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United States Securities and Exchange Commission
100 F Street, N.E.
Washington DC 20549-1090
Attention: Ms. Elizabeth M. Murphy, Secretary

Re: Proposed Rule – Facilitating Shareholder Director Nominations
File No. 57-10-09

Ladies and Gentlemen:

The Corporate and Securities Committee of the Association of Corporate Counsel ("ACC") appreciates this opportunity to comment on the Securities and Exchange Commission's ("Commission") Proposed Rulemaking, "Facilitating Shareholder Director Nominations" (the "Proposed Rules").

Overview

The ACC is the world's largest bar association serving the professional needs of attorneys who practice in the legal departments of corporations, associations, and other private-sector organizations around the world. Its nearly 25,000 members in over 80 countries are employed by more than 10,000 organizations. Among the largest of ACC committees, the Corporate and Securities Committee (the "Committee") consists of approximately 6,700 members at over 4,000 different organizations in the United States. The Committee's membership spans organizations ranging from small public and private companies to some of the world's largest public and private corporations. ACC's membership includes attorneys from 95 of the Fortune 100 and over 400 of the Fortune 500 companies. The Committee has submitted this letter to represent the position of a majority of its constituent members and, therefore, it represents the views of the Committee and not necessarily those of the ACC as a whole.

Because the Proposed Rules, if adopted as proposed, would adversely alter the process of corporate governance for all publicly traded companies in the United States, the Committee deems it vital to express its views to the Commission.

We support the proposed amendment to Rule 14a-8(i)(8) to permit shareholders to propose proxy access bylaws for their respective companies because we believe the shareholder proposal process has worked sufficiently in the past at spurring changes that have empowered shareholders.[1] These changes include the decrease in the use of poison pills and the movement toward declassifying boards of directors. The Rule 14a-8 process strikes the proper balance between permitting shareholders access to issuers' proxy materials without the intrusion and problems raised by the proposed Rule 14a-11.

The significant number of recent positive corporate governance developments, including: e-proxy, majority voting, declassifying boards of directors, and shareholder forums cumulatively

[1] Given the magnitude of this issue, a higher threshold, e.g. 1%, would be appropriate for shareholder proposals with respect to proxy access.

provide shareholders with more ability to influence the management and direction of public companies now more than at any time in history. A federal system requiring all public companies to be subject to the same process – "one size fits all" – would not be in the best interests of these public companies and their shareholders. Accordingly, we do not support the adoption of Rule 14a-11 (the "Proxy Access Rule") primarily because:

- federally mandated proxy access is not necessary because shareholder proxy access is spreading in the absence of such government intervention;
- the proposed proxy access solution does not properly address the problems it seeks to remedy;
- proxy access is governed by state law; and
- the Proxy Access Rule encompasses significant issues which make effective implementation impractical.

A more detailed discussion of these issues as well as various potential solutions to problems we identify is provided below.

I. Federally Mandated Proxy Access is Not Necessary.

The manner in which a public company elects to govern itself involves a process determined by many parties and factors, including: the state of incorporation, shareholders, board of directors, management, self-regulatory organizations, and employees. These stakeholders, with the richness of their experiences, would more often than not develop a better proxy access solution for themselves than one imposed by a federal mandate. The following three points further illustrate why a federal proxy access system is not necessary.

A. Shareholders Already Have the Means to Nominate Directors.

Federally mandated proxy access is not necessary because shareholders already have the ability to nominate candidates to the board via the proxy contest procedure. Moreover, with the introduction of e-proxy, the costs associated with these contests have been materially reduced. In addition, states have begun to enact laws to enable shareholders to recoup certain expenses associated with soliciting proxies for the election of directors.

B. Increased Shareholder Empowerment.

The prevalence of the director majority vote standard, board declassification, shareholder forums as well as the elimination of broker discretionary voting for director elections and other developments underscores the position that the Proxy Access Rule is unnecessary. The following points further detail the basis for this position.

- Majority vote standard. Majority voting for the election of directors has become the prevailing election standard among large public companies. In the past few years, without regulatory mandates, most large public companies have adopted majority voting in uncontested director elections. As the Commission observed, nearly 70% of S&P 500 companies have adopted some form of majority voting.[2] The increased adoption of the

[2] Facilitating Shareholder Director Nominations, SEC Release No. 33-99045, 74 Fed. Reg. 29,024 n.69 (June 18, 2009).

majority standard has given shareholders significantly greater input in the election of directors.

- Annual election of directors. The percentage of S&P 500 companies with classified boards has declined from approximately 61% in 1999 to 34% at the end of 2008, in part due to Rule 14a-8 shareholder proposals requesting companies to declassify their boards allowing the annual election of all directors.[3]

- Elimination of broker voting. In July 2009, the Commission approved a change to New York Stock Exchange Rule 452 that eliminated the ability of brokers to vote uninstructed street name shares on a discretionary basis in uncontested director elections. This change fundamentally empowers shareholders and will force boards to actively seek votes, particularly for public companies that have adopted a majority voting standard.

- Electronic Shareholder Forums. The exemption from the federal proxy rules of several communications made in electronic shareholder forums has created an expanded opportunity for shareholder communications, enhanced transparency, and made management and directors more accountable to shareholders.

C. Developments in state corporate law.

The recent state law developments described generally below have granted shareholders greater proxy access.

- Delaware. Newly adopted Section 112 of the Delaware General Corporation Law authorizes corporations to adopt bylaw provisions that would permit proxy access, and to impose any lawful condition on the access provision.[4] Delaware also allows a corporation to reimburse a shareholder for the expenses incurred in soliciting proxies for the election of directors.[5]

- North Dakota. The North Dakota Public Corporations Act allows shareholders that own more than 5% of the outstanding shares of a publicly traded corporation and have held such shares for two years to nominate one or more candidates for the board[6] and provides for the reimbursement of certain solicitation costs.

- Other States. The American Bar Association is considering amendments to the Model Business Corporation Act similar to those enacted in Delaware.[7]

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[3] Classified Boards Year Over Year, www.SharkRepellent.net (from 302 at year end 1999 to 172 at year-end 2008).
[4] See Delaware General Corporation Law §112.
[5] Delaware General Corporation Law §113.
[6] North Dakota Publicly Traded Corporations Act, N.D. CENT. CODE §§10-35 et. al. (2007). A public company may choose to opt into the North Dakota Publicly Traded Corporations Act.
[7] The Committee on Corporate Laws of the American Bar Association Section of Business Law recently approved proposed amendments to the Model Business Corporation Act regarding proxy access for director nominations and reasonable reimbursement for shareholder expenses incurred in proxy contests for director elections. See Press Release, dated June 29, 2009 "Corporate Laws Committee Takes Steps to Provide for Shareholder Access to the Nomination Process." (available at:

These important state law reforms, some of which will be effective in the 2010 proxy season for the first time, negate the need for a mandatory federal proxy access process.

II. Proposed Proxy Access Solution Does Not Address Problems It Seeks To Remedy.

A. SEC Formulation of Problems.

The Commission articulated two principal reasons for proposing the Proxy Access Rule:

"First, we believe that we can and should structure the proxy rules to better facilitate the exercise of shareholders' rights to nominate and elect directors. The right to nominate is inextricably linked to, and essential to the vitality of, a right to vote for a nominee. The failure of proxy process to adequately facilitate shareholder nomination rights has a direct and practical effect on the right to elect directors. ...Second, we believe that parts of the federal proxy process may unintentionally frustrate voting rights arising under state law, and thereby fail to provide fair corporate suffrage. These two potential shortcomings in our regulations provide compelling reasons for us to reform the proxy process and our disclosure requirements relating to director nominations." [8]

If the proxy process unintentionally frustrates shareholder voting rights, that problem is not best remedied by creating an entirely new set of rules and obligations (which would result in significant administration and other company expenses) that require issuers to provide access to and pay for solicitations by select shareholders. Through the implementation of the e-proxy rules, the Commission has already acted to remove a consequential obstacle to shareholder nomination and voting rights because e-proxy significantly reduces the costs of proxy solicitations for all interested stakeholders in the election of directors.

B. The Proxy Access Rule imposes complicated system without solving issues Commission has articulated.

The Commission runs the risk of creating a rule that fails to take into account the differences among companies in terms of their capitalization, share ownership, and board composition and structure. We are concerned that the proposal's mandatory inclusion of nominees who achieve the threshold will be overbroad and cause significant expense without achieving any significant shareholder benefit.

C. Approving amendments to Rule 14a-8 would allow issuers and shareholders to develop suitable more individualized solutions.

A more appropriate solution would be to amend Rule 14a-8 to allow states, issuers, and shareholders to develop workable solutions. The main advantage of amending the existing language of Rule 14a-8 as opposed to the Proxy Access Rule is flexibility. The Rule 14a-8 proposal would allow shareholders and companies to tailor proxy access to meet an individual company's needs as opposed to a "one size fits all" scheme.

III. Proxy Access is Governed by State Law.

Generally, corporate governance is an issue predominately framed by state law, an issuer's organizational documents, self-regulatory organizations and various rules and regulations issued by the Commission. However, the Commission's mandate to regulate the

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https://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=688). Thirty states have adopted all or substantially all of the Model Act as their general corporation statute.

[8] 74 Fed. Reg. at 29027, columns 1-2.

solicitation of proxies and disclosure surrounding proxies does not extend to state substantive law. In *CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89 (1987)*, the Supreme Court stated, "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."

IV. Proxy Access Rule Implementation as Proposed Is Impractical; If Implemented, the Following Issues Must be Addressed.

If the Commission decides to adopt the Proxy Access Rule, a number of "workability" issues must be addressed prior to its implementation.

A. Create a two-step process involving nominating committee.

The Proxy Access Rule does not permit negotiation between the board and a proponent. Establishing an inherently adversarial process as the default system during each year's election cycle is unworkable and potentially toxic to a properly functioning board. Instead, the Commission should adopt a two-step process.

Under a two-step process, shareholders would first suggest a candidate to the nominating committee. If the nominating committee were to reject the candidate, then the shareholder or shareholders would be able to advance the candidate under the Proxy Access Rule. Once included in the proxy materials, the nominating committee and board of directors may decide to recommend the nominee, whether or not the nominee was initially rejected. Regardless of whether the board supports the shareholder's nominee, the nominee would count against the maximum number of nominees to be nominated by shareholder proxy access. The suggested two-step process is designed to facilitate dialogue between shareholders and board members.

B. Mandate information gathering procedures.

The Proxy Access Rule does not have any mechanism for due diligence or investigation by a company into candidates nominated by shareholders. Any proxy access model should allow companies to implement procedures to gather sufficient information about the nominees and the nominating shareholders in advance of the printing of proxies in order to verify ownership, intent, capacity and independence and to make fair and adequate disclosures to shareholders.

While the Proxy Access Rule addresses the independence rules of the relevant exchange listing regulations, some companies also are required to conduct a review of various licensing concerns prior to nominating a director for election. These include companies engaged in federal government procurement, bank holding companies, gambling related industries, and defense contractors. Shareholders may not take these reviews into account when selecting a slate of candidates. Consequently, the company should be granted the right to implement procedures to review potential candidates prior to issuing proxy materials. Further, proxy access shareholder nominees should be required to complete a company questionnaire designed to enable company management to determine if the nominee is independent based upon applicable rules and corporate governance guidelines.

C. Require information about nominating shareholder.

The Proxy Access Rule requires virtually no disclosure about the nominating shareholder, unlike what would be required on Schedule 13D (or Schedule 13G) or what is required of an insurgent in a traditional proxy contest. More information, general and specific, on the nominating shareholder or shareholder group should be provided to the shareholders so

that they can make an informed decision on the candidate nominated. For example, what is the principle business of the shareholder? How long has this shareholder held the stock? Does the shareholder have a hedging position? These and others issues may be considered material necessary factors in a shareholder's informed voting decision.

D. Ensure shareholder nominee independence from shareholder.

The Proxy Access Rule does not have safeguards to ensure that the nominee is not a single-issue nominee or captive to a certain group of shareholders. Mandatory access to a corporation's proxy materials may facilitate the election of special interest or "single issue" directors that would advance the interests of the nominating shareholder over the interests of the shareholders as a group. Previous rules proposed by the Commission sought to prevent the possibility of special interest directors being submitted by barring individuals with certain relationships with the nominating shareholder to be nominated. Similar restrictions should be applied to the Proxy Access Rule.

E. Require nominating shareholders to have held their shares for two years.

The Proxy Access Rule requires share ownership for only one year. This holding requirement encourages the promotion of short-term interests. In seeking to balance the ability of shareholders to participate more fully in the nomination and election process against the potential cost and disruption to companies subject to the proposed new rule, the Commission proposes that only holders of a "significant, long-term interest" in a company be able to rely on the Proxy Access Rule. Long-term shareholders are more likely to have interests that are aligned with other shareholders and are more likely to take a long-term view of the company and its operations. Shareholders who have held their shares for only one year should not be deemed to be long-term shareholders. The nominating shareholder should be required to beneficially own the securities used for the purpose of determining the ownership threshold for at least two years prior to the date of the shareholder notice on Schedule 14N.

F. Require higher ownership threshold.

The Proxy Access Rule creates thresholds that are too low and may result in a flurry of shareholder nominations. Under the Proxy Access Rule, the right to utilize proxy access is limited to those shareholders holding a specified percentage of beneficial ownership of the company. The applicable percentages are conditioned upon the size of the company. Thresholds at the 1% or 3% level would mean companies could have multiple nominating shareholders, without taking into consideration any aggregation at all and, when shareholders aggregate into groups, the numbers of potential nominating shareholders could be overwhelming. It would not be difficult for shareholders to communicate their intent to use the Proxy Access Rule and aggregate their holdings. Therefore, it is advisable to raise the thresholds to 5% for a single nominating shareholder and 10% for a group of nominating shareholders in order to provide the appropriate balance between permitting shareholders who have a substantial economic interest in the company to utilize proxy access, and limiting the potential cost and disruption to companies and their shareholders.

G. Require minimum un-hedged threshold positions by nominating shareholders.

If adopted as proposed, the Proxy Access Rule would allow nominations by shareholders that "beneficially owned" the required percentage of shares, but such proposing shareholders may not bear the economic risks associated with share ownership. Nominating shareholders can easily decouple their economic interests in company shares from their voting rights in these shares, in part or in whole, though a variety of hedging strategies, including covered short sales, the purchase or sale of puts and calls, as well as a variety other

transactions. In these cases, the company's other shareholders must have information about the nominating shareholder's complete positions in order to assess each nominating shareholder's interest in the company. To accomplish this goal, the Commission should require that each nominating shareholder:

- Represent that it has not hedged or otherwise divested its economic interest in the requisite shares during the required holding period and upon request provide the issuer with documentation of this fact;
- Disclose its total position in the company's shares rather than just long positions; and
- Disclose any arrangement that affects, or could affect, the nominating shareholder's voting or economic rights.

H. Require that nominating shareholders hold shares through the election and report any disposition of shares during the initial term of any elected director.

The Proxy Access Rule would allow nominating shareholders to dispose of their shares prior the meeting even though the shareholder stated that it intends to continue to hold the shares. Regardless of any minimum pre-nomination holding period that may be adopted, the nominating shareholder should be required to hold all shares through the election, or if the shareholder sold any shares or hedged its position so that its economic interest dropped below the minimum threshold, the issuer could exclude that shareholder nominee from the Proxy Statement. Alternatively, the shareholder should be required to report any change in its shares ownership from the date of submission of the nomination until the completion of the initial term of board service of any elected board members nominated by that shareholder.

I. Shareholders should only be permitted to nominate one director per year.

The Proxy Access Rule would allow nominating shareholders to submit a "bloc" of candidates. There are currently procedures in place that allow a shareholder to submit a "bloc" or short slate of directors. Shareholders nominating a "bloc" could make the process much more contentious, for example, by proposing several nominees to bargain for a single seat. Shareholders who intend to nominate a bloc of directors should be required to conduct a traditional proxy contest pursuant to Regulation 14A or a short slate proxy contest using Rule 14a-4(d). If each eligible nominating shareholder is limited to nominating one nominee, multiple nominating shareholders would have the opportunity to nominate members for election to the board of directors, thereby increasing shareholder participation.

J. Proxy access shareholder nominees should not constitute more than 15% of the board.

The Proxy Access Rule is flawed because allowing nominating shareholders to submit nominees equal to 25% of the board of directors is disruptive. Although using a fixed percentage would promote clarity, 25% is too high a percentage. A lower percentage would still enable shareholders to nominate a meaningful number that would not dramatically alter a board of directors' composition in any one year. The maximum number of directors that may be nominated by shareholders should be set at 15%.

K. Reconsider the deadlines required by rule.

The Proxy Access Rule is flawed because it would not allow issuers time to properly review and vet candidates. The timeline contained in the Proxy Access Rule does not allow adequate time for companies to review and evaluate Schedule 14N and to challenge the

inclusion of shareholder nominees, where appropriate. Consider the following example suggested by a member of the Committee:

"Under our current advanced notice bylaw provision, nominees are due no earlier than 120 days and no later than 75 days before the first anniversary of the previous year's meeting date (January 7, 2010-February 21, 2010 for 2010 annual meeting), which would not allow us to ever provide the required notice to the SEC of an intent to exclude the shareholders' nominees by the SEC deadline (80 days before we file our proxy statement). Since our meeting is always early May, we file our proxy early/mid-March to allow sufficient timing for solicitation. If we assume an estimated proxy filing date of around March 10, 2010, we would have to send the required SEC notice by roughly December 20, which is before our advance notice Bylaw provision would even allow a shareholder to make a timely nomination."

L. Issuers Should Have The Ability To Opt Out.

Under the Proxy Access Rule, no company can "opt out" of the new system in favor of a better system preferred by its shareholders. The Proxy Access Rule eliminates any potential for flexibility among companies to establish and refine a proxy access system tailored to the unique needs of the particular company. In addition to a simpler process, many shareholders and companies may favor ownership requirements that are different than those in the Proxy Access Rule, different temporal requirements for holding the shares prior to being granted proxy access, or any other term that differs from the term in this Proxy Access Rule. Any of these solutions could be instituted by way of a shareholder proposal pursuant to revised Rule 14a-8(i)(8), but not if the Proxy Access Rule is adopted.

We appreciate the opportunity to comment on the Proposed Rules and are available to provide you with further information (including additional anecdotes from practitioners and issuers' counsel) if you would find it helpful.

Respectfully submitted,

Corporate and Securities Committee of the Association of Corporate Counsel.

By: 

Arden T. Phillips, Chair