ICGN
International Corporate Governance Network

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

August 17, 2009

Re: ICGN Support for "Facilitating Shareholder Director Nominations" (File No S7-10-09)

Dear Ms. Murphy,

We are writing on behalf of the International Corporate Governance Network (ICGN) in follow up to our initial response letter dated 15 July 2009. In the intervening period, we have continued to reflect on the consultation document and on the responses published to date. We set out below our comments on a number of the specific questions raised.

The ICGN is a global membership organisation of predominantly institutional investors based in 45 countries with a mission to raise standards of corporate governance worldwide. As such, the ICGN is a strong supporter of the efforts of the Securities and Exchange Commission (SEC) to facilitate the exercise of shareholders' rights to nominate directors.

We believe it is valuable to have a market-wide minimum standard for shareholder nominations of directors, as set out in Rule 14a-11, with the potential for companies, with shareholder approval or where shareholders themselves request it, to make the requirements less onerous, as made possible under the proposed Rule 14a-8. This seems to us to strike the optimal balance between federal and state law. It also ensures a level of certainty and predictability through the minimum standards whilst allowing for private ordering between shareholders and companies. A similar approach is effective in Europe, where the Shareholder Rights Directive, once fully implemented, sets the maximum ownership threshold for shareholders to propose resolutions at the general meeting at five per cent whilst allowing Member States to provide for lower thresholds (and implicitly for companies and shareholders to set relevant by-laws). Similarly in countries within the British Commonwealth (e.g. Australia and South Africa), the five per cent threshold applies and shareholders can propose binding resolutions on the nomination of directors.

We again urge the SEC to keep the final rules and the procedures for their application as simple as possible. Accordingly, we welcome the SEC's intention to make Rule 14a-11 widely available and not to require any 'triggering events' before shareholders would be able to make use of it (Questions B13-21). Similarly, we would discourage the SEC from allowing companies to exempt themselves from the application of Rule 14a-11 on the basis of having done the right thing by shareholders under other rules (Question B10).

As we explained in our earlier letter, we believe that the only eligibility criterion for shareholders to be able to nominate directors should be that they are, individually or collectively, significant

shareholders. The tiered approach proposed in Section 3 of the consultation document seems to us to be appropriate as a market-wide standard for determining what is a significant shareholder, although as noted above we support the SEC's proposal to allow shareholders and companies to agree different thresholds if relevant, but only if these are less onerous than the maximum set at federal level (Questions C1-C7). Our preference would be for there to be no additional eligibility criteria, such as the proposed one-year holding period. In principle, we believe that all shareholders should be treated equally (regardless of holding period). However, we understand the concerns about short-termism and believe that there is merit in requiring the same holding period as applies to the entitlement to make shareholder proposals. A requirement for nominating shareholders to commit to continue longer-term to be shareholders is more problematic and should not, in our opinion, be included in the rule. (Question C14-C20).

In relation to the requirements of the shareholder nominees, we believe that the basic condition for eligibility should be compliance with state law, federal law and listing requirements. Beyond that we believe the onus is on the director nominee to provide to all shareholders a full and detailed explanation of his or her professional background, skills and experience, motivation for seeking election and disclosure of any factors that may, or may be seen to, impair independence. It is then for the shareholders to assess the merits of the nomination (Questions D1-16).

We do not have a strong view on the most appropriate number of directors shareholders should be limited to nominating. From a non-US perspective a limit seems over-complicated. Shareholders nominating their own candidates should be able, in extremis, to replace all serving directors, except where there is a legal provision for certain appointees (say, government representatives) (Questions E1-E6). That said, we recognise that there are other mechanisms available to shareholders wishing to replace the entire board. Thus, a limit of, say, 25 per cent of the board would seem to us to strike an appropriate balance. This would ensure that director nominees, if successfully elected, would have some influence on board decision-making but not sufficient power effectively to take control. We believe the limit should apply only to the number of directors nominated in any one year (i.e. over a number of years it could be that all the directors on a board were originally nominated by shareholders) but from any source, i.e. either under Rule 14a-11 or voluntarily put on the ballot (Questions E7-E8). In the event that there are too many shareholder nominees we suggest that, rather than having a 'first in first on the proxy' system, all the names go forward but only those attracting the highest majority votes fill the quota (Question E10).

We are in broad support of the procedural proposals set out in sections 6 through 8 in the consultation document. You ask if there are any impediments to shareholders making effective use of Rule 14a-11. Anecdotally, some shareholders cite concern about falling foul of the SEC rules as a reason for not acting collectively with fellow shareholders on engagements. This clearly could also be a significant impediment to shareholders forming groups to reach the thresholds under the proposed Rule 14a-11. We would encourage the SEC to try to eliminate any ambiguities and further clarify guidelines about definition of a 'group' for the purposes of section 13D and to specifically exempt activities in connection with Rule 14a-11. We believe that the SEC has a pivotal role to play in ensuring shareholders understand the boundaries and are encouraged to act as responsible share owners within them.

In closing, we reiterate our support for the SEC in its efforts to make it more straightforward for shareholders to exercise their basic rights to nominate board directors and subsequently to hold them accountable. We believe strongly that the interests of board directors and shareholders are, for the large part, aligned and that the matters under consideration as part of this consultation relate to those relatively rare instances where this is not the case. Both shareholders and shareholder nominees would be reckless to take lightly the responsibilities they have as fiduciaries. Thus, we are less concerned than some commentators that the proposed rules would be abused. We are confident that making shareholder access

to the proxy simpler will enhance the governance framework in the United States and have a positive long-term impact on corporate performance and investors returns.

Thank you for the opportunity to comment on the proposals. We hope you find our input constructive. Please contact Christianna Wood, ICGN Chairman, by email at secretariat@icgn.org or by telephone on + 44 20 7612 7098, if you would like to discuss it further.

Yours sincerely,

Christianna Wood
ICGN Chairman

Michelle Edkins
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