PETITION FOR AMENDMENT OF PROXY RULE REGARDING BOARD NOMINEE DISCLOSURE – CHART / MATRIX APPROACH

March 31, 2015

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Dear Ms. Murphy:

On behalf of public fund fiduciaries, who collectively supervise the investment of over $1.12 trillion in assets, we respectfully submit this petition for rulemaking. Specifically, we ask the Commission to require new disclosures related to nominees for corporate board seats in order to provide investors with necessary information to evaluate the nominees' gender, racial, and ethnic diversity, as well as their mix of skills, experiences, and attributes needed to fulfill the corporation's mission.

Our proposal builds on current Item 407(c)(2)(v) of Regulation S-K, which requires registrants to identify the minimum skills, experiences, and attributes that all board candidates and nominees are expected to possess. Our proposal requires registrants to indicate, in a chart or matrix, each nominee's gender, race, and ethnicity, in addition to the skills, experiences, and attributes described above. We propose such disclosure, even if these attributes have not been identified by the nominating committee. This amendment to Regulation S-K of the Securities Act of 1933 (last amended December 16, 2009, effective February 28, 2010), 17 C.F.R. § 229.407(c)(2)(v), is set forth below [added language is underlined]:

> Describe any specific minimum qualifications that the nominating committee believes must be met by a nominating committee-recommended nominee for a position on the registrant's board of directors, and describe any specific qualities or skills that the nominating committee believes are necessary for one or more of the registrant's directors to possess. <u>When the disclosure for this paragraph is presented in a proxy or information statement relating to the election of directors, these qualities, along with the nominee's gender, race, and ethnicity should be presented in a chart or matrix form.</u>[1]

We believe this additional sentence captures information about board nominees more comprehensively than the current language.[2]

[1] Gender, race, and ethnicity should be input in XTML or other electronic format that enables the data to be easily aggregated across registrants.

[2] The 2009 amendments to Rule S-K also included Item 407(c)(2)(vi) which provides:

Our petition proceeds in the following manner: First, we discuss the difficulties with the current disclosure rule. Second, we present information about the more robust disclosure regimes in other foreign jurisdictions. Third, we explain the importance of diversity disclosure and how diversity may better manage company risk. Finally, we explain the importance of the chart or matrix approach and electronic formatting for shareholders. We conclude our petition by identifying the growing number of shareholder proposals and requesting the Commission to make a simple one sentence amendment.

The Challenges of the Current Disclosure Rule

The current disclosure rule makes it difficult for shareholders to determine racial and ethnic diversity of boards. In some cases, it is difficult to determine gender diversity, particularly if pictures of nominees are not included in proxy materials, and first names or pronouns are excluded in the description of the board candidates. Even when pictures are provided, shareholders are not able to accurately determine race or ethnicity of director nominees. Although some corporations provide aggregate board diversity information, board level diversity is not available for all companies, and individual director diversity attributes, which are necessary for investors to fully exercise their voting rights, are not reported.[3] As a result, investors who care about gender, racial, and ethnic diversity must do their own investigation. Such collection of information about race and ethnicity of directors can be time consuming, expensive, and fraught with inaccuracies.

Disclosure Regimes Followed in Other Jurisdictions

Currently, several foreign jurisdictions employ a more robust and enhanced disclosure regime for board diversity compared to our disclosure rules. For instance, in June 2010, the Australian Stock Exchange's Corporate Governance Council recommended that listed entities disclose goals related to gender diversity and disclose the respective proportions of men and

---

> Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.

Although there have been some unintended consequences with this language, we view it as complementary to the matrix approach discussed above. The unintended consequences include the statement by many companies that they consider diversity, but do not have a diversity policy. Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 U. Dayton L. Rev. 39, 63 (2011). Therefore, they do not describe how the diversity "policy" is implemented, nor do they assess its effectiveness. In addition, since Rule S-K does not define diversity, some companies have used such broad definitions of diversity that the concept conveys little meaning to investors. *Id*. at 67 (study of the proxy statements of Fortune 100 companies showed that companies defined diversity by demographic factors, by general factors such as viewpoints or perspective, or by both demographic and general factors).

[3] *See* CATALYST ALLIANCE FOR BOARD DIVERSITY, *Missing Pieces: Women and Minorities on Fortune 500 Boards-2012 Census*, (2013), *available* at http://www.catalyst.org/system/files/2012_abd_missing_pieces_final_8_15_13.pdf (*Note*: Some data is reported, by company, for organizations with 40% or more diversity. However, gender, race, and ethnicity are not reported for the specific board members).

women at various levels in the entity, including the corporate board.[4] Such disclosure is not mandated. However, if the listed entity elects not to make the disclosure, it must explain the reason for not doing so. In other words, "If not, why not?"[5] In 2014, the Canadian Securities Administrators adopted a similar approach about the disclosure of the number of women on Toronto Stock Exchange-listed company boards, including targets for female board representation and policies on board gender diversity. If issuers do not have such targets or policies, then they must explain their reasoning.[6] In May 2012, the Singapore Exchange revised its Code of Corporate Governance that also required companies to comply with governance principles, including board diversity, or explain in their annual report why they departed from such principles.[7] Finally, in October 2014, the European Parliament adopted amendment to the Directive on Disclosure of Non-Financial and Diversity Information that requires companies to disclose its diversity policy that may include age, gender, educational, and professional backgrounds.[8] Again, like the other foreign jurisdictions' requirements, if the company does not adopt such a diversity policy, it must provide an explanation as to why it has not done so.[9]

Importance of Diversity Disclosure and Avoiding Groupthink

We believe it is important for companies to disclose the gender, racial, and ethnic characteristics of their director nominees. This Commission received a number of comments in 2009 regarding the value of such demographic diversity.[10] Some investors value demographic diversity, and list it as an important factor influencing their director voting decisions. Some commenters suggested that diverse boards may perform better than non-diverse boards. Other commentators stated that diverse boards reduce workplace discrimination and improve employee recruiting, retention, and productivity. Still other commentators stated that a diverse board better reflects the diversity of employees, customers, and other corporate stakeholders than a non-diverse board.

Furthermore, diversity on boards can better manage risk by avoiding groupthink. In a February 2011 report, the International Monetary Funds' Independent Evaluation Office identified a "high degree of groupthink" as contributing to the IMF's failure to correctly identify the risks leading up to the worldwide financial crisis.[11] The term "groupthink" refers to a cognitive bias whereby homogenous, cohesive groups tend to "consider issues only within a

[4] ASX CORPORATE GOVERNANCE COUNCIL, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 11 (2d ed. 2010).

[5] *Id.* at 11.

[6] *See* McMillan LLP, *New Gender Diversity and Board Renewal Disclosure Rules*,1 (Dec. 1, 2014).

[7] MONETARY AUTHORITY OF SINGAPORE, Code of Corporate Governance (May 2, 2012), *available* at http://www.mas.gov.sg/~/media/resource/fin_development/corporate_governance/CGCRevisedCodeofCorporateGo
vernance3May2012.pdf.

[8] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330/1) Article 19a(2), *available* at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.330.01.0001.01.ENG.

[9] *Id*.

[10] These comments are summarized in Hazen & Broome, *supra* note 2, at 51-55.

[11] INDEPENDENT EVALUATION OFFICE OF THE INTERNATIONAL MONETARY FUND, *Why did the IMF Fail to Give Clear Warning*, 17 (April 12, 2011), *available* at http://www.ieo-imf.org/ieo/files/completedevaluations/01102011Crisis_IV._Why_Did_the_IMF_Fail_to_Give_Clear_Warning.pdf

certain paradigm and not challenge the basic premises."[12] In addition, Tufts University Professor Samuel Sommers has noted that "demographically diverse groups are exposed to a wider range of perspectives than homogeneous groups, but diversity can also lead people to process evidence more accurately, and to discuss controversial and polarizing issues."[13] Moreover, board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are not limited by gender, race, or ethnicity.

An Amendment that Requires a Chart/Matrix Approach in an Electronic Format

For the reasons set out above, we believe it would be beneficial for a simple one sentence amendment to require companies to disclose the qualities of directors in an electronic format. The chart or matrix approach allows shareholders to easily see the skills, experiences, and attributes identified by the board as *minimum requirements for all directors*, along with those identified by the board as *necessary for one or more of the directors* to possess. Shareholders can judge whether the listed skills, experiences, and attributes are appropriate in the light of the company's overall business strategy, and assess the suitability of the slate of nominees to the desired skills, experiences, and attributes.

The matrix approach, which resulted from a National Association of Corporate Directors ("NACD") Roundtable with the Society of Corporate Secretaries and Governance Professionals, has been endorsed by the NACD in a white paper entitled *Board Building: Analyze, Recruit, Evaluate*.[14] In an appendix to the report, the NACD suggested that companies prepare a template, chart, or matrix to include qualifications and skills, as well as listing other directorships held by each nominee and any legal proceedings involving nominees.[15]

In addition, several companies have successfully implemented this approach.[16] One example is United Health. As Michele Hooper and Anne Simpson write for *NACD Directorship*, this matrix approach ensures that the "qualifications – not the identity – of the candidate become the driving consideration for selection."[17] Other corporate governance experts, including the Council of Institutional Investors, have also recommended this method of disclosing director qualifications and skills.[18]

Finally, registrants could much more efficiently and accurately collect this information through self-reporting by board nominees than investors and interested organizations engaged in

---

[12] *Id*.

[13] Tufts University Department of Psychology, Diversity and Intergroup Relations Lab, Research and Publications, *available* at http://www.ase.tufts.edu/psychology/sommerslab/researchPublications/

[14] NATIONAL ASSOCIATION OF CORPORATE DIRECTORS, *Board Building: Analyze, Recruit, Evaluate* (October 1, 2010).

[15] *Id*.

[16] *See* COUNCIL OF INSTITUTIONAL INVESTORS, *Best Disclosure: Director Qualifications and Skills*, February 2014, *available* at http://www.cii.org/files/publications/governance_basics/04_28_14_best_disclosure.pdf (pointing out companies such as Coca-Cola, General Electric, Microsoft, Pfizer, Prudential Financial, and Walt Disney as examples).

[17] Michele Hooper & Anne Simpson, *How to Engage Shareholders When Selecting New Directors*, NACD DIRECTORSHIP MAGAZINE, January/February 2013, at 13.

[18] *See* COUNCIL OF INSTITUTIONAL INVESTORS, *supra* note 16. *See also* Lawrence J. Trautman, *Corporate Director Selection and Recruitment: A Matrix*, THE CORPORATE BOARD, May 2013.

their own information collection. As indicated in the proposed footnote to the new language to Item 407(c)(2)(v), we believe an electronic format would achieve two other important purposes: first, investors could easily pull such information from the proxies of all registrants, and second, investors could accurately assess and report on the aggregate data of gender, racial, and ethnic diversity.

*

Since the 2010 amendments to Item 407 of Regulation S-K, the evidence shows no meaningful increase in diversity on corporate boards. For instance, the Catalyst Alliance for Board Diversity reported that in 2010 the percentage of women and minority directors on Fortune 500 companies was 25.5%.[19] The most recent 2012 data shows that the percentage of women and minority directors increased only slightly to 26.7%.[20] Moreover, we believe these amendments to Item 407 have not provided shareholders with sufficient details to assess board diversity and their ability to manage risk.

Not surprisingly, shareholders in public companies have continued to express their interest in board diversity through shareholder proposals. For example, in 2013 the New York City Comptroller on behalf the New York City Pension Funds filed a proposal with C.F. Industries Holdings, Inc. to "include women and minority candidates in the pool from which Board nominees are chosen," and report to shareholders "its efforts to encourage diversified representation on the board." The proposal received a majority of shareholder votes.[21] Last month, fund manager BlackRock, Inc. revised its proxy voting guidelines to potentially oppose a board members' reelection for reasons including "insufficient attention to board diversity."[22]

As large institutional investors, we have a real interest in electing a slate of board nominees who are well-positioned to help carry out a company's business strategy and meet our long-term investment needs. We believe better disclosure about the board's skills, experiences, gender, race, and ethnic diversity can help us as investors determine whether the board has the appropriate mix to manage risk and avoid groupthink. For these reasons, we urge the Commission to initiate a rulemaking process to require better disclosure. If the Commission or staff have any questions, please feel free to contact Jay J. Chaudhuri, General Counsel & Senior Policy Advisor at (919) 508-1024 or via electronic mail at jay.chaudhuri@nctreasurer.com or Meryl Murtagh, Corporate Governance Staff Director at (919) 807-3011 or via electronic mail at meryl.murtagh@nctreasurer.com.

---

[19] Catalyst Alliance for Board Diversity, *supra* note 3.

[20] *Id.*

[21] New York City Pension Funds shareholder proposal to C.F. Industries Holdings, Inc. via the New York City Comptroller, *available* at http://www.sec.gov/Archives/edgar/data/1324404/000104746913003875/a2213922zdef14a.htm#dq77401_proposal_6__stockholde__dq702404

[22] Kristen Grind and Joann S. Lublin, *Vanguard and BlackRock Plan to Get More Assertive with Their Investments*, WALL ST. J., Mar. 4, 2015, *available* at http://www.wsj.com/articles/vanguard-and-blackrock-plan-to-get-more-assertive-with-their-investments-1425445200.

Sincerely,

Anne Simpson
Director of Global Governance
California Public Employees Retirement System

Theresa Whitmarsh
Executive Director
Washington State Investment Board

Denise L. Nappier
Treasurer
Connecticut Retirement Plans and Trust Fund

Anne Sheehan
Director of Corporate Governance
California State Teacher's Retirement System

Scott Stringer
Comptroller
New York City

William R. Atwood
Executive Director
Illinois State Board of Investment

Karen Carraher
Executive Director
Ohio Public Employees Retirement Systems

Thomas P. DiNapoli
New York State Comptroller
New York State Common Retirement Fund

Janet Cowell
Treasurer
North Carolina Department of State Treasurer

cc: Mary Jo White, Chair
Luis A. Aguilar, Commissioner
Daniel M. Gallagher, Commissioner

Kara M. Stein, Commissioner
Michael S. Piwowar, Commissioner