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VIA ELECTRONIC MAIL

United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-10-09
Facilitating Shareholder Director Nominations
Release No. 33-9046 (the "***Release***")

Ladies and Gentlemen:

We are submitting comments to proposed Rule 14a-11 ("***Rule 14a-11***"), proposed Schedule 14N ("***Schedule 14N***") and the proposed changes to Regulation 14a-4, each as proposed to be promulgated under the Securities Exchange Act of 1934 by the Securities and Exchange Commission in the above-referenced Release. We have reviewed many of the comment letters submitted to date in response to the Release and have tried to avoid duplicating many of the other very valid concerns that have been raised.

We represent a number of public high-technology, life sciences and other companies who, like most public companies in a post-*Enron* and now post-*TARP* environment, have invested and continue to invest substantial time and effort in implementing enhanced corporate governance structures, processes and "best practices." We see our clients actively discussing corporate governance issues at the board of directors and committee levels and with shareholders and shareholder advisory firms on a regular basis. In fact, most of them spend a significant amount of time working with these constituencies to conform their corporate governance to these organizations' and shareholders' views of "best practices," including specifically seeking to enhance their numeric governance scores or quotients that are published by these organizations. Like them, we are supportive of efforts to make the governance of public companies as effective as possible consistent with the overarching goal of increasing shareholder value.

We are providing comments to address two important concerns regarding the above referenced proposals contained in the Release, one relating to the effect of the rules on the role of the nominating committee of the board of directors and the second being that certain aspects of Rule 14a-11 would facilitate unintended changes in control of public company boards of directors.

The Role of Nominating Committees

We think that the goal of any revision of the director nomination and election process should be to enhance the ability of shareholders to elect the highest quality candidates to serve on the company's board of directors. As acknowledged in previous actions of the Commission and the major stock exchanges (see, for example, Release Nos. 33-8340; 24-48825; IC-26262, "Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors"; NASDAQ Listing Rule 5605(e), "Independent Director Oversight of Director Nominations"; and New York Stock Exchange Rule 303A.04 "Nominating/Corporate Governance Committee") the nominating committee of the board of directors has the key fiduciary responsibility under state corporation laws to identify and nominate such candidates. If nominating committees are not effectively carrying out this mission, a premise presumably underlying the proposal, then the aim of the new rules should be to impose a proxy access process that encourages committees to be more inclusive and effective. One of our primary issues with the proposal is that rather than seeking to make nominating committees more effective, it will actually undercut the role of the nominating committee as an effective, even-handed agent for the identification and nomination of the highest quality candidates to serve on the company's board of directors.

We believe that proxy access alone will not significantly advance the laudable goal of electing high quality boards of directors. The inherent limitations in scope and the arbitrary functional provisions of any broad-based rule of this nature ensure this. For example, under the proposal, when more than one qualifying shareholder desires to include a nominee in the proxy materials, the first to qualify will be allowed to do so. This allocation of the right to proxy access certainly cannot be counted upon to regularly result in the highest quality nominee being included. We think that any proxy access system whose central tenet is to allow, and even encourage, unvetted candidates to be nominated by disparate groups of shareholders, as is the case with the proposal, may serve to increase the quantity of candidates standing for election but not the quality.

These observations do not cause us to oppose proxy access. We simply think that it should be implemented in a way that will encourage shareholders to bring qualified candidates to the nominating committee and also encourage committees to actively and fairly evaluate all candidates brought to their attention, in whatever manner that occurs. The proposed rule will almost certainly have the opposite effect.

Most importantly, the rule would require that shareholders need to own shares for a minimum period of just one year. If a shareholder who desires to do so can submit a nominee this quickly, why would it endeavor to interact with the committee at all? That shareholder's main goal will be to submit its nomination more quickly than other shareholders, not to have the nomination seriously evaluated by the committee. Further, the disclosure required by a nominating shareholder by Schedule 14N will not contain any information regarding whether the shareholder has submitted a nominee to the committee for its consideration. It seems quite obvious that the contemplation of the rule is that the shareholder will not have bothered to interact with the committee. We think that it would be, and should be, material to other shareholders to understand whether the nominating shareholder requested the committee to nominate its candidate and how the committee responded to that proposal. Finally, while perhaps a small ministerial element of the proposal, the elimination of shareholders ability to vote for the company's slate of directors as a whole is a very powerful indication that the federal proxy rules do not believe that the judgment of the nominating committee, which of course has a fiduciary duty under state corporations law to nominate the company's slate, is worthy of any deference by shareholders. We must also observe that this change in practice exhibits a remarkably low assessment of shareholders' powers of discernment in exercising their franchise.

In light of the foregoing, we respectfully respond as follows to the questions contained in the Release:

C.14. Should there be a restriction on shareholder eligibility that is based on the length of time that securities have been held? If so, is one year the proper standard? Should the standard be longer (e.g., two years, three years, four years or five years)? Should the standard be shorter (e.g. six months)? Should the standard be measured by a different date (e.g., one year as of the date of meeting, rather than the date of the notice)?

The holding period should be a minimum of four years. We believe this provides a reasonable period of time for a shareholder to evaluate the effectiveness of the incumbent board. More importantly, this holding period will induce a shareholder who is dissatisfied with the overall quality of the company's board of directors to interact with the nominating committee to express its concerns. We think that in most cases a concerned shareholder would express a general concern with the quality of one or more directors and suggest ways that the board can be improved, such as the replacement of one or more directors or the addition to the board of a director or directors with particular skills. If in the judgment of the shareholder these suggestions are not appropriately responded to, then the shareholder would likely submit its nominee to the committee. If, following that natural progression, the committee is not responsive; the shareholder could opt to nominate its candidate in the company's proxy statement.

We think that proxy access with a four year holding period is sufficiently long that a shareholder with strongly held views about the quality of board nominees would, effectively, be forced to have a dialogue with the committee about its concerns. We think that dialogue is

appropriate and consistent with the fiduciary duty of the committee. On the other hand this is a sufficiently short holding period that committees will recognize that they cannot simply fail to be responsive to shareholder concerns due to the high cost of running an opposing candidate, because, within a discrete time period, a dissatisfied shareholder will have the ability to make its own nominations in the company's proxy statement.

F.2. Are there additional matters that should be included? For example, is there additional information that should be included with regard to the nominating shareholder or group with regard to the shareholder nominee?

We believe that in addition to the proposed requirements, Schedule 14N should require the nominating shareholder to:

- State whether or not the shareholder has recommended to the nominating committee that it consider its candidate for nomination to the board, and if so the time that it made this recommendation.

- Provide a brief description of the response, if any, that the shareholder received from the committee in reaction to its recommendation.

Providing this information would, of course, allow other shareholders to be made aware of the extent to which the nominating committee considered the shareholder's nominee in proposing the slate nominated by the committee and of the extent to which the committee did or did not evaluate the qualifications of the shareholder's candidate. This disclosure would also, over time, provide information to the shareholders at large of the committee's receptivity to shareholder nominees.

G.4. Under the proposal, companies would not be able to provide shareholders the option of voting for the company's slate of nominees as a whole. Should we allow companies to provide that option to shareholders? Are any other revisions to the form of proxy appropriate? Would a single ballot or "universal ballot" that includes both company nominees and shareholder nominees be confusing" Would a universal ballot result in logistical difficulties? If so, please specify.

We believe that shareholders should be allowed to vote for the company's slate of nominees as a whole if the company's slate has been approved by a nominating committee of the board that satisfies the relevant criteria of the exchange or inter-dealer quotation system on which the company is listed or traded, for companies not so listed or traded, or of such an exchange or inter-dealer quotation system selected by companies not so listed or traded. Such a rule would further encourage companies to establish independent committees. We also think that the committee's recommendation is worthy of acknowledgment by the proxy rules and that facilitating the desire of shareholders to follow the committee's recommendations is appropriate for this purpose.

Potential for Unintended Changes in Control

In addition to the broader concerns regarding the role of nominating committees, we also believe that the proposed changes to Rule 14a-11 will have the effect of facilitating changes in control. The Staff has clearly stated that Rule 14a-11 is not intended to facilitate changes in control of a registrant:

> "we do not intend for proposed Rule 14a-11 to be available for any shareholder or group that is seeking to change control of the issuer or gain more than a limited number of seats on the board....Further, extensive changes in board membership, or the possibility of such changes as a result of additional nominees being included in the proxy statement, have the potential to be disruptive to the board, while also potentially being confusing to shareholders." (See the Release at pp. 74-75)

While we agree that the proposed changes would indeed facilitate shareholder nominations of directors, we are concerned that certain aspects of proposed Rule 14a-11 would in fact facilitate significant and disruptive changes to boards of directors.

Proposed Rule 14a-11(d)(2)

E.7. Should any limitation on shareholder nominees take into account incumbent directors who were nominated outside the Rule 14a-11 process, such as pursuant to an applicable state law provision, a company's governing documents or proxy contest? If so, should such directors count as "shareholder nominees" for purposes of determining the 25%?

Proposed Rule 14a-11(d)(2) provides that if a registrant's board of directors currently has director(s) elected as nominees under Rule 14a-11 serving for terms that extend past the shareholder meeting, the registrant would not be required include additional shareholder nominees pursuant to Rule 14a-11 if the total number of directors serving on the board that were nominated pursuant to Rule 14a-11 would exceed the one director/25% of the board standard of proposed Rule 14a-11(d)(1).

We do not see a reason for proposed Rule 14a-11(d)(2) to be limited to situations in which directors nominated by shareholders only pursuant to Rule 14a-11(d)(2) should be counted towards the one director/25% of the board limit. As noted in the Release, shareholders can nominate their own full or short slates of directors, subject to having to use their own proxy statement, and we have seen increasing numbers of registrants that have shareholder-nominated "short slates" of directors elected to boards. For companies with non Rule 14a-11 shareholder nominees already serving on the board, there can easily be a significant change in overall composition of the board if only Rule 14a-11 nominees were taken into consideration.

For example, a company with an eight-member classified board would typically have three directors standing for election in each of two years, and two members standing for election in a third year. A shareholder could nominate three members outside the Rule 14a-11 process in one year. In the next year, another shareholder could use the cheaper and less burdensome Rule 14a-11 process to nominate two additional board members, which would result in turnover of a majority of the board.

In this example, given that shareholders would already have representation on the registrant's board, shareholders of the registrant as a whole are not hindered in their ability to seek representation on the board of directors, and the registrant would not face the costly and disruptive prospect of a consecutive election contest, with the added risk of effecting an incremental change in the majority board of the board.

We also believe that Rule 14a-11(d)(2) should not necessarily apply only to directors whose terms extend beyond the meeting date. As acknowledged in the Release, election contests and frequent changes in the composition of a board of director can be extremely disruptive to a company's ability to conduct its business. If a company has had shareholder-nominated board members serving on its board within a relatively recent period, for example two or three years, clearly, company shareholders have demonstrated that they have the ability to obtain board representation. In order to avoid the significant disruption of frequent election contests and changes in board composition, we do not believe that shareholders of companies that have had shareholder representation in the recent past need the assistance of Rule 14a-11 in order to be heard.

We propose that proposed Rule 14a-11(d)(2) be revised at a minimum to provide that all board members nominated by shareholders with terms extending past the meeting date be taken into account in calculating the limit on directors that can be nominate under Rule 14a-11. Additionally, we believe that a "look back period" of at least two years should also be included within Rule 14a-11(d)(2) as well.

Rule 14a-11(d)(3) and Contested Elections

B.20. Should companies be exempted from complying with Rule 14a-11 for any election of directors in which another party commences or evidences it intent to commence a solicitation in opposition subject to Rule 14a-12(c) prior to the company mailing its proxy materials? What should be the effect if another party commences a solicitation in opposition after the company has mailed its proxy materials?

Rule 14a-11(d)(3) addresses the situation of multiple nominees using the Rule 14a-11 process, establishing a "first come, first served" approach. However, Rule 14a-11 is silent as to what would happen in a situation where there is a contested election, or a competing short slate of nominees outside the Rule 14a-11 process. As drafted, it would appear that both the Rule 14a-11 nominees and the other shareholder nominees would then be voted on at the meeting,

together with the registrant's slate of directors. Effectively having three or more slates of directors would compound the already confusing and time-consuming process for shareholders and registrants alike currently face with two competing slates.

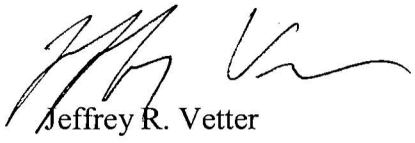
We believe that in situations where there are other shareholder nominees outside the Rule 14a-11 process, shareholders have clearly had the means to be heard and nominate board members. To require companies to then also include additional nominees in their proxy statements would turn the meeting into a "free-for-all."

Further, in the case of an eight-member board with all directors up for election annually, a shareholder could nominate a three person "short slate" outside the Rule 14a-11 process and another shareholder could nominate an additional two members under the 14a-11 procedure. The company would again be facing a change of control, with the swing members' election being largely funded by the company itself.

Therefore, we recommend that registrants be permitted to exclude from their proxy statements, any Rule 14a-11 nominees if any shareholder properly puts forth nominee(s) on the agenda for the meeting outside of the Rule 14a-11 process. In the event a solicitation in opposition has been commenced subsequent to a company's mailing of its proxy materials, we believe it should be able to remove the Rule 14a-11-nominees from the meeting agenda. A company could then communicate this through a press release or additional soliciting materials pursuant to the existing proxy disclosure regime.

Thank you in advance for your consideration of these comments. We would be happy to further discuss our concerns at your convenience.

Very Truly Yours,



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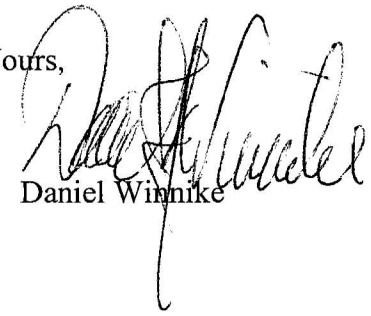

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