at about 55% of its high seven years ago. These market prices would not warrant any increase in the threshold.

We therefore conclude that no increase is warranted at the present time, but that if there is to be an increase in the threshold, such increase should not exceed \$500.

#### F. Resubmission Thresholds

The Release also asks whether the SEC should propose to increase the present resubmission thresholds to some indefinite higher figure. We do not believe that any increase is called for at this time. The reason generally advanced for an increase is the fact that shareholder proposals have been receiving more votes (i.e. receiving a higher percentage of the votes cast). This argument is simply saying that because shareholders have been exercising their rights more vigorously, some of their rights should be taken away. We fail to see the logic in that argument.

Less than ten years ago, the Commission looked at the resubmission thresholds and decided against altering them. See Release 34-40018 (May 18, 1998) where (footnote 81) the Commission stated that some “commenters were concerned that the increases would operate to exclude too great a percentage of proposals -- particularly those focusing on social policy issues which tend to receive lower percentages of the shareholder vote.”

The concern expressed in footnote 81 to the 1998 Release continues unabated. According to ISS (Risk Metrics)’s data with respect to the 2006 proxy season, 81% of SRI and environmental shareholder proposals that came to a vote received sufficient support to be eligible for resubmission. If the resubmission thresholds were to be increased to, say, 10-15-20%, only 36% would have been eligible for resubmission. Other than to warm some corporate hearts, we are unaware of any policy reason that has been advanced that would justify such a drastic reduction in resubmissions. Surely the 90 proposals that would be eliminated do not represent any threat to the efficient workings of the economy or capital markets. On the other hand, the elimination of those 90 shareholder proposals would represent considerable harm to the significant number of shareholders who had supported those proposals. Nothing contained in the Release sets forth any justification for this drastic type of change.

We believe that there presently exists no compelling reason to revisit this issue. As was noted in the opening portion of this letter, some SRI proposals start out slowly (e.g. the early climate change proposal), but gradually build momentum. This is because such proposals are often “early warning” alerts which raise issues before they become popular but which the registrant receiving the proposal would be well advised to pay attention to. Thus, SRI proposals often serve the same early warning function as does the canary in the mine. It would be unwise to kill the canary.

#### G. Forms 10Q and 10QSB

Giving percentages is unnecessary. Anyone can figure out the appropriate percentage that he/she wants to use (with the denominator being number of shares entitled to vote,

number of shares actually voted on the issue, number of shares present at the meeting etc), provided that all of the underlying facts are given. The only additional fact that might occasionally prove useful would be the number of shares entitled to vote on the matter.

#### H. Area for Clarification

We believe that the Staff's analysis of "risk" under Rule 14a-8(i)(7), as set forth in Staff Legal Bulletin 14C (June 28, 2005), is faulty. For example, all environmental proposals implicate some degree of risk to the registrant, whether that risk be reputational risk or risk to the company's present method of doing business. To focus on wording that refers to these risks, while ignoring the underlying concern about the environmental impact of the company's operations, is to elevate form over substance. We urge the Commission to review this matter and to distinguish between those companies (e.g. insurance companies) whose business it is to evaluate risk and those companies whose own operations are creating environmental "risk".

#### I. Possible 14a-8 Amendment

We are opposed to the Commission's undertaking any review of Rule 14a-8 at this time, as no pressing need for revision has been advanced. However, if the Commission decides to open up the question of revision of the Rule, we request that any proposing release again include the proposal made in 1997 that there be a method whereby 3% of the shareholders may, by petition or otherwise, overrule a Staff interpretation of Rule 14a-8(i)(5) or Rule 14a-8(i)(7). See Release 34-39039 (September 18, 1997). Such a provision would permit the shareholders themselves, rather than the Staff, to decide what issues are important to them.

#### J. Proxy Access

We support the concept of proxy access but believe that neither the Release nor (especially) Release 34-56161 address the matter in a satisfactory way.

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In conclusion, the old saw seems particularly applicable to the suggestions for "reform" of Rule 14a-8, namely "if it ain't broke, don't fix it". Nothing in the Release indicates that anything about precatory proposals is broken or in need of fixing.

We appreciate the opportunity to convey to you the views of ICCR on the Release. If you have any questions, please do not hesitate to get in touch with me at the above listed numbers and addresses, or with Laura Berry, the Executive Director of ICCR, at 212-870-2294 or [lberry@iccr.org](mailto:lberry@iccr.org).

Very truly yours,

Paul M. Neuhauser

cc: Laura Berry