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

Re: File No. S7-10-09, Release Nos. 33-9046, 34-60089 – *Facilitating Shareholder Director Nominations*

Dear Ms. Murphy:

I am writing on behalf of AT&T Inc. ("AT&T") to comment on the Commission's proposed proxy access rule, Exchange Act Rule 14a-11 ("Rule 14a-11").[1] AT&T is a holding company incorporated under the laws of Delaware, with its principal offices in Dallas, Texas. AT&T, through its subsidiaries, ranks among the leading providers of telecommunications and other communications services in the United States and in the world. The company has annual operating revenues in excess of $120 billion, and it employs approximately 301,000 persons. AT&T currently has approximately 3,900,000 beneficial owners of shares.

AT&T appreciates the opportunity to provide its views to the Commission on the mandatory proxy access provisions set forth in proposed Rule 14a-11. Under that rule, a corporation would, subject to certain limitations, be compelled to include in its proxy materials shareholder-nominated candidates for its board of directors. AT&T is strongly opposed to Rule 14a-11. That is so for multiple reasons.

First, the Commission lacks the statutory authority to adopt Rule 14a-11. Rule14a-11 would impose a uniform federal mandate on corporations that would deprive shareholders of existing rights under state law to regulate the nomination and election of directors. Because Congress has not delegated to the Commission the authority to regulate the substance of corporate

[1] *See* Facilitating Shareholder Director Nominations, SEC Release Nos. 33-9046, 34-60089, 74 Fed. Reg. 29,024 (proposed June 18, 2009).

governance – which has long been the province of state law – Rule 14a-11 exceeds the Commission's authority.

Second, Rule 14a-11 rests upon a fundamental contradiction with respect to shareholder voting: on the one hand, the rule betrays a deep distrust of shareholders' capacity to invest in companies with nomination and election procedures that advance shareholders' welfare and/or to amend corporate bylaws to achieve the optimal level of proxy access. On the other hand, Rule 14a-11 is proposed as a means of enhancing shareholder suffrage, on the theory that shareholders can make welfare-enhancing decisions with respect to the nomination and election of directors. These assumptions are at war with one another: if shareholders can be trusted to make appropriate director nomination and election decisions, they can also be trusted to determine for themselves the optimal level of proxy access.

Third, Rule 14a-11 would inflict enormous costs on corporations and steer corporate governance in the wrong direction by, among other things, empowering some shareholders with narrow, parochial agendas (at the expense of other shareholders) and by inviting acrimonious contested elections that will undermine the capacity of boards to respond to the current economic crisis. Finally, and in light of these serious concerns, if the Commission does adopt Rule 14a-11, it should do so with key modifications designed to minimize the rule's disruption to corporations.

I. RULE 14a-11 EXCEEDS THE SEC'S STATUTORY AUTHORITY

Section 14(a) of the Securities Exchange Act makes it "unlawful for any person . . . , in contravention of such rules and regulations as the Commission may prescribe . . . , to solicit . . . any proxy."[2] Section 14(a) thus grants the Commission rulemaking authority but it limits that authority to the regulation of disclosure in connection with "proxy" "solicit[ation]."[3] As the D.C. Circuit has said, there is no "serious[] dispute[] that Congress's central concern [in section 14(a)] was with disclosure."[4] Because "an agency literally has no power to act . . . unless and until Congress confers power upon it,"[5] the Commission's statutory authority under section 14(a) is limited to regulating proxy

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[2] 15 U.S.C. § 78n(a).

[3] *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 174 (1994) ("the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit") (internal quotation marks omitted).

[4] *Business Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990).

[5] *New York v. FERC*, 535 U.S. 1, 18 (2002) (internal quotation marks omitted).

disclosure; it is not a grant of authority to regulate corporate governance generally.

In that way, section 14(a) respects the basic jurisdictional (and constitutional) divide between federal and state law with respect to corporations.[6] "Corporations," as the Supreme Court has held, "are creatures of state law."[7] It is a corollary of that principle that "investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."[8] The basic relationship between a corporation's board and its shareholders is an internal corporate matter,[9] and, as discussed further below, state law is the traditional forum for regulation of director nomination and election,[10] as well as proxy solicitation generally (Delaware's corporate law is just one example).[11] Indeed, "the corporate election process is a central element of substantive corporate law, within the province of state law," and questions such as "[w]hether corporations have to hold elections, how elections are funded, who is eligible to be a director, and how often elections occur are core state law questions."[12] It is thus not surprising that the Commission acknowledges in the accompanying release "the traditional role of the states in regulating corporate governance."[13]

Rule 14a-11 would substantially intrude upon states' longstanding authority over corporate governance, and thereby exceed the Commission's defined role under section 14(a) of regulating proxy disclosure. In purpose and effect, Rule 14a-11 would regulate the balance of power between a corporation and its

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[6] *See, e.g.*, U.S. Const. amend. X.

[7] *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (internal quotation marks omitted).

[8] *Id.* (internal quotation marks and emphasis omitted).

[9] *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949) ("relations between management and stockholders" in a corporation are "dependent upon state law").

[10] *See infra* p. 5.

[11] *See, e.g.*, Del. Code Ann. tit. 8, § 212 (2009) (setting forth detailed rules governing the means for granting proxy authority).

[12] Vice Chancellor Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 Harv. L. Rev. 1759, 1776 (2006); *see also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.").

[13] 74 Fed. Reg. at 29,025.

shareholders, as well as between classes of shareholders, and substantially transform the manner in which directors of corporations are nominated and elected. Although Rule 14a-11 is couched in the language of disclosure,[14] the rule would, in all important respects, implement a substantive corporate governance standard. The rule would create a right of shareholder proxy access that does not exist under state law and would define the standards for which shareholders are eligible to invoke this right and thus to have their nominees placed on a corporation's proxy materials (compelling the company to subsidize the nominees of some shareholders but not others). Notably, moreover, corporations and shareholders would be free to adopt more expansive shareholder eligibility criteria, but they would be foreclosed from adopting more restrictive standards. Beyond that, the substantive nature of the rule is confirmed by the fact that Rule 14a-11 reflects the Commission's substantive judgment that current provisions under state law and corporate bylaws for director nomination and proxy access are insufficient.[15] Rule 14a-11 thus crosses the line from permissible regulation of proxy disclosure into the spheres of internal corporate voting and governance, which have long been the exclusive province of state law.

The D.C. Circuit's decision in *Business Roundtable* is virtually dispositive of the question of the Commission's authority to promulgate Rule 14a-11. The D.C. Circuit there struck down the Commission's Rule 19c-4 – which prevented national exchanges from listing the stock of a corporation that took any action to restrict or impair the voting rights of common stockholders and which was adopted in response to "one-half vote per share" stock.[16] The Commission's principal claim of authority was "§ 14's grant of power to regulate the proxy process."[17] The D.C. Circuit squarely rejected this argument, however, because section 14 "bears almost exclusively on disclosure," yet Rule 19c-4 governed the substantive balance of power between corporations and shareholders.[18] As the D.C. Circuit explained, Rule 19c-4 could not be justified as a disclosure or

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[14] *See, e.g., id.* at 29,032.

[15] *See, e.g., id.* (opining that the current procedures for proxy contests and elections are inadequate). The substantive nature of Rule 14a-11 is confirmed by the fact that the rule does not apply when "shareholders . . . are seeking to change the control of the issuer or to gain more than a limited number of seats on the board of directors." *Id.* These limitations, although appropriate, make clear that Rule 14a-11 embodies federal policy choices about which shareholders should and should not hold sway in director elections – elections that have long been the province of state corporate law.

[16] 905 F.2d at 407.

[17] *Id.* at 410.

[18] *Id.*

voting procedure regulation because it "directly interfere[d] with the substance of what the shareholders may enact" in a manner intended to effect "the distribution of voting power."[19] The rule, the D.C. Circuit held, "directly invade[d] the firmly established state jurisdiction over corporate governance and shareholder voting rights."[20]

As described above, Rule 14a-11 suffers from the same infirmities. In purpose and effect, the rule is a substantive attempt to redistribute power between corporations and shareholders, to define the categories of shareholders entitled to invoke proxy access rights, and to second-guess the processes of director nomination and election in state law and corporate bylaws. At the least, Rule 14a-11 is almost certain to face serious legal challenge, and it is difficult to see how the rule's transformation of the balance of power between states and the federal government with respect to these important areas of corporate law will withstand judicial review in light of existing precedent.

The Commission's statements in the accompanying release regarding its supposed authority to promulgate Rule 14a-11 are unpersuasive and foreclosed by existing precedent. First, the Commission states that "[r]egulation of the proxy process and disclosure is a core function of the Commission."[21] To that end, the Commission cites Congress's belief that "fair corporate suffrage" is an important corporate right.[22] But the D.C. Circuit has previously held that this very same reasoning overlooks the *means* by which Congress authorized the Commission to ensure fair corporate suffrage – namely, disclosure in connection with the proxy solicitation process. Section 14(a) is not a font of authority to regulate the substance of shareholders' choices.[23] As explained above, there can be no serious question that section 14(a) is a substantive regulation of internal corporate affairs.

Second, the Commission appears to recognize that Rule 14a-11 represents a substantial expansion of federal authority in an area long entrusted to states, but it attempts to save the Commission's authority by pointing out that the rule will not apply where "state law . . . prohibits shareholders from nominating directors."[24] This limitation does not save Rule 14a-11. The Commission

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[19] *Id.* at 411.

[20] *Id.* at 413 (internal quotation marks omitted).

[21] 74 Fed. Reg. at 29,025.

[22] *Id.* (internal quotation marks and brackets omitted).

[23] *See Business Roundtable*, 905 F.2d at 411.

[24] 74 Fed. Reg. at 29,031.

acknowledges that no state currently prohibits such nominations,[25] so the effect of Rule 14a-11 will be to set binding federal-law governance standards with respect to director nomination and proxy access where no such standards exist under state law. The burden would then be on states affirmatively to prohibit shareholder director nominations if a state wished to free itself from the federal mandate. Under the rule, therefore, states would be prohibited from allowing shareholder director nominations *unless* they were willing to abide by the mandatory access standards imposed by the Commission, underscoring why the effect of Rule 14a-11 will be to federalize this area of state corporate law.

In short, Rule 14a-11 – which the Commission appropriately acknowledges reflects a "significant" and "novel[]" change in law[26] – would result in substantive federal regulation of internal corporate matters and would deprive states of longstanding authority over director nominations and elections. Because Congress did not delegate authority to the Commission to displace state law in this way, the Commission's proposed federalization of corporate law exceeds the Commission's statutory authority.[27]

II. RULE 14a-11 IS PREDICATED ON IRRATIONAL AND CONTRADICTORY ASSUMPTIONS ABOUT SHAREHOLDERS' VOTING COMPETENCE

Apart from the absence of statutory authority to adopt Rule 14a-11, the Commission should decline to adopt the rule because it rests upon incurably contradictory assumptions about shareholders' capacity to make decisions that maximize shareholder welfare.

Rule 14a-11, on the one hand, reflects a deep distrust of shareholders' capacity to determine the appropriate level of proxy access. Rule 14a-11 is not necessary for shareholders to amend bylaws, to nominate directors, or both – those rights exist under state law, subject to reasonable constraints as corporations may impose in bylaws. Shareholders accordingly can vote with their feet by investing in corporations governed by state laws and bylaws that contain director nomination and election procedures and proxy access rules that satisfy shareholders' demands. Indeed, states are experimenting with different approaches in this area now, making clear that shareholders do have

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[25] *See id.* at 29,031 n.99.

[26] *Id.* at 29,043.

[27] In enacting the Sarbanes-Oxley Act, Congress made substantial changes to corporate governance and financial reporting matters, but it did not take any action to expand the authority of the Commission with respect to the nomination and election of directors.

choices. Delaware, for example, has recently authorized shareholders, if as owners of the company they vote to adopt such a bylaw, to include director nominees in corporate proxy materials,[28] while North Dakota has created a state proxy access right.[29] Apart from an ability to vote with their feet through investment decisions – an ability that makes corporate governance very different from political governance – shareholders can often use available procedures to amend corporate bylaws to establish director nomination and election procedures and proxy access rules that advance shareholders' interests. A core premise underlying Rule 14a-11, however, is that shareholders are not responsible enough or otherwise capable of establishing appropriate director nomination and election procedures and proxy access rules that best advance shareholders' interests.[30] Otherwise, a mandatory federal rule would be unnecessary.

On the other hand, however, the Commission justifies Rule 14a-11 as a means of empowering shareholders and enhancing their ability to nominate and elect directors and to influence the direction of corporations (presumably for the better). Such empowerment, of course, would make sense only if shareholders are responsible corporate citizens and are capable of nominating and voting for directors who will increase, not undermine, shareholder welfare.[31] But that theory cannot be reconciled with the Commission's justification for a mandatory rule in the first place: if shareholders can be trusted to make appropriate director nomination and election decisions, there is no sensible basis to conclude that they cannot be trusted to make use of existing processes to set appropriate director nomination and election procedures and proxy access rules tailored to the individual company's circumstances.[32]

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[28] *See* Del. Code Ann. tit. 8, § 112 (2009); *see also id.* § 212.

[29] *See* N.D. Cent. Code § 10-35-02(8) (2009) (defining a qualified shareholder as one that owns more than 5% of outstanding shares and has held that interest for two years continuously); *id.* § 10-35-08 (creating proxy access right for qualified shareholders).

[30] *See* Letter from Professor Joseph A. Grundfest, Stanford University, to Elizabeth M. Murphy, Secretary, SEC, File No. S7-10-09 (July 24, 2009) (attaching Joseph A. Grundfest, *Internal Contradictions in the SEC's Proposed Proxy Access Rules*, Rock Center for Corporate Governance Working Paper No. 60 (July 24, 2009) ("Working Paper No. 60")).

[31] *See* Working Paper No. 60 at 2 ("A fundamental premise of every proxy access proposal is that the majority of shareholders are sufficiently intelligent and responsible that they can be relied upon to nominate and elect directors other than the nominees proposed by an incumbent board.").

[32] *See id.* at 2 (noting that the accompanying release is devoid of any explanation for why "shareholders can be relied upon to nominate and vote on directors, but not to set the rules by which directors are nominated and elected"); *id.* at 6 ("[T]here is no intellectually credible

In light of this glaring contradiction at the heart of Rule 14a-11, the Commission should reconsider adopting it. If the Commission does adopt the rule notwithstanding this basic irrationality, the rule will almost certainly be subject to legal challenge. It is axiomatic that agencies must engage in reasoned decisionmaking,[33] and adopting a rule founded upon a contradiction cannot count as a reasonable agency decision.

III. RULE 14a-11 WOULD IMPOSE SUBSTANTIAL COSTS ON CORPORATIONS AND STEER CORPORATE GOVERNANCE IN THE WRONG DIRECTION

The Commission should also decline to adopt Rule 14a-11 because of the substantial costs the rule would impose on corporations, including giving rise to unnecessary, expensive, distracting, and acrimonious contested elections – brought about by shareholders with narrow agendas, including speculative, short-term investors – at a time when the focus of corporations should be on responding to the grave challenges posed by the current economic crisis.

As an initial matter, there can be little doubt that Rule 14a-11 would lead to a substantial increase in contested elections. Currently, contested elections are relatively rare: boards have fiduciary duties to corporations and to their shareholders, and boards thus nominate qualified directors who will best advance the long-term interests of shareholders. Rule 14a-11, however, is certain to increase contested elections – in which a shareholder nominee is pitted against a board nominee. This increase in contested elections is likely to be caused almost entirely by shareholders with a particular agenda separate and apart from the long-term health of the company, meaning that none of the theoretical benefits of enhanced shareholder democracy are likely to be achieved. Indeed, under Rule 14a-11, there would be no obvious downside to a large shareholder nominating a director whenever possible given that proxy costs would be borne by the corporation as a whole (in that sense, Rule 14a-11 is a subsidy to large shareholders, and basic economic theory teaches that subsidies will increase subsidized activity).

A substantial increase in contested elections would have deleterious effects on corporations. Contested elections force corporations to expend significant time and resources to defeat nominees who are not qualified or who express positions antithetical to the corporation's best interests. An increase in

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argument that shareholders are selectively intelligent and responsible: that they are competent to elect directors but incompetent to determine the rules governing the election of directors.").

[33] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

contested elections also would deter many qualified directors from seeking nomination so as to avoid the acrimony and public spotlight associated with frequent election contests. And regular contested elections would diminish the capacity of the board itself to manage day-to-day issues by demanding that the board's time and energy be dedicated to fending off electoral challenges. If Rule 14a-11 does result in the election of directors nominated by shareholders with parochial agendas, the resulting divisions on and balkanization of corporate boards would also pose a threat to good corporate governance.

There is no justification for imposing these costs on corporations at a time when they are struggling to respond to an economic crisis. But such costs are particularly unwarranted because they would come about as a result of the contested elections caused by shareholders with short-term, parochial interests.[34] AT&T believes that long-term value creation, not a blinkered focus on the short term, is in the best interest of all shareholders. If Rule 14a-11 is adopted, however, there is a real danger that large shareholders (such as institutional investors with narrow interests and hedge funds) will use the threat of contested elections to extract from boards concessions contrary to the goal of long-term value creation.[35] Even worse, Rule 14a-11 would give this enhanced leverage over boards to shareholders that already have institutional muscle (owing to their size, expertise, and experience), leaving the interests of smaller, individual shareholders unprotected.[36] Whereas a corporation's board

[34] *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. Rev. 561, 564-65 (2006) (arguing that, in light of the divergent interests of shareholders, shareholders "may use any incremental power conferred upon them to pursue those interests to the detriment of shareholders as a class" and that, "[a]s a result, transferring power from boards to shareholders will not necessarily benefit all shareholders" and "could reduce overall shareholder welfare").

[35] *See* Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 Va. L. Rev. 733, 744-45 (2007); *see id.* at 745 (noting that shareholders with narrow, specific agendas, which are repeat players, that "would stand to benefit most . . . from a general shareholder subsidy" in connection with director elections).

[36] The Commission's belief that empowering the interests of these large shareholders will benefit all shareholders appears to rest on the assumption that shareholders' interests are homogenous. The Commission, however, cites no empirical or theoretical support for this counterintuitive supposition. Absent empirical or other hard evidence supporting this assumption, Rule 14a-11 will be subject to serious legal challenge. *See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984) (per curiam) (because "[a]n agency decision . . . must have a rational basis in the record," "when an agency undertakes a thorough, primary evaluation of all relevant facts, it is highly desirable that the agency," among other things, "independently amass the raw data; verify the accuracy of that data; apply that data to consider several alternative courses of action; and reach a result confirmed by the comments and submissions of interested parties").

has fiduciary duties to the corporation and to all shareholders with respect to nominating directors, individual shareholders do not. If shareholders with narrow, short-term agendas are afforded an opportunity to advance their self-interests by Rule 14a-11, it is almost certain that they will do so and that they will demand that boards focus on short-term gains. An increased focus on short-term value would be detrimental to the interests of shareholders as a whole and it would exacerbate the economic issues the Commission hopes that Rule 14a-11 would help to combat, thereby having the exact opposite effect from that desired by the Commission.[37]

IV. IN ALL EVENTS, RULE 14a-11 SHOULD BE MODIFIED IN KEY RESPECTS

In view of the Commission's lack of statutory authority to adopt Rule 14a-11, the fundamental contradiction underlying the rule, as well as the substantial costs the rule would impose, AT&T submits that the best course for the Commission is to decline to adopt Rule 14a-11. If the Commission does move forward, however, it should substantially modify the rule.

In the accompanying release, the Commission states that, in order "to balance shareholders' ability to participate more fully in the nomination and election process against the potential cost and disruption to companies subject to the proposed new rule," it proposes that "only holders of a significant, long-term interest in a company be able to rely on Rule 14a-11."[38] To that end, and with respect to large cap companies such as AT&T, the rule would limit proxy access to any individual or group holding 1% of the outstanding shares of that company for a period of one year or more. These criteria, however, are wholly insufficient to achieve the Commission's stated aim of limiting "cost and disruption." AT&T thus strongly encourages the Commission to modify Rule 14a-11 in important respects.

First, the Commission should allow mandatory proxy access only for a shareholder that owns 20% of a corporation's stock, which the shareholder has held continuously for two years. To mandate such access for shareholders with smaller or shorter-term holdings would allow shareholders with no demonstrated deep and/or long-term commitment to a company to inflict the costs of a proxy contest on a corporation. As explained above, this would lead

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[37] *See* Strine, 119 Harv. L. Rev. at 1764 (noting that the "the increasing sway of institutional investors over corporations, and the institutions' laser-beam focus on quarter-to-quarter earnings, helped create managerial incentives that contributed to the debacles at corporations like Enron, WorldCom, HealthSouth, and Adelphia").

[38] 74 Fed. Reg. at 29,035.

boards to focus on the short-term objectives of these shareholders rather than the long-term interests of the corporation. Furthermore, and as also explained above, any attempt to change the composition of a board will create diversions and distractions from the day-to-day operation of a company. Such distractions and diversions should occur only when there is sufficient support for a nominee, support which can be gauged by the fact that a nominee has the support of a sufficiently large percentage of shares. Therefore, a 20% ownership threshold is important to ensure that a candidate has a non-trivial prospect of being elected to warrant the costs of a contested election. AT&T's proposed eligibility criteria, moreover, would help to ensure that the proxy process is not held hostage by speculators and others with an agenda separate from the long-term interests of the company.[39]

The Commission's proposed criteria would not, in AT&T's business judgment, sufficiently protect against costly and unnecessary contested elections. AT&T, for example, currently has eight shareholders that own 1% or more of AT&T's stock. Each of these eight shareholders would accordingly satisfy Rule 14a-11's proposed 1% ownership threshold for placing director nominees on AT&T's proxy materials and would thus be able to bring about a contested election. That there are currently eight AT&T shareholders that would satisfy the 1% threshold also demonstrates that it would not be difficult for shareholders with particular agendas separate and apart from the long-term health of the company to obtain 1% of a company's shares in an effort to nominate (or threaten to nominate) directors so as to compel a board to focus on short-term gains rather than long-term value creation. The Commission's proposed ownership threshold will accordingly empower a shareholder with its own particular agenda, contrary to the interests of all shareholders.

Second, Rule 14a-11 should include an additional ownership criterion – namely, that a shareholder must prove uninterrupted voting power and ownership throughout the two-year ownership period. This criterion is needed to remedy the *double-counting* of shares that might otherwise occur in determining the eligibility of a shareholder to place a director nominee on a corporation's proxy materials. Currently, as this Commission is aware, institutional shareholders often loan shares for the purpose of short-selling the

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[39] There is also no justification for a different shareholder ownership threshold for small and large cap companies. Rule 14a-11, as written, proposes that shareholders of companies with more than $700 million in market capitalization would need to own only 1% of a corporation's shares to be eligible to nominate a director, whereas shareholders of companies with less than $700 million in market capitalization would need to own 5% of a corporation's shares to be eligible. There is no empirical basis for such differential treatment, however, because the Commission cites no evidence that small cap companies are likely to have more large, institutional shareholders.

stock. As a result, more than one person or entity may claim ownership of the same shares, although only one of them is lawfully permitted to vote the shares.[40] In the context of the eligibility criteria under Rule 14a-11, such double-counting could lead to a shareholder reaching the eligibility threshold to nominate a director that should not qualify. To guard against this concern, AT&T believes that the Commission should require that, in order to satisfy Rule 14a-11's eligibility criteria, a shareholder must prove uninterrupted voting power and ownership for the full two-year period.

In addition to these important changes to Rule 14a-11's eligibility criteria, AT&T strongly encourages the Commission to only adopt Rule 14a-11 subject to certain triggering conditions. In considering shareholder director nomination rules in 2003, the Commission proposed imposing certain triggering conditions before director nomination rules would apply to a particular company, in an attempt to minimize the costs and disruptions as a result of the rules and to ensure that only those companies with demonstrated governance issues would be subject to federal mandates.[41] Proposed Rule 14a-11, however, does not impose any triggering conditions; instead it applies a one-size-fits-all approach to all public companies, even if there is no evidence of a need for greater director accountability to shareholders at a particular company. There is no reasonable basis for subjecting companies that have created processes that are already working to respond to shareholders' needs to the substantial costs and disruptions that a mandatory rule will bring about. Sensible triggering events would help to ensure that the

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[40] Because of insufficient records kept reflecting the transfers of ownership during these transactions, over-voting – that is, the voting of shares by the institution that lent the shares and by the shareholder that ultimately purchased the short-sold shares – is an ongoing problem in corporate elections. *See* Erik R. Sirri, Director, Division of Market Regulation, SEC, Remarks Before the SIFMA Proxy Symposium (Oct. 16, 2007), *available at* http://www.sec.gov/news/speech/2007/spch101607ers.htm ("Similarly, securities lending may contribute to the overvoting problem as well. Even though the industry-standard lending contract allocates the vote to the borrower, the lender broker may not reconcile its records to reflect it no longer has the vote or loaned securities. As a result, if the loaned securities are not returned on or before record date, both the borrower and the lender may attempt to submit a vote for the same securities.").

[41] *See* Security Holder Director Nominations, SEC Release No. 34-48626, 68 Fed. Reg. 60,784, 60,790 (Oct. 23, 2003).

rules target only those companies for which mandatory federal rules might be necessary to ensure greater director accountability, and thus are plausibly worth the costs.

Sincerely,

Wayne Watt

Sr. Executive Vice President
and General Counsel