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August 17, 2009

Via E-mail – (rule-comments@sec.gov)

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

Re: File No. S7-10-09: Facilitating Shareholder Director Nominations (Release Nos. 33-9046, 34-60089 and IC-28765)

Dear Ms. Murphy:

On June 10, 2009, the Securities and Exchange Commission (the "Commission") published for public comment the above-referenced release entitled: "Facilitating Shareholder Director Nominations" (the "Release") containing proposed rules (the "Proposed Rules") that, among other things, would require public companies to include shareholder nominated director candidates in their proxy materials, if both the nominator and nominee meet certain threshold requirements. The Release, unfortunately, barely acknowledges the many significant changes in corporate governance that have occurred since the enactment of the Sarbanes-Oxley Act. Among these changes are the widespread adoption of majority voting for directors, which provides shareholders with a greater voice regarding director accountability, and the electronic proxy rules, which significantly reduce the cost of proxy solicitation. More significantly, the Release fosters the mistaken notion that the current economic crisis was caused solely by failures of corporate governance.

The Release is the most recent in a series of proposals by the Commission addressing the issue of shareholder access to company proxy materials.[1] Similar to the Commission's previous proposals, the Proposed Rules raise numerous concerns. In our view, there is a significant risk that the Proposed Rules would, if adopted, have a number of negative effects on the operation of public company boards of directors. In particular, we believe that the Proposed Rules, if adopted, would in many instances:

[1] In 2003, the Commission proposed rules that would have implemented a form of proxy access. Security Holder Director Nominations, Release No. 34-48626 (October 14, 2003) [68 FR 60784]. In 2007, the Commission proposed rules relating to Rule 14a-8(i)(8). Shareholder Proposals Relating to the Election of Directors, Release No. 34-56161 (July 27, 2007) [72 FR 43488].

- disrupt and polarize boards,
- discourage qualified candidates from serving on boards,
- increase the likelihood of costly election contests,
- facilitate the election of directors with a short-term rather than long-term strategic focus,
- facilitate the election of directors who see themselves as representing particular interest groups rather than all shareholders,
- adversely impact the collegiality of boards, and
- limit the ability of boards to achieve a desirable mix of experience, expertise and other attributes.

In our view, as a policy matter, these negative effects substantially outweigh whatever benefits may be perceived to be advanced through adoption of the Proposed Rules. In addition to these policy-based concerns, we believe that (i) the Commission lacks the authority to adopt the Proposed Rules and (ii) the Proposed Rules raise a number of significant technical issues. These concerns are the focus of the balance of this letter.

<u>The Proposed Rules</u>

The Release proposes two fundamental changes to the Commission's existing rules. The first is proposed new Rule 14a-11, which would require, subject to certain eligibility and other requirements, a registrant to include in its proxy statement and form of proxy the name of a person nominated by a shareholder (or shareholder group) for election to the registrant's board of directors. Proposed Rule 14a-11 thus would permit a shareholder wishing to propose a director nominee at an annual or special meeting of shareholders to use the registrant's proxy materials to solicit proxies in favor of that nominee. The Release also proposes amendments to existing Rule 14a-8(i)(8) that would reverse the existing Commission rule and eliminate the current ability of registrants to omit from their proxy statements shareholder proposals that relate to the registrant's procedures for the election of directors.

Limits of the Commission's Authority and Conflict With Law

In the Release, the Commission bases its authority for the Proposed Rules on the Securities Exchange Act of 1934 (the "Exchange Act"), and in particular Section 14(a).[2] For the reasons stated below, however, it is clear in our view that Section 14(a) does not provide the Commission with the authority to adopt the Proposed Rules.

It has long been recognized that the authority granted to the Commission pursuant to Section 14(a) of the Exchange Act is narrowly circumscribed. In 1990, in *Business Roundtable v. Securities and Exchange Commission*[3], the D.C. Circuit Court of Appeals held that the Commission lacked authority under the Exchange Act to adopt a rule purporting to govern the substantive voting rights of shareholders, an area traditionally reserved to state law. Speaking specifically to Section 14(a) of the Exchange Act, and in response to the Commission's assertion that the purpose of Section 14 is "to ensure shareholder suffrage," the court stated that "it is not seriously disputed that Congress's central concern was with disclosure." The court continued:

> "That proxy regulation bears almost exclusively on disclosure stems as a matter of necessity from the nature of proxies. Proxy solicitations are, after all, only communications with potential absentee voters. The goal of federal proxy regulation was to improve those communications and thereby to enable proxy voters to control the corporation as effectively as they might have by attending a shareholder meeting."

The Proposed Rules go well beyond disclosure. Rather than merely regulating the accuracy or completeness of the information provided to shareholders in the exercise of their voting rights under state law, the rules would grant shareholders a substantive right to include a nominee for director in the registrant's proxy statement. This right is one that shareholders would not ordinarily have under state law. The Proposed Rules accordingly exceed what the *Business Roundtable* court established as the purpose of Section 14(a) and the federal regulatory structure relating to proxies. The right to include a shareholder nominee in a registrant's proxy materials is clearly not a right that a shareholder would have by virtue of attending an annual meeting in person.

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[2] Section 14(a) provides:

> "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12."

[3] 905 F.2d 406 (D.C. Cir. 1990).

Furthermore, the rights purported to be granted by the Proposed Rules go beyond the grant of a mere right of access to a registrant's proxy statement and override and conflict with state law as well as corporate governance provisions authorized pursuant to state law. The Release states that the requirement of Proposed Rule 14a-11 to include a shareholder nominee for director in the registrant's proxy statement applies "unless state law or a company's governing documents prohibits shareholders from nominating directors." On the surface, this statement appears to defer to state law and a company's governing documents with respect to nominations by shareholders, but, in fact, the Proposed Rule would have the effect of overriding a substantial amount of regulation in governing documents that is prescribed by, or validly adopted under, state law.

The text of Proposed Rule 14a-11(a)(1) and (2) contains exceptions to the Rule's requirement to include a nominee in a registrant's proxy statement. The first parallels the language of the Release quoted above and applies if the registrant's governing documents "prohibit the registrant's shareholders from nominating a candidate … for election as a director." The second exception applies if a nominee's candidacy would "violate … the registrant's governing documents …." If these two exceptions can be read to mean that registrants are not required to include in their proxy statements shareholder nominations that are not submitted in full compliance with the registrant's governing documents, the conflict with state law would be lessened. Footnote 152 in the Release, however, makes it clear that this reading is not the intended interpretation. Footnote 152 states:

> "If a company's governing documents permit the inclusion of shareholder nominees in the company's proxy materials but impose more restrictive eligibility standards or mandate more extensive disclosures than required by Rule 14a-11, the company could not exclude a nominee … on the grounds that the shareholder or the nominee fails to meet the more restrictive standards included in the company's governing documents. In other words, companies may not opt out of Rule 14a-11 by adopting alternate requirements for inclusion of shareholder nominees for director in the company's proxy materials."

These statements clearly indicate a view that shareholder nominations made pursuant to Rule 14a-11 may not be made subject to restrictions or other conditions lawfully adopted and included in a registrant's governing documents and thus would override and conflict with governance provisions validly adopted and existing under state law. The Commission, however, has no authority, under Section 14(a) of the Exchange Act or otherwise, to limit the state law rights of public companies in this manner.

Many companies have adopted bylaws or other provisions in their governing documents that impose restrictions or conditions upon the nominating process. These provisions <u>regulate</u> the process for shareholder nominations but do not specifically <u>prohibit</u> nominations by shareholders and frequently require that (i) notice of the nomination must be given during a particular period, (ii) the nominating shareholder must provide information regarding the nominating shareholder and the nominee, including holdings of interests in the registrant, compensatory or other arrangements between the nominating shareholder and the nominee, and other information required to determine independence and other conditions of eligibility to serve as a director, (iii) the nominating shareholder must agree to appear at the meeting to make the nomination, (iv) the nominee must submit a questionnaire to support proxy disclosures, (v) the nominee must consent to serve if elected, and (vi) the nominee must agree to abide by the registrant's policies applicable to directors.

In addition to provisions governing the nomination process, many companies' governance documents include eligibility requirements for director nominees (including evaluation criteria prescribed by RiskMetrics and other shareholder advisory firms), such as minimum and maximum age requirements, limits on "over-boarding", changes in principal occupation or employer, absence of felony or drug-related convictions, requirements to sign confidentiality agreements or confirmations that persons will comply with the company's code of ethics, and requirements to provide additional information to determine compliance with various laws and rules relating to director qualification and director interlocks. For instance, there are rules governing whether persons with certain attributes, including citizenship requirements, are qualified to serve as directors of companies that hold governmental licenses such as licenses granted by the Federal Communications Commission and gaming licenses issued by various state commissions. There are restrictions and/or requirements relating to directors under, among other federal and state laws, the Federal Power Act and related FERC regulations, federal maritime laws and regulations, Department of Defense security procedures, Department of State export licensing requirements, bank holding company laws, Federal Reserve regulations, FDIC regulations and U.S. government procurement regulations. Interlocking directorates can create issues under Section 8 of the Clayton Act, Section 1 of the Sherman Act, and Section 5 of the Federal Trade Commission Act. These eligibility requirements are necessary, among other things, to prevent a violation of law or regulation, or the loss of a valuable license or franchise that could result from the election of an ineligible director. The Release does not seem to appreciate that nominating committees and company counsel spend considerable time and effort reviewing the background of director candidates in order to assure that these eligibility requirements will be satisfied and to avoid embarrassment to the company and the candidate.

The Proposed Rules would override and conflict with an advance notice or director eligibility provision that was validly included in a registrant's governing documents pursuant to state law. Advance notice provisions and eligibility requirements are generally permitted under applicable state law and have been accepted as a reasonable means to regulate corporate affairs. Registrants have valid and important interests in implementing these requirements, including the efficient administration of the process for shareholders to submit nominations for directors, protecting valuable corporate interests, ensuring that director nominees are qualified, and promoting good corporate governance. Indeed, many of the eligibility requirements assist registrants in complying with the policy recommendations of shareholder advisory firms.

Furthermore, the Proposed Rules would be in direct conflict with a recently adopted amendment to Delaware's General Corporation Law regarding proxy access, effectively invalidating the statute's provisions to the extent they exceeded the scope of the Proposed Rules. That amendment adds a new section authorizing Delaware corporations to adopt bylaws granting access to their proxy statements for shareholder nominated director candidates. The amendment expressly permits the bylaws to specify procedures and impose conditions on such right of access, and sets forth a list of permissible conditions[4], some of which would be more restrictive than, and therefore in conflict with, those in the Proposed Rules. Importantly, such bylaws can be adopted by shareholders on their own initiative, and not just by a company's board of directors.

We believe that Proposed Rule 14a-11 may not validly override validly adopted provisions in a registrant's governing documents. If the rule were to do so, it would intrude, even further than a grant of mere access to a registrant's proxy statement, into the traditionally state regulated realm of corporate governance. Even the Release acknowledges that the Commission is "mindful of the traditional role of states in regulating corporate governance." Granting substantive rights to shareholders to nominate directors that would contravene corporate governance provisions allowed or required by state law would reach well beyond disclosure and effective communication and would exceed the Commission's rule-making authority under the existing statutory scheme.

Finally, if the Commission determines, notwithstanding the concerns identified above, to adopt some variant of the Proposed Rules, we encourage the Commission to clarify the intended relationship between the Proposed Rules and state-law sanctioned mechanisms, such as by rejecting the statements expressed in Footnote 152 and amending the Proposed Rules so that they expressly permit governance provisions that validly regulate the director nomination process in accordance with state law through, for example, advance notice bylaw and director eligibility provisions. Failure to clearly spell out the relationship between the Commission's rule and a registrant's governing documents and other corporate guidelines and procedures will inevitably lead to time-consuming and expensive litigation.

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[4] The list of permissible conditions is non-exclusive, but specifically includes: minimum ownership, provision of information regarding the shareholder and the nominee, limited number or percentage of directors nominated by shareholders, exclusion of nominations by shareholders that have acquired shares within a specified period of time, and indemnification by the shareholder for false or misleading information.

Maximum Number of Nominees

Proposed Rule 14a-11(d)(1) provides that a registrant will not be required to include in its proxy statement more than one shareholder nominee or the number of nominees that represents 25% of the registrant's board of directors, whichever is greater. We believe that 25% is too high and should be reduced to at most 15%. A 25% block is a significant force in any forum, but it is particularly so in a boardroom where all the members are supposed to be striving for the common purpose of the shareholders' collective interests. That disruption is unnecessary if the Commission's objective is to give disaffected shareholders an inexpensive means to have a voice on the board. That voice can be heard just as clearly through a single director as with multiple directors. Any greater percentage than 15% should require a contest funded by the proponent and not by the registrant because any greater representation is apt to create the same discord in the board's operations as would a full-fledged hostile contest.

Furthermore, Proposed Rule 14a-11(d)(1) should provide an exception for controlled companies and companies with a contractual obligation that permits a certain shareholder or group of shareholders to appoint a set number of directors. For instance, if only 25% of the directors of a controlled company are elected by public shareholders (e.g., a publicly traded subsidiary in which the parent holds a class of stock that elects 75% of the directors), the Proposed Rules would result in 100% of the nominees that are eligible to be elected by public shareholders to be subject to the requirements of Proposed Rule 14a-11. In such case, Proposed Rule 14a-11 should be limited to a percentage of the number of directors that are elected by the public shareholders (rather than a percentage of all directors) and should not apply to directors that are elected by (i) shareholders of a class of stock having a right, either contractually or under the terms of the company's governing documents, to nominate and elect a specified number or percentage of directors or (ii) preferred shareholders having such right as a result of the company's failure to pay dividends. Furthermore, if a controlling shareholder held a majority of the shares of the common stock of a public company, requiring the company to include a nominee designated by the non-public shareholders would serve no purpose since, even under a majority voting scheme, the controlling shareholder would be entitled to elect the entire board.

We also note that the Proposed Rules do not address how a director nominated pursuant to Proposed Rule 14a-11 who has been elected should be treated in connection with subsequent annual meetings – particularly in circumstances where the registrant has a board with staggered terms. We believe that such a director, if renominated by the board, should continue to count as a shareholder nominated director for purposes of Proposed Rule 14a-11(d)(1) for at least the next two annual elections. Any different provision would assure that such a director would not be renominated by the board. Moreover, the nominating and governance committee would be better able to present a slate of director candidates that it believes appropriate if the committee knows how a previously elected shareholder nominee is to be counted.

First to File

Proposed Rule 14a-11(d)(3) anoints the first nominating shareholder to give notice as the shareholder whose nominee will be included in the registrant's proxy materials when more than the maximum number of nominees are submitted. This provision would inevitably produce a race to give notice by competing activist shareholders. The Proposed Rule gives no adequate rationale for this result. This omission is not surprising, as it is hard to imagine what regulatory purpose could possibly be served by rewarding speed in this context. To the contrary, the Proposed Rule would penalize the shareholder who defers submitting a nomination and instead engages in dialogue with the registrant's nominating committee through the process available under state law.

The Proposed Rule also does not explain to registrants how to determine the winner when separate, competing notices are received on the same date. We believe a more sensible procedure would be to select the nominee of the nominating shareholder with the largest beneficial interest. Permitting the nominating shareholder with the greatest stake in the registrant to present its candidate would come closer to realizing the intent professed in the Release of having the proxy process "function, as nearly as possible, as a replacement for an in-person meeting of shareholders." Further, such a shareholder has more at stake, has a potentially broader interest and is more likely to have interests that are more closely aligned with other shareholders.

Holding Period

Proposed Rule 14a-11(b)(2) would require the nominating shareholder to have held the applicable percentage of securities continuously for at least one year. We agree with the Commission that "long-term shareholders are more likely to have interests that are better aligned with other shareholders . . . ." We do not agree that a one-year holding period is sufficient to identify "long-term" shareholders. We believe, consistent with the 2003 proposing release and the recent legislation proposed by Senator Schumer, that a holding period of at least two years is necessary before requiring the registrant and its other shareholders to bear the expense of an activist shareholder's campaign. The shorter period is likely to result in an annual contested election with the consequent distraction of the board from its primary oversight obligations. Cost-free election contests would become the favorite sport of activist shareholders with short-term goals. The perception that would likely be created in the minds of long-term investors, as the board is forced to spend more of its time each year defending the nominees chosen by its nominating and governance committee, is that the board's primary interest has become self-preservation. We fail to see how this unfortunate misperception would stem the "erosion of investor confidence" that the Commission perceives.

Further, we believe all shareholders constituting a group should be required to meet the holding period requirement. Without that requirement, a member of a group could satisfy the requirement with a single share and that possibility would fall short of the stated focus on long-term shareholders.

Empty Voting/Hidden Voting

We believe that nothing along the lines of the Proposed Rules should be effected unless it is coupled with addressing the issue of empty/hidden voting. Empty/hidden voting generically describes situations in which the party possessing the right to vote shares has less than full economic exposure to share ownership. The complex issues created by the increasingly common practice of decoupling economic ownership from voting interests and the potential abuses resulting from the lack of transparency regarding such matters have been discussed in a series of articles by two well known academicians, Professors Hu and Black. [5] We agree with these authors that the current regulatory rules are in many ways inconsistent and that a comprehensive review of these matters is required as well as regulatory reform. Equity derivatives, share lending and other developments in the financial markets have made it possible for a shareholder with the right to vote on a matter to have no economic interest in that matter (or in some cases to actually have a negative economic interest). Clearly a shareholder with a negative or zero economic interest should be distinguished from a shareholder with a more traditional holding. The Proposed Rules would compound these issues by continuing to use the existing notions of beneficial ownership without consideration of the complexities of empty voting or hidden voting. Failure to carefully consider the impact of these matters could lead to manipulation of both the minimum beneficial ownership requirement and the minimum holding period requirement contained in the Proposed Rules.

Disclosure Considerations

We question the adequacy of the disclosure concerning nominating shareholders and their nominees that would be called for by Proposed Rules 14a-18 or 14a-19 and Schedule 14N. The Proposed Rules and Schedule form would require very little information of value regarding the nominating shareholder. The prescribed disclosures for shareholder nominees should be more extensive to allow a fully informed voting decision by other shareholders.

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[5] Henry T.C. Hu and Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 Southern California Law Review 811-908 (2006); Henry T. C. Hu and Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms*, 61 Business Lawyer 1011-1070 (2006); Henry T. C. Hu and Bernard Black, *Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership*, 13 J. Corp. Fin. 343- 367 (2007).

Information required of nominating shareholders is limited. A nominating shareholder would be required only to identify itself, to disclose the number of shares beneficially owned, to describe any legal interests in matters to be voted on, and to provide a statement concerning involvement in certain legal proceedings in the past five years. Nothing further would be required on the nominating shareholders' background or experience, so that an evaluation of its ability to name qualified prospective directors would not be possible. The limited information required concerning share ownership would not require disclosure of other arrangements respecting the shares, such as the use of hedged positions (including whether the nominating shareholder has any economic interest in the shares as to which beneficial ownership is claimed). A nominating shareholder using such hedged positions would not be at risk to the same extent as other stockholders. More generally, the Proposed Rules would not require nominating shareholders to disclose the purposes they seek to accomplish through representation on the board. We believe that these deficiencies would be mitigated if the Proposed Rules included disclosure requirements similar to those found in Items 4 (Purpose of Transaction) and 6 (Contracts, Arrangements, Understandings or Relationships With Respect to Securities of the Issuer) of Exchange Act Schedule 13D. Furthermore, the Proposed Rules should expressly permit, and not restrict, the right and ability of a registrant to require a nominating shareholder to provide other information that is required by state law or validly adopted corporate governance documents.

Information on shareholder nominees should be even more extensive. A shareholder nominee may have business, financial, or political interests not shared by other shareholders. In such a situation, it would be reasonable to believe that, as a director, such a nominee would seek objectives that might be adverse to shareholders in general, and these interests should be required to be disclosed. Unless any final version of the Proposed Rules requires disclosure of such interests, shareholders considering such nominees would be making their voting decisions based on incomplete information. The same information should be required for nominating shareholders. We do not believe (as we did not in 2003) that the independence requirements of the Proposed Rules will foreclose the possibility that shareholder nominees may have agendas that reasonable shareholders would perceive as inimical to their own interests.

Accordingly, any final rules should expressly permit and not restrict a registrant's ability to require additional disclosure, including, in particular, information about a nominee that is required by state law or validly adopted corporate governance documents. As noted above at page 5 of this letter, failure to satisfy director eligibility requirements applicable to a particular registrant can have a serious adverse impact on that registrant. Information regarding these matters would be critical to the ability of a registrant's shareholders to consider and vote upon a director nominee proposed by another shareholder. A registrant may also need such information to consult with regulatory authorities to clear interlocking directors or resolve other matters. A failure to comply with these laws or regulations could cause companies to lose valuable franchises or other rights from regulatory authorities or face other sanctions or penalties. Accordingly, a registrant should be permitted to request, obtain and disclose all information required by the registrant and its shareholders to evaluate these matters.

Obtaining such additional information and completing an evaluation of whether the election of a nominee would violate any laws also requires additional time. As noted in the next section, the Proposed Rules do not provide sufficient time for such action.

Timing Considerations

The Proposed Rules contain various procedural provisions governing the communications between registrants and shareholders proposing director nominees for inclusion in a proxy statement. Briefly, the Proposed Rules lay out a series of deadlines. The initial deadline specified by Proposed Rule 14a-18 requires a qualifying shareholder to submit a notice of intent to have a director nominee included in a registrant's proxy statement ("Notice of Intent") "by the date specified by the registrant's advance notice bylaw provision or, where no such provision is in place, no later that 120 calendar days before the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that … if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder … must provide and file its notice a reasonable time before the registrant mails its proxy materials…." Under Proposed Rule 14a-11(f)(3) and (5), if a registrant determines that it may exclude a shareholder nominee, it must provide notice to the shareholder not less than 14 calendar days after receipt of the Notice of Intent, whereupon the shareholder has 14 calendar days to respond to the registrant's objection. If, following this exchange, the registrant still concludes that it may exclude the shareholder nominee, the registrant must so notify the shareholder not less than 80 calendar days before it files its definitive proxy statement. This proposed procedure is similar to the currently existing procedure under Rule 14a-8, except that the initial shareholder submission under current Rule 14a-8 must be delivered no later than 120 calendar days prior to the anniversary of mailing the prior year's proxy, without reference to any deadline contained in a registrant's advance notice bylaws.

Because many advance notice bylaw provisions contain a notice deadline that is substantially shorter than 120 days, it is possible that the 80 day deadline will have expired before the deadline for submitting the Notice of Intent. Although the Commission has reserved the ability to shorten the 80 day deadline "if the registrant demonstrates good cause for missing the deadline," the combination of the 80 day deadline with the two 14 day periods during which contrary positions are required to be exchanged prior to the 80 day deadline, would suggest that any company with an advance notice deadline of less than 108 days would require relief from the Commission.[6]

As noted above under Disclosure Considerations, certain companies require additional time to obtain, review and investigate additional information regarding a nominee to determine if the election of that nominee would violate applicable law or have other adverse consequences to the registrant, and possibly to consult with regulatory authorities to clear interlocking directors or resolve other matters. The Proposed Rules would not provide sufficient time or flexibility for such action.

A further issue is raised by the reference in the Proposed Rules to "the date specified by the registrant's advance notice bylaw provision." Many companies have two separate advance notice provisions in their bylaws: one governing the submission of nominees for director and a separate provision governing the submission of other shareholder proposals. A reasonable inference might be that the language of the Proposed Rules refers to an advance notice bylaw applicable to the submission of director nominees; however, the language does not make this clear. In the case of a company with separate provisions applicable to director nominations and other shareholder proposals, each with a different notice period, the Proposed Rule would be susceptible to conflicting interpretations. Furthermore, if a company had an advance notice provision applicable to shareholder proposals generally but that was not applicable to director nominations, a further uncertainty would exist.

Finally, most advance notice provisions provide for a period of time during which a submission must be made to the company rather than a single deadline. For instance, such a provision might provide that a nominee must be submitted no earlier than 90 days and no later than 60 days prior to the mailing of the proxy. In such a case, do the Proposed Rules refer to the earliest date or the latest date by which a proposal may be submitted? This uncertainty should be resolved in any final rule.

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[6] One Delaware Chancery Court stated the following: "advance notice by-laws mandating a 90 day minimum period of advance notice, are commonplace. Daniel Burch, one of Mentor's proxy solicitors and an expert witness at the trial, so testified, as did Professor Bernard Black, a trial expert witness for the defense. Professor Black testified that a 1998 study by the Investor Responsibility Research Corporation revealed that of 1922 large publicly traded companies, 880 (46%) have some form of advance notice by-law. Of those by-laws, the most common notice period (adopted by 335 companies) is 50 to 70 days, and the second most common notice period (adopted by 223 companies) is 75 to 100 days. That evidence is uncontroverted." *Mentor Graphics Corp. v. Quickturn Design Systems, Inc.*, 728 A.2d 25, at 42 (Del. Ch. 1998), *aff'd on other grounds*, 721 A.2d 1281 (Del. 1998). The Court also suggested that a 90-100 day period "may approach the outer limit of reasonableness." Id. at 42 ("In my view, the 90 to 100 day interval chosen by the Quickturn board, although arguably it may approach the outer limit of reasonableness, struck a proper balance in this specific case.")

Miscellaneous Technical Comments

We also have several additional technical comments regarding provisions of the Proposed Rules:

We note that Proposed Rule 14a-11(c) provides that the registrant is not responsible for any information in the notice from the nominating shareholder or otherwise provided by the nominating shareholder, "except where the registrant knows or has reason to know that the information is false or misleading." The Release fails to address what the registrant should do under various circumstances where the exception applies. We further note that proposed changes to Item 7(f) of Schedule 14A provide that ". . . the registrant *must include* the disclosure required from the nominating shareholder or nominating shareholder group under §240.14a-19(a)-(f) with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group [emphasis added]" – seemingly without alteration or correction. How are any necessary changes to be handled? If the process is such that the registrant may not make changes it believes are necessary to correct the information, it seems unfair for the exception to continue to apply. If the information is determined to be false or misleading after the proxy materials have been distributed to shareholders, who is responsible, legally and financially, for making the corrections and making shareholders aware of the corrections? In this regard, we note that Proposed Rule 240.14n-2 addresses the need to amend Schedule 14N filings for "material change," but does not indicate how those amendments affect any published proxy materials. In situations where the registrant's changes have not been permitted, and certainly after the proxy materials have been published, we think the burden should be on the nominating shareholder and that the exception imposing liability on the registrant should not apply.

We note that Proposed Rule 14a-11(f)(8)(iv) refers to the need for a supporting opinion of counsel "when the registrant's basis for excluding a nominee relies on a matter of state law." We note, as discussed earlier, that a nominee may be excludable for reasons of federal law, and thus this provision should refer to federal law as well.

We note that Instruction 1 and Instruction 2 to Proposed Rule 14a-18(h) and (i) provide guidance with respect to the treatment of partnerships and corporations, but do not address limited liability companies, business trusts or associations. In particular, the treatment of limited liability companies, which possess characteristics of both partnerships and corporations, should be clarified.

We note that Proposed Rule 14a-18(k) and Proposed Rule 14a-19(f) refer to a shareholder's web site on which it may publish soliciting materials. We think the provisions should be clear, and confirm that the contents of such a web site (including any information linked to that site from other web sites), if referenced in the notice and the proxy materials, would be regarded as soliciting material from the shareholder and would be subject to the antifraud provisions applicable to proxy materials. Further, we note the "Note to §240.14a-19," which, like Proposed Rule 14a-11(c), provides that the registrant is not responsible for any information in the notice, which could include a web site reference, "except where the registrant knows or has reason to know that the information is false or misleading." We make the same comments noted above in the second paragraph under this heading, but also note that it should be clear that the registrant has no responsibility whatsoever for the content of any web site of the shareholder referenced in the notice or other materials. The registrant should not be responsible for reviewing, or monitoring, the content of such web sites.

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We appreciate the opportunity to submit comments on the Proposed Rules and hope that these comments are useful.

Very truly yours,

SIDLEY AUSTIN LLP