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August 17, 2009

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

Re: File No. S7-10-09: Proposed Rules for Facilitating Shareholder Director Nominations

Dear Secretary Murphy:

I am writing on behalf of the Florida State Board of Administration (SBA) to express our support for the proposed rules for facilitating shareholder director nominations and provide comment on the matters discussed therein. The SBA believes the proposed rules represent a key development in the progress of shareowner rights. The SBA manages the Florida Retirement System (FRS) on behalf of 1.1 million beneficiaries and retirees. In combination with our other mandates, SBA assets under management total approximately $110 billion.

This proposal is about increasing the accountability and responsiveness of companies to shareowners. We believe that shareowners have a pivotal role to play in the monitoring of a company's board and ultimately management. However, the ability of owners to act in placing directors as their representatives has been cumbersome and unduly expensive.[1] This has made our duty of proper oversight difficult. In some instances, it has created an atmosphere of unresponsiveness to shareowner concerns.

The proposal's overview provided an accurate depiction of the difficulties that shareowners face in electing directors under the current system and the inadequacies of other options such as proxy contests, selling of the position, dialogue with management, vote-no campaigns, in-person nomination of candidates at shareowner meetings, and proposal of candidates to the nominating committee. Therefore, we agree with the basis presented for the proposed rules in Section I.

Ideally, we would like to see proposed Rule 14a-11 applied to all companies, without exclusions for state law or governing articles of the company. As Congress recognized a federal interest in the way public corporations handle the proxy process, we believe that the Commission can best serve the facilitation of shareholders' right to nominate and elect directors by making this rule universally applicable. Because we agree that the right to nominate is inextricably linked to, and

[1] See "The Myth of the Shareowner Franchise," by Lucian Bebchuk, Discussion Paper No. 567, John M. Olin Center for Law, Economics, and Business, Harvard Law School, November 2006.

essential to the vitality of, a right to vote for a nominee[2], we suggest this revision so that shareowners at every company may have such rights. The current federal proxy process does not adequately replicate the conditions of the shareowner meeting, and a rule allowing bifurcated application may leave many shareowners without this crucial ability. We would like to see Rule 14a-11 apply as a base at every company, with individual states or companies able to go beyond this minimum standard as they deem fit.

There are many aspects to a policy that will accomplish needed change in a way that is not disruptive or impractical. We thank you for offering this detailed proposal and offer the following comments cited by question heading in an effort to help the Commission craft the best possible rules.

A.1. We wholly agree with the need for the Commission to facilitate shareowner director nominations. This is the most efficient method of ensuring shareowners' ability to elect legitimate representation and most closely mimics the rights of a shareowner attending the meeting.

A.2. While we agree that the move away from plurality voting in uncontested elections has been helpful, this trend was embraced by investors as a mechanism to cope with the lack of proxy access. However, there is no alternative that can deliver the same utility as a robust shareowner nomination process. A federal solution is required. Proxy contest reimbursement remains an inferior solution as it requires an upfront investment of capital and effort with much assumed risk, thus drastically limiting the number of instances where the need for nomination will actually be met.

A.5. Without universal application of Rule 14a-11, there is a danger that the indirect effect of the rule will be to encourage companies to adopt provisions in their governing documents that avoid this mechanism of shareowner nominations. The result could be more companies using governing articles to circumvent Rule 14a-11, requiring shareowners to fall back on the amendment to Rule 14a-8(i)(8) and creating the delayed, inefficient process that led the Commission to propose Rule 14a-11.

A.9. If Rule 14a-11 is applied with exclusions for state law or governing documents, the modification of Rule 14a-8(i)(8) is necessary to allow shareowners the ability to change the company's governing documents, leaving a mechanism through which shareholders could revive the ability to nominate directors. We favor a universal application of Rule 14a-11. The modification of Rule 14a-8(i)(8) would remain helpful in allowing investors the ability to add to the protections afforded via Rule 14a-11.

A.10. Adoption of only the amendment to Rule 14a-8(i)(8) would leave a cumbersome, multi-year process for nomination of directors. Depending on the final rule application, the election of two directors at a company with staggered board elections or small board size could take three

[2] Page 13 of the proposal states, "First, we believe that we can and should structure the proxy rules to better facilitate the exercise of shareowners' rights to nominate and elect directors. The right to nominate is inextricably linked to, and essential to the vitality of, a right to vote for a nominee."

years to complete. Rule 14a-11 is necessary to enable a proper level of oversight and monitoring without being overly time-consuming, costly or burdensome to any party or imposing needless delay.

B.2. Rule 14a-11 should apply to all companies, without providing the proposed exclusion for state law or governing documents of the company. The rule will better facilitate shareowner rights with such broader application.

B.7. It would be appropriate to only permit companies to comply with state law or governing document provisions when those provisions provide greater nomination or proxy disclosure rights than Rule 14a-11. Even if shareowner-approved, such provisions should not lessen the protections below those afforded under Rule 14a-11.

B.8. The approval to amend NYSE Rule 452 will result in legitimate elections that reflect the true preferences of voting shareowners. Its effect will enhance proposed Rule 14a-11, and it will not require further changes to nomination rules.

B.9. The proposed rules should not exempt companies with majority voting policies in their governing documents. As a preventive measure, the proposal could be amended to require a plurality voting standard, rather than majority, in the event of shareowner-proposed nominees on the ballot. This proposal also lessens the need for cumulative voting provisions, which are not widely prevalent[3] and are of most benefit to investors voting at majority-controlled companies. The use of cumulative voting could be restricted, except in the instance of majority-controlled companies for which the ability to cumulate votes serves an important purpose.

B.10. As Rule 14a-11 would enable an important right, we see no basis for granting temporary exemptions to its provisions based on actions such as implementing a majority-supported shareowner proposal. The rule's provisions should not be used as governance bargaining chips and neither are they intended to inflict punishment on company boards or management; therefore, we believe exemptions for otherwise good behavior are unnecessary and miss the intent of the proposal.

B.11. We do not support any limitation on the ability of shareowners to file advisory proposals; the voting on these proposals serves many roles in communicating matters of importance to investors. Often such votes reflect widespread investor sentiment on issues that apply universally, and such votes inform management and market participants, including other companies facing similar investor concerns.

Most investors who use the proposal process to help shape the governance and practices of a company have no desire to nominate a director. Most of these proposals are submitted at companies with directors who are elected year after year with excellent support from owners. Shareowner proposals serve an entirely different purpose than that of facilitated nominations. Further, keeping in mind that any shareowner nominations under 14a-11 would be limited to a

[3] According to RiskMetric's CGQ data on a universe of 5,212 U.S. companies, 343 companies (6.58 percent) have provisions allowing the use of cumulative voting.

small percentage of the overall board, we feel it is best for owners to retain the present opportunities afforded under Rule 14a-8.

B.12. Even with the presence of reimbursement provisions, the occurrence of shareowner nominations will occur sub-optimally. Campaigns to distribute a separate proxy statement are extremely time consuming and expensive. There is great risk assumed by the person or group submitting the nominees. There is no guarantee of payback, which may be limited. The use of these provisions in lieu of facilitated nominations would lead to sharply reduced instances for voter choice.

B.13. The proposed eligibility thresholds serve as an appropriate limiting factor. No additional triggers are required.

B.14. No set of triggers can be effective without causing significant time lags for shareowner action. Minimum ownership thresholds to nominate, followed by a plurality of votes to elect, are barriers of appropriate significance for legitimate elections without undue burden to any party.

B.15. We prefer no additional triggers, but if a voting trigger is considered, the only appropriate standard to use is based on actual votes cast. The use of votes outstanding is an inappropriate assessment of voter feedback and places unwarranted hardship on proponents.

B.20. Companies should not be exempt from complying with Rule 14a-11 when another party commences a solicitation. Past elections have been successfully conducted with greater than two slates. Such an exemption would allow a potential "white knight" scenario where a management-friendly party could wage a solicitation campaign with the goal of invalidating a facilitated nomination. As such, the existence or status of other solicitations should not affect the application of Rule 14a-11.

C.1. The proposed eligibility requirements are appropriate and necessary. We agree that the ownership level and time thresholds serve an important function in signifying substantial financial interest. One important aspect of ownership for the Commission to consider is requiring these thresholds based on net ownership. Net ownership requirements will prevent derivatives and other financial instruments or agreements from being used to disassociate economic and legal ownership. It is extremely important to the integrity of this proposal with its prescribed ownership limits to ensure that the intent behind such significant economic exposure is not undermined with the use of financial engineering. Such disclosure of net and absolute holdings should be required in the 14N statement.

C.5. Tiered ownership thresholds are a useful method for fairly applying the rule at companies of widely varying market value. We support the percentages and filer categories as proposed. These percentages are low enough to allow owners to individually or jointly nominate directors, but are not so low as to invite systematic overuse or abuse of the opportunity to nominate.[4]

[4] For example, according to recent 13F filings for Nabors Industries—which is classified as a "large accelerated filer" with a market value of $700 million or more—the top 5 public pension funds held approximately 2.9 percent of Nabors' total outstanding shares.

C.7. Given the achievable standards set for ownership thresholds, we believe an additional standard based on the number of beneficial owners in a group is unnecessary.

C.17. With regard to the disclosure of the time period through which a nominating shareowner intends to maintain holdings, a statement of intent to hold the securities through the date of the annual meeting will suffice. At that point, the vote of all owners determines whether the nominees will be elected, and upon election, they become representatives of all shareowners. There is no need for the nominating parties to continue or pledge to continue holding their shares any more so than owners who simply voted in favor of the nominees.

C.18. As conditions at companies can change quickly and drastically over even short periods of time, we consider the prohibition of nominations based on prior levels of low support to be unnecessary. We would not favor the inclusion of such a provision in the final rule.

C.19. Aggregation of positions in meeting the proposed ownership requirement is a very important factor in the ability of owners to effectively use Rule 14a-11. Public funds would need to form a nominating group in order to meet the hurdle in nearly all cases.[5]

C.21. As long as the owner's, or group's, overall share position continues to meet the ownership threshold for the required one-year time period, there should be no prohibition on partial sales when determining eligibility.

C.24. On the matter of whether to require shareowners to represent that they will not seek to change control of the company, the limit of board seats accommodated by facilitated nominations ensures that an individual election performed under the rule cannot result in a change in control. As nominees would be subject to a vote by all shareowners, we see no reason to specify additional limitations. If nominees from an individual or group in consecutive years can gain support from a plurality of votes, it should be allowed. The owners will judge the nominating shareowner's or group's intentions if they shift over time.

D.16. It would be concerning if a particular nominee was presented in consecutive years and received minimal support. One reason for this concern is the application of the first-in provision for submitting candidates. A shareowner or group submitting candidates that receive such low levels may be impeding the ability of other owners to nominate a candidate. For this reason, we suggest a provision stating that an owner or any group that includes owners who submitted a candidate receiving less than 10 percent of the votes cast be precluded from obtaining "first in" status under Rule 14a-11 if multiple nominations are made at the same company for one year. This will ensure that other owners are able to participate in the nomination process and will prevent one owner or group from dominating the process with repeat submissions of nominees that lack broad appeal.

[5] See the Council of Institutional Investors comment letter provided for this proposal for additional illustrations of this point.

E.1. It is appropriate to limit the number of shareholder nominees. However, we believe it would be more appropriate to apply the rule by making the same percentage of the board seats available at each election (i.e. in each election, facilitated nominations would be possible for up to 25 percent of the board seats). Once a nominee becomes a director under the process described in Rule 14a-11, they become a director representing all owners. The next elections may hold different candidates proposed by another set of owners, and it should be up to the owners as a whole whether to accept such a nominee. As it is not possible to challenge any individual director for a head to head election competition, it is important that an existing director nominated under the proposed rule will not serve to indefinitely exclude other shareowner nominations.

In the event the Commission deems a change in control over multiple years to be a great obstacle, an alternative is to not allow the specific nominating owners or members of a group to use Rule 14a-11 again within their elected candidates' terms. This alleviates change in control potential from a single owner or group members while still allowing the potential for other owners with eligible holdings to exercise their rights. This issue gains further importance with the use of the first-in provision.

E.2. We prefer the maximum percentage of facilitated nominations to be 25 percent of the board per election. We see no reason to apply an overall cap on the percent of directors serving via facilitated nomination; however, if one is adopted, we would be satisfied by a limit of 45 percent. A hybrid solution might allow 25 percent nominees to the board in a single election and not greater than 45 percent of board members overall. A minimum of two director nominations should be allowed, regardless of board size.

E.3. We suggest that any rounding rule include a provision of rounding up to the nearest integer when the decimal portion is .50 or greater and rounding down to the next integer when the decimal portion is less than .50. Doing so is logical and will mitigate the potential dilution effect on shareowner-nominated directors via expansion of the board's size.[6]

E.5. With regard to accounting for incumbent directors elected using provisions of Rule 14a-11, we do not believe these directors should count against the maximum 25 percent threshold. While it takes comparatively small holdings to nominate an individual, it takes a majority of votes to elect. An elected individual becomes a representative for all owners, and future use of Rule 14a-11 by potentially different nominating individuals should not be restricted.

E.6. The number of eligible shareowner nominees should be based on total board size, but should not exceed the number of director positions up for election at companies using staggered elections. We expect and hope this limit would not provide incentive for companies to increase the use of staggered board elections.

E.7. Incumbent directors who were nominated outside of the Rule 14a-11 process should not be counted as shareholder nominees for the purposes of determining nominating ability under the rule. This rule is intended to facilitate representation suggestions from owners of significant size,

[6] This potential is noted in the proposal within the discussion of costs and benefits on page 182.

but who might not be able to otherwise participate in the proxy process through expensive measures such as a proxy contest. The presence of directors elected via proxy contest or methods that are alternative to Rule 14a-11 does not obviate the need for participation under this rule.

E.10. There are elements in the use of "first in" for submission of candidates under this rule which give us pause. However, the most attractive feature of this criterion is the notion of certainty. We believe the fairness of such an option would be increased if the dates for such submissions were set in calendar form, announced by the company in Form 8-K filings at least 30 days prior to the date of effectiveness. The notion of counting 120 calendar days back from previous meeting dates is a standard used in other instances, such as filing of proposals under Rule 14a-8, but we believe the need to be first in submission of candidates calls for an explicit date range for nominations to be disclosed by the company so that no misunderstandings or miscalculations occur and beginning and end dates are clear.

Alternatively, the largest beneficial ownership might be a workable criterion. If two or more owners or groups were to each submit nominees, the owner or group with the largest committed beneficial ownership by the end of the submission period would have their nominees included under Rule 14a-11. Note that this method could include the possibility for other owners who did not originally submit the nominees to add their shares and pledge support to the nominee set of their choice. Thus, the process in this regard would be a bit more like a caucus and potentially increases the legitimacy of such nominees. The use of a minimum value of shares in order to add an owner's support to any set of nominees, such as $2,000, as with Rule 14a-8, would be appropriate in keeping group size and accounting of pledges manageable.

The notion of how to most fairly include only one set of nominees under Rule 14a-11 provides a difficult challenge. The notion of a caucus is reasonable, though it is more complex than a first-in procedure and requires an initial submission period for nominee sets followed by a subsequent period in which remaining shareowners can pledge support. We would expect the number of times a caucus would be necessary due to multiple submissions to be quite low, due to the ownership requirements to even cast a nomination.

F.1. The elements proposed for content in Schedule 14N are each appropriate and desirable, with the exception of the disclosure of intention to continue ownership of shares required after the election. Once the vote among all owners has transpired, it is not relevant what the nominators will do with their holdings since the directors are now either elected, and thus fiduciaries on behalf of all owners, or not elected, and hence the ownership of the nominees is still irrelevant.

One element that is necessary in the disclosures required within Schedule 14N is the inclusion of absolute and net ownership positions of any nominating owner or group. The disclosure of net ownership and the use of any financial engineering is extremely important information to voting shareowners. The disclosure of mere absolute ownership figures may result in circumvention of the Commission's carefully crafted standards of significant economic interest.[7]

[7] See page 881 of "The New Vote Buying; Empty Voting and Hidden (Morphable) Ownership" by Henry T.C. Hu and Bernard Black. Southern California Law Review, Vol. 79:811, 2006, for suggested elements of net ownership position disclosures.

F.6. Failure to adhere to deadlines proposed for submitting Schedule 14N to the company or Commission should render the nominations ineligible as proposed.

F.8. We prefer a federal standard governing the timing of submission of shareowner nominations for directors. We believe consistent application will result in an easier and clearer process for investors wishing to use this process in nominating directors.

F.10. As stated above, the process would be enhanced with the specification of an acceptable date range for nominee submission. The use of clear beginning and end dates for nominations is important when considering a first-in system. We would like companies to file Form 8-K to announce these dates with sufficient time, at least 30 days notice, for investors to act.

F.15. The information contained in Schedule 14N is important to investors and should be filed with the Commission at the time it is provided to the company. The deadline for filing Schedule 14N should be the same day as notice is provided to the company.

F.17. We favor the requirement to amend Schedule 14N to promptly update any material change in facts, but we do not consider the nominating shareholder's or group's intentions pertaining to continued ownership to be relevant or material once the election has occurred.

F.20. We favor a description of any material transactions between a nominating shareowner and the company or any of its affiliates in the preceding 12 months to be required in Schedule 14N.

F.22. We would find value in disclosures informing shareowners of any meetings or communications in the preceding 12 months in which nominations or facilitated nominations were a topic. This background, in addition to any material transactions as noted above, is important for consideration.

G.1. In the case of multiple nominees made by a shareowner or group, the exclusion of any one of the nominees by the company for any reason should not allow the exclusion of the entire set of nominees as long as there is no basis to challenge the validity of the remaining candidates.

G.2. We agree, as proposed, that neither the composition of a nominating shareowner group nor a shareowner nominee could be changed as a means to correct a deficiency identified in the company's notice to the nominating shareholder or group. The shareowner or shareowner group should have the option of resubmitting a new facilitated nomination provided the window of eligibility has not expired. The resubmission should be considered as a new and separate submission, and it should only meet the first-in requirement if no other owners or groups have filed their own facilitated nomination under the rule in the interim.

G.5. It is reasonable to allow nominating shareowners, as well as the company an opportunity to make a brief statement supporting their nominees in any use of Rule 14a-11. All statements of support should be subject to a 500-word limit.

I.2. If Rule 14a-11 is not applied universally to all companies, then the proposed changes to Rule 14-a8(i)(8) should apply to all companies, keeping with the elements of Rule 14a-8 that

govern all other shareowner proposals. The rule should allow any proposed or requested modifications to governing documents for inclusion of a proposed director in the company's proxy materials as long as such amendments are not prohibited under state law. The use of Rule 14-a8(i)(8) should not be limited to states or companies that already have provisions concerning the inclusion of nominees.

I.8. Current Rule 14-a8(i)(8) thresholds for $2,000 in market value or one percent of securities, continuously held for one year, are appropriate. A different standard should not apply based on the subject matter for this particular type of proposal.

I.10. No disclosures or burdens should apply to a shareowner making a proposal under Rule 14-a8(i)(8) other than those required more generally for other types of proposals under Rule 14a-8.

I.12. The burden of disclosure concerning any nominees submitted in response to a proposal made under Rule 14-a8(i)(8) should be equal to those of Rule 14a-11. The disclosure provides important information about the nominees and should be retained for nominations under the use of either rule.

J.1. We agree that a shareowner or group simply nominating one or more directors should retain their eligibility to file as a passive or qualified institutional investor. Additional conditions based on the identity of the nominee should not be adopted.

J.2. Additional 13D filing and disclosure requirements are not necessary given the substantial disclosures required under Rule 14a-11 as proposed.

Comments on the Cost-Benefit Analysis and the Efficiency, Competition and Capital Formation Impact

Special Interest Takeover - It is difficult to conceive that a candidate seeking to represent special interests could achieve victory in an election. Special interests are by definition limited to a minority of shareowners. If elected by a majority or preponderance of shares, such an agenda can no longer be considered fringe or special interest. For this reason, we do not consider the claim that a small minority could impose their will on the majority to be a valid concern in this proposal. Additionally, the proposal provides further protection against such a scenario by requiring disclosure designed to highlight any such interests or relationships.

Board Disruption - As an indirect cost, it has been suggested that the presence of directors elected via facilitated nomination may cause disruption in the boardroom and affect the functioning of the overall board. The potential costs have been proposed already by some commenters as resulting in a less efficient board due to disruptions or lack of cohesion. Judging by the vitriol in past particularly heated and personal proxy battles waged, this is not an entirely unreasonable speculation. However, if the minority slate proposed through the proxy access vehicle is successful in winning board positions, it is then legally incumbent upon each board member to act in the best interests of shareowners according to fiduciary duty. A director or directors who are disruptive to the point that it impedes the board's functioning must be dealt in

this legal regard, and as this potential is not limited to directors who have been elected through the facilitated nomination process, we do not see any rationale in restricting proxy access for minority slate candidates for this reason. As it is shareowners that ultimately bear any cost, we favor their ability to cast votes that take into account any such possibility. We agree that investors may be able to evaluate a company's board of directors more effectively and make more informed investment decisions as a result of the proposed rules.

Deter Qualified Directors - As fiduciaries ourselves, we cannot place the importance of a director's pride or reputation above the priority of ensuring our invested company has the most qualified and well-equipped directors. If a candidate desires the opportunity to assist in the oversight and management of a firm, it should be worth the chance that the candidate may ultimately be unsuccessful in their bid for a seat on the board. It is our opinion that a well-qualified director candidate will assume this risk. These are paid positions of considerable importance and responsibility, and in the interest of shareowners, it cannot come with a guarantee of tenure or election. Further, competition in this area may discourage less qualified individuals, as noted in the proposal, and thereby increase the overall quality of the board. We agree that the proposed rules will improve information flow and give more direct effect to shareholder preferences for directors, a positive outcome.

Lastly, we note that some comments have been submitted to the Commission noting that the time period for comments is too condensed to allow for sufficient analysis. The Business Roundtable and several other prominent groups have noted in a joint submission that this proposal represents a challenge for gathering information and data. Members of this group assembled a survey that was cited in comments to the Commission's 2003 proposal on this topic and is noted in the current proposal, but which the members now indicate has diminished in value following "the sea change in corporate governance that has occurred in the last six years." Their comments note the numerous times the Commission has considered this topic as evidence not to rush, but to investigate more. We are of the opinion that the Commission has crafted a well-conceived proposal as a result of these previous considerations and that further analysis, after years of doing so, is unnecessary. Since it has been widely circulated that the Commission was considering reform in this area once again for some time, it is puzzling that these prominent groups have waited to conduct further surveys, particularly given their expectations that sentiments have changed considerably since the 2003 work.[8]

We believe the Commission has made a sufficient and honest attempt at quantifying the costs and benefits of this proposal. We expect that further comments in this regard will be carefully weighed. It is our belief that the tremendous benefits that come with increased accountability and legitimate elections will far exceed the expected incremental costs arising from both elections and proposals enabled by these rules. Advancement of rights in this area is truly overdue, having been considered several times in years past without reform. We hope the Commission will work to implement these reforms as quickly as possible.

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[8] Discussions hinting at some form of proxy access began as soon as President Obama was elected, (See "Shareowners see Victory in Obama Administration" by Barry B. Burr, *Pensions and Investments*, November 10, 2008) and Chairman Schapiro noted in testimony to the Senate Committee on Banking, Housing and Urban Affairs on March 26, 2009 that proxy access would be a key part of the SEC's agenda.

In summary, we appreciate the Commission's efforts in crafting these proposed rules. We believe such reforms would make boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors, and more vigilant in their oversight of companies. We do not believe these rules will result in undue complexity or disruption to the current election process.

We hope the Commission will implement these recommendations and enhance the ability of shareowners to elect the most qualified representatives. Thank you for your consideration of this significant issue impacting our pension investments. If you have any questions, please contact Mike McCauley, Senior Officer—Investment Programs and Governance, at (850) 413-1252 or governance@sbafla.com.

Sincerely,

Ashbel C. Williams
Executive Director & CIO

cc: Governor Charlie Crist, as Chairman of the SBA
CFO Alex Sink, as Treasurer of the SBA
Attorney General Bill McCollum, as Secretary of the SBA
Chairman Mary L. Schapiro
Commissioner Kathleen L. Casey
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes