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KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

601 Lexington Avenue
New York, New York 10022

(212) 446-4800

Facsimile:
(212) 446-4900

www.kirkland.com

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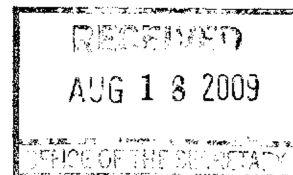


Via email to rule-comments@sec.gov

Elizabeth M. Murphy
Secretary, Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: Proposing Release Nos. 33-9046; 34-60089; IC-28765; File No. S7-10-09, Regarding Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

We are pleased to respond to Release Nos. 33-9046; 34-60089; IC-28765 (the "Proposing Release") issued by the United States Securities and Exchange Commission (the "Commission") proposing and seeking comment on significant amendments to the proxy rules of the Securities Exchange Act of 1934 (the "Exchange Act") that would, under certain circumstances, (i) require companies subject to the proxy rules to include in their proxy materials director candidates nominated by shareholders and (ii) eliminate the right of companies to exclude from their proxy materials shareholder proposals regarding the director nomination and election process.

This letter sets forth a number of comments regarding the proposed amendments and the rationale for each comment. The bulk of the comments relate to proposed Rule 14a-11 that would provide for shareholder access to a company's proxy materials under certain circumstances. A final comment relates to the proposed amendments to Rule 14a-8(i)(8) that would eliminate, under certain circumstances, the right of companies to exclude from their proxy materials shareholder proposals regarding the director nomination and election process. The references to the "Requests for Comment" below are to the specific requests for comment set forth in the Proposing Release. In many cases, we have paraphrased or summarized the actual "Request for Comment" set forth in the Proposing Release rather than repeating it verbatim.

This letter reflects the views of Kirkland & Ellis LLP as well as the input we received from certain of our clients in response to a solicitation of their views regarding the proposed amendments.

Comments to the Proposed Amendments

1. Rule 14a-11 -- New rule requiring companies, under certain circumstances, to include shareholder nominees for director in the companies' proxy materials

(a) ***Request for Comment B.3:*** As a general matter the rule would apply to all companies subject to the Exchange Act's proxy rules other than companies subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act. Should any other groups of companies be excluded from operation of the rule (e.g., companies subject to the proxy rules for less than a specified period of time (e.g., one year, two years, etc.))?

(i) Comment: Companies should not be subject to the rule until their third annual shareholders meeting ("ASM") after going public or their second ASM after emerging from bankruptcy.

(A) *Rationale:* An initial period following a company's IPO or emergence from bankruptcy during which shareholders would not have access to the company's proxy materials for purposes of nominating directors would give the board of the newly public or newly re-organized company a "grace" period to establish a track record of the company's financial and operational performance before shareholders could directly challenge the incumbent board using the company's own proxy materials. Shareholders who buy into an IPO and shareholders and other stakeholders (e.g., creditors who experience a debt for equity swap) who voluntarily or involuntarily acquire stock in a debtor's reorganization would be on notice that they would not have access to the company's proxy materials for the applicable periods. The period for a newly reorganized debtor is shorter in recognition of the fact that some stakeholders may involuntarily receive stock in the reorganization.

(b) ***Request for Comment B.12:*** Should the proposed rule provide that it does not apply to a company whose governing documents include a provision for reimbursement of expenses incurred by a participant or participants in the course of a solicitation in opposition as defined in Rule 14a-12(c)? If so, should the rule specify what manner of reimbursement would be sufficient for proposed Rule 14a-11 not to apply?

(i) Comment: Yes. Without reference to Rule 14a-12(c), the rule should not apply to a company that includes in its governing documents an obligation to reimburse any shareholder that would otherwise have access to a

company's proxy materials under the rule for reasonable, documented, out-of-pocket expenses incurred in connection with the solicitation of proxies for the election of directors, up to the amount spent by the company in connection with the solicitation of proxies for election of directors at the meeting in question.

(A) *Rationale:* The fundamental concern expressed by the Commission in proposing these amendments is that it is too expensive for individual shareholders to solicit proxies for the election of directors. The Release states: "The chief complaint from shareholders about the existing options is the high cost involved in mounting a proxy contest under the Commission's proxy rules." Consequently, as long as a company agrees to reimburse a shareholder that would otherwise have access to a company's proxy materials under the rule for the cost of preparing, printing and mailing proxy materials itself, it should be relieved of the obligation to include such shareholder's nominees in its own proxy materials.

(c) ***Request for Comment C.15:*** Should eligibility to use the rule be conditioned on meeting the required threshold [1% to 3% of the outstanding voting securities] by holding a net long position for the required period [one year]?

(i) Comment: Yes. Eligibility to use the rule should be conditioned on meeting the required threshold by holding a net long position for the required period.

(A) *Rationale:* The eligibility to use the rule should be based on the shareholder's interest in ensuring the company has the best board of directors to maximize shareholder value due to the shareholder's own economic exposure in holding the company's equity securities. A shareholder whose shareholdings in the company were entirely or substantially hedged for all or a substantial part of the one year holding period may not have the same interests as long term shareholders. Note that the Proposing Release itself specifically states: "[W]e [the Commission] believe that long-term shareholders are more likely to have interests that are better aligned with other shareholders and are less likely to use the rule solely for short-term gain."

(d) ***Request for Comment C.18:*** Should the rule include a provision denying eligibility (1) to any nominating shareholder or group who had a nominee or (2) to

any nominee himself or herself who was, included in the company's proxy materials within a specified period of time (e.g., last one, two or three years) where the nominee did not receive a sufficient percentage of the votes (e.g., 5%, 15%, 35%)?

(i) Comment: Yes. The rule should include a provision denying eligibility (1) to any nominating shareholder or any member of any shareholder group who had a nominee or (2) to any nominee himself or herself who was, included in a company's proxy materials within a specified period of time where the nominee did not receive a sufficient percentage of the votes. We believe the appropriate "look back" period should have two tiers and should depend on whether the company's directors are elected by majority voting or a plurality of the votes cast. Specifically, if a nominating shareholder or shareholder group nominated a nominee for election at an ASM and such nominee received less than (i) 25% of the votes cast in the director election in the case of a company with majority voting or (ii) less than 50% of the votes cast in favor of the successfully elected director receiving the fewest votes in the case of a company with plurality voting, neither the nominating shareholder (or any member of a nominating shareholder group) or the nominee himself or herself would have access to the company's proxy materials at its next ASM. If such nominee received less than (i) 10% of the votes cast in the director election in the case of a company with majority voting or (ii) less than 25% of the votes cast in favor of the successfully elected director receiving the fewest votes in the case of a company with plurality voting, neither the nominating shareholder (or any member of a nominating shareholder group) would have access to the company's proxy materials at its next two ASMs.

(A) *Rationale:* The failure of a shareholder's nominee(s) to receive a sufficient percentage of the votes at the last one or two ASMs demonstrates a lack of support among the shareholders for the views of that particular shareholder. Similarly, the failure of a particular nominee to receive a sufficient percentage of the votes at the last one or two ASMs demonstrates a lack of support for that nominee among the shareholders. There should be a meaningful disincentive on shareholders to repeatedly nominate persons as directors of the company -- and an equally meaningful disincentive on nominees to seek election as directors -- where there is a demonstrated lack of support among shareholders for the views of the nominating shareholders and/or the views or qualifications of the nominees themselves.

(e) ***Request for Comment E.6:*** Should Rule 14a-11 provide an exception for controlled companies?

(i) Comment: Yes. The rule should not apply to controlled companies.

(A) *Rationale:* It makes no sense to apply the rule to a company with a controlling shareholder that holds enough voting securities to control the outcome of all director elections. It is a waste of time and money to require a controlled company to include in its proxy materials the nominees of any shareholder other than the controlling shareholder, whose nominees are almost certainly the company's own nominees.

(f) ***Request for Comment E.10:*** The proposed rule provides that the nominating shareholder or group that first provides notice to the company of its desire to include its director nominee or nominees in the company's proxy materials will prevail over other shareholders that thereafter provide similar notices to the company. Is this appropriate? If not, should there be different criteria for selecting shareholder nominees (e.g., largest beneficial ownership, length of security ownership, etc.)

(i) Comment: The "first in" provision of the rule should be replaced with a rule that provides that the largest shareholder or shareholder group (based on the number of voting securities over which such shareholder or group has voting control (as opposed to beneficial ownership)) should be given preference in terms of including its director nominee or nominees in the company's proxy materials. This is basically the approach proposed by the Commission in connection with the 2007 proposed proxy access rules that were ultimately not adopted by the Commission.

(A) *Rationale:* The "first in" approach is not logical or equitable. The Commission's purported reason for adopting the "first in" approach as opposed to the "largest shareholder" approach is as follows: "By using a first-in standard, a company would be able to begin preparing its materials and coordinating with the nominating shareholder or group immediately upon receiving an eligible nomination rather than waiting to see whether another nomination from a larger nominating shareholder or group is submitted before the notice deadline." However, this purported administrative or logistical problem is not likely to cause companies any significant problems, particularly in light of proposed requirement that shareholders give the company notice of an intention to include a

nominee or nominees in the company's proxy materials at least 120 calendar days before the anniversary of the date on which the company mailed its definitive proxy materials to shareholders in connection with the prior's year's annual meeting (subject to different rules in the event the company advances or delays its annual meeting by more than 30 days from the anniversary of the prior year's annual meeting). In addition, it is far more logical and equitable to give preference to a larger shareholder over a smaller one. In addition, as a general matter creating a race among shareholders to submit the required notice to the company is not desirable.

(g) ***Request for Comment F.10:*** Should there be a specified range of time in which a shareholder is permitted to submit a nominee (e.g., no more than 150 days and no less than 120 days before the anniversary of the date the company mailed its proxy materials the previous year)?

(i) Comment: Yes. As indicated above, the proposed rule requires that a shareholder or group wishing to include its director nominee or nominees in a company's proxy materials provide notice to the company at least 120 days in advance of the anniversary of the date upon which the company mailed its definitive proxy materials to shareholders in connection with the prior year's annual meeting. We think an outside date of 180 days before such anniversary (thus creating a 60 day window for such notice to be delivered to the company) is appropriate.

(A) *Rationale:* Such an outside date would help ensure that shareholders do not submit nomination notices to the company so far in advance of the likely date of the next annual meeting that the circumstances giving rise to the nomination are likely to change before the annual meeting. This 60 day window gives shareholders plenty of time to prepare and deliver such notices to the company.

(h) ***Request for Comment G.7:*** The rule provides that a company will have 14 days from receipt of a shareholder's notice of its desire to include a director nominee or nominees in the company's proxy materials to respond to that notice and notify the shareholder of any determination not to include the nominee or nominees in its proxy materials. Is this time period sufficient?

(i) Comment: No. We believe this 14 calendar day time period is too short and should be extended to 15 business days. As noted in paragraph (f)

above, we believe that the largest shareholder or shareholder group in terms of the number of voting securities over which it has voting control should be given priority access to a company's proxy materials instead of the "first in" approach proposed by the Commission in the Proposing Release. Accordingly, this 15 business day period should commence on the first business day following the last day on which shareholders could notify a company of its intention to seek to include a nominee or nominees in a company's proxy materials (as proposed, 120 days prior to the anniversary of the date on which the company mailed its definitive proxy materials to shareholders in connection with its prior year's ASM).

(A) *Rationale:* In most cases this 14 calendar day time period will include only 10 business days and may, in the event of a holiday falling with this 14 day period, include even fewer business days. In determining whether a company is required to include a particular shareholder's nominee or nominees in its proxy materials, the company will be required to make a number of determinations, including the eligibility of the shareholder to make use of the Rule 14a-11 and the eligibility of the nominees under the rule. These determinations may require considerations of state law, stock exchange listing requirements and relationships between the company and the nominating shareholder. In addition, we believe it is likely that many companies will determine it is necessary or appropriate to consult with their board of directors (or the appropriate committee thereof) regarding the appropriate response to such a shareholder director nomination. We believe 14 calendar days will often provide too little time for a company to make these decisions and complete any required or appropriate board consultations. We believe 15 business days, while still requiring diligent attention to the matter by a company receiving such a notice, will give the company enough time to properly respond to the notice.

2. Amendment to Rule 14a-8(i)(8) -- Amendment to this rule, which currently permits companies to exclude shareholder proposals related to director elections, to preclude companies from relying on the rule to exclude such proposals under certain circumstances.

(a) ***Request for Comment I.8:*** Rule 14a-8 currently requires that a shareholder proponent have held continuously at least $2,000 in market value or 1% of the company's securities entitled to vote on the proposal at the meeting for at least

one year as of the date of submission of the proposal. Are these thresholds appropriate?

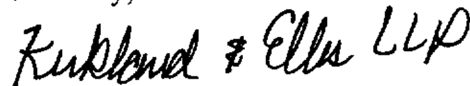
(i) Comment: No. We believe the thresholds for inclusion in the company's proxy materials of a shareholder proposal regarding director nominations or elections should be the potentially higher thresholds for inclusion of director nominees in the company's proxy materials under Rule 14a-11.

(A) *Rationale:* Only a reasonably significant shareholder (based on the tiered-shareholding approach proposed for Rule 14a-11) should have access to a company's proxy materials for purposes including shareholder proposals regarding director nominations and elections. We think it is not logical to subject shareholder proposals regarding the director nomination or election process -- which should be within the purview of the company in the first instance -- to a lower threshold than for director nominations themselves. This is particularly true because such shareholder proposals will likely be proposed bylaw amendments that will generally require the approval of a majority of all outstanding voting securities while director elections will generally be decided by plurality voting or a majority of the votes cast at the meeting.

* * * * *

We appreciate the opportunity to comment to the Commission on the proposed amendments and would be pleased to discuss any questions the Commission may have with respect to our comments. Please direct any questions you may have to Tom Christopher (telephone number: 212-446-4790; email: thomas.christopher@kirkland.com) or Bob Hayward (telephone number: 312-862-2133; email: robert.hayward@kirkland.com).

Sincerely,



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