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August 17, 2009

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

Re: File Number S7-10-09
Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

This year legislators and regulators have announced initiatives apparently for the purpose of correcting the perceived causes of the recent economic crisis. These actions are indicative of a growing momentum for increased federal encroachment into corporate governance matters, a realm historically left largely to state law. The Securities and Exchange Commission ("SEC") attributes the present need for proxy access to the "loss of investor confidence" and "serious concerns about the accountability and responsiveness of some…boards of directors to the interests of shareholders" that have arisen from "one of the most serious economic crises of the past century."[1] While a board of directors serves at the pleasure of a company's shareholders, and it should include responsiveness to shareholder concerns at the top of its list of duties, it must also take into account other factors including, but not limited to, the long-term stability and growth of the company.

We live in a world with a 24-hour news cycle and the investing public has a similarly short-term memory. This "short-termism"[2] distorts the priorities of management and boards by incentivizing them in certain cases to pursue unsustainable earnings growth through high risk behavior. While the SEC's empathetic response to shareholders' current plight is understandable, the proposal to amend Rules 14a-11 and 14a-8 should not be adopted because it subjects shareholders to an access regime they may not want and is unlikely to restore investor confidence. In fact, it may actually erode it.

[1] Securities & Exchange Commission, *Facilitating Shareholder Director Nominations*, (Jun. 10, 2009) (available at http://www.sec.gov/rules/proposed/2009/33-9046.pdf) (hereinafter referred to as SEC Shareholder Proposal).
[2] *See* Martin Lipton, Jaw W. Lorsch and Theodore N. Mirvis, *A Crisis is a Terrible Thing to Waste: The Proposed Shareholder Bill of Rights Act of 2009" Is a Serious Mistake* (May 12, 2009).

Previous Proxy Access Proposals Have Failed to Garner Support

In 2003, the SEC issued a proposal to the rules that would have enabled shareholders who held long-term, significant holdings to have their director nominees included in the company's proxy statement and proxy card. The 2003 proposal required the inclusion of a shareholder's or shareholder group's director nominee if one or both of the following two triggering events occurred: (1) at least one of the company's nominees for the board for whom the company solicited proxies received withhold votes of more than 35% of the votes cast at an annual shareholders meeting, or (2) a shareholder proposal submitted to a vote of shareholders received more than 50% of the vote of shareholders holding more than 1% of the company's securities for more than one year. The majority of the comments to the proposal were negative, and the SEC abandoned the proposal. The SEC revisited the issue four years later with similarly unenthusiastic results. In 2007, the SEC's proposal would have required the inclusion of shareholder proposals for bylaw amendments concerning procedures for nominating directors in the company's proxy statement if the nominating shareholder owned more than 5% of the company's voting securities for more than a year and was eligible to report on Schedule 13G.

The current proposals represent a renewed effort to make a company's proxy materials available for use by shareholders to elect their own director nominees, and to make it easier for shareholders to put up for vote proposals that would change how the company's elections are carried out. The SEC stated that it has significantly reformulated the agency's previous proposals with the goal of restoring investor confidence. Not only will the proposals fail in achieving this goal, they will have the opposite effect on investors' willingness to reinvest in corporate America.

Granting Substantive Rights to Shareholders is the Province of State Law

Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[3] Federal regulators must seriously consider Justice Brandeis' admonition that there are legitimately different approaches to addressing shareholder proxy access that should be left to individual states to address because good policy can only be developed by examining a wide variety of approaches.

Commissioner Schapiro recently stated, "While many of the proposals will require legislative activity…there are several areas where the SEC can act and already is acting."[4] Ms. Schapiro is clearly referencing the proposed proxy access rules, which grant shareholders the substantive right to directly access a company's proxy statement, a right governed by state and not federal law. The proposed rules go beyond procedural requirements and constitute preemption of state law on a shocking scale. The SEC's authority under Section 14(a) of the

[3] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
[4] Mary L. Schapiro, *Speech at New York Financial Writers' Association Annual Awards Dinner*, States News Service (June 18, 2009).

Exchange Act does not extend to the creation of shareholder rights. Under the corporate law of individual states, the board of directors has the authority and responsibility to manage the business and affairs of the company, including directing the process of electing new directors. In stark contrast, SEC regulation has traditionally been limited to the promulgation of disclosure and process-oriented rules. The proposed rules would apply only to companies incorporated in states that allow shareholders to nominate directors. This limitation implicitly acknowledges that the SEC does not have the authority to grant such a right, but the proposed rules disregard this constraint and grant substantive rights to shareholders.

A universal governance scheme is patently inappropriate for most businesses because the internal affairs of each can be individually tailored to best suit its needs. Forcing the same corporate governance regime on an Ohio manufacturer and a financial services firm in New York is patently antithetical to facilitating innovation and growth.

In recent years, the importance of the shareholder vote has come to the fore, and a notable trend has developed. Plurality voting has given way to majority voting for directors, without legislative, regulatory, or judicial imposition. Over 50 percent of the Standard & Poor's 500 companies now have some form of majority voting. In reaction to the trend, states have accommodated this governance innovation by amending their corporate codes to facilitate majority voting.

Delaware and North Dakota are two examples of states that are promoting a tailored company-by-company approach to shareholder director nominations. For example, new Section 112 of the Delaware General Corporation Law explicitly authorizes, but does not require, bylaws granting shareholders access to the corporation's proxy materials to nominate directors. In contrast to SEC's proposed new Rule 14a-11, Section 112 permits boards and shareholders flexibility to determine the proper governance balance. In addition, Delaware has adopted new Section 113. Section 113 permits a bylaw providing for the corporate reimbursement of shareholders' expenses from soliciting proxies for the election of directors, while it also provides a non-exclusive list of conditions that the corporation may impose on stockholders that effectively reward a stockholder for a successful proxy solicitation. This nullifies the argument, without the extensive baggage of the proposed rules, that shareholders would be discouraged from waging a proxy contest because of financial constraints. Active consideration is being given to amending the Model Business Corporation Act — which 30 states have adopted, at least in part — along the lines of Sections 112 and 113 of the Delaware code.

In April of 2009, North Dakota adopted the North Dakota Publicly Traded Corporations Act. The North Dakota Corporate Governance Council described the act as being designed "to reflect the best thinking of institutional investors and governance experts and addresses each of the current hot topics in corporate governance." The law permits firms incorporated under North Dakota law after July 1, 2007 to include a provision in their Articles of Incorporation that they elect to be subject to the new statute. Shareholders are then given the rights of majority voting for directors, advisory shareholder votes on executive compensation committee reports, reimbursement of proxy expenses to shareholders to the extent they are successful in getting nominees elected, a requirement of a non-executive board chair and restrictions on poison pills and other takeover devices. Certain shareholders may propose board nominees on the company's proxy statement.

These developments illustrate how state corporate law has adapted and continues to adapt in facilitating shareholder director nominations. Shareholders increasingly have the opportunity to propose bylaw amendments that they believe are best for the company. However, this structure has not been forced on the companies or shareholders; it has been allowed to grow organically without undue Federal government interference.

Numerous Pieces of Legislation on Proxy Access and the Shareholder Vote are Already Being Considered

Even though the primacy of the states in fashioning substantive shareholder rights seems firmly established, the SEC is not the only Federal government body acting on the topic of shareholder proxy access. Most notably, Senator Charles Schumer (D-NY) introduced the "Shareholder Bill of Rights Act of 2009," which is designed to reform several aspects of corporate governance, including proxy access. This bill would amend the Securities Exchange Act of 1934, as amended ("Exchange Act") to: (1) require shareholder advisory votes on executive compensation; (2) require the SEC to facilitate shareholder nominations; (3) eliminate staggered boards; (4) and require independent chairmen. Legislation introduced in the House of Representatives builds upon the proposals in the Bill of Rights Act. Congressman Gary Peters (D-MI) introduced the "Shareholder Empowerment Act of 2009," which would amend the Exchange Act to: (1) require the clawback of certain bonuses; (2) eliminate severance payments for separation due to poor performance; and (3) require the disclosure of specific performance targets related to compensation for executives of public companies absent the grant of a formal confidential treatment request.

The U.S. House of Representatives also passed the "Corporate and Financial Institution Compensation Fairness Act of 2009," which is the latest version of a "Say-on-Pay" bill. While not specifically related to proxy access, the Say on Pay bill serves as another example of a Federal government attempt to grant substantive rights to shareholders, a function which has traditionally been the province of the states.

The Say on Pay bill would require companies to hold a non-binding shareholder vote in two situations: (1) to approve executive compensation at the company's annual meeting of shareholders; and (2) to approve "golden parachute" arrangements at a company's annual or special meeting where shareholders are asked to approve an acquisition, merger, consolidation or sale of the company and disclosure of such arrangements in any proxy statement relating to such a meeting.

The bill also contains new rules related to the responsibilities given to compensation committees, the independence of outside compensation consultants and mandatory proxy statement disclosure related to both of these.

The White House recently entered the Fray with the Investor Protection Act of 2009. The Investor Protection Act authorizes the SEC to issue rules requiring broker-dealers and investment advisers to act solely in the best interest of clients; prohibiting actions that the SEC deems to be contrary to investor interests; and limiting or banning mandatory arbitration provisions in customer agreements. Amazingly, the Investor Protection Act states that increasing the SEC's enforcement powers will bolster the "SEC's authority to conduct consumer testing," and allows the SEC to create a whistleblower fund to further the goal of consumer protection.

The White House and Congress are conflating the SEC's mission with that of a consumer protection agency. The SEC was created and is currently mandated to regulate the stock markets and prevent corporate abuses relating to the offering and sale of securities and corporate reporting. It is primarily a regulatory body vested with the power to ensure that investors are provided with adequate information to make informed decisions about the financial risks they undertake when making an investment.

New NYSE Rule 452 Will Erode the Voting Rights of Retail Shareholders

Self-Regulatory Organizations have also entered the shareholder proxy access debate and the SEC has been receptive to their participation, as demonstrated by the SEC approval of the New York Stock Exchange's proposal to amend NYSE Rule 452. New Rule 452, which is effective for all annual meetings held on or after January 1, 2010, eliminates broker discretionary voting in all director elections, whether or not contested. When considered as part of the overall corporate governance movement currently taking place, new Rule 452 could significantly increase the power of institutional and activist shareholders as well as proxy advisory firms to influence such elections, and therefore, direct corporate affairs in furtherance of their narrow interests, all at the expense of the independent business judgment of directors who bear a fiduciary duty to act on behalf of the interest of all shareholders.

Brokers commonly exercise their discretionary authority to vote a beneficial owner's shares as recommended by the management of the issuer, which old NYSE Rule 452 permits for non-routine matters. While uncontested director elections have long been included in the list of routine items under old Rule 452, new Rule 452 provides that the election of directors is no longer a routine matter. As a result, brokers may no longer vote on director elections without instructions from the beneficial owner.

The investing public should not be mistakenly led to believe that the effects of new Rule 452 are limited in scope by the fact that it is an NYSE rule, as the SEC's adopting release makes clear that the rule change affects voting by NYSE member firms as opposed to voting on director elections for NYSE-listed issuers. Thus, new Rule 452 will apply to director elections at

NASDAQ-listed companies to the extent that the clients of NYSE-member brokerage firms hold stock of such companies.

The substantial impact of this rule change on public companies include having to: (1) ensure that a discretionary item, such as the ratification of the independent auditors, is on the annual meeting agenda so that the company can rely on broker votes to establish a quorum at the meeting; and (2) resort to alternative, more costly means to elect management director nominees and aggressively combat activist shareholders who are conducting withhold vote campaigns.

Even though the amendment to Rule 452 was born out of the NYSE's desire to promote "better corporate governance and transparency of the election process"[5] the reality is that the efforts of the NYSE and SEC to preserve and strengthen the shareholder franchise may actually be antithetical to such interests, at least with respect to retail shareholders. Several analyses of historical voting patterns of retail shareholders indicate that the loss of the broker discretionary vote will have a significant negative impact on companies with considerable retail brokerage stock ownership. Among other things, such analyses have concluded that a minimum of two-thirds and perhaps a much larger percentage of all retail brokerage shares do not typically vote unless being prompted to do so by proactive solicitation efforts.

New Rule 452 will also make director elections and annual meetings more difficult for corporate issuers. For example, even though new Rule 452 seems to incentivize companies to communicate directly with retail shareholders as part of the proxy solicitation process, complex ownership structures make it nearly impossible in some cases for companies identify retail shareholders and certain SEC rules and regulations actually prohibit many forms of direct shareholder communication.

Companies that do not generally ask shareholders to ratify their audit firm or have some other routine proposal on the agenda are in jeopardy of not receiving the necessary vote requirement to achieve quorum at their annual meetings. Also, the increasing movement of director elections to a majority vote requirement when coupled with the loss of the broker discretionary vote could substantially hinder companies' ability to successfully re-elect director nominees. Finally, "Vote No" Campaigns and other shareholder activism against boards and individual directors will likely increase and have greater impact as activists seize the opportunity to pressure companies in anticipation of the low shareholder voting numbers that will likely result from the loss of the broker discretionary vote.

And, although the impact of this rule change is substantial in its own right, new Rule 452 should not be viewed in a vacuum, but rather as part of this country's rapidly evolving corporate governance regime.

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[5] SEC Release No. 34-59464 at 6.

Mandatory E-proxy has Already Eroded the Voting Rights of Retail Shareholders

The notice and access approach under the SEC's mandatory e-proxy rules, which allows companies to post their proxy statements on internet website and notify shareholders of the website address, has resulted in a precipitous decline in retail shareholders exercising their voting rights when compared with the traditional mailing of proxy materials.[6] It bears repeating that one of the main tenets under which e-proxy was adopted was the cost-savings potential for companies choosing notice and access. However, with its approval of new Rule 452, it seems the SEC has no problem forcing companies to choose between the cost-savings of notice and access and the risk that director elections will be decided by an overly vocal, narrowly-focused minority of their shareholders.

The combined effect of the SEC's proposed rules on proxy access, the myriad pieces proposed legislation such as the Bill of Rights Act, the Shareholder Empowerment Act and the Investor Protection Act, and the newest version of Say on Pay, new Rule 452 and mandatory e-proxy further deteriorate the regime to patchwork with significant consequences.

Rule 14a-8(i)(8) – The Narrowing of the Election Exclusion

The proposed rules would severely narrow the "election exclusion" of Rule 14a-8(i)(8) by limiting companies' ability to exclude shareholder proposals relating to (1) the nomination or election of directors; or (2) any procedures or disclosures related to such nomination or election, including those required by the company's governing documents.

While a company could still exclude any shareholder proposal that violates state law on this point, the reality is that most states, following Delaware's lead, merely authorize companies to establish their own director nomination and election procedures, rather than mandate certain procedures through state law. Thus, in most instances, companies will not be able exclude these shareholder proposals based on an appeal to state law

A shareholder submitting a proposal to amend, or request an amendment to, a company's governing documents would remain subject to the already-existing Rule 14a-8 eligibility requirements. However, the proposed rules do not couple these additional shareholder rights with any additional eligibility or disclosure requirements for shareholders submitting a proposal.

Peeling back the election exclusion in this manner would set the stage for increased disruption and for further wasting of the resources that companies in the current economic environment can hardly afford. In fact, the frequency of election contests could very well rise to that of Rule 14a-8 proposals generally. Because the proposed rules do not provide companies any way to exclude proposals that are extreme or unworkable, amended Rule 14a-8(i)(8) would permit a shareholder to include in the company's proxy any proposed amendment to director

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[6] "Notice & Access: Statistical Overview of Use with Beneficial Shareholders," Broadridge Financial Solutions, Inc. (June 30, 2008) *available at* http://www.broadridge.com/notice-and-access/NAStatsStory.pdf.

nomination or election procedures. This will almost certainly result in the familiar Rule 14a-8 no action requests and statements in opposition as companies attempt to defeat these wholly unrealistic proposals.

Amended Rule 14a-8(i)(8), as proposed, would allow activist shareholders to eschew even those director nomination and election procedures and disclosures that are in a company's governing documents, even if they have previously been approved by the majority of shareholders. This fact seems to directly contradict the central premise of every proxy access proposal to date, namely, that shareholders should be able to nominate and elect directors other than the nominees proposed by an incumbent board. It also contradicts the notion that shareholders should have a voice in deciding the procedures by which their directors are nominated and elected.

Rule 14a-8(i)(8) and its Interaction with Rule 14a-11

Not only will Rule 14a-8(i)(8) cause companies myriad problems in and of itself, but additional complications arise when amended Rule 14a-8(i)(8) is viewed in conjunction with the proposed new Rule 14a-11. In fact, the only real limitation on shareholder proposals under amended Rule 14a-8(i)(8) is that such a proposal could not seek to amend a company's governing documents in a way that would conflict with proposed new Rule 14a-11. However, because Rule 14a-11 is nothing more than a floor for the amount of proxy access that companies must afford shareholders, the proposed rules combined create a one-way ratchet whereby companies can only exclude Rule 14a-8 proposals seeking to decrease the level of proxy access afforded in their governing documents, but not those seeking to increase it.

This one-way ratchet approach to proxy access is perhaps the most troubling feature of the SEC's proposed rules and with it, the SEC again seems to contradict the premise that a majority of a company's shareholders should be able to determine that company's mechanism for nominating and electing directors. If the SEC truly believes this, then the shareholders should also be allowed to set more stringent proxy access standards than those proposed in new Rule 14-11. By not allowing this, it seems more evident than ever before that the SEC wishes to lock all companies into a mandatory minimum federal proxy access regime.

That the SEC included this amendment to Rule 14a-8(i)(8) in the same release in which it proposed new Rule 14a-11 should serve as a notice and a warning to companies that there will be significant interaction between these two proposals. What is unclear is whether the SEC has taken sufficient account of these interactive effects.

At a minimum, the SEC could revise the proposed rules to allow the majority of shareholders to opt in to the proxy access regime of their choosing. This would make it equally possible for shareholders to vote for a more liberal regime, such as the one being thrust upon all companies by the proposed rules, or for much more restricted proxy access.

Rule 14a-11 – Shareholder Proxy Access

Proposed new Rule 14a-11 is purportedly borne out of the SEC's desire to ensure that only shareholders with a "significant, long-term interest in a company" are given proxy access. However, a close examination of the proposed rules reveals that this desire is at best naïve and at worst disingenuous. As proposed, Rule 14a-11 requires a nominating shareholder to have held a certain amount of securities in the company for one year as of the date that the shareholder files new Schedule 14N (disclosing his or her director nominee(s)) and to represent an intention to continue to own the securities through the date of the annual meeting.

First, the SEC has not established exactly why holding shares of a company for one continuous year should automatically entitle a shareholder to anything more than the traditional right to vote on items of business and director nominees. On the contrary, it shows a lacking understanding of or concern for the negative impact that short-term interests can have on companies' long-term growth and profitability. It is these short-term interests that experts within the SEC and around the country consider to be a main cause of the current dip both in investor confidence and the general economy. Second, new Rule 14a-11 would allow a nominating shareholder to completely divest itself of a company's securities the day after the meeting at which that shareholder's director nominee wins a seat on the company's board.

The proposed rule's requirement that a nominating shareholder must state its intent with respect to continued ownership after the meeting does not equate to a requirement to hold a minimum number of shares, for example, at least through the term of any successful shareholder nominee's board service. While this was specifically contemplated by the SEC, it was rejected with little to no explanation in the proposing release.

It is hard to see how a shareholder or group could make a colorable claim to a valid interest in nominating a director if the shareholder or group plans to sell their shares before or shortly after the election. With respect to this issue, one may make an analogy to a shareholders' agreement under which a major shareholder is given the contractual right to nominate one or more directors to a company's board. Without exception, such rights are granted only for so long as the major shareholder maintains a minimum shareholding. Typically, any director nominated by the major shareholder must step down when the shareholder's percentage ownership falls below the minimum. Similarly, a nominating shareholder or group should represent their intent to hold their shares until the election, and thereafter for the duration of the nominee's term as a director should the nominee be elected. In the event the nominee is elected and the nominating shareholder or group falls below the ownership percentage eligibility threshold (*e.g.*, 10%), the director should step down from the board

Nor does Rule 14a-11, as proposed, give companies any way to limit shareholder nominees where election of the shareholder nominates in lieu of any of the company nominees would decrease the number of "outside directors" as defined in Section 162(m), non-employee directors under Rule 16b-3 of the Securities Exchange Act of 1934, "audit committee financial experts" under the rules of the SEC or director independence and audit committee member independence requirement of any applicable national securities exchange. This does not even address company-implemented director qualification standards, if any, which should not be abrogated to the whims of a single nominating shareholder.

As previously mentioned, new Rule 14a-11 does not offer any relief from its stringent requirements for companies that have already addressed proxy access through amendments to their governing documents. Rule 14a-11's one-size-fits all approach would even apply where the level of proxy access provided for in the governing documents are a result of an amendment approved by shareholders. Again, this is especially unjust where shareholders have amended the company's governing documents to make proxy access more restrictive because Rule 14a-11 only permits amendments that make it easier for shareholders to nominate directors.

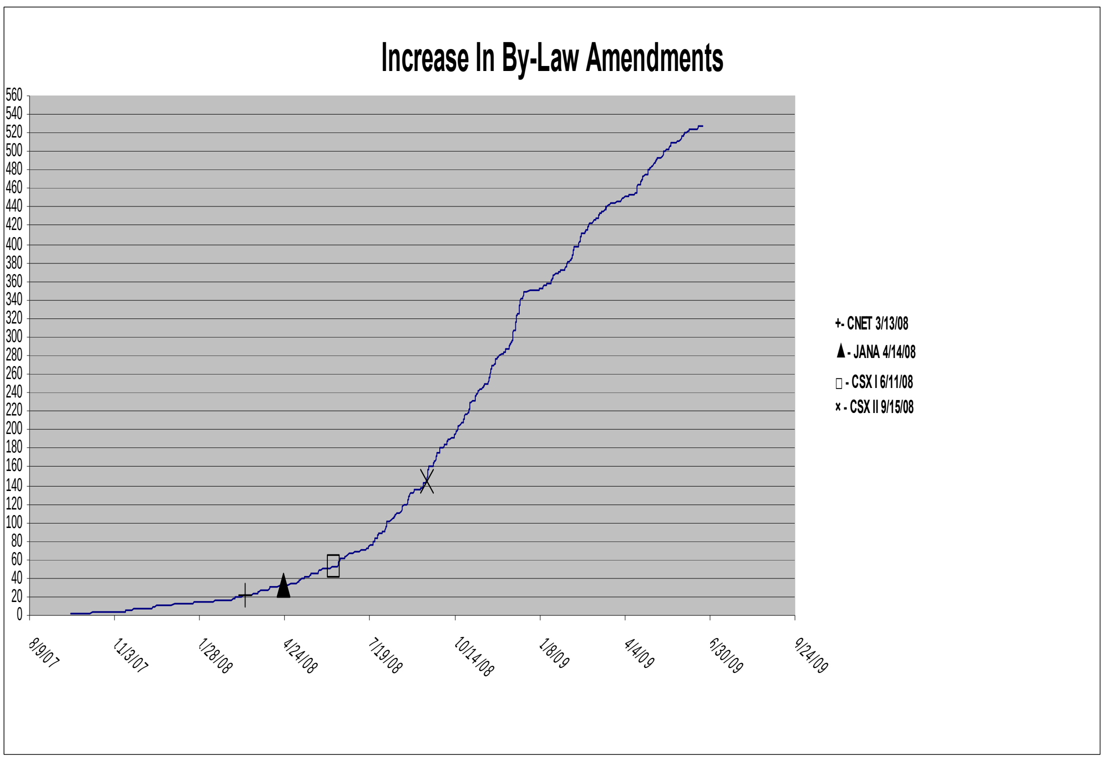
The SEC tries to couch the 25% limitation on the number of shareholder nominees that must be included in a company's proxy materials as beneficial to companies. But, Rule 14a-11 forces a company receiving nominees exceeding the 25% limitation to include the nominations that were received first. Thus, the company is prohibited from evaluating the merits of potential shareholder nominees or the intentions of the nominating shareholders in an effort to include in its proxy materials the most qualified nominees and those whose interests are most aligned with the majority of the company's shareholders. It also incentivizes shareholders to submit their director nominees well in advance of the meeting at which the election will occur, increasing the likelihood that the financial position and corporate governance of the company could change significantly by the time the actual election of directors takes place.

Rule 14a-11 would not apply where state law or a company's governing documents completely prohibit shareholders from nominating directors. While the proposing release says that no states currently prohibit shareholders from nominating directors, it is unclear how many states permit companies to put such a prohibition in their governing documents The SEC does not explore whether the proposed rules would cause more companies to enact such a prohibition, if permitted by the law of their state of incorporation. Nor does the SEC consider whether more states would enact legislation permitting companies to prohibit shareholder nominations in hopes that companies may seek to reincorporate in states that permit such a prohibition.

Indeed, in a key respect, Rule 14a-11 is in tension with the overall disclosure philosophy of the federal securities laws. An example best illustrates the point. Assume that the shareholders of Delaware Corp., a large public company, adopt a proxy access bylaw pursuant to Section 112 of the Delaware code, and that the bylaw requires that a nominating shareholder or group has beneficially owned at least three percent of Delaware Corp.'s shares for at least two years. The interplay between state law and Rule 14a-11 would result in the substantive negation of the shareholder-approved bylaw, as the lower one-percent/one-year Rule 14a-11 eligibility requirements would, in effect, override the shareholder-approved three-percent/two-year requirements. Put differently, the mandates of Rule 14a-11 not only work to displace private ordering and state law, but risk negating the importance of a shareholder vote

Interplay between the Proposed Rules and Companies' Advance Notice Provisions

Just as the SEC has failed to consider the interplay between amended Rule 14a-8(i)(8) and new Rule 14a-11, or between both of these rules and the numerous legislative developments already discussed, it has not taken stock of the barrage of recent privately-instituted changes to the processes for conducting director elections and monitoring corporate governance. The chart below shows the striking momentum that such advance notice by-law amendments has gathered among U.S. public companies.



What if a company, like so many recently, has enacted advance notice bylaws requiring far greater disclosure for any potential shareholder nominees? It seems that this should also apply to shareholder nominees submitted for inclusion in the proxy materials under Rule 14a-11, but the proposing release does not mandate this outcome.

The SEC has not completely ignored the phenomenon that is the recent evolution of advance notice provisions. In fact, the proposed rules require nominating shareholders to file Schedule 14N in accordance with the advance notice provisions of the company's bylaws or, if the company has no advance notice provisions, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting. This is actually somewhat problematic because many companies have enacted advance notice provisions calling for 60 or 90 days notice, for fear that 120 days notice might be struck down by state courts as unreasonable.

The Schedule 14N notification requirement effectively punishes these companies by not providing them as much of a heads-up for shareholder nominees. As a result, companies will need to consider whether to go back and amend their advance notice provisions to require 120 days notice. One other thing to consider: many advance notice provisions now require nominating shareholders to re-certify their eligibility at a time much closer to the election of directors. A re-certification requirement seems quite justified and yet Rule 14a-11 does not include one, nor does the proposing release say whether shareholders using Schedule 14N would have to provide such a re-certification.

Conclusion

"As we consider the parameters of regulatory reform, it is essential that we do not overreact to the recent hardships."[7] We urge the SEC to take a holistic view of all market participants, sources of regulation and the considerations in this letter. If the SEC is truly concerned about the purported loss of investor confidence, it will consider deeply the dissents of its Commissioners to this proposal, the significance of the current role of Congress, states and other regulators, and the greater importance of other matters that merit the SEC's resources. Consequently, we strongly urge the SEC to reject this rule proposal.

Thank you for providing the opportunity to comment.

Sincerely,

KEATING MUETHING & KLEKAMP PLL

By: F. Mark Reuter
F. Mark Reuter

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[7] Troy A. Paredes, *Remarks at Conference on "Shareholder Rights, the 2009 Proxy Season, and the Impact of Shareholder Activism,"* Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (June 23, 2009).