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August 14, 2009

VIA EMAIL

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

Re: Proposed Rules Relating to Facilitating Shareholder Director Nominations (File No. S7-10-09)

Dear Ms. Murphy:

We are pleased to respond to Release Nos. 33-9046, 34-60089, IC-28765 (the "Proposing Release") in which the Securities and Exchange Commission (the "Commission") solicited comments on proposed rules which will permit shareholders meeting certain eligibility requirements to include shareholder nominees in a company's proxy materials.

This letter is submitted on behalf of Schulte Roth & Zabel LLP. As part of our corporate practice, we frequently represent shareholders seeking board representation.

We appreciate the opportunity to provide comments on the Proposing Release and commend the Commission on their excellent work in its preparation. Although the Proposing Release does not fully reach its stated, and laudable, goal of replicating the actions that could be taken by shareholders at a meeting in every respect, we understand the need for an incremental approach in this area and, except as we comment below, we approve of the approach taken in the Proposing Release.

We believe it is very appropriate, and well within the Commissioner's power, to mandate shareholder access to company proxy statements. The inequity of shareholders being forced to incur material personal expense to effectively nominate a director, while management utilizes the corporate treasury to promote management-selected nominees, has led to a real separation of ownership from control and a lack of true accountability for corporate boards to the company's owners. Leaving the reform of proxy access to state corporate law or individual corporation's policy decisions will surely result in perpetuation of the status quo, with its wildly uneven playing field and consequent lack of corporate accountability.

Our specific comments are set out below:

I. The "First to File" Provision of Rule 14a-11(d)(3)

Under the Proposing Release, when more than one shareholder or group would be eligible to include a nominee or nominees in a registrant's proxy materials, the company is required to include only the nominee or nominees of the first nominating shareholder or group from which it receives timely notice of intent to nominate a director pursuant to the rule. We believe that this "First to File" method of allocating proxy access among different shareholders is problematic and should be replaced with the "Largest Holder" method articulated by the Commission in 2003.

The First to File method of allocating nominee slots has a number of drawbacks. First, we are concerned that this method will cause some shareholders, in order to guarantee that they are the first, to file nomination notices extremely early in the year, possibly as early as the day after the previous year's annual meeting. Clearly, this would have the effect of unduly prolonging the period during which a company would be subject to a potential contested director election campaign. More substantively, we are concerned that First to File will have the effect of increasing the proportion of nominations made by shareholders whose motivation is not related to the performance of the board or the company, but is rather based on personal issues, or at best, narrowly focused issues that sometimes have only an indirect connection to board and company performance - so called "special interests". Because the scope of interest of such shareholders tends to be less focused on performance related issues, we believe they are more likely than performance focused shareholders to make nomination notices early, for the simple reason that shareholders with a performance-based motivation will wait longer into the then-current board term to determine whether board performance is such that a shareholder-proposed nominee, and the related necessary campaign effort, is warranted. Because the first to file wins under the Proposing Release, it is entirely possible that specifically focused shareholders, willing to nominate candidates irrespective of board performance, will preclude participation by shareholders with performance-based concerns and will end up dominating the Rule 14a-11 process entirely. This will severely undercut the shareholder monitoring benefits that we would expect proxy access to bring to the corporate landscape. Finally, because under the First to File method the nominating shareholder's ownership level (above the requisite level) is not relevant, the concerns of the nominees included in the company proxy materials pursuant to Rule 14a-11 may not be in any way reflective of widespread shareholder sentiment.

In contrast, a "Largest Holder" method would avoid the problems described above, and we believe would bring added benefits to the director nomination and election process. Under the Largest Holder method, the largest shareholder or group to submit a notice to the company would be permitted to include their nominee or nominees in the company's proxy materials. In contrast to First to File, in which share ownership above the requisite level is irrelevant to proxy access, the use of a Largest Holder allocation method would increase the probability that the nominating shareholder or shareholder group will be representative of a more significant portion of the shareholder base. To ensure that their shareholder group is in fact the largest group to submit a nomination, shareholders interested in nominating directors pursuant to Rule 14a-11 would be encouraged to seek consensus, and would likely limit their nomination efforts to issues or candidates that would appeal to a significant number of shareholders. Thus the Largest Holder method would make it likely that the nominees included in the company's proxy materials addressed an issue of widespread shareholder concern. In addition, because shareholder grouping is permitted, a Largest Holder method would not necessarily favor the largest single holder, but rather the candidate that is supported by the largest portion of the shareholder base. Furthermore, we believe it is noteworthy that when the Commission proposed the Largest Holder method in 2003, commenters at that time generally did not object to its use. Finally, we do not share the concern articulated in the Proposing Release that the Largest Holder method would be difficult to administer. To the contrary, we believe that the question of which of two or more competing shareholder groups represented a largest number of shares would be relatively simple to determine, based on documentation provided by brokers or nominees and submitted to the company.

However, if the Commission declines to revert to the Largest Holder method proposed in 2003 and instead retains a First to File method, we recommend that the Commission create a filing window, by imposing, in addition to the notice deadline, a “no earlier than” rule: i.e., notice of a nomination pursuant to Rule 14a-11 may be given no earlier than 120 days prior to the date of last year's annual meeting. The creation of a filing window would avoid early commencement of director election campaigns, and provide shareholders with more time to evaluate an incumbent board's performance.

II. Rule 14a-18: Deadline for Submission of Nominees and the Use of Advanced Notification Bylaws

Under the Proposing Release, the lead-in paragraph to Rule 14a-18 requires a nominating shareholder or group to provide notice of an intention to nominate to the registrant by the date specified in the registrant's advanced notice bylaw provision, or where no such provision is in place, no later than 120 calendar days prior to the date that the company mailed its proxy materials for the prior year’s annual meeting. We have two principal comments on this provision of the Proposing Release: first, we believe that a company's advanced notice bylaw should not be used as a reference point for the filing deadline, and second, we believe that the proposed filing deadline is too far in advance of the shareholder meeting to which the nomination relates. As an alternative to the proposed deadline, we recommend that shareholders be required to provide notice of a nomination on Schedule 14N no later than 90 calendar days, and no earlier than 120 calendar days, prior to the anniversary of the company’s last annual meeting.

With respect to the use of the company's advanced notice bylaw as a reference point to the deadline, we believe it is both unnecessary and possibly detrimental to the policy goals we believe underlie the Proposing Release. We are concerned that the use of a deadline that relates directly to the length of an advanced notice bylaw will simply encourage companies to amend their bylaws to lengthen their advanced notice dates to 120 days, or longer. While courts have recognized that advanced notice bylaws serve a legitimate function, they have also held that 90 days is generally adequate. We believe that longer advanced notice periods tend to have a chilling effect on shareholder-level corporate governance initiatives for a number of reasons: they require that shareholders plan for, and publicly declare, governance activity too far in advance of the annual meeting, and they enable companies to safely postpone controversial action until after the deadline has passed. As a result, we are concerned that the Proposing Release's reliance on the advanced notice bylaw date may encourage earlier deadlines and have the perverse effect of diminishing shareholder efforts, both within and outside of the Rule 14a-11 context. Furthermore, as the Commission is aware, the length of the notice period in advanced notice bylaws varies greatly, from 30 days to 180 days or even longer. We believe that incorporating this variability into the nomination deadline would not contribute clarity to the proxy-access process for shareholders. Additionally, we note that a lengthy advanced notice deadline could produce an extremely early nomination deadline, with negative consequences, as discussed more fully below. For these reasons, we believe that the use of a fixed date would be preferable. We note in this regard that the deadline for submissions under Rule 14a-8 does not take advanced notice bylaw dates into account.

With regard to the 120 day aspect of the Rule 14a-11 deadline, we believe that the proposed deadline is too far in advance of the annual meeting. Companies typically mail their proxy materials between thirty and sixty days ahead of their annual meeting. As a result, a notice period of 120 days before the company mailed its proxy materials for the prior year's annual meeting, assuming the annual meeting at issue is held at the same time as the prior year's annual meeting, would result in a required filing deadline that is between 150 and 180 days, or five to six months, before the annual meeting with respect to which shareholders relying on Rule 14a-11 are making nominations. Shareholder preparation to give the notice, including evaluation of a company's performance, discussion with other shareholders, selection of nominees, etc., would have to commence months before the deadline. We are concerned that this proposed deadline is too far ahead of the annual meeting, for several reasons, and we believe it can and should be moved closer to date of the annual meeting.

First and foremost, an early deadline will require any assessment of board or individual director performance to be made at a point where shareholders have not had an adequate opportunity to evaluate such performance, for the simple reason that directors will not have held office for very long. At six months, or even five months, ahead of the upcoming annual meeting, incumbent directors elected for one year terms are only halfway, or slightly more, into their terms, having served as directors for only six or seven months. This period of time is not optimal for shareholders to evaluate a board's performance and to make an informed decision regarding the desirability of non-company director nominees. Shareholders should be given more time to evaluate the performance of directors before being forced to determine whether to contest their reelection, and accordingly we would be in favor of a shorter notice period, of not longer than 90 days prior to the relevant annual meeting anniversary.

Second, since director elections and the related campaign activities often commence with the giving of notice of an intention to nominate, an early notice deadline will likely produce a correspondingly lengthy election contest. Opponents of proxy access frequently argue against it on the grounds that the resulting election contests will distract directors and managers from their true role as operators of the business. While we believe this argument is significantly overstated, particularly where, as under the Proposing Release, no more than 25% of director seats can be contested (and as a result, no change of control is at stake), we recognize that some expenditure of corporate time and resources will be involved in an election contest under Rule 14a-11. A later deadline would shorten the contest period and benefit the company (and the shareholder proponents) by limiting such expenditure and distraction.

Furthermore, while as noted above we are in favor of greater proxy access for shareholders and generally support the Proposing Release, we would favor, and would like the process to favor, nominations premised on issues of board or company performance, as opposed to issues that may not be closely related to the economic strength or success of the company. While we expect that many shareholder nominations made pursuant to Rule 14a-11 will be primarily motivated by board or director performance, we recognize the reality that some nominations will be motivated by more narrowly focused issues. We are concerned that the early filing deadline and the relatively truncated evaluation period it produces will have an effect similar to that of the First to File allocation method discussed above - specifically, increasing the proportion of nominations made by such shareholders. We believe that shareholders who would base a decision to nominate primarily on their perception of board performance (such as large holders) will not have time to reach an informed decision, and as a result financially sophisticated investors knowledgeable about the issuer may refrain from exercising their 14a-11 rights. Specific interest-focused shareholders, in contrast, are more likely to initiate a nomination decision regardless of the board's performance and the duration of the evaluation period. This dynamic could result in a higher proportion of nominations by such shareholders. Both in order to provide shareholders more data on which to evaluate a board, and to make sure that it is not only specific interest-focused shareholders who avail themselves of Rule 14a-11, we recommend moving the deadline closer to the annual meeting date.

Lastly, a notification deadline that is five or six months ahead of the annual meeting would have the unintended but adverse effect of permitting board members to operate during most of the second half of their term without the heightened shareholder accountability that we believe the Proposing Release will produce. Additionally, in order to avoid adverse shareholder reaction and a possible Rule 14a-11 based nomination campaign, board members may be tempted to "game the system" by intentionally postponing controversial action until after the notification deadline has passed. A later deadline would mitigate both problems.

While we are cognizant of the need to provide adequate time to registrants to review submissions, and to the Commission to review challenges, we respectfully suggest that in light of the predominately objective nature of the requirements imposed by Proposing Release, significantly shorter notice and challenge periods could be mandated, permitting the shortening of the deadline we advocate. Furthermore, we believe that this could be accomplished without any increase in the burden imposed on companies or the Commission. As drafted, the notice and challenge deadlines of the Proposing Release mirror those found in Rule 14a-8. However, we believe that the Proposing Release provides fewer grounds on which companies are entitled to challenge shareholder actions than Rule 14a-8. (We note that Rule 14a-8 identifies 12 separate categories of objections). More importantly, we believe that unlike Rule 14a-11, many of the bases for exclusion set forth in Rule 14a-8 (e.g. substantially implemented; relevance; personal grievance; duplication) require qualitative judgments. Such judgments are inherently time consuming, and also by their nature lend themselves to review by a neutral third party. In contrast, the grounds for exclusion under Rule 14a-11 tend to be more quantitative and objective in nature, and disagreements regarding purported non-compliance with Rule 14a-11 should be far easier to resolve than comparable objections under Rule 14a-8.

As noted above, we propose that shareholders be required to provide notice on Schedule 14N by no later than 90 calendar days before the anniversary of the company's last annual meeting. This, together with a "no earlier than" filing limitation, would provide shareholders with more time to evaluate a board, while, we believe, still allowing enough time for the challenge procedure contemplated by the Proposing Release to function smoothly.

III. Item 8 of the Schedule 14N: Certification by Nominating Shareholder Regarding Change of Control

Under the Proposing Release, Item 8 of Schedule 14N requires nominating shareholders or shareholder groups seeking to rely on proposed Rule 14a-11 to certify that "the securities (reported on)… are not held for the purpose of or with the effect of changing control of the (company) or to gain more than a limited number of seats on the board." We believe that this certification is overbroad, unnecessarily limiting, and in part simply unnecessary. We would advocate, and we believe shareholder and company interests would be better served by, a more narrowly tailored certification that focused not on "effecting a change of control of the registrant" in general, but rather on the absence of a current intention on the part of the nominating shareholder to acquire control of the company.

We feel that the certification is overbroad because the language regarding "effecting a change of control" unnecessarily prohibits legitimate shareholder advocacy of a range of issues. Whether or not a company should be subject to a change of control, whether by means of a sale, merger or otherwise, is both a fundamental question of corporate policy and a legitimate topic of both board and shareholder interest. Nevertheless, the proposed language of the certification in Item 8 would prohibit discussion or advocacy of these issues by nominating shareholders, at the nominating stage and presumably, if elected to the board, at the board level. We are unable to see a sound policy reason for a rule that excludes such an important topic from discussion in connection with director elections. Put differently, why should nominating shareholders be prohibited from using the issue of a sale of the company as a platform when attempting to form a shareholder nominating group or as the basis for an election campaign?

Nor is there is a sound policy basis for prohibiting directors elected under Rule 14a-11 from advocating in favor of a change of control at the board level. All directors, whether nominated by shareholders or by the existing board, should be free to advocate, as required by their fiduciary duties, the actions they believe to be in the best interests of shareholders. (We note in this regard that directors owe a fiduciary duty to all shareholders, not just to the shareholder or shareholders responsible for their nomination.) Yet having made the Item 8 certification as drafted, directors elected pursuant to Rule 14a-11 could be subject to litigation or enforcement action for doing so. To preclude shareholder-nominated directors from discussing or advocating a company sale once elected is to essentially relegate such directors to the status of second class directors. We note that management-nominated directors do not face similar restrictions on the topics they advocate (and incidentally, are free to advocate a change of control when seeking their own election). We note also that the Item 8 certification is to a large extent unnecessary - the minority of directors that can be elected under Rule 14a-11 would be powerless, because they are a minority, to effect a change of control of the company in any case, without first obtaining significant support from board-nominated directors. Lastly, but importantly, we feel that certification as drafted could provide yet another basis for litigation by incumbent management against outside nominees, and as a result could inadvertently have a chilling effect on the willingness of shareholders to utilize the Rule 14a-11 process.

Furthermore, the second prong of the proposed certification to seek no more than "a limited number of directors" is simply unnecessary, and should be deleted. As noted above, proposed Rule 14a-11(d) clearly imposes strict limits on the number of directors shareholders can include in the company's proxy materials and elect pursuant to Rule 14a-11. In light of Rule 14a-11(d), this statement is superfluous. If the rationale for the inclusion of this phrase is to prevent shareholders relying on Rule 14a-11 from simultaneously conducting an independent proxy campaign outside of Rule 14a-11, the rule should state this clearly, rather than relying on an oblique reference to a limited but unspecified number of directors.

IV. Item 5(b) of Schedule 14N: Representations by Nominating Shareholders

With respect to the representations required by Item 5(b) of Schedule 14N, we support the first statement regarding an intention to maintain ownership of the requisite shares prior to the annual meeting, and believe it should be retained in its current form, but we disagree with the need for or benefit of the second sentence, which focuses on continued holding after the annual meeting.

We believe that the first representation correctly focuses on the intention of the shareholder, and believe this concept should be retained. This focus ensures that a subsequent change in intent will not result in a disclosure violation or punitive litigation. (In contrast, a statement that obligated nominating shareholders to retain, without exception, the shares held as of the date of nomination would be unnecessarily restrictive and would have a chilling effect on shareholder nominations.) In addition, we believe the representation correctly identifies the "requisite number" of shares as the appropriate shareholding level to be addressed in the statement. While requiring shareholding levels above specified thresholds is a reasonable prerequisite to participation in a Rule 14a-11 nomination, we feel that any shares owned by the nominating shareholder above and beyond the requisite number are not relevant, and are properly not included in the statement of intention contained in the first sentence of Item 5(b).

However, we do not believe that the second sentence of Item 5(b), which requires the nominating shareholder to provide a written statement of intent with respect to continued ownership after the election, is necessary or appropriate. First, other nominees, including management nominees, are not required to make a statement of their future intentions with respect to their stock ownership. Second, by meeting the requisite ownership threshold, nominating shareholders have already demonstrated their long-term commitment to the company, and any further statement to this effect, whether express or implied, should not be necessary. We feel that this statement adds no benefit to the election process, and we are concerned that despite its reference to "intention", it will invite litigation if the nominating shareholder or group decides to sell shares after the election.

V. Rules 14a-2(b)(7) and 14a-2(b)(8): Solicitations in Connection with the Formation of Shareholder Nominating Groups and In Support of Nominees

We support the adoption of Rule 14a-2(b)(7) as an additional exemption from the current restrictions on solicitations in connection with the formation of shareholder nominating groups, because we believe that such an exemption will encourage the formation of groups and thereby serve as a meaningful supplement to the goals of the Proposing Release. However, while we support Rule 14a-2(b)(7) in general, we believe that the requirement that solicitations made pursuant to that rule be in writing is unduly burdensome to soliciting parties and is unnecessarily restrictive in light of the alternatives. While we recognize the need for a content restriction, we feel that the means proposed to enforce the content restriction - the written communication and same day filing requirements - are excessive in light of what we feel is the relatively low risk of misuse of the rule, i.e., to conduct an undeclared control campaign. This is particularly true in light of the consensus-building nature of the communications being regulated. In reality, the formation of a shareholder group is likely to involve back and forth communication between the initial proponent and the possible group members. Must all such communications be in writing, so that the use of the telephone is implicitly prohibited? We also question the need for the rule when very small shareholders are seeking to group together to meet the filing threshold, in which case the chance that what is really occurring is an undisclosed control campaign are remote, since the ownership percentages involved will be so small. Rather than relying on the prophylactic but somewhat draconian requirement of a written statement filed with the SEC on the same day of use, the SEC can and should rely on existing regulations and enforcement powers to investigate suspected misuse of the rule. We note in this regard that shareholders large enough to have a meaningful control impact will either already have a Schedule 13D or Schedule 13G filing obligation, or will incur one as a result of their activities.

In the event that the Commission retains the requirement that communications pursuant to Rule 14a-2(b)(7) be in writing, we recommend that the "date of first use" filing deadline be relaxed. We note that many small or inexperienced shareholders may not have ready access to the Edgar filing system, and thus may be unable to make same day filings. More importantly, the stated policy goal of the filing requirement (to ensure that the content restriction is adhered to) would not be in any way compromised by a more reasonable filing deadline. It is our belief that a three business day deadline would be more than adequate for the Commission's purpose.

With respect to the content restrictions of Rule 14a-2(b)(7), we recommend that they be expanded to permit shareholders to include a brief statement of the reasons for the formation of the nominating shareholder group. Such a statement would be helpful to prospective nominating group members when deciding whether or not to join the group, and would provide a useful supplement to the statement identifying the candidate and his or her characteristics, which is already permitted by the proposed rule.

Lastly, as a technical matter, we believe that proposed Rule 14a-2(b)(8) should provide shareholders with the same opportunity to direct readers to previous filings when describing their direct or indirect interests as is contained in Rule 14a-12. The current Rule 14a-12(a)(1)(i) requires a description of the participants' "direct or indirect interests… or a prominent legend in clear plain language advising security holders where they can obtain that information." Proposed Rule 14a-2(b)(8)(ii)(A), which is analogous to Rule 14a-12, also requires a description of direct or indirect interests of the shareholder proponent, but omits the "prominent legend" option. There does not seem to be any basis for the difference between the rules, nor would there seem to be any benefit to requiring shareholders to repeat their information in every solicitation while permitting the company, which presumably would rely on Rule 14a-12 for any solicitations it makes, to merely refer readers to previously filed material.

VI. Rule 14a-11(f)(6): Replacement of Nominees under Certain Circumstances

We do not disagree with proposed Rule 14a-11(f)(6), which would prevent a nominating shareholder from changing its nominee in order to correct a deficiency. However, we believe the Proposing Release should expressly permit a nominating shareholder to replace one qualified nominee with another qualified nominee if the first nominee is unable to serve as candidate or director for reasons not related to his or her eligibility under the proposed rules. This option could be available if, for example, the nominee becomes ill, has a change of life event causing a withdrawal from the campaign, or in certain other limited circumstances. We note that under the Proposing Release, the default deadline for the submission of nominations is approximately 150 days, or approximately 5 months, prior to the annual meeting. Significant changes can occur to a nominee in that period, including, for example, his or her death or disability, and we believe it would be unfair to require a nominating shareholder or group, having invested considerable effort to initiate a campaign, to abandon the campaign in the event that its nominee is unable to serve (again, as noted, for reasons not related to his or her eligibility under the proposed rules). We note in this regard that the company has the ability to replace director nominees for a much longer period - at least up until the printing of its proxy materials, and possibly until the date of the meeting, through the exercise of the discretionary authority typically granted to the company on the proxy card. Furthermore, the need for nominating shareholders to be able to replace nominees under certain circumstances is arguably greater than the company's: while the company nominates a full slate of candidates, the nominating shareholder may have nominated as few as one candidate. For these reasons, we recommend that the proposed rules expressly permit the replacement of nominees by nominating shareholders in certain defined circumstances.

VII. Rule 14a-11(d)(2): Maximum Number of Available Board Seats

While proposed Rule 14a-11(d)(1) states that a company will not be required to include in its proxy statement and form of proxy the greater of (i) more than one shareholder nominee or (ii) the number of nominees that represents 25% of the company's board of directors, Rule 14a-11(d)(2) provides that shareholders will be prevented from nominating additional directors to staggered boards where the 25% maximum was reached in a prior election for a different class of directors. We believe that the maximum imposed by proposed Rule 14a-11(d)(2) is both unfair and inconsistent with the goals of proxy access, and should be eliminated.

While not necessarily in agreement, we recognize the policy, and to some extent, political basis for Rule 14a-11(d)(1)'s implicit requirement that any changes in board composition made pursuant to proposed Rule 14a-11 be incremental in nature. While incremental change may be appropriate, we believe that once a year has elapsed since the election of a shareholder-nominated director, the goal that change be incremental has been met, and allowing further shareholders nominations at this point should not be problematic. More importantly, it is difficult to see the policy reason for an absolute limitation on the number of shareholder-nominated directors who can serve on a board. As proposed, Rule 14a-11(d)(2) essentially creates a subset of "shareholder seats" to be filled by shareholder representatives, the number of which cannot be exceeded under any circumstances in connection with access to the company's proxy. We are uncomfortable with the idea that a shareholder-nominated director is, once elected, somehow deemed to be in a separate category from the company-nominated directors. We believe, and fiduciary duties require, that all board members are shareholder representatives.

Furthermore, proposed Rule 14a-11(d)(2) would serve to unfairly disenfranchise other company shareholders who may wish to seek board representation through the use of proposed Rule 14a-11 in subsequent years. We believe it is unfair and inconsistent with the concept of shareholder democracy to restrict access by all other company shareholders to the company's proxy materials simply because the "shareholder slots" are already occupied, especially, as noted above, when a year has elapsed. While a prohibition against further nominations by the same shareholder or shareholder group may be appropriate, there should be no restriction at all if the group seeking representation has no connection to the shareholder group already represented on the board. More than one shareholder or shareholder group may wish to be represented on the board, and the presence of one group of shareholder-nominated directors on a board does not satisfy the aspirations of all shareholders.

For the reasons above, we recommend that classified boards be treated the same as non-classified boards - i.e. subject to the director limitations annually. To that end, we recommend that the Commission not adopt proposed Rule 14a-11(d)(2), and instead clarify that the limitations already included in proposed Rule 14a-11(d)(1) apply to all boards, classified and non-classified.

VIII. Instruction 1 to Rule 14-1(11)(a): Proposing Shareholder Affiliate Status

We support the inclusion of Instruction 1 to Rule 14-1(11)(a), which provides that the presence of an agreement between a nominating shareholder and either a candidate or, if such candidate is elected, a director, where the agreement relates only to the nomination, would not be sufficient to confer "affiliate" status on a nominating shareholder. However, we recommend that the instruction provide further clarification, and include an instruction stating that the presence of other types agreements between a nominating shareholder and a candidate or director would not necessarily confer affiliate status on the nominating shareholder, and that Rule 14a-11 is not intended to change the current law regarding affiliate status.

It is not unusual for nominating shareholders and their chosen candidates to enter into agreements during the nomination and proxy solicitation process. Nominees often request agreements, such as indemnification agreements, that clearly relate only to their nomination. In other situations, however, nominees and nominating shareholder enter into other agreements, including compensation agreements, that may not relate exclusively to the nomination. We believe nominating shareholders should be permitted to enter into such agreements with nominees, including compensation agreements, if so desired, and that such compensation or other agreements should not automatically confer affiliate status on the nominating shareholder if the nominee is ultimately elected to the board.

The question of whether or not a person or entity is an affiliate of a company is a fact-specific determination, and while the presence of an agreement between a nominating shareholder and a director of that company will be relevant to the analysis, it is not dispositive, and the determination will necessarily include reference to other factors, including the nature of the agreement. To confer affiliate status by virtue of the existence of any agreement, without an examination of other facts, would represent an extension of existing law. We believe it would be helpful to nominating shareholders and practitioners if the Proposing Release were to include, in the instruction, a statement to this effect.

IX. Section 16 Relief

We note that the Proposing Release declines to provide relief from Section 16 liability for shareholder nominating groups whose ownership level exceeds 10%. We respectfully disagree with this conclusion. We believe that Section 16 relief - in particular, an exemption from Section 16's reporting and short swing profit disgorgement provisions for shareholder nominating groups - would provide a meaningful supplement to the goals and procedures set out in the Proposing Release.

First and foremost, we note that members of a shareholder nominating group that exceeded a 10% ownership level could not reasonably be considered company "insiders" in any manner. The group exists for the sole purpose of nominating a candidate, and, absent special facts, would have no access to inside information about the company. Thus the statutory purpose of Section 16 - the prevention of insider trading - would not be relevant to such groups.

We are concerned that potential Section 16(b) liability could act as a significant disincentive to shareholder nominating groups that approach or would like to exceed a 10% ownership threshold. There is no policy reason why such a disincentive should be tolerated - shareholders should have unfettered discretion to form groups of any size. Shareholders naturally have an incentive to form the largest group possible, in order to maximize the chances of nominating and electing their nominee, and there is no sound basis to discourage this incentive. If anything, large groups are to be encouraged, because the existence of a large group strongly suggests that the issue raised by such group has widespread shareholder support.

We note that Section 16 relief was granted by the Commission in the 2003 Release. We do not believe that the reduction in qualifying thresholds in the Proposing Release from those set out in the 2003 Release should lead to any difference in the application Section 16.

X. Schedule 13G Eligibility

We note that we support the position taken in the Proposing Release that a nomination pursuant proposed Rule 14a-11 would not result in a nominating shareholder or nominating shareholder group losing its eligibility to file on Schedule 13G. We believe this will encourage use of the Rule 14a-11 process, in particular by large shareholders who are knowledgeable about the company but may otherwise be reluctant to take action that may jeopardize their status as a Schedule 13G filer.

If you would like to discuss any aspect of the foregoing comments or the Proposing Release, please do not hesitate to contact Marc Weingarten at (212) 756-2280, David Rosewater at (212) 756-2208 or Bill Cassin at (212) 756-2522.

Very truly yours,

Schulte Roth & Zabel LLP

Schulte Roth & Zabel LLP