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August 31, 2009

Via e-mail to: rule-comments@sec.gov

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

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

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "we") of the Section of Business Law (the "Section") of the American Bar Association (the "ABA"), in response to the request for comments by the U.S. Securities and Exchange Commission (the "Commission") in its June 10, 2009 proposing release referenced above (the "Proposing Release").[1]

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section, nor does it necessarily reflect the views of all members of the Committee.

We plan to supplement this letter with an appendix identifying our responses to specific questions contained in the Proposing Release.

We have organized our comments as follows:

[1] This letter has been prepared by a Drafting Committee identified at the end of this letter consisting primarily of members of the Committee's Task Force on Shareholder Proposals, working with other interested committees of the Section.

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I. Overview

We are pleased to have the opportunity to comment on the proposal. The subject of access to a company's proxy materials to promote the candidacy of shareholder nominees for election as directors has been on the Commission's agenda for a number of years and the Committee has participated in this process with prior comment letters and in other ways. There have been significant changes in corporate governance practices since the Commission previously focused on shareholder access and, just as the Commission's views have evolved during this period, so have our views along with those of the various corporate and shareholder constituencies. The focus of this letter is on how we believe proxy access can best be accomplished in an effective and efficient manner.[2]

We support the Commission's proposal to enable proxy access by amending Rule 14a-8(i)(8) to permit shareholder proposals related to proxy access, although we recommend a different approach to the structure of the proposed amendment in order to address some of the considerations we identify below. We also agree that it is advisable and appropriate for the Commission to amend its disclosure and related rules to explicitly address an access regime implemented under state law or a company's governing documents. We believe that these reforms can be implemented successfully and expeditiously to facilitate shareholders' ability to exercise their state law rights to nominate director candidates.

On the other hand, because of the complexity of the issues raised by proposed Rule 14a-11, the significant policy and practical considerations that must be addressed to create a balanced proxy access regime and the inherent inflexibility of a prescriptive rule, we do not believe Rule 14a-11 as proposed or any other prescriptive federal rule would be workable in all the situations to which it would have to apply. We therefore urge the Commission not to adopt any form of Rule 14a-11 at this time. Not only do we believe that doing so would be impractical and undesirable, but allowing market forces to operate, especially in the context of a revised Rule 14a-8, as we recommend, will provide important information and experience that will inform the Commission and the various corporate and shareholder constituencies on the operation of proxy access and the need for and approach to any further federal rulemaking concerning access. We are convinced that, because of the complicated issues and variability of situations that inevitably must be dealt with in any proxy access regime, an approach that allows corporations and their shareholders to address access issues as part of a director nomination process that is based on their own particular circumstances is by far a better way to provide access rights to shareholders and achieve the Commission's objectives.[3]

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[2] We believe the issue is not the ability of shareholders to nominate candidates for election as directors but rather under what circumstances and conditions, if any, a long-term shareholder with substantial holdings and no control intent should have the right to use the company's proxy materials to solicit for candidates that it has nominated. The ability to nominate director candidates exists under state law independent of the use of a company's proxy materials.

[3] We are not addressing the Commission's authority to adopt an access rule in the form proposed. The Committee has addressed that subject in the past and we expect it will be addressed with respect to these particular proposals.

For the same reasons that we believe that a prescriptive federal proxy access rule is neither a workable approach nor appropriate as a matter of policy, we believe it would be neither feasible nor prudent for the Commission in any event to attempt to adopt such a rule on a schedule that would permit it to apply to the 2010 proxy season.

We note that some commenters have suggested that mandating proxy access would not be a big event and that the Commission need not trouble itself with the task of carefully defining eligibility standards, since an access nominee will only be elected if supported by shareholders who vote a majority of a company's shares. We believe to the contrary that establishing an access regime is a significant corporate governance initiative. Proxy access, as proposed by the Commission, is certain to encourage proxy contests, creating costs, burdens and distractions for companies and their shareholders, and without such a governance regime and its consequences necessarily having been endorsed by those shareholders. In addition, it could discourage qualified directors from serving and raise issues regarding the effectiveness of board composition and operation. In fact, it is important to bear in mind that by its nature the effect of proxy access is to relieve certain shareholders of costs that they are unwilling to incur to run a traditional short-slate election contest and to shift those costs to the company so that they are effectively borne by all shareholders. We believe that the costs of access to be borne by a company can be significant and may be greater than the costs shifted from a shareholder to the company by providing access. In addition, these costs and burdens will be borne regardless of whether an access nominee is eventually elected, and thus care is necessary to avoid eligibility or other standards that are set so low that the costs are needlessly incurred in situations where the access candidates represent narrow interests and do not have real prospects of being elected.

We also note that proposed Rule 14a-11 involves unusual and unique rulemaking for the Commission and poses special challenges. Unlike the usual Commission rules which can be generally applicable to registrants across the board, a prescriptive proxy access rule deals with matters of internal governance but cannot realistically be tailored to meet the individual governance needs and structures of each of the thousands of companies to which it would apply.

We first set forth some basic principles that we believe should be considered in addressing access. We then discuss the Commission's Rule 14a-11 proposal and why we believe adoption would be impractical and undesirable. We then turn to the Rule 14a-8 amendment proposal. We conclude with discussing other issues involved in the Commission's proposals.

II. Basic Principles

The following are some basic principles we believe provide a context for evaluating the Commission's proxy access proposals and our recommendations.

See, e.g., comments of Professor (and former Commissioner) Grundfest dated July 24, 2009. We do, however, make suggestions which we believe would ameliorate issues regarding the Commission's authority.

A. Purpose of the Rule Proposal

A clear understanding of the purpose of the rule proposal, and ultimately an articulation by the Commission of the purpose of any rules that are adopted, is needed in order to evaluate the specific provisions of the proposal and to implement and interpret any rules that may be adopted. In our view, the purpose of the Commission's proposal should be articulated as follows:

> to facilitate through use of the company's proxy materials the ability of long-term shareholders who have a meaningful ownership stake in a company and no control purpose to seek election of a limited number of independent persons they nominate as directors in a manner that has no control effect.[4]

We discuss the relevance of this purpose as we consider particular provisions.[5]

B. Absence of Control Effect

We concur in the Commission's view that access should not be used in connection with control activity. There are other regulatory structures in place designed to deal with that situation. Rather, access is intended and should be designed solely to facilitate the opportunity for eligible shareholders not seeking to otherwise affect or influence control to use the company's proxy materials to promote the election of their candidates for directors. As we discuss below, we believe there are aspects of the proposal that fail to ensure that access will not have control implications and indeed that will enable the Commission's access rules to be easily used in efforts to affect control.

C. Independence of Nominee

We agree with the Commission that a nominee should be independent from the company under established independence standards. We believe, however, as did the Commission in its 2003 proxy access proposal, that the nominee also should be independent of the nominating shareholder. Requiring that additional independence will help mitigate the risk that access would be used for a control purpose or with a control effect. Independence from the nominating shareholders is, in our view, especially critical given the relatively large percentage

[4] The Commission describes an objective of its proposals as follows: "In particular, the proposed rules would create a process for long-term shareholders, or groups of long-term shareholders, with significant holdings to have their nominees for director included in company proxy materials." See Proposing Release at pp. 202 - 3.

[5] The Commission cites removing impediments to the exercise of the shareholder voting franchise as a reason for its access proposal. We do not consider "removing impediments" to be a sufficient statement of purpose for a proposed access rule because the Commission's proposals go beyond what is needed to fulfill that objective and because that statement does not provide an adequate basis for determining what provisions of an access right are consistent with the underlying purpose or in guiding the interpretation of those provisions.

of directors a shareholder can nominate under the Commission's access proposal. Moreover, an independence requirement will help avoid the risk that a successful nominee will be the representative of only one shareholder or shareholder group and instead will help ensure that access directors fulfill their obligations as directors to act in the best interests of all shareholders. Requiring independence of the nominee from the nominating shareholder would also help to avoid the divisiveness and disruption that can come from having directors representing special interests. Finally, requiring such independence should help to ameliorate the thorny issue of preserving confidentiality within the boardroom and avoiding misuse of material non-public information.

D. Role of State Law

As the Commission noted in the Proposing Release, it is "the traditional role of the states [to] regulat[e] corporate governance." This statement is in line with the consistent recognition by federal and state courts of the primary role of the states in regulating internal corporate affairs, especially as they pertain to the relationship among or between the corporation and its officers, directors and shareholders.[6] The importance of the federal government respecting the province of the states has recently been emphasized by President Obama's Memorandum and Executive Order.[7] Thus, the Commission should be cautious in proceeding with rulemaking that intrudes on internal corporate governance matters traditionally reserved to the states. We are concerned that a prescriptive Commission access rule, like proposed Rule 14a-11, goes down that path to a far greater extent than the Commission has in the past. The proposed rule does not preserve or merely implement state granted rights but instead (i) creates new rights for a federally defined class of shareholders to use corporate assets to promote their own candidates for election, (ii) imposes a federally prescribed governance regime on the corporation's shareholders whether or not they desire it and (iii) prohibits shareholders from being able to opt out of or vary that regime by limiting the extent to which it can be modified.

Moreover, as proposed, Rule 14a-11 would place the Commission and its staff in the position of grappling with important and difficult state law issues concerning corporate governance that are currently within the province of state courts. This is not an area in which the Commission and its staff necessarily have expertise, nor do they have a mandate under our federal system to perform this role.[8]

Significantly, the Commission acknowledges the changes that have occurred recently in corporate governance practices, in some cases spurred by changes in state law. The significant expansion of majority voting to replace plurality voting as the prevailing standard in

[6] *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987).
[7] Memorandum for the Heads of Executive Departments and Agencies, dated May 20, 2009 (available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption/).
[8] The issues regarding the role of state law are discussed in greater depth by the comment letter submitted by the Delaware State Bar Association dated July 24, 2009.

uncontested director elections is just one example. Delaware, the leading state for incorporation, has recently adopted amendments to its corporate statute to expressly recognize the authority of shareholders to adopt proxy access and expense reimbursement bylaws, and the ABA Corporate Laws Committee has taken steps to adopt similar amendments to the Model Business Corporation Act, upon which over 30 state corporation statutes are based. The Committee's Task Force on Shareholder Proposals recently developed a form of illustrative access bylaw to assist companies that wish to adopt such a bylaw. These and similar efforts should be allowed time to develop before the Commission considers the extraordinary step of dramatically increasing its intrusion into state corporation law. We are concerned that the Commission's adoption of a prescriptive access rule will stifle the very progress the Commission should be encouraging by occupying the field, preventing evolution and testing of different approaches and discouraging the development of additional alternatives.

These concerns are among the reasons that lead us to believe that a private ordering solution to issues raised by the creation of an access right is a preferable approach and to recommend that the Commission, at a minimum, defer consideration of Rule 14a-11 or any other preemptive access rule to allow time for that to occur.

E. Investor choice

It is not axiomatic that all investors favor access or one particular type of access regime, as proposed in Rule 14a-11. Investors have different interests and perspectives which can vary depending upon the company and the particular situation. The Commission should be sensitive to denying room for company and investor choice in an area of corporate governance with respect to which there are so clearly diverse views and interests. We think it troublesome that the proxy access rule proposed by the Commission, which is intended to promote shareholder freedom of choice in the selection of directors, itself denies that same freedom of choice when it comes to fashioning an access regime or providing alternative governance arrangements.[9] Given that access deals primarily with basic corporate governance precepts that are within the realm of state corporation law, we believe any federal requirement should give full effect to the principle of shareholder choice.

F. Relationship of a Prescriptive Rule to Governing Document Provisions

There inevitably will be inconsistencies and conflicts, as well as uncertainties regarding their scope and resolution, between a prescriptive federal proxy access rule and the provisions of a company's governing documents concerning such matters as shareholder voting rights, board composition, director nomination procedures and other governance measures that are permissible and valid under state law. Many of such provisions will have been approved by

[9] We note that Professor Grundfest's submission referred to in note 3 above highlights the inconsistency in the Commission's proposal.

shareholders and some will be the product of negotiation between the company and particular shareholders or other parties. If a company's governing documents contain a provision that is inconsistent with a prescriptive access rule adopted by the Commission, the question will exist, apart from resolving uncertainties and interpretive issues (which we discuss below), whether the provision may continue to apply or whether the Commission contemplates that its access rule would preempt the provision.

These issues would not arise under a private ordering regime as the access provision and the company's other governance documents would be tailored to work together. If the Commission were to adopt a prescriptive access rule, the Commission would need clearly to delineate the extent to which the rule would preempt governing document provisions (assuming the Commission had the authority to do so).[10] This would be important in determining the respective role and authority of the Commission and the states over important areas of internal corporate affairs and to the implementation and workability of the rule. We see this as an especially daunting task. In addition, to the extent that a prescriptive rule would preempt such a governing document provision, it would be important for companies to be provided a reasonable transition period before the preemption becomes effective in which to have the opportunity to seek to amend any such provision to take account of the rule. Their ability to do so could be dependent upon board and shareholder action and negotiation and agreement with third parties, which could take considerable time. Thus, the period would need to be long enough to accommodate such action.

G. Issues of Workability, Complexity and Flexibility

Any access provision, whether in a Commission rule or a company bylaw, must be workable if it is to serve the interests of the corporation and its shareholders. Workability requires that the rule or bylaw be easily understandable, be able to be readily administered, address all relevant issues, operate in a time frame that permits proper conduct of shareholder meetings and action by a fully informed shareholder body, recognize the role and fiduciary responsibility of the board of directors, comply with the requirements of the Commission's rules and other applicable law and allow the company and its shareholders sufficient flexibility to respond to changed circumstances in a timely manner. Setting aside the important policy issues involved in denying shareholders the ability to exercise their collective judgment about what may be the right access regime for any given company, the level of complexity associated with the adoption of a uniform rule applicable to every public company that would address the numerous substantive and procedural issues inherent in an access regime is extremely challenging, to say the least. Administering such a rule also would involve the Commission and

[10] As discussed further below, a general standard such as allowing rules that "do not conflict" with the Commission's rules will nonetheless create uncertainty and result in expensive and time-consuming proceedings to resolve those issues.

its staff in endless state law and interpretive debates that would far exceed the current burdens and issues dealt with under Rule 14a-8.

We focus on some of the more important of these workability issues in our comments and recommendations immediately below. We further address these and related issues in our analysis of the Commission's Rule 14a-11 proposal below.

1. Need for Flexibility

Whatever approach the Commission follows, there must be sufficient flexibility to accommodate (i) the many variations in corporate governance structures, (ii) the multitude of issues that arise in fashioning an access provision and the range of alternative solutions to those issues, and (iii) the changing circumstances that can occur. We think it is doubtful that a prescriptive federal rule, especially one without sufficient provision to allow for shareholder choice to modify or opt out entirely from that rule, can provide the requisite flexibility to constitute sound regulation, encompassing provisions that are workable and serve their intended purpose.

2. Variations in Board and Capital Structures

- Corporate board structures can differ, requiring different issues to be addressed in an access provision. Boards can be classified in time with directors having staggered terms or they can be classified by groups of directors elected by particular classes of shareholders. These board structures raise the issue of how access should be implemented without skewing the balance of interests among the classes of directors. In addition, in some states certain directors may be provided greater or lesser voting power than other directors. An access provision would need to address these variations.

- Corporations may have multiple classes of stock which vote together in the election of directors as a single class, although often with different weighting of votes (e.g., 10 to 1 is not unusual), or which have separate voting rights for different classes of directors. Also, in some states the right to vote for directors may be granted to debtholders. For these and other reasons, voting power and economic interest will often not be aligned, in some cases quite dramatically. These situations may change over time, such as when events trigger a right by preferred stockholders to elect two of a company's directors. An access regime would have to address these differences and decide how to treat them.

- Corporations may be controlled companies because of the ownership and voting power of a shareholder or group of shareholders. A proxy access regime likely will make little sense for these companies.

- Corporations may operate in specific regulated industries, in which the failure of directors to comply with citizenship or other criteria results in the company being ineligible to engage in certain businesses or from holding certain licenses. The election of a director who causes a company to fail to meet such criteria could have a material adverse effect on the company's business, to the detriment of all of its shareholders.

3. Other Workability Issues That Would Need To Be Addressed

- Ownership Eligibility. The level of ownership as a threshold for determining shareholders eligible to nominate directors under access is a critical factor to satisfy the purpose underlying access, but there is no single appropriate level. The Commission recognizes this by tiering the shareholder ownership eligibility requirement based on market capitalization. But this is, at best, an imprecise measure since it is not responsive to other important company-specific factors, such as number of holders, nature of holders, allocation among retail and institutional investors and type of institutional investors, relationship of market float to total capitalization, etc. Private ordering would permit a targeted approach and provide the flexibility to set an appropriate level of ownership depending on the circumstances. The Commission's proposed threshold tiers, and for that matter any other threshold or threshold tiers, will necessarily be arbitrary for many companies and simply cannot reflect what may be appropriate for each of the 7,000+ public companies that would be governed by the proposed access rules. In addition, the very definition of ownership needs to deal with the complexities of separation of voting rights and economic interest that can result from various financial engineering techniques.

- Holding Period for Threshold Shares. The length of time shares have been continuously held is also key to ensuring access is available only to sufficiently long term holders to achieve the intended purpose. The Commission has proposed one year, but could just as easily conclude that a longer period is more appropriate (as evidenced by the two-year holding period proposed by the Commission in 2003 and reiterated in

the context of the pending rulemaking by a number of commenters and by pending legislation in both the House and Senate).

- Number of Access Nominees. The Commission has proposed that the number of access nominees not exceed a fixed percentage of the board, but, as with many other aspects of the proposal, there are other alternatives, just as reasonable for different companies, for establishing the maximum number of permissible access nominees so as to ensure only minority participation and the avoidance of control effect. As set forth below, we believe that the Commission's 2003 proposal establishing a formula for the maximum number of access nominees is a more sustainable and realistic means of determining the permitted maximum number of access nominees considering the variations in board and voting structures of the thousands of corporations that would be affected by the rule. The most effective means of determining the appropriate number of such nominees would be achieved through private ordering inasmuch as there are so many variables to take into account.

- Characterization as Access Nominee. A related question is who to count as an access director in calculating the permissible number of access nominees. The proposed rule deals with this issue only in the context of a classified board but, as we later note, it is a critical point that should be dealt with in a number of other contexts.

- Concurrent Access Election Contest and Traditional Election Contest. It is clear to us that any proxy access regime should not operate at the same annual meeting at which there is a conventional election contest. This is necessary to avoid the confusion that would come from simultaneous proxy access contests and traditional election contests waged by the same or a different shareholder group and the effect on control that could result from such concurrent contests, among other reasons. As well, to prevent access from being used in conjunction with an effort to affect control of a company, access provisions should preclude nominating shareholders under an access regime from participating in a concurrent traditional election contest.

- Independence. Companies and their shareholder may, in some circumstances, have in place different or more stringent independence standards for directors than those proposed by the Commission and may choose to require independence from the nominating shareholder to achieve the purpose of access.

- Prioritization. The Commission has proposed one prioritization approach based on the time a nomination is communicated to the company. There are a number of other equally valid or preferable alternatives, such as size or duration of shareholdings. A first in time priority would encourage a "race to nominate." In addition, the Commission's proposal permits one shareholder or group to fill all the available access slots. This may not be viewed as a desirable approach because of its obvious control implications and because it might be preferable to allow as many shareholder groups as practicable to nominate access directors. There are various ways to deal with these issues, including apportionment by size of shareholdings or limiting the number of nominations permitted by a shareholder group or a combination of these and other alternatives.

- Process and Timing Issues. Companies and their shareholders may choose to implement procedural steps that ensure a workable access system and that mesh with the company's corporate governance system. For example, they may choose to ensure that there is sufficient time in the process to allow the nominating and governance committee to assess an access candidacy. These procedural steps also would need to coordinate with the company's particular advance notice bylaw.

4. Changes in Circumstances

- An access provision that may be appropriate for a company at one point in time may become inappropriate or require adjustment if circumstances change, for example, as a result of a change in its corporate structure or a subsequent transaction. Unlike a Commission rule, which can only be interpreted and therefore cannot be readily adaptable and responsive to changes at individual companies, private ordering permits these changes in circumstances to be dealt with in an efficient and timely manner.

- An access provision may be inconsistent with and impose an impediment to certain business combination transactions. For example, a "merger of equals" among two public companies usually involves a delicate balancing of control considerations and defining of board representation for some period post merger. A prescriptive access provision could have the effect of disrupting that delicate balance and affect the viability of such transactions.

- Similarly, a prescriptive access provision could interfere with a company's ability to arrange financing on the most advantageous terms because the financing source cannot be certain that the corporate governance structure and board composition upon which it relies when it extends credit will continue to function as contemplated.

H. Effective and Practical Dispute Resolution

Any access regime must include an effective and practical approach to address questions of interpretation, resolve disputes and provide relief from unintended, inequitable or adverse consequences. We do not believe that is achievable with a one-size-fits-all federally mandated access requirement administered in the first instance by the Commission's staff through an informal, non-binding no-action letter process.

III. Rule 14a-11 Access Proposal

With these basic principles in mind, we now turn to addressing the specific Rule 14a-11 proposal. As discussed above, we do not believe it is desirable for the Commission to adopt a prescriptive access provision given the complexity surrounding this subject and the range of variables that exist. Instead, as stated above, we support amendment of Rule 14a-8(i)(8) to permit shareholder proposals to establish a proxy access regime in accordance with state law. If the Commission nevertheless chooses to adopt such a prescriptive rule, it should provide a mechanism for companies and their shareholders, as discussed further below, to make their own decisions regarding the advisability of access, the form it should take and other alternatives to achieve the objectives of director accountability and enhancing the shareholder voting franchise. Moreover, any such access rule must be designed to achieve its purpose, must be workable and must cover the range of issues that need to be addressed. In that connection, we recommend below revisions to Rule 14a-11 as proposed that are intended to try to address and minimize the extent to which some of these workability issues manifest themselves. However, we believe that even this effort illustrates the difficulty of fashioning a "one-size-fits-all" rule in so complex an area and we do not believe that it is possible to address every such issue that a prescriptive access rule raises.

A. Applicability

We are concerned about the burden an access regime would place on smaller issuers which, because of their size and constrained resources, typically are confronted with a limited pool of available qualified directors and are far more challenged than larger companies in maintaining the quality and experience of their boards. Access could further diminish that pool because of the desire of potential board candidates not to expose themselves to an election contest or not to serve in an environment that may be contentious. Thus, we recommend that any

mandated access regime exclude companies that are not at least accelerated filers and perhaps be limited, at least initially, to large accelerated filers.

In addition, an access rule should exclude from its application companies that qualify as "controlled companies." As a practical matter, providing access in this context would be futile because there is no prospect that an access nominee would be elected in this situation. We recommend that the definition of controlled company used by the stock exchanges in connection with the director independence requirement be used for this exclusion. The exclusion would only apply while the registrant is a controlled company.

We also are concerned that under proposed Rule 14a-11 holders of preferred shares (and other classes of special shares) may be considered to be accorded the same rights with respect to having their nominees included in a company's proxy materials as conventional common shareholders in circumstances when the holders of such preferred (or special) shares are not entitled under state law and the company's governing documents to vote generally in the election of directors. For example, holders of preferred shares, especially non-convertible preferred shares, often are not entitled to vote in the election of directors except that they are entitled, voting as a separate class, to elect a specific number of directors under certain circumstances, such as arrearage in the payment of preferred dividends. Usually, in such circumstances where such special director voting rights have been triggered, the holders of the preferred shares, and only such holders, would be permitted under state law and the governing documents to nominate candidates for election by the preferred shareholders. We do not believe it is consistent with the purposes of access to provide holders of preferred (or other special) shares which have only in certain circumstances special voting rights with respect to certain directors the same access rights as conventional common shareholders. Arrangements for the nomination of candidates for the board seats that such class of shares can elect will likely be a matter specifically negotiated in connection with the issuance of such shares. If the Commission were to adopt a prescriptive rule establishing access rights, we believe access rights should be available only to shareholders who vote generally in the election of directors. At the least, a separate set of access eligibility criteria would be needed to determine the holders of such shares who have access rights and it should be made clear that such holders do not have access rights with respect to board seats as to which they do not have voting rights. We discuss below the treatment of other circumstances where a class of shareholders are entitled to vote only on the election of certain directors.

B. Eligibility to Make Access Nominations

We agree that, consistent with the purpose of an access regime, access rights should be limited to long-term shareholders who have a meaningful ownership stake in the company. To implement this fundamental purpose, we think any access rule requires eligibility criteria that include a minimum amount and length of continuous holdings.

Putting aside complexities in applying a percentage ownership threshold (which we discuss below in this section), we believe that a minimum threshold of 5% is a more appropriate threshold to establish a meaningful ownership interest for both large accelerated and accelerated filers than the Commission's proposed 1% and 3% levels. This was the threshold used by the Commission in its 2003 proxy access proposal. We see no reason to draw a distinction based on size of market capitalization because that does not necessarily indicate number and nature of stockholdings. We recommend above excluding non-accelerated filers but, if the Commission were to include them, we believe a higher threshold than 5% is justified, recognizing that they typically have more large holders, making it easier to assemble blocks to permit access nominations.

The Commission has proposed a one-year ownership requirement but could just as easily have proposed a longer ownership period in order to establish more clearly the long-term nature of the shareholder's interest as it did in 2003. We consider one year to be the minimum necessary ownership period and believe that it is more in line with the long-term holder criteria for proxy access to require two years, especially if the Commission does not accept our recommendation of a 5% ownership threshold. We note that a number of interested parties are supporting a two-year ownership period for access eligibility, including several advocates of access and the sponsors of legislation now pending in the Senate and the House.

However ownership is defined (which we address in the next section) and for whatever holding period is required at the date of filing of a Schedule 14N or comparable notice, we believe the minimum level of ownership should be required to be maintained throughout the nomination and election period to qualify for eligibility to participate in an access regime. Otherwise, there will be too much opportunity for game playing, which would undermine a core purpose of access. We also believe such a requirement is consistent with the point made by many advocates of access that the rule is intended to assist those shareholders who are not in a position to do the "Wall Street walk" by selling or reducing their holdings and will help to avoid access being used by a person who has acquired shares solely to undertake a contest. Accordingly, rather than requiring merely a statement of intent as to whether a nominating shareholder plans to continue to hold at least the threshold number of shares, we believe that an access rule, to achieve its purpose, should require that the minimum ownership be maintained at least through the meeting in order to ensure that the access right is in fact being used by those with a long-term interest.

We note that customary practice, often reflected in advance notice bylaws, is to require, consistent with state corporation law, that nominations be presented at the shareholders' meeting (even where advance notice of intent to make a nomination has been required). This is also the requirement for Rule 14a-8 proposals.[11] We recommend that the Commission recognize

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[11] Rule 14a-8(h) provides that a shareholder proponent must "follow the proper state law procedures for … presenting [a] proposal" including attending personally or by authorized representative the shareholders' meeting to

the common practice by which nominations are formally made under state corporation law and require in any access rule the Commission may adopt comparable provisions requiring a nominating shareholder to present its nomination in accordance with valid state law nominating procedures.[12]

Returning to the level of ownership, a percentage test appears deceptively simple but it can be more complex when multiple classes or complicated voting schemes exist or when voting power and economic interest are not aligned. Proposed Rule 14a-11 bases the threshold percentage on ownership of securities entitled to vote in the election of directors. But ownership of securities may not correlate with voting power. Thus, in some multi-class capital structures, such as the ten-to-one voting provisions of the typical A/B common stock structure, shares will have voting rights significantly disproportionate to the number of shares held, which also often creates a large disparity between the two classes in terms of the economic value of a single vote. The possible inequities that would arise under the proposed access rule are illustrated by the potential ability of a relatively small economic interest holding only high, ten vote shares qualifying to nominate access directors, whereas an almost ten times larger economic holding would not have enough votes to meet the threshold. There are many other situations where – because of capital structures involving, for example, the existence of convertible securities or voting securities with value based on yield – voting rights and economic interest differ, often significantly, among classes entitled to vote together as a single class to elect directors, raising the question whether access eligibility should be based on voting rights or economic interest or a blend of the two. These complexities in capital structure would need to be dealt with in an access rule. There are a variety of solutions – notably their appropriateness is a function of the particulars of capital and governance structures, thus illustrating the difficulty of devising a single, prescriptive access regime that is responsive to the particular situation of all public companies.

- While a simple, practical test could be based on ownership of securities representing the specified percentage of votes entitled to be cast in the election of directors, ignoring the relative economic interests could produce seemingly unfair results as illustrated above in the context of the typical A/B stock structure.

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present a proposal and disqualifies a proponent from making proposals for two years if it fails to do so without good cause.

[12] We note that proposed Rule 14a-18 is not clear whether the Schedule 14N itself serves as the means of nominating a candidate or is just a notice to the company of a nominating shareholder's intention to do so and to obtain access for the nomination. We suggest that the Commission clarify that Schedule 14N serves solely as notice of intent to use access for a nomination but that the nomination must comply with applicable state law or governing document procedures. This will avoid some of the complexities regarding the proposed rule being inconsistent with state law.

- Basing access nomination rights solely on economic interests could lead to equally inappropriate results if high economic value stocks (such as a non-convertible preferred stock with a high dividend yield) carried low voting rights**.**

- Yet another possible solution would be to limit access to the largest class of stock in terms of market capitalization that votes ordinarily in the election of directors—thus eliminating from access rights special classes such as high vote common stocks and preferred stocks, which are typically not the truly "public common" stock. However, if the other class were also publicly held, its holders would be denied access rights to which they might fairly contend they should be entitled.

- Another workability issue is how a Commission proxy access rule should deal with classes of voting stock that are not registered under Section 12 of the Exchange Act. This issue involves both whether a Commission rule should provide unregistered classes access rights in any circumstance and, even if not, how an unregistered class affects calculation of the required ownership of the registered class. We proceed on the assumption that access rights under a Commission access rule would be provided only to holders of a class registered under the Exchange Act. However, an argument could be made to extend access rights to holders of an unregistered class, at least in some situations. For example, where the unregistered class votes only for a separate class of directors, denying access under a federal rule to that class would not seem controversial. On the other hand, where the unregistered class votes together with registered classes to elect directors, the appropriate treatment of the unregistered class is more complicated since holders of the unregistered class would ordinarily have the same state law nomination rights and the same financial and filing impediments in soliciting proxies on behalf of its nominees as holders of the registered class. The resolution of the question how the unregistered class affects calculation of the required ownership threshold for holders of the registered class also needs to be addressed. Presumably, if an unregistered class votes together with a registered class, the votes of the unregistered class should be included in the calculation even if the unregistered class does not have access nomination rights under the Commission's access rule.

Capital structures may also classify directors by voting group, so that one class elects certain directors and another class elects others. Similar workability issues as those above apply in this situation and need to be considered.

- One possible solution to deal with classes of directors elected by different classes of stock would be that to treat each class separately for access purposes and to calculate the access eligibility threshold separately for each class based on the total number of votes to be cast in the ordinary election of directors by that class. This approach, however, might result in a company being faced with a multiplicity of access nominations, as well as complications in applying a 25% cap on total access nominees because of rounding problems particularly with classes of fewer than four directors.

- An equally plausible and simpler to administer alternative would be to restrict access nomination rights to the largest class of common stock determined by market capitalization and not to extend access nomination rights to smaller "special" classes. However, while this approach would solve the problem of truly "special" classes, it might not adequately address more complex, albeit less common, board structures where two relatively equal sized classes of stock each had the right to elect, for instance, half of the directors. (For a discussion of the effect of classes of directors on the number of access nominees, see below.)

C. Beneficial Ownership

If the purpose of providing proxy access to long-term shareholders with meaningful ownership interests is to be achieved, ownership must encompass both voting power and economic interest. As noted, this ownership should be continuous throughout the required holding period, exist at the time notice of nomination is provided and continue at least through the shareholder meeting.

The Section 13(d) definition of "beneficial ownership" does not serve this objective because it can include "shared" voting or investment power that is obtained by contract. Moreover, financial engineering techniques today are such that ownership of shares does not necessarily mean retention of any voting power or economic interest and ownership of shares is not necessary to obtain voting power or to have an economic interest. Whatever may be appropriate for other regulatory purposes, we think it is clear that, for purposes of eligibility for proxy access, ownership of a minimum number of so-called "physical" shares together with the entire bundle of voting and economic rights (sometimes referred to as "ultimate beneficial ownership") of such shares should be required. This would require, for purposes of access, that any hedging that reduces economic risk be netted in determining a shareholder's ultimate beneficial ownership. We would further limit the ownership definition to preclude, for purposes of access eligibility, utilization of "synthetic" ownership consisting of derivative positions that replicate the economic and voting interests traditionally associated with ownership of "physical" shares. In this connection, we understand that the Commission is currently studying the effect of derivatives, hedging and other financial techniques on the concept of beneficial ownership under

the federal securities laws. The importance of these issues in a proxy access regime is yet another reason for the Commission to refrain from acting prematurely to adopt a prescriptive access rule.

We note that beneficial ownership, including voting power and investment power, is often shared or delegated. For example, ultimate beneficial owners of the economic and voting rights embodied in stock often delegate voting or investment decisions to investment advisers or others, but commonly retain the right to be consulted or to approve decisions by the investment adviser, particularly voting decisions. In our view, any proxy access rule should provide that, so long as the delegation of voting or investment power is revocable, only the ultimate beneficial owner of shares, not the intermediaries, should be entitled to act as nominating shareholders and intermediaries possessing revocable, shared or delegated voting power or investment power should expressly be precluded from making proxy access nominations with respect to those shares. We also believe that any fully revocable delegation or sharing of voting or investment power should not interrupt continuity of ownership for purposes of the required holding period under a proxy access rule.

In this regard we note that proposed Schedule 14N calls for certification of continuity of ownership by the "record holder." The use of the term "record holder" in this context (and the similar term used under Rule 14a-8(b)(2)(i)) creates confusion on the part of many shareholders and companies with the term "holder of record" as used under Delaware and other state laws. Evidence of this confusion has emerged in Rule 14a-8 no-action letters. Accordingly, we suggest that Schedule 14N (and the corresponding reference in Rule 14a-8(b)(2)(i)) be revised to provide certifications from the direct custodian for the ultimate beneficial owner, not from the record holder.

Another issue that needs to be considered in connection with establishing continuity of beneficial ownership for purposes of satisfying the required holding period is the widespread practice of "stock lending." In stock lending, the physical security is transferred to a "borrower" who becomes the beneficial owner of the security and can resell it or use it to cover a short position and typically to vote it. In exchange, the "borrower" usually posts collateral and promises to deliver an equivalent physical share position on demand or at a stated date. The practice of stock lending can lead to "double-counting" of beneficial ownership by both the borrower, even though the borrower may have shorted the stock, and the lender, who no longer owns the stock but has a right to have shares "returned" pursuant to the lending arrangement. Any access rule should clarify how stock lending arrangements should be treated for purposes of meeting the continuous ownership requirement for the lender of the shares. For example, by applying a simple Section 13(d) standard of beneficial ownership, two shareholders could – whether intentionally or due to the inability to know from whom specific shares have been borrowed – each claim to be the beneficial owner of the same shares due to stock lending. In contrast, applying an "ultimate beneficial owner" standard as we advocate (so long as the lender has ownership of the "physical" shares at the time notice of nomination is given and such

ownership continues through the meeting) would resolve this issue and ensure that stock lending by the ultimate beneficial owner does not interrupt eligibility to be a nominating shareholder.

D. Restrictions on Nominating Groups

As we point out below under Part VI, we believe that formation of nominating groups, particularly if the Commission were to adopt proposed Rule 14a-2(b)(7), is easily subject to a variety of manipulations that would undermine the purpose of a proxy access rule, including misuse as a "nose counting" device to test the vulnerability of a company to a potential conventional proxy contest or other control effecting event. Although our concerns in this regard would be substantially alleviated by our recommendation that the Commission not adopt proposed Rule 14a-2(b)(7), we believe the process of solicitation to form a control group could nonetheless have significant implications affecting control of a company if the nominating groups are not limited in number of shareholders or aggregate number of shares owned. For example, absent such a limitation, a shareholder could build a nominating group with literally hundreds of shareholders owning far in excess of the threshold amount required for a nomination under proxy access. While reliance on Rule 14a-2(b)(2) would act as a partial brake by limiting the number of exempt solicitations (but not the amount of the aggregate holdings of the group), we observe that there are no comparable limits under Rule 14a-2(b)(6) nor would there be any if the shareholder forming the group chose not to rely on an exemption and instead complied with the applicable proxy rule.

Accordingly, we recommend that, without regard to whether the Commission accepts our recommendations with respect to elimination or limitation of proposed Rule 14a-2(b)(7), it also explicitly provide as a condition to eligibility for proxy access that there be a cap either on the permitted number of members in a nominating group (such as ten) or on the aggregate holdings of a group (such as limiting participation in a group to the fewest holders required (taking into account all shares beneficially owned within the meaning of the access rule) in order to achieve the ownership threshold and prohibiting further additions to the group once the threshold has been met). We believe a limitation of this type on nominating groups eligible for access would be entirely consistent with the purpose of an access rule while helping to avoid use of the access nomination process to effect or influence control of the company or other goals of the shareholders forming the group unrelated to an access nomination.

E. Number of Access Nominees

As access is not intended to affect control or create a control event, we urge the Commission to reconsider its proposed 25% cap on the number of access nominees. For companies having a board of 12 or more, the 25% cap allows access to be used to put in place a block of three (or more) directors, which would likely have a significant influence on board policies. That is not consistent with the purpose of the creation of an access right. In its 2003 access proposal, the Commission specified the maximum number of access nominees, scaling up

the number from one for a board of eight or fewer members, to two nominees for a board of greater than eight and less than twenty members, and three nominees for a board of twenty or more members. We believe this provides an adequate opportunity for shareholders seeking to improve board performance to solicit for their nominees using a company's proxy statement at company expense, as distinguished from launching their own election contest to affect or influence control.

We also note that, while applying a cap (25% or otherwise) to a board elected annually by a single class of common stock is easy, doing so in the context of more complicated board and capital structures is not.

Classified board structures, for example, raise special issues. Boards may be classified in time (for example, four directors are elected annually for three year terms, resulting in a total of 12 directors) or by electing group (for example, Class A shares elect eight directors and Class B shares elect four directors). Another common pattern would be a single class of directors, but with a specified number of seats allocated by the company's governing documents or contract to be designated by a defined group of holders (e.g., financing sources in a PIPE transaction or representatives of former shareholders of an acquired company). To be workable, a prescriptive proxy access regime would have to address these situations.

- In the case of a board classified in time, the balance and continuity on the board could be upset if all the permitted access slots could be allocated to one class (in the example above, under the access proposal three of the four directors of the class to be elected could be access directors using a 25% cap). We believe the correct approach would be to apportion the number of access nominees that can be elected to a class at any one meeting based on the percentage that the number of directors in the class bears to all directors (rounded down to a whole number but not less than one), with the aggregate number of access nominees over the multi-year election cycle limited by the cap that would apply if the board were not classified. Under this approach, if there are three classes of four directors each and a 25% cap, 1/3 of the total number of four directors in each class, or one director after rounding down, could be an access nominee each year, resulting in a total over three years of three access nominees, which would equal the 25% cap. In the case of a nine member board divided into three classes, there could be one access nominee in each year, subject to an overall 25% cap which would limit the total number of access nominees to two over the three-year period.

- In the case of boards with different classes of directors, each elected by a different class of stock, the determination of the number of eligible access nominees could be determined by application of the limit separately to each class of directors. We believe this approach would be appropriate whether

each class of stock is accorded access nomination rights with respect to its class of directors, or only the "dominant" class of common stock has access nomination rights with regard to its class of directors.

- One critical variation is where all or a significant percentage of the directors are subject to designation by current or former stockholders or their representatives. This is often the case in merger-of-equals type transactions, where the constituent companies provide in the merger agreement for a division of the entire board of the surviving entity in a fixed proportion (e.g., 50-50 or 40-60) for a fixed number of years. These situations are typically relatively short-lived and rarely extend beyond 3 to 5 years. During their duration, however, any right of access would require abrogation in some fashion of the merger agreement. Rather than interfering with such contractual rights, the better solution would be to provide that there are no rights of proxy access so long as the entire or a significant percentage of the board is subject to a designation scheme set forth in a merger agreement or related documents.

In the case of a board classified by time, the operative provision must be, as provided in proposed Rule 14a-11, that in considering the cap based on the total number of directors, an access nominee elected to the board is treated as such for each year for his or her entire term. This would ordinarily result in an access director retaining that status for a period of three years.

In the case where the entire board is elected annually, we believe that an access nominee, if renominated by the board, should likewise count as an access nominee for the next two annual meetings, or a total period of three years, and as such reduce the number of available access nominee slots for such period. We recommend this principle for a number of reasons. First, if renomination of an access director by a nominating committee or board did not reduce the total access slots available, the proxy access provision could be used to achieve a potential change in control in a short period, 12 months using a 25% cap, with 25% of the board elected at one election and another 25% elected at the following election. Such a result would be inconsistent with the purpose of access and inimical to board continuity and cohesion. Moreover, treating such a director as a continuing access nominee will help board dynamics because a board nominating committee would be more comfortable recommending that director for reelection if the committee knows that by doing so it would not open up a corresponding access slot on the board. Treating an access director as such for three years would also give the access director a sense of continuity and equality of status with other directors who typically serve with the expectation of renomination if they do a good job. If proxy access is to be a successful experiment in corporate governance, we believe it must be designed to foster sufficient collegial behavior in the boardroom to permit consensus to be the prevailing decisional mode and to avoid

proxy access directors being treated as "enemies within the gates" or being encouraged to behave as such if it is not likely that they will be renominated by the company's nominating committee.

An alternative to continuing a renominated access director's status as such for three years would be to limit proxy access to a triennial event, which might lead to greater board continuity and stability. First, by removing the potential gamesmanship of a possible access nomination in each year, it would eliminate the pressure for an incumbent board to recruit director candidates on an annual basis to oppose what it believes are less qualified access nominees or nominees with agendas that are believed not to be in the company's best interests. Second, a two-year hiatus free of access contests and issues would strengthen what we believe would be the natural inclination of most boards (which we think will be reinforced by the reality that the proxy access director won an election contest) to give a new access director a "fair" chance to become a constructive director, rather than automatically refusing to renominate the access director. This, in turn, should lead to less of an "us" versus "them" psychology on the part of all of the directors and encourage a more constructive working atmosphere.

In sum, we think there will be strong reasons for boards as a general matter to renominate proxy access directors if they are in fact good directors. Putting barriers or contrary incentives in the way of such an outcome will be counterproductive for all constituencies and the antithesis of good corporate governance. In our view, an effective way to permit constructive engagement and acceptance of proxy access directors in the boardroom is to give all of the parties breathing room between contested proxy access elections.

F. Independence and Other Nominee Eligibility Criteria

As noted above, we agree that an access nominee should be independent from the company. We believe, however, that the Commission's proposal to limit the independence requirement to comply with "objective" director independence listing standards does not go far enough. The principal director independence listing standard is a "subjective" one, and there is a still higher standard of independence required for members of a company's audit committee and legislation has been approved by the House to extend that higher standard to members of compensation committees. Moreover, many companies have established more stringent definitions of independence for their directors. Unless these independence standards are applied to access nominees, election of an access nominee could result in the company failing to have the minimum number of independent directors required by listing standards or having the independent directors needed under listing standards to serve on the audit and compensation committees. These are likely to be particular problems for smaller issuers, which typically have smaller boards and more difficulty in recruiting highly qualified directors. Accordingly, we believe that a company should be able to require that access nominees meet all applicable director independence listing standards, including, where appropriate, the heightened standard for independence for audit and compensation committee service.

In addition, we believe that a proxy access rule should contain a requirement that any access nominee be independent of the nominating shareholder or shareholders and their affiliates. This requirement, as recognized by the Commission in its 2003 proxy access proposal, is necessary to avoid the risk of access being used for control purposes and to enhance the likelihood that the nominee, if elected as a director, would represent the interests of all shareholders and not just that of the nominating shareholder. It would also help create a healthier climate of cooperation and collegiality in the boardroom, which is necessary for a well-functioning board of directors. In the absence of such an independence requirement, there is considerable risk that access nominees will be representatives of narrow special interests or, worse, representatives of the shareholders responsible for their nomination, rather than persons chosen for their qualifications to serve as directors, as intended. Finally, we note that a requirement of independence between the access nominee and the nominating shareholders will significantly reduce the risk that the nominating shareholders will be deemed "affiliates" under a traditional standard and that the access director will feel entitled or compelled to share material non-public information concerning the company or board deliberations with his or her "sponsors".

The Commission recognizes in proposed Rule 14a-11(a)(2) that there can be limitations on an access nominee's ability to serve as a director that should result in disqualification of the nominee for purposes of an access rule. These are generally situations where election would result in violations of law, the registrant's governing documents or stock exchange rules (other than those regarding director independence). We believe that these potential disqualifiers need to be broadened and clarified to also cover qualifications that are required for a company to engage in one of its lines of business or that are otherwise imposed by the company on all directors. Most state laws permit companies to establish qualifications for directors, typically in the bylaws of the company but they may appear in resolutions or policies. Many companies have done so, for example, in the form of a mandatory retirement age, limitations on the number of other boards and certain other board committees on which a director can serve, agreement to submit a resignation upon certain events or U.S. citizenship or regulatory approval requirements for certain regulated industries, such as broadcast, maritime shipping and aviation. Other regulated industries, such as gaming, may impose or warrant other eligibility or licensing requirements that are phrased as conditions that need to be satisfied in order for a company to engage in a line of business and not as standards on whether board service would be unlawful. We believe that such non-discriminatory board qualifications that are valid as a matter of state law should be a condition to a person's eligibility to be an access nominee. The Commission should make this clear in any final rule.

The Commission should also make clear that, once elected, a proxy access director is subject to non-discriminatory governance policies adopted by the board or in the bylaws to the same extent as any other director. These could include such matters as compliance with insider trading policies, compliance with confidentiality polices, participation in peer review and similar evaluation programs, adherence to director resignation policies and bylaws,

compliance with stock ownership and retention policies and furnishing information to the company for the purpose of allowing determinations of independence under subjective standards and for purposes of the company's compliance with SEC disclosure and other regulatory requirements.

G. Disclosure

We agree with the Commission that there should be prescribed disclosure requirements in connection with an access nomination that provide information on the nominating shareholder or group, on the nominee and on relationships and arrangements between or among the nominating shareholders and nominee and other specified parties. Additional information may be relevant and necessary for regulatory or other purposes, and we therefore recommend that any rule clearly specify that companies may require additional information through advance notice bylaws or otherwise in compliance with state law.

We note that the Commission on July 10, 2009 proposed additional disclosure requirements relating to directors and director nominees. We believe that application of those requirements (if adopted) to access nominees should be confirmed. This would include the reasons the person was selected for nomination.

H. Concurrent Election Contests

Proposed Rule 14a-11 does not by its terms prohibit one group of shareholders from nominating proxy access directors at an annual meeting while at the same time that group or other shareholders run a traditional proxy contest at their own expense. We believe for a number of reasons that proxy access should not be available when there otherwise is a proxy contest for a number of reasons.

A purpose of proxy access is to provide eligible shareholders with an opportunity to seek election of their director nominees without the economic burden of a traditional proxy contest. When some shareholders are already willing to accept the economic burden of a traditional proxy contest, the right to proxy access becomes less meaningful. Also, permitting proxy access concurrent with a traditional proxy contest has the potential to affect control of a company because the number of directors opposed to the board's nominees are likely to constitute a significant minority, and in many cases a majority, of the board if elected. To make the control implications worse, such a concurrent proxy contest would, under the current rule proposal, permit the proponent of an access nominee actively to solicit for the traditional dissidents and the traditional dissidents actively to solicit for the proxy access nominees. Further, the dissidents would be permitted to add the proxy access nominees to their "short slate" proxy card, which would facilitate use of the dissident card in lieu of the company's universal proxy card. In addition to the potential control effects, we think a concurrent traditional contest and a proxy access contest have the potential of causing great confusion among investors, particularly

given the practical consequences of having two separate proxy cards, one a proxy card listing more candidates than available seats, which itself might create confusion, and the other listing the traditional insurgent slate perhaps augmented by the proxy access candidates (who would have the arguably unfair advantage of being listed on both proxy cards).

Because of the control implications and likely creation of shareholder confusion, the Commission should make clear, if it proceeds with a prescriptive access rule, that access is not available if the company is the subject of a traditional proxy contest. We do not think that a less stringent rule provision (such as prohibiting a proxy access slate from being combined with an insurgent short slate on the insurgent's proxy card or providing that proxy access is conditioned on the proponents of an access nominee not campaigning for candidates of conventional dissidents) will be adequate to deal either with the control implications or the likelihood for confusion on the part of shareholders in voting on such concurrent election contests.

If the Commission does not adopt our recommendation to prohibit a concurrent vote on access nominees and a traditional proxy contest, we urge the Commission to provide in any access rule that candidates of another shareholder running in conventional proxy contests be counted against the number of permissible access nominees. Access is intended to facilitate the ability of significant, long-term shareholders to seek election of their nominees as directors, at the company's expense, as an alternative to the board's slate. Access is not warranted if alternative candidates are nominated by shareholders through a traditional proxy contest. Furthermore, not counting traditional insurgent nominees against the cap on proxy access nominees would create a potential "control" dynamic if the two categories of nominees were to align. This is directly contrary to the fundamental purpose that proxy access not be used with the purpose or effect of changing control. Similarly, if traditional insurgent nominees do not count against the cap on access nominees, it would be possible for shareholders to "game" the proxy access system, with some shareholders banding together to nominate access directors and others who share similar views but have not formed a "group" for purposes of the Williams Act with those seeking access sponsoring a traditional insurgent election contest.

Like access nominees who are elected directors, insurgent candidates who are elected should, if renominated by the board, continue to count against the limit on access nominees on the same basis as discussed above in order to avoid the control effect that could result from cumulating the election of access and insurgent directors.

I. Limitations on Nominating Shareholder Solicitation Activities

Consistent with the purpose for proxy access, any access rule should make clear that a nominating shareholder using proxy access is limited to using the company's proxy card and may not circulate a second proxy card, whether for a short slate or setting forth a full slate by including some board nominees. This will avoid confusion arising from multiple proxy card

solicitations for the same candidate and level the playing field since the board is required to use the single proxy card listing the access nominees.

In addition, if concurrent access and traditional proxy contests are not prohibited, in order to avoid the use of proxy access for control purposes or having control effect, it should be a condition of proxy access that a nominating shareholder not be a "participant" (as defined under Schedule 14A) in the traditional proxy contest or engage in any soliciting activity for a nominee of another shareholder. Related to the foregoing, dissidents in a traditional proxy contest should be precluded from including access nominees on the dissident's proxy card.

J. Failed Nominations

Proposed Rule 14a-11 does not address the consequences of a failed access nomination. Thus, a nominating shareholder is not precluded from fielding proxy access nominees every year no matter how few votes the candidate receives. We believe that companies and their shareholders should have meaningful protection against repeated unsuccessful attempts by a nominating shareholder. The need for such a limit is far more critical in the context of access than it is with respect to a Rule 14a-8 proposal because the economic and opportunity costs of an election contest and the importance of the election of a director can be so much higher than those associated with a Rule 14a-8 proposal.

We therefore recommend that a nominating shareholder whose access candidate receives votes from less than 25% of the shares present and eligible to vote should be barred from making or participating in a proxy access nomination for at least three years. Where a group is involved, we would apply the limitation to the largest members of the group (e.g., those whose ownership exceeds a threshold percentage, such as 10%) of the group's ownership because they are likely to be the leaders of the group.

A similar concern exists for a nominee who has failed to gather sufficient support. Recognizing the difficulty of a proxy contest and the access nomination rights of other shareholders, we recommend that any final proxy access rule not prevent a failed candidate from being nominated again by another shareholder in the succeeding year. However, if that candidate failed to receive 25% of the vote in the following year, he or she should not again be eligible for an access nomination by any shareholder for three years.

K. Disqualification of Nominee

A proxy access rule should address what happens if an access nominee becomes unable to serve, or otherwise ceases to be eligible as an access nominee, between the deadline for notice of the nomination and the election. This could occur for a variety of reasons, such as death, disability or other inability to serve; a decision not to proceed with the nomination by either the nominating shareholder or the nominee; disqualification of the nominee, either as of

the time of the notice or due to subsequent events; or failure of the nominating shareholder to satisfy or to continue to satisfy the requirement for access. These events could occur before or after the required response by the company under the no-action dispute resolution process set forth in proposed Rule 14a-11 and, indeed, could occur after distribution of the proxy materials.

We believe that inability to serve or disqualification should have meaningful consequences and that the company should not be required to include a substitute access candidate, either one proposed by the nominating shareholder whose candidate was unable to serve or was disqualified or an access candidate proposed by another nominating shareholder prior to the deadline for Schedule 14N notices. The company may not have the requisite time to determine whether a new candidate meets the qualification tests and to seek exclusion of the nomination in accordance with the proposed rule if the company believes the qualification tests had not been met. This difficulty would be more pronounced the later the inability to serve or disqualification occurs. It also would be quite complex to devise provisions addressing fully an appropriate ordering of replacement nominations. For example, it is possible that facts with respect to other nominations previously made might have changed, and time would be necessary to deal with these circumstances.

L. Prioritization

The Commission has proposed a "first-come, first-served," "winner take all" method of allocating proxy access nomination slots among competing nominating shareholders. We have serious concerns about both aspects of this approach.

The "first-come, first-served" approach creates the wrong dynamics and fails to relate to the purpose of access.

- First, in the absence of a relatively short window period for notice of nomination intention (such as no earlier than 150 days and no later than 120 days before the anniversary date for mailing the prior year's proxy statement), this approach will create a strong incentive for shareholders to rush to submit access nomination notices to "get in line," even if they are not sure they will want to carry through. Thus, it will promote access nomination notices as a matter of routine rather than an extraordinary event, which may have a destabilizing effect on companies. We are concerned that it also would create an opportunity for shareholders, particularly activist shareholders who disclaim a control intent, to mount a campaign to undermine the board's credibility and legitimacy as early as the conclusion of one year's annual meeting or perhaps even earlier. Even if the early nomination notice is not intentionally destabilizing, it may well have such an effect in the boardroom. The directors will be subject to an implicit, or perhaps explicit, threat that if they don't serve the nominating shareholder's agenda they will be subject to a

proxy contest at the following annual meeting. Operating in such an environment, in our view, could be very damaging to the integrity of board decision-making and to the quality and cohesion of board processes.

- We also note that the proposed rule is silent with regard to the effect of change in circumstances between the time a Schedule 14N is filed and the 120 day cutoff date. We assume that qualification for access would be measured as of the cutoff date, not an earlier date of submission, particularly if the rule does not specify a relatively short window for notices of an intent to make access nominations. We urge the Commission to clarify this aspect of the rule by providing explicitly that the date for determining the qualifications of an access nomination begins with the last day of the cutoff period for notices and continues through the meeting.

- Even with a window period for access notices, a first-come, first-served priority approach is not, in our view, appropriate. We believe that this approach will encourage a "race to the courthouse" dynamic as soon as the window period opens that will discourage potential nominating shareholders from engaging in constructive dialogue with management and the board during the window period in an effort to achieve their objectives without an election contest. The effect of the approach therefore may be to push any constructive discussions, even if they occur, even earlier in the calendar to a point in time when it is more difficult or impossible for a board and its nominating committee to form a well-considered view about the composition of next year's board. Moreover, the approach may encourage a "gamesmanship" attitude among possible nominating shareholders, who may view being first on line as creating special leverage with other shareholder groups and/or with management that the earliest nominating shareholder can "trade" for other advantages. Finally, and most telling, a first-come, first-served rule in our view ignores the basic purpose of proxy access -- that it is intended to enhance the ability of a significant, long-term shareholder or shareholder group to solicit for its nominees in the interest of all shareholders. By establishing a priority rule that ignores both the relative size of a nominating shareholder's holdings, and the duration of the holding, the proposed first-come, first-served priority undermines a purpose of the access rule and encourages activist and other opportunistic shareholders to get nominations in as early as permitted.

- We also disagree strongly with the proposed priority rules to the extent they would permit a single nominating shareholder to nominate candidates for all available access slots, thereby foreclosing nominations by other nominating shareholders. First, this will only heighten the "race to the courthouse"

dynamic of the access nomination process. If the current priority structure of the rule is maintained, the combination of a first-in-time priority and the ability to nominate candidates for all available slots would create a monopoly in the first mover. Even, however, if the priority system accorded priority to the largest holder, or perhaps the longest term holder, the ability of that holder to nominate all of the candidates seems to us to put too high a premium on one of a number of rational attributes for priority. Second, we believe multiple nominations by the same shareholder can be at odds with the premise that access should not be a vehicle to change or influence control. The difference between having one nominee on a board versus two or, in the context of larger boards, three or more is, in our view, very significant in terms of potential influence on board and management decisions – a traditional hallmark of control.

- An important corollary to limiting each nominating shareholder to one nomination is to preclude a nominating shareholder from participating in more than one nominating shareholder group. Absent such a provision, nominating shareholders could form multiple, near identical, groups to make multiple access nominations. We recommend inclusion of a provision that precludes shareholders from participating in more than one proxy access nomination for any one election.

In sum, we believe the combination of a lack of a reasonably short window period for proxy access notices, a priority system based only on a first-come, first-served principle and the ability of one nominating shareholder to nominate as many candidates as there are proxy access slots, undermines the fundamental purpose of proxy access as being appropriate only for significant, long-term holders, is acutely open to gaming by shareholders who perceive value in claiming proxy access slots for reasons unrelated to the purpose and policy of the proxy access rule and will lead to unintended consequences in terms of the quality and legitimacy of corporate governance.

Whatever priority system is used, we think it is critical that there be an outside limit on how early notice of access nominations can be delivered. Consistent with the approach followed by many advance notice bylaw provisions, we believe that the earliest date that notice of an access nominee should be delivered is 30, or at most 60, days prior to the deadline. This timing has the benefit of providing companies with an opportunity to seek to constructively respond to concerns expressed by shareholders prior to being presented with an access nominee, and provides a timeframe for shareholders to engage in discussions with management without the risk of other shareholders preempting their ability to submit an access nominee. More important, it eliminates the gaming and destabilizing opportunities noted above in response to the Commission's current proposal that permits notices as early as or earlier than the prior year's annual meeting.

In addition, as we suggest above, there are a number of means of allocating access nominations that are superior to a "first in time" approach. This variability is one of the reasons we favor a private ordering rather than prescriptive rule solution. We support an approach that orders nominees in accordance with the largest qualifying shareholdings, but subject to the qualification that the Commission, as we recommend above, impose a cap on either the permitted number of members in a group or on the aggregate holdings of a group and limit each nominating shareholder or group or their affiliates to only one access nomination at an annual meeting.

If, contrary to our recommendation, shareholders are not limited to one nomination, we would support an approach that uses the number of shares necessary for a nomination based upon the largest holdings (capped for a group as recommended above) and then proceeds in size of holding sequence with the remaining shares of nominating shareholders or groups counted for any remaining available access nomination slots. This method has the advantage of recognizing size of shareholdings but not on an all-or-nothing basis, thus allowing for spreading nominations among nominating shareholders.[13]

M. Process and Timing

We have a number of concerns about the process and timing contemplated by proposed Rule 14a-11.

- The last date for submission of an access nomination notice under proposed Rule 14a-18 would be "the date specified by the registrant's advance notice bylaw provision or, where no such provision is in place, no later than 120 calendar days before the date that the registrant mailed its proxy materials for the prior year's annual meeting…." As proposed, this minimum notice provision is unworkable. Advance notice bylaws typically provide that notice of an intention to nominate a candidate for director must be received by the company no later than 60 or 90 days prior to the annual meeting date. Assuming a company's proxy materials are mailed 30-40 days prior to an annual meeting, the difference in minimum notice provisions between the Rule 14a-8 120-day provision and the typical advance notice bylaw is on the order of 60-100 days. The reason for the relatively short notice period in advance notice bylaws is that there is no SEC dispute resolution process in the context of conventional proxy contests and the company does not have to include any dissident provided information in its proxy materials. Accordingly, the typical 60 or 90 day advance notice for traditional election

[13] Another priority system that would serve the purpose of proxy access would award access nomination slots first to the qualifying nominating shareholder or group with the largest holding (subject to the constraints stated above on size of the group or the group's holdings), next to the qualifying nominating shareholder or group with the longest holding period, then to the next largest holder and so on.

contests is adequate to allow the company and its board to address the insurgents' nominations. Any substantially longer advance notice could raise issues under state law. On the other hand, we do not think the Commission's proposed timetable for dispute resolution through a no-action letter process is amenable to any shortening of the period proposed, which is based on the Rule 14a-8 requirement of 120 days prior to the anniversary of the mailing of the prior year's proxy materials. Indeed, we believe that, if anything, the 120-day minimum notice period may prove in practice to be too short for the no-action letter dispute resolution process embedded in the proposed access rules. Accordingly, we urge the Commission to delete the reference to advance notice bylaws in proposed Rule 14a-18 and, instead, to make the 120-day minimum notice provision applicable under all circumstances (subject to the nominating shareholder also complying with any other notice requirement under state law).[14]

- A second process and timing issue relates to the interrelation of the access nomination process and the nominating committee's central function of selecting the best available slate of candidates for director. In our experience, most nominating committees schedule their review of director performance and renomination decisions as close as practicable to the preparation and mailing of proxy materials for the next annual meeting. This gives the nominating committee the better part of twelve months of performance by the incumbents on which to base its judgments about suitability for renomination. For a calendar year company, the director review and nomination process thus typically occurs in the beginning of the calendar year looking toward an annual meeting in the spring of that year. However, under the 120 day minimum notice period that we believe is essential for the workability of the Commission's proposed no-action dispute resolution process, notices of access nominations will need to be made before the nominating committee's

[14] If the Commission does not delete the reference to advance notice bylaws in the proposed rule, we believe most companies will adopt one of two solutions, neither of which would be as satisfactory as decoupling the minimum notice for proxy access and the minimum notice for other shareholder nominations under advance notice bylaws. The first would be to amend a company's advance notice bylaws to provide a minimum 120 day notice period for all director nominations and to justify extending the traditional 60 or 90 day notice period for traditional proxy contests on the basis of the need to make the Commission's proxy access regime workable. The other would be to amend a company's advance notice bylaws to provide separate notice periods of 120 days prior to the anniversary of the prior year's proxy mailing for access nominations, and the traditional 60 or 90 day minimum notice for all other nominations. Both could raise issues of validity. The latter, while workable if valid, would raise interpretative issues concerning whether the amended bylaw was "inconsistent" with or more "restrictive" than Rule 14a-18. Until definitively resolved, these issues would create uncertainty concerning the working of the prescriptive proxy access regime, permit nominating shareholders to contest the validity of the company's advance notice bylaw amendment in state or federal courts (which might offer conflicting interpretations) and lead to a prolonged period of confusion concerning the applicable advance notice period for both access and conventional proxy contests.

process has begun or when it is just in the preliminary stages. The consequences of this discontinuity in timing is likely to create difficult, and often counterproductive, decisions for potential nominating shareholders and for nominating committees, particularly where one or more access directors are in office.

- Unless the nominating committee acts before the expiration of the access notice period, the potential nominating shareholder will not know if the serving access directors will be renominated and whether there will be any available access slots (where renominated access directors count toward the access slots, as we propose be the case for three years). Moreover, a potential nominating shareholder may not be the same as the one who supported the sitting access directors and may prefer to have a candidate of its choice to run for office if a slot becomes available. Even if the nominating committee signals an intention to renominate the access director, a potential nominating shareholder may be fearful that the nominating committee or full board will change its mind later in the director review process and decide, after all, not to renominate the access directors. As a result, there is a substantial probability that nominating shareholders will file a Schedule 14N to "protect" their position and to create leverage for a possible negotiation with the nominating committee.

- On the other hand, whatever a nominating committee's intentions might otherwise have been regarding renomination of the access director, once the nominating committee is confronted with a "protective" nomination, it will have to choose between the access director it knows and the access nominee it doesn't. Moreover, it will do so in the context of knowing that a renomination may be tantamount to election of the access director, while taking on a new access nominee in an election contest may stand a good chance of having the board's nominee win the contest. These considerations might well lead nominating committees to bypass sitting access directors and nominate in their stead other candidates who are perceived to be preferable candidates.

- These are just some of the issues surrounding an annual access regime that we fear will discourage constructive board involvement of access directors and their successful integration into the board. We do not believe that the tactical gamesmanship that will beleaguer proxy access can be easily avoided.

The timing discontinuities between the Commission's proposed access regime and both typical advance notice bylaws and nominating committee working schedules is largely attributable to the Commission's contemplated reliance on a no-action letter process to deal with dispute resolution. Absent the need for a roughly 80-100 day period for the no-action letter process, notices of access nominations could be moved closer in time to proxy mailing dates, alleviating some of the timing tensions we have noted.

N. Remedies and Dispute Resolution

We have significant reservations about the operation and wisdom of the no-action letter process as the cornerstone of dispute resolution for a proxy access regime.

First, contrary to the assertion in the Proposing Release, we believe that the very nature of a prescriptive proxy access regime ensures there will be a large number of disputes among the participants requiring resolution and that the nature of the disputes will be varied and often be difficult to resolve.

- The Commission in the Proposing Release states that "boards generally would be cautious in expending resources to defeat shareholder nominees insofar as incumbent board members generally are interested in the outcome of elections…" We question the basis for this conclusion. Instead, we believe that the process will be the same as that which is experienced with traditional proxy contests, because the board's fiduciary duties in each case will be the same. Specifically, upon receiving notice of a potential nominee, the board nominating committee and likely the full board will assess the nominee's qualifications and the objectives of nominating shareholders, including whether they advocate any changes in business strategy or other corporate changes. If the nominee is determined not to be as appropriate a candidate as those to be nominated by the board's independent nominating committee or to likely advocate positions that the board believes are not in the company's best interests, then the board will be compelled by its fiduciary duty to make an appropriate effort to oppose the nominee, which may include committing company resources and money to campaign against the candidate, just as is done in the context of traditional proxy contests. Moreover, boards also will be obligated to ensure that nominating shareholders and nominees have satisfied the conditions for access set forth in the Commission's rules, and if there is ambiguity as to how those rules are interpreted or factual questions as to whether they are satisfied, the board likely will view itself as obligated to take appropriate action, including appealing to the staff or commencing litigation, to resolve these uncertainties. Thus, we expect that access nominations will result in elections that are as hotly contested as traditional proxy contests and, due to the ambiguities and uncertainties that will arise

under a federally mandated access regime, may involve disputes and litigation to a greater degree than traditional contests.

- Not only will there be many disputes, the grounds of dispute will be varied and far more complicated than those typically confronted by the staff in the traditional Rule 14a-8 dispute resolution process. The disputes will encompass the entire range of procedural and substantive requirements of the prescriptive access rules, ranging from the mundane (but not necessarily simple) question of the time of receipt of a complying Schedule 14N, to far more complicated and factually intense questions such as the eligibility of the nominating shareholders, the accuracy and completeness of the Schedule 14N and the statements made by both sides in the contest, to the fundamental scope and application of the proxy access rules (such as whether a valid company bylaw prescribing qualifications for directors has been satisfied by the nominee and whether it is operative or pre-empted by the proxy access rules).[15]

Because of the sheer number of disputes, their likely complicated nature and the highly contentious aspects of proxy contests, we are concerned that the proposed dispute resolution process contemplated by proposed Rule 14a-11 will place an unexpectedly large burden on the staff of the Commission and, quite probably, on the Commission itself as parties will be far more likely to appeal staff positions to the full Commission than has been the case under Rule 14a-8.

Moreover, we are not persuaded that a staff-based no-action process is a desirable and appropriate method for dispute resolution for many of the issues that are likely to arise.

- First, a large number of issues will involve matters of state law and corporate governance that may not be within the experience and expertise of the Commission and its staff. For example, if the governing documents of a company impose director qualification standards not met by a nominee, on what basis will the staff decide whether those qualification standards are

[15] We note that proposed Rule 14a-11(a)(2) as a condition of eligibility states that the candidacy and election of a proxy access candidate "would not violate…the registrant's governing documents…" On the other hand, in the Proposing Release the Commission states in footnote 152 that "if a company's governing documents…impose more restrictive eligibility standards…than those required by Rule 14a-11, the company could not exclude a nominee on grounds that the…nominee fails to meet the more restrictive standards…." The seeming inconsistency of the proposed rule and the Proposing Release is but one example of the difficult interpretative issues that could easily arise under provisions in a company's governing documents. Even if the Commission were to resolve this apparent inconsistency, the Commission's use of phrases such as "more restrictive" (in footnote 152) or "not be deemed to conflict with" (in footnote 255) of the Proposing Release, to delineate the boundaries of its proposed proxy access regime and its preemptive effect are ambiguous and will inevitably lead to numerous interpretative issues over time.

permissible and valid as a matter of state law? The experience the Commission and its staff has had under Rule 14a-8 with the inadequacy of the no-action letter process to deal successfully with state law issues that are contested by the parties and subject to "dueling" opinions of counsel is instructive of the procedural and decisional challenges almost certainly to be faced in the context of a prescriptive proxy access regime.

- Other issues under a prescriptive proxy access regime will involve factual disputes, such as ownership claims of a nominating shareholder or the absence or presence of a disqualifying control intent or effect on the part of a nominating shareholder. We believe it will be difficult and time-consuming for the staff to resolve these types of intensely factual disputes, including issues of credibility of the disputants, and it is not clear that the staff necessarily will have available the means or expertise to do so.

- Another troubling aspect of reliance on the staff as the primary arbiter of disputes under a proxy access regime, at least in the first instance, is that no-action letters do not include any factual findings, nor any reasoning. They are simply "per curiam" decisions, arrived at through an "informal" process and explicitly not binding on the Commission or the parties. As such, we believe the process is particularly ill-suited to develop a publicly accessible and understandable body of precedent on which parties can rely for planning purposes and on which the Commission can rely to resolve the ambiguities in its proxy access rules and to lessen the number and nature of disputes going forward.

- Because of these and other weaknesses in and limitations of the no-action process, we believe many companies and nominating shareholders involved in proxy access disputes will resort to litigation in state or federal court either for tactical reasons (such as foreclosing the staff no-action process or gaining access to discovery) or because they believe that they are more likely to receive a favorable and binding determination.

We recognize that proxy access, no matter how implemented, will be fraught with dispute and will require dispute resolution. We believe, however, that state courts and federal courts are far better equipped and far more experienced in handling disputes of this type than the Commission's staff. We observe that, if in lieu of a prescriptive proxy access rule, proxy access were a matter of private ordering under state law enabling statutes (as we advocate in this letter), the natural forum for dispute resolution would be the state, and to a lesser extent the federal, court system. Moreover, unlike a federal prescriptive proxy access rule that in effect is written on a clean slate and at best will be grounded only in a generalized statement of purpose that is process oriented (i.e., to provide a mechanism for certain shareholders to seek election of their

board nominees utilizing a company's proxy materials), a private ordering regime will be firmly grounded in state law corporate governance principles that will enable dispute resolution based on a substantive framework focused on the proper roles of boards and shareholders in the selection of directors and the management of the company. Finally, we note that, as suggested above, a private ordering approach in particular should be able to eliminate the timing discontinuities inherent in the proposed access rule because of its reliance on the no-action letter process.

O. Need for Flexibility and the Alternative of an Opt-Out Mechanism

For the reasons stated above, we think it is essential that any proxy access rule the Commission may adopt should permit shareholders or boards subject to shareholder ratification to vary the access regime applicable to their company by adopting or ratifying board-adopted bylaws regulating access or to decide that an access rule should not apply to their company. We do not think it is appropriate to deny shareholders their state law rights to select their governance system. For example, shareholders may decide based on the particular circumstances applicable to their company that the disruption, distraction and expense of an access regime outweigh the governance benefits afforded by access. There may be other mechanisms in place that they consider better able to achieve the perceived governance benefits. They may make choices with respect to specific provisions that are different than the choices the Commission makes for a rule of general application. There may be a specific transaction on the table that necessitates a change in the access regime.

The Commission's statements in the Proposing Release that shareholders would have the right to adopt bylaws that do not "conflict" with the Commission's rules or are not more "restrictive" does not adequately address this fundamental policy issue and, in fact, may arguably result in preemption of state corporation law. Accordingly, we urge the Commission to include in any proxy access rule it might adopt a clear provision allowing for any variations from the Commission's rules that are contained in a bylaw adopted by shareholders or ratified by shareholders at the next annual meeting. In this regard, we think the rule should expressly acknowledge that boards may adopt bylaws or bylaw amendments relating to access, subject to subsequent shareholder ratification, to deal with workability or other issues that arise between annual meetings. Although the ability of a board to adopt or amend bylaws will be governed by applicable state law, we believe the Commission should expressly acknowledge that board action between annual meetings may be necessary to enable workability of the applicable access regime before the next annual meeting. The board action would be effective until the next annual meeting when the shareholders can act on ratification of that board action. The alternative of requiring companies to call special meetings of shareholders to deal with correcting unworkable proxy access regimes is not a practical one because of the costs and potential disruption and because it would be far too time-consuming to be effective if the issues arose within three or four months of the deadline for proxy access nominations.

IV. Rule 14a-8 Proposal

We support the Commission's proposal to authorize proxy access shareholder proposals pursuant to Rule 14a-8 provided that the rule change is accompanied by the amendments (addressed in Part V below) that the Commission has proposed to other proxy rules to explicitly address and accommodate the operation of an access regime implemented under state law or a company's governing documents. However, we have recommendations as to the conditions under which access proposals should be allowed pursuant to Rule 14a-8(i)(8) and we have concerns as to the other, non-access related revisions proposed to Rule 14a-8(i)(8).

We are concerned that the Commission's proposal to revise Rule 14a-8(i)(8) is far broader than is necessary to allow proxy access proposals. This breadth has the potential effect of significantly changing the administration of Rule 14a-8(i)(8) with respect to proposals that have nothing to do with access. Accordingly, we suggest alternative and targeted language. Instead of rephrasing existing Rule 14a-8(i)(8) so dramatically by removing entirely the language setting forth the general standard for exclusion that historically has been relied upon to address a broad range of election-type proposals covering issues other than proxy access, we believe that the general standard in existing Rule 14a-8(i)(8) should be retained and the language amended only to specifically authorize access proposals that would operate under a new Rule 14a-19 disclosure rule, similar to the Commission's alternate proposal in August 2007. Under this approach, clause (i)(8) of the rule would read:

> If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election, except for a proposal to establish a procedure under applicable state law or a registrant's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials.

A. Permitting Access Proposals under Rule 14a-8(i)(8)

To the extent shareholders are in a position to make proposals under Rule 14a-8, we are concerned about those proposals being workable and consistent with the Commission's purpose behind facilitating access. Accordingly, we believe that caution is appropriate as to the terms on which Rule 14a-8(i)(8) access proposals are allowed. Because of the significant inter-relationship of proxy access and a company's capital and governance structure, the costs that access can impose on a company, and the complexity of implementing access, we believe it is appropriate to impose additional conditions on the ability of shareholders to submit access proposals beyond what is currently required for Rule 14a-8 proposals.

- We recommend that the Commission include a meaningful ownership threshold that is higher than that currently provided (for example, 1% of the total voting power of the class eligible to elect directors).[16]

- We recommend that the provision permitting access proposals under Rule 14a-8 initially be limited to non-binding proposals, for example, for the first two proxy seasons following adoption of an amended Rule 14a-8(i)(8). Consistent with our expectation that private ordering of proxy access regimes will take place at many companies, encouraged in part through the Rule 14a-8 process, we believe it is desirable to give companies time to put in place access bylaws that are workable. Limiting Rule 14a-8(i)(8) access proposals to precatory proposals, for at least an initial two-year period, would give companies an important opportunity to address the many issues involved in implementing an access bylaw and gauge the views of shareholders, while empowering shareholders to express their view on whether the company should implement an access regime.[17] It also would provide all of the relevant constituencies with an opportunity to gain experience on how companies are responding to access efforts, to develop "best practice" solutions and to ascertain the most effective access regime or other alternatives for their own situations.

- This Committee's Task Force on Shareholder Proposals has prepared and disseminated an exposure draft of an illustrative bylaw designed to achieve these objectives. The Task Force is planning on revising that illustrative bylaw to reflect further thinking prompted by the Commission's Proposing Release and other comments, and then issuing a final version in order to facilitate private ordering of the proxy access process. The experience with

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[16] We understand and acknowledge the importance of shareholder proposals, but we believe it would be appropriate, perhaps as part of its more general review of the proxy system, for the Commission to consider raising the ownership requirements for Rule 14a-8 proposals generally. We note that a disproportionately large number of Rule 14a-8 no-action letter requests are generated by persons who hold a relatively small number of shares, imposing costs on all shareholders and demands on the Commission's resources. Currently, shareholders need only hold $2,000 in market value of a company's securities to submit a proposal under Rule 14a-8. In the United Kingdom, for example, shareholder resolutions must only be included in the Annual General Meeting if shareholders representing at least 5% of the outstanding share capital or at least 100 shareholders having paid at least £100 for their shares propose a resolution. In Germany, shareholders holding shares in the minimum amount of 5% of the registered share capital or shares corresponding to EUR 500,000 of the registered share capital are entitled to request items to be put on the agenda.

[17] Alternatively, the Commission could make the changes to Rule 14a-8(i)(8) effective beginning only in the 2011 proxy season to give companies and others sufficient time to deal with access. However, we believe there is an advantage to have the Rule 14a-8 change apply only to non-binding proposals for at least two proxy seasons beginning in the 2010 proxy season to encourage engagement by the corporate and shareholder constituencies in a process to develop a workable proxy access regime that will serve the articulated purpose for access.

> the bylaw drafting process has highlighted a number of policy and technical issues that need to be addressed in implementing an access regime.

B. Other Changes to Rule 14a-8(i)(8) Proposed by the Commission

The proposed revision to Rule 14a-8(i)(8) would eliminate entirely the existing language that historically has been relied upon to address a broad range of election-type proposals and authorize exclusion under Rule 14a-8 of only specific types of proposals that have been addressed under Rule 14a-8(i)(8) in the no-action process to date. However, the amendment the Commission proposed is inconsistent with the structure of the other elements of Rule 14a-8, which establish general categories of proposals that are excludable. Such a dramatic rewording of existing Rule 14a-8(i)(8) could have adverse consequences under the Commission's proxy rules. Specifically, Rule 14a-8(i)(8) was adopted because Rule 14a-8 was not intended to be a substitute or additional mechanism for conducting contested elections or for effecting reforms in contested elections outside of the context of the Commission's carefully developed rules (such as Rule 14a-12 and proposed Rule 14a-19) governing elections of directors.[18] As noted above, our support of the Commission's proposal to amend Rule 14a-8(i)(8) to authorize proxy access proposals is premised on the condition that such action be accompanied by other amendments to the Commission's proxy rules to explicitly address and accommodate the possibility of an access regime. However, without language retaining the general standard for determining whether an election-related proposal is proper for consideration under Rule 14a-8(i)(8), the Commission's original objective for that provision, and the objectives the Commission is seeking to implement in the current rulemaking effort, could be undermined.

We acknowledge that the specific types of proposals addressed in the proposed language appear designed to codify the types of proposals which to date the Commission staff have concurred may be excluded pursuant to Rule 14a-8(i)(8).[19] The fact that only four types of proposals have been addressed to date and that other types of non-access, election-related proposals have not been presented or considered for exclusion under Rule 14a-8(i)(8) may in part be attributable to the fact that the general standard currently set forth in the rule operated to avoid other impermissible proposals from being presented in the first place. If that general standard is repealed, the Staff would have no basis upon which to assess non-access related proposals that might represent efforts to circumvent or supplement the Commission's proxy solicitation rules. Eliminating the general standard currently set forth in the rule also could have other unknown and unintended consequences that are not related to the goal of authorizing access proposals, and clearly goes beyond what is necessary in order to permit access-related shareholder proposals.

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[18] Exchange Act Release No. 12598 (July 7, 1976).

[19] *See* Attachment A to the legal analysis submitted by the Commission's Office of the General Counsel and the Division of Corporation Finance in the AFSCME v AIG case, detailing the types of proposals that to date had been excluded and not excluded under Rule 14a-8(i)(8); Response to Inquiry of the Court in American Federation of State, County & Municipal Employees, Employees Pension Plan v American International Group (March 24, 2006), Attachment A.

One example of the unintended consequence of the proposed revision is that proposed Rule 14a-8(i)(8)(iv), as drafted, would appear to allow Rule 14a-8 to be used by a shareholder as a means to nominate an individual for election pursuant to Rule 14a-11, a state law provision or a company's governing documents.[20] Accordingly, we believe that the existing language of Rule 14a-8(i)(8) should be retained but with a carveout for access proposals, similar to the Commission's alternate proposal in August 2007.[21]

V. Other Proxy Rule Amendments to Accommodate Proxy Access

We also agree that it is advisable and appropriate for the Commission to amend its proxy disclosure and related rules to explicitly address and accommodate an access regime. The Commission's proxy rules are structured around a disclosure regime that "requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information in Schedule 14A."[22] Because an access regime represents a departure from that fundamental premise under the existing proxy rules, amendments to other proxy rules are necessary. We address those specific amendments below.

A. Rule 14a-3 Amendment

We recommend amending Rule 14a-3 to expressly set forth the circumstances under which a person is or is not required to file a proxy statement with the Commission. As noted by the Commission in the Proposing Release, "The requirements to provide these disclosures to shareholders from whom proxy authority is sought are grounded in Rule 14a-3, which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information in Schedule 14A." However, the text of Rule 14a-3 does not expressly address the issue of who is required to file a proxy statement under the Commission rules, and does not specifically identify the exceptions to this standard that are (or pursuant to the current rulemaking, would be) allowed under the

[20] Even if the Commission determines not to utilize the language that we suggest above, proposed Rule 14a-8(i)(8)((iv) should be revised to clarify that it is addressing proposals that relate to procedures for nominating access candidates, and that Rule 14a-8 is not a rule under which actual nominations may be submitted. For example, the clause could be revised to read, "(iv) Relates to a procedure for nomination or election of directors, other than a proposed nomination, or a procedure to make a nomination, under applicable state law provisions or a registrant's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials."

[21] Alternatively, as long as the existing general standard addressing exclusion of election-type proposals is retained in the text of Rule 14a-8(i)(8), we do not object to *in addition* identifying specific categories of proposals that can be excluded. Thus, the proposed rule could be amended by adopting the text proposed for Rule 14a-8(i)(8)(i) through (iii), amending clause (iv) as addressed in the immediately preceding footnote of this letter, and adopting a revised version of clause (v) that read as follows: "(v) Otherwise could affect the outcome of the upcoming election of directors or relates to a nomination or an election for membership on the company's board of directors or analogous governing body." If the Commission were to adopt Rule 14a-11 as a provision that automatically applies to all registrants, it would not be necessary for Rule 14a-8(i)(8)(iv) to reference Rule 14a-11.

[22] Adopting Release, [text following note 253]

Commission rules. The advent of proxy access marks a further exception to and shift away from the historical approach of the proxy rules, and thus may further create uncertainty among shareholders, companies and courts when addressing situations involving solicitations or communications among shareholders. Accordingly, we recommend that Rule 14a-3(a) be amended to read along the following lines: "Unless exempt pursuant to Rule 14a-2 or unless proxies are otherwise solicited pursuant to Rule 14a-8 or Rule 14a-19, a person who engages in a solicitation subject to this regulation or another participant in the solicitation shall satisfy the filing requirements of Rule 14a-6 and, unless such person has previously furnished such information, shall concurrently furnish each person solicited with [remainder of text remains unchanged]". If the Commission were to adopt Rule 14a-11 and Rule 14a-18, then Rule 14a-18 would likewise be enumerated in the foregoing text.

B. Rule 14a-4 Amendments

We recommend that Rule 14a-4 be amended to expressly state, either in the text of the rule or in an instruction, that management's proxy card may clearly identify whether a director candidate is nominated by management or by a shareholder pursuant to an access provision. In this way, shareholders will be better informed as to the source of the nomination. Just as Rule 14a-4(b)(2) provides a non-exclusive list of means for a proxy card to authorize security holders to withhold voting authority for nominees, the Commission should provide an instruction or other guidance as to "safe harbor" means for this identification – for example, a list of nominees under the caption "Nominated by the Board of Directors" and a list of nominees under the caption "Nominated by Shareholder(s)."

As currently the case under Rule 14a-4, we also believe that the form of proxy should be permitted to provide for voting for the board's nominees as a group or for withholding authority for that group. While many large institutional investors have shed the administrative burden by outsourcing the actual proxy voting process for their portfolio, we believe individual shareholders will be discouraged from voting and thereby effectively disenfranchised if the proxy voting process is overly tedious because it prevents them from easily voting for (or withholding votes for) a group of nominees if they so desire. The burden on individual investors of having to vote separately for as many as 10 or 12 or more director candidates, as would be the case for many boards, and of having to do so with respect to each company in which they have invested throughout the proxy season, should not be underestimated.

We believe that, instead, the situation of having non-company nominees on the company's proxy card is comparable to having shareholder proposals on the company's proxy card, where the Commission's rules have long allowed shareholders to easily vote on all matters as recommended by the company through the exercise of discretionary voting authority, provided that the form of proxy clearly indicates how the company's proxies intend to vote. We note as well that even under the existing proxy rules, it is common for companies to provide means for shareholders to vote "For All, except" and then to provide means for identifying

specific nominees for whom the proxy is not authorized to vote. Thus, we believe that the company's proxy card should be permitted to have a "For All, except" alternative with respect to company nominees, provided that a means is provided to clearly indicate the company nominees for whom voting authority is not authorized and the form of proxy clearly states that to vote for nominees identified on the proxy who are nominated by shareholder(s), the shareholder should so indicate in the space provided with respect to those nominees.

C. Rule 14a-9 Provisions Regarding False or Misleading Statements

We believe strongly that the provision in the Note to proposed Rule 14a-19, stating that a company is not responsible for any information in the notice from the nominating shareholder or nominating shareholder group or otherwise provided by the nominating shareholder or nominating shareholder group, should be affirmatively reflected in the text of Rule 14a-9 as a limitation on potential liability of the registrant. Further, we believe strongly that the standard currently reflected in that Note (and the corresponding provisions proposed for Rule 14a-11(e)) should be revised to make clear that companies do not have any potential liability for information furnished by the nominating shareholder(s) that is materially false or misleading (or which is accurate when provided but becomes materially false or misleading during the course of the solicitation), regardless of whether the registrant knew or should have known that the information is potentially false or misleading.

We believe that it is highly inappropriate for a company to have any potential liability for information furnished by nominating shareholders for inclusion in a company's proxy statement (regardless of whether the access regime is mandated under proposed Rule 14a-11 or implemented pursuant to applicable state law provisions or the company's governing documents), any more so than if the information were included in separate materials distributed by the nominating shareholder. Instead, we believe that the appropriate recourse is against the nominating shareholders or nominating shareholder group, who will have filed that information with the Commission under Schedule 14N. If companies are exposed to any potential liability for information included in the company proxy pursuant to an access regime (regardless of whether mandated or voluntarily adopted), companies, in order to protect themselves, will in many cases be put in the position of having to challenge nominating shareholder disclosures, including when necessary resorting to court if they suspect that any information provided to the company by the nominating shareholder or the nominating shareholder group might be false or misleading. The prospect of expensive and time-consuming litigation that will be imposed on companies *and* on nominating shareholder(s) to determine whether in fact any such information is false or misleading, and if so whether such information is material, is likely to undermine to some extent the Commission's objective in authorizing proxy access. Instead, as the Commission proposed in 2003, we believe that the appropriate standard is the same as currently set forth in Rule 14a-8(l)(2) with respect to shareholder proposals that are included in a company's proxy statement and under existing Rule 14a-7(a)(2)(i) with respect to shareholder

soliciting material that is mailed with a company's proxy materials: "the company is not responsible for the contents of [the shareholder proponent's] proposal or supporting statement."

Finally, we believe that Rule 14a-9 should be amended to provide that companies do not have any potential liability for failing to correct or recirculate proxy materials if after the company mails its proxy materials it is notified or learns that information provided by nominating shareholder(s) and included in the company's proxy materials is or has become materially false or misleading. The burden of updating and correcting information provided by a nominating shareholder should be solely the obligation of the nominating shareholder.

D. Rule 14a-19 Proposal and Schedule 14N

Rule 14a-19 and Schedule 14N are significant and critical components of any Commission rulemaking to address proxy access because, by establishing information filing requirements, they advance the federal securities law objective of setting forth fundamental disclosure standards that are necessary to ensure that *all* shareholders have appropriate information if a shareholder is seeking to have proxies solicited in favor of a director nominee. While many of our comments in this section are technical, we believe that clarity in the disclosure requirements as well as balance in the information requirements are important for the protection of investors to avoid proxy access being used (by either shareholders or company-backed candidates) as a means of circumventing the Commission's traditional proxy solicitation rules.

As an initial matter, we recommend that all of the disclosure requirements applicable to a shareholder who is using a proxy regime be set forth directly in Schedule 14N. As proposed, Item 7 of Schedule 14N requires disclosure of the information required by Rule 14a-19, Rule 14a-19 in turn requires disclosure of information by reference to certain items of Schedule 14A, and in many cases those enumerated items under Schedule 14A in turn require disclosure of information called for under enumerated Regulation S-K items. In order to ease the burden on shareholders attempting to prepare a Schedule 14N, we recommend that (as with Schedule 14A) the Items under Schedule 14N either directly state the information to be disclosed or cite directly to the relevant items of Regulation S-K. In this manner, references in proposed Rule 14a-19 to a notice required under the proxy rules would instead simply refer to the obligation to file a Schedule 14N[23] and Rule 14a-19 either could be limited to address only procedural and liability issues or could be eliminated completely and the procedural and liability issues could be addressed only under proposed Rules 14n-1 through -3. If the Commission were

[23] For example, under this approach the Schedule 14N would have an item requiring an exhibit setting forth a statement signed by each nominee in which the nominee consents to the matters addressed in proposed Rule 14a-19(a).

to adopt proposed Rule 14a-18, which in many respects parallels the disclosure items set forth in proposed Rule 14a-19, then our comments apply equally with respect to Rule 14a-18.[24]

We suggest language below to address the following observations regarding the proposed wording for the introductory text in Rule 14a-19. The language proposed by the Commission is worded as if Rule 14a-19 is enabling language, suggesting that it creates an access right instead of addressing only federal securities law requirements when an access right provided under applicable state law or the registrant's governing documents is proposed to be exercised. At the time of delivering its notice, the nominating shareholder may not know for certain that its nominee will be included in a company's proxy statement. In addition, by stating that the notice addressed under Rule 14a-19 "shall be sent to the registrant" by a specified date, the proposed language may inadvertently suggest that it controls timing requirements under state law nomination procedures.[25] While a company's deadline for notice may be set forth in an advance notice bylaw as that term is commonly understood, it may also be set forth in a different provision specifically addressing procedures for access nominees or under state law. To address each of the foregoing points, we suggest that the introductory text of proposed Rule 14a-19 instead be phrased as follows:

> "If a shareholder or group of shareholders proposes to nominate one or more nominees at a registrant's forthcoming annual meeting and seeks to include such nominees in a registrant's proxy materials pursuant to a procedure set forth under applicable state law or the registrant's governing documents addressing the inclusion of shareholder director nominees in the registrant's proxy materials, the nominating shareholder or nominating shareholder group must file a Schedule 14N with the Commission and deliver a copy of the Schedule 14N to the registrant. The Schedule 14N shall be filed with the Commission and provided to the registrant no later than the date the nominating shareholder or nominating shareholder group notifies the registrant of its intention to seek to include one or more nominees in the registrant's proxy materials pursuant to applicable state law and the registrant's governing documents. If state law and the registrant's governing documents do not specify a deadline for such notice, the Schedule 14N shall be filed with the Commission and provided to the registrant no later than 120 calendar days before the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from

[24] In particular, with minor differences that appear to be inadvertent, proposed Rule 14a-18(e) and (g) through (k) appear identical to proposed Rule 14a-19(a) through (f).

[25] Many advance notice bylaws require a notice to be "delivered to" or "received by" the company by a specified date and do not address when the notice is sent.

> the prior year, then the nominating shareholder or nominating shareholder group shall file the Schedule 14N a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8-K (§249.308 of this chapter) filed pursuant to Item 5.07 of Form 8-K and deliver a copy to the registrant on the same date."[26]

Proposed Rule 14a-19(b) and (c) call for disclosure, with respect to the access nominee and each nominating shareholder, of the information that would be provided in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A. However, Items 4(b) and 5(b) of Schedule 14A are captioned "*Solicitations subject to Rule 14a–12(c)*" and the text of those items call for information regarding persons who are engaged in a solicitation subject to Rule 14a-12(c) and participants in such solicitation. Thus, it is at best ambiguous whether and how these disclosure items apply in the context of an access nominee solicitation that is being conducted through the company's proxy statement and that is funded, at least in part, by the company. In order to clearly indicate what information is required and to avoid disputes and potential litigation over whether a Schedule 14N is compliant, we recommend that the Schedule 14N disclosure items be written in a manner that avoids doubt as to their applicability to the nominees and each nominating shareholder (regardless of whether they are deemed to be engaged in or participants in a solicitation).[27] This could be achieved by specifying that, for purposes of providing disclosure under Schedule 14N, each nominating shareholder and access nominee should be treated as a participant in a solicitation, or the Commission could adopt language under Schedule 14N that tracks the disclosure requirements under Items 4(b) and 5(b) of Schedule 14A but refers to nominating shareholders and access nominees instead of referring to participants in a solicitation.

Proposed Rule 14a-19(b) also calls for disclosure that would be provided in response to the disclosure requirements of Item 7(b) of Schedule 14A, which in turn requires,

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[26] If language along these lines is used, proposed Rule 14n-1 should be revised with conforming language referring to a shareholder or group of shareholders that submits "notice of an intention to seek to include one or more nominees in the registrant's proxy materials pursuant to applicable state law or the registrant's governing documents." If for purposes of the minimum access notice provision the Commission accepts our recommendation to dispense with reference to a company's advance notice provision and to instead require that an access nomination always be delivered by the 120th day before the anniversary date of the distribution of the prior year's proxy statement, the reference in the instruction to the company's governing documents would be accordingly deleted.

[27] In the context of proposed Rule 14a-11, this ambiguity would be heightened by proposed Instruction 3 to Rule 14a-12, which would provide that solicitations made in connection with a Rule 14a-11 nomination would not be deemed to be solicitations in opposition subject to Rule 14a-12(c). It appears however that the only consequence of being engaged in a solicitation in opposition is (i) the requirement to file a proxy statement, which we address above in our suggested amendment to Rule 14a-3, and (ii) the obligation under Rule 14a-12(c) to provide certain disclosures when using reprints and reproductions in the context of a solicitation, which are not onerous and which we believe should apply to activities by nominating shareholders and access nominees. As stated above, all of the information requirements under Item 4(b) and 5(b) of Schedule 14A, which are required to be furnished pursuant to 14a-18 and 14a-19 in the Schedule 14N, by their terms apply only to participants engaged in the solicitation. Thus, we question the need for proposed Instruction 3 to Rule 14a-12(c) and do not believe that it should be adopted.

among other things, the disclosure called for under Items 407(d)(4) and 407(d)(5) of Regulation S-K. These items, which address registrant disclosure of whether the company's board has an audit committee and whether the board has concluded that its audit committee includes one or more audit committee financial experts, do not appear to involve information that a nominating shareholder would be able to provide about an access nominee and thus should not be applicable to Schedule 14N disclosures.

We support the proposal to require, through reference to Item 5(b)(iv) through (viii) of Schedule 14A, disclosure of stock ownership information (including hedging and other types of agreements) of the type currently required in contested elections. As noted above, for purposes of clarifying the application of this information in the access context, the rules should expressly state that each nominating shareholder is deemed to be a "participant in a solicitation" for purposes of these disclosure requirements. Access nominees also should be required to give the same beneficial ownership information that would be required under Item 6(d) of Schedule 14A.[28] Regardless of what ownership standards are applied for purposes of determining eligibility to nominate an access nominee, we believe that it is important for shareholders to know the extent to which those nominees and each nominating shareholder is a beneficial owner under Section 13(d) of and has other agreements relating to the company's equity securities. Such information should be provided as of the date of the Schedule 14N and, as with all Schedule 14N information, should be amended throughout the solicitation period if there is a material change in the information. For ease in the presentation of this information and to utilize a format with which shareholders and companies are familiar, the Commission should consider reformatting the cover page of Schedule 14N to present beneficial ownership information in the same format as the cover page of Schedule 13D.

With respect to proposed Instructions 1 and 2 to proposed Rule 14a-19(c) and (d), we believe it important for shareholders to know who has a financial interest in nominating shareholders' activities. Thus, the information called for in paragraphs (c) and (d) also should be provided by each person who has a greater than 10% economic interest in any such partnership or corporation. We believe as well that the information called for by the instructions should be provided with respect to persons holding similar positions with respect to and interests in nominating shareholders that are organized as trusts or other entities.

Proposed Rule 14a-19(e) states that specified information should be provided "regarding the nature and extent of the relationships between the nominating shareholder or nominating shareholder group and nominee and the registrant or any affiliate of the registrant." However, the enumerated items do not specifically call for disclosure of information on relationships between the nominating shareholder or nominating shareholder group and the

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[28] While this information may be called for through the proposed rule's cross reference to Item 5(b) of Schedule 14A, specifically calling for the disclosures comparable to those required under Items 5(b) and 6(d) would help to ensure that shareholders are provided the same information that would be disclosed by participants in a traditional proxy contest.

nominee. While such information may be picked up through the disclosure requirements referencing Item 5(b) of Schedule 14A, we believe that Schedule 14N should clearly establish the requirement to disclose such information.[29]

Proposed Rule 14n-2(a) should apply not only if a material change occurs in the facts set forth in a Schedule 14N, but also if any other development occurs as a result of which the information in the Schedule 14N is materially false or misleading or omits information necessary to prevent the Schedule 14N from being materially false or misleading. Proposed Rule 14n-2 or proposed Rule 14n-3 should contain a provision expressly stating that a registrant is not responsible for disseminating information contained in an amended Schedule 14N that is filed after a date that is ten days before the registrant mails its definitive proxy materials. This ten day period would accommodate the time that registrants may require to format and print their proxy materials and prepare those materials for mailing.

As noted above, we recommend that the cover page of proposed Schedule 14N and the instructions to the cover page be reformatted to parallel the format of and the information required on the cover page of Schedule 13D. As with Schedule 13D, Item 2 of proposed Schedule 14D should require disclosure of a nominating shareholder's citizenship. The Item 3 beneficial ownership information should be presented in a manner similar to that of Schedule 13D to require information on the nominating shareholder's sole and shared voting and investment control over the relevant class of the registrant's securities. Because it will in many cases be difficult for shareholders who own stock through banks or brokerage firms to obtain same-day documentation from a custodian confirming the number of shares held for the benefit of the shareholder, shareholders should be permitted to provide the written statement required pursuant to proposed Item 5(a) of Schedule 14N by an amendment to the Schedule 14N that is filed within fourteen days following the filing of the Schedule 14N.

VI. Application of Other Proxy Rules

A. Solicitation to Form a Group

As proposed, Rule 14a-2(b)(7) would provide an exemption from the proxy solicitation rules for a communication in connection with the formation of a nominating shareholder group. The exemption would apply to written communications that are filed with the Commission and that contain only limited information, including a statement of the shareholder's intent to form a nominating group, brief information on the proposed nominee, the shareholder's stock ownership and the means to contact the shareholder.

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[29] Even if the Commission adopts Rule 14a-11 as proposed and determines that access nominees need not be independent of their nominating shareholder, the nature of any agreements and relationships between such persons are material information that should be disclosed to other shareholders who are assessing whether or not to vote for an access nominee.

1. Exemption in Proposed Rule 14a-2(b)(7) Is Not Necessary

We do not believe that this proposed exemption is necessary given the existing exemptions available to a person seeking to form a nominating group. These include the exemption for communications to up to 10 shareholders under Rule 14a-2(b)(2) and the exemption for communications in an electronic shareholder forum under Rule 14a-2(b)(6). However, we do agree with the Commission that certain disclosure protections should be provided to shareholders who are solicited to participate in a nominating group.

- The existing proxy rule exemptions in our view provide adequate opportunity to form nominating groups sufficient to meet the minimum thresholds likely to be included in an access rule. Moreover, these exemptions do not seem to have been the subject of many disputes or abuse since their adoption and, so far as we are aware, have not been the source of worrisome change-of-control activities. In particular, we do not think it is necessary or desirable to permit the formation of large shareholder nominating groups without compliance with the normal disclosure obligations of the federal securities laws.

- When a group of shareholders acts in concert to coordinate voting or investment decisions, including the nomination of a director, there is a high risk of triggering consequences under, for example, state anti-takeover provisions, shareholder rights plans and other provisions of state law or a company's governing documents. The impact of these consequences can be significant to the registrant and to the group members, and the analysis as to whether they are triggered will in many cases grow more difficult as the number of group members increases. In many of these instances (as in proposed Rule 14a-11 itself), the analysis depends on the investment or control "intent" of the group members, which can be difficult to identify, but increasingly so as the number of group members increases. At some point, the sheer size of the holdings of the group would have control implications without regard to other evidence of control intent. Thus, the Commission does not allow a person holding 20% or more of a company's voting stock to file on Schedule 13G, regardless of intent.

- Our concern about consequences of the formation of a nominating group is elevated because, as proposed, there is no upper limit on the number of participants in, or the size of the holdings of, a nominating group. Although much attention has been paid to the minimum aggregate ownership of a nominating group, there is nothing in the rule proposals preventing formation of a nominating group that holds a

large portion of the company's stock (e.g., 15%, 20 %, 30% or more). Moreover, the safe harbors under Section 13(d) included in the proposed rules are not restricted to small nominating groups. As discussed above, we recommend that the size or size of holdings of a shareholder nominating group under an access rule be limited.

- Exempting nominating group formation activity, as such, could create an end-run around the compliance requirements that the Commission proposes to accompany Rule 14a-11, as solicitations to support a nomination could involve the first stages of a campaign against incumbent directors and in favor of access nominees without the protections afforded to shareholders by a proxy statement. The existing proxy rule exemptions do not generate this concern to a like degree.

- We share the Commission's concern that shareholders solicited to form a nominating group should receive certain basic information about the potential nominee and the security ownership of the soliciting shareholder, as specified in proposed Rule 14a-2(b)(7)(i). We believe, however, that the required information should be expanded to include the following:

    - The length of time the soliciting shareholder has continuously held (utilizing the ownership definition in the access rule) the specified number of securities. We think it is important that shareholders know how long the soliciting shareholder has continuously held its shares, as well as the extent to which the soliciting shareholder's ownership stake would satisfy the continuous beneficial ownership definition and holding period required under Rule 14a-11.

    - A description of any positions or other hedging arrangements by which the soliciting shareholder has reduced or otherwise altered its economic stake in the company, consistent with our discussion above in the context both of the definition of ownership and of the required disclosures in Schedule 14N.

    - A description of any plans or proposals the soliciting shareholder has with respect to the company and any contracts, arrangements, understandings or relationships (legal or otherwise) between the soliciting shareholder and any other person with respect to any securities of the issuer. These

required disclosures should be consistent with that required by Items 4 and 6 of Schedule 13D.

To the extent this information is not included in the company's proxy statement or required in a Schedule 14N we believe it should also be required disclosure under the exemption for solicitations in support of an access nominee proposed to be provided by Rule 14a-2(b)(8).

- We also agree with the Commission's proposal that the information to be provided to a shareholder solicited to become part of a nominating group should be in writing and filed with the Commission, as proposed Rule 14a-2(b)(7)(ii) provides.

Accordingly, we recommend that, instead of creating a separate exemption for solicitations made in connection with the formation of a nominating group under Rule 14a-11, persons making such a solicitation should rely on the existing exemptions provided by Rule 14a-2(b)(2) and (6) (or prepare and file a proxy statement for the solicitation in accordance with the proxy rules) but in the case of such a solicitation in reliance on either exemption the soliciting person should be required to file the solicitation material with the Commission and include with it specified information as discussed above. The same exemptions, subject to the same filing and disclosure requirements, should apply to persons seeking to form a shareholder group to obtain access to a company's proxy material under a provision of state law or a company's governing documents. In sum, we do not see a significant difference between a solicitation seeking to form a nominating group and a solicitation in support of a nominee for whom access to a company's proxy statement has been provided, from the perspective of the information required for investor protection purposes and after taking into account the nature of the activities that would be involved in, and the significant implications to the company and its shareholders of, the formation of a nominating group.

2. <u>If Adopted, the Rule 14a-2(b)(7) Exemption Should Be Limited</u>

If the proposed exemption relating to formation of a nominating group is adopted, we believe that use of the exemption should be limited in a number of respects to reduce the risk that it is used inappropriately. In particular, we suggest the following limitations:

- *No use of multiple exemptions*. The exemption should not be available if the shareholder or any group member is using another available exemption in connection with a nomination to be presented at the same shareholders' meeting. For example, a shareholder should not be permitted to utilize Rule 14a-2(b)(7) to communicate its interest in forming a shareholder group to a broad group of other shareholders, while separately using Rule 14a-2(b)(2) to exempt another

communication relating to a nomination to a group of 10 or fewer shareholders. If a shareholder is acting such that it needs the benefit of the new exemption, then the limitations and requirements of the new exemption should apply to all solicitations by the shareholder in connection with a nomination.

- *Bona fide intent to use Rule 14a-11*. The Commission should prevent the use of the solicitation exemption as a data-gathering strategy for a shareholder who is testing the waters for a conventional proxy battle or for other purposes. Specifically, in order to avoid circumvention of rules applicable to a traditional proxy contest, a shareholder using this exemption should be required to certify in its communication that it has a bona fide intent to present a nomination in accordance with Rule 14a-11. Following use of this exemption, the shareholder should not be permitted to nominate directors for election at the same meeting other than pursuant to Rule 14a-11. Absent these limitations, a shareholder could use the exemption to gauge the reaction of shareholders broadly, or some subset of shareholders, and then abandon the Rule 14a-11 process and proceed with a full scale proxy contest using the information gleaned from the exempt solicitation process.

- *No use with traditional proxy contest*. The exemption, consistent with our discussions above regarding the application of Rule 14a-11 generally, should not be available if the company or another shareholder has publicly announced that the company will be facing a traditional proxy contest.

- *Exemption not available for oral communications*. We agree with the Proposing Release that the exemption should not apply to oral communications, as there would be no way to ensure that information is being provided to shareholders in a consistent manner and in accordance with the rule's requirements. However, we are concerned that the proposed rule itself is not structured so as to appropriately implement this intent. Proposed Rule 14a-2(b)(7) exempts "[a]ny solicitation" but only imposes the content limitations on "written communications." We believe that to implement the Commission's stated intent, the word "written" should be added to the first sentence of Rule 14a-2(b)(7). In addition, for the avoidance of doubt, we recommend that the SEC add an instruction to the Rule expressly stating that oral solicitations are not eligible for the exemption.

3. Exemption Should Not Be Expanded Outside the Rule 14a-11 Context

We see no reason to treat a soliciting shareholder seeking to form a nominating shareholder group under another proxy access process set forth in the company's governing documents or applicable law differently from a soliciting shareholder under Rule 14a-11. Therefore, for the same reasons we believe that a new exemption should not be available for solicitations seeking to form a nominating group under Rule 14a-11, we believe the exemption should not be expanded to apply to alternative proxy access processes.

B. Solicitation For or Against a Candidate

Proposed Rule 14a-2(b)(8) would provide an exemption for solicitations by a nominating shareholder in favor of a candidate included in the company's proxy materials under Rule 14a-11, or against a board-supported candidate. We support this exemption as a means of encouraging an orderly and transparent campaigning process, and believe that the requirement for immediate SEC filing and the prominent legend are appropriate mechanisms to protect shareholders' interests. However, we have a number of recommendations with respect to this exemption.

1. Exemption Should Apply Only After Inclusion of Nominee Is Determined

The proposed exemption refers to solicitation "in support of a nominee placed on the registrant's form of proxy" or "against the registrant's nominee or nominees" but does not clearly provide a time frame for when the solicitation can occur. Language in the proposed legend suggests that the solicitation may occur before the company's proxy statement is available. We believe that in order to avoid confusion and misunderstandings, the rule should specify that the exemption only applies to solicitations in favor of a shareholder nominee or against a board nominee that occur after the distribution of the company's proxy statement so it is certain that the referenced nominee(s) will in fact be included. The potential for confusion exists if the exemption is interpreted to cover solicitations for or against nominees that do not ultimately appear in the company's proxy statement. In addition, the solicitations should not occur before shareholders have access to the more complete and balanced disclosure in the company's proxy statement.

2. No Use With Traditional Proxy Contest

For the same reasons discussed above with respect to Rule 14a-2(b)(7), if access is permitted when a traditional proxy contest is pending contrary to our recommendation above on the application of Rule 14a-11, the exemption should not be available if the company or another shareholder has publicly announced that the company will be facing a traditional proxy contest, even from an unrelated shareholder. In this context, any solicitation by a

nominating shareholder is certain to affect the traditional proxy contest and should be subject to the customary proxy rule disclosure and other requirements.

3. Exemption Should Apply In the Rule 14a-19 Context

Proposed Rule 14a-2(b)(8) should be expanded to apply to any written solicitation by or on behalf of a nominating shareholder in support of a nominee placed on a registrant's form of proxy pursuant to applicable state law provisions or the company's governing documents. When access nominations are implemented pursuant to state law provisions or a company's governing documents, the nominating shareholders should be permitted to solicit in support of their nominees, provided that they do not use a form of proxy that differs from the company's, do not furnish or otherwise request a form of revocation, abstention, consent or authorization and file their solicitation material for their access nominees or against board nominees with the Commission on the date of first use.[30] We believe that it is particularly important that the Commission act by rulemaking in this regard, since this is a proper subject of Commission concern and is an aspect of proxy access regimes that may not be as effectively implemented through private ordering.

VII. Issues under Schedule 13D and 13G

The proposed rules would amend Rule 13d-1 to provide that "activities solely in connection with a nomination" under Rule 14a-11 would not cause a nominating shareholder or group to lose their eligibility to file on Schedule 13G, as opposed to Schedule 13D.

A. Schedule 13G Eligibility Standard Should Not Change

We believe that the proposed change to the Schedule 13G eligibility standard is not consistent with the purpose or the language of Section 13(d)(5) of the Exchange Act or the rules thereunder. In accordance with Section 13(d)(1), Schedule 13D is designed to provide a company and its shareholders with information regarding the intentions and interests of a large shareholder that does not have a purely passive investment intent. The determination as to whether a shareholder is a passive investor that can file a short-form Schedule 13G, as permitted by Section 13(d)(5), is based on the relevant facts and circumstances. We do not believe that simply because a shareholder is pursuing a proxy access nomination or an ensuing election contest that the shareholder should be treated differently from all others in terms of Section 13(d) disclosure.

[30] Likewise, consistent with our comments on proposed Rule 14a-11, to avoid confusion among shareholders and prevent access rules from being used to circumvent the traditional proxy regime, the rules should make clear that a shareholder using access under applicable state law provisions or the company's governing documents would be limited to using the company's form of proxy and would not be able to furnish or otherwise request a form of revocation, abstention, consent or authorization.

Pursuant to Section 13(d)(5), the Commission has authority to permit a short-form filing (i.e., Schedule 13G instead of Schedule 13D) if it appears to the Commission that the securities "were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer." Rule 13d-1(b), (c) and (e) track the use of the phrase "changing or influencing control of the issuer." We do not think that the word "influence" in the statute and the underlying rules can or should be ignored as doing so is entirely inconsistent with the "passive investor" theory underlying Congress' authorization of the Schedule 13G regime.

We do not believe there is a persuasive basis for the Commission to provide that under all circumstances a shareholder or group seeking to nominate a director -- or possibly up to 25% of a board of directors -- and in opposition to the election of incumbent directors is not seeking to "influence" control of that issuer. The Commission acknowledges this fact by requiring the certification proposed for Schedule 14N to state only that the shareholder has no intention of "changing control" of the issuer and does not require the nominating shareholder to certify that it has no intention of "influencing control." Presumably such an election contest will not be over mere personality differences but will instead be focused on the governance, strategic direction and/or policy initiatives of the issuer. To cite an obvious, but realistic, example, if a shareholder seeks to nominate directors on a platform advocating that the company explore a sale of control or major recapitalization, it is hard to say that the shareholder is not seeking to "influence" the issuer in the most fundamental manner. Even if a proxy access contest is about qualifications and fitness to serve as a director, the very change in composition of a board, particularly as much as 25% of the board in a single year, will be of "influence" on the other directors and management of the company. Moreover, the nature of the proponent of the access election contest, without regard to the character and abilities of its candidate, may have such an influence. For example, if the nominating shareholder is closely associated with the bargaining agent for a company's employees, its successful election of a director it has nominated may have important ramifications with regard to the company's position in future union negotiations apart from the identity of the new board member. The same could easily be true if the proponent were a prominent activist investor. The point, of course, is not to question the bona fides of these or other possible nominating shareholders, but to illustrate that under some circumstances the election of a single access director could have a profound impact on the governance, operations and policies of a company in a manner that constitutes "influence" in the control context.

We believe that the level of disclosure provided for in Schedule 13D can be appropriate for a shareholder or group of shareholders that has beneficial ownership in excess of 5% of a class of voting securities and that is participating in a process to designate a shareholder nominee. A Schedule 13D filing would not require significant information from a nominating shareholder or group beyond that required under proposed Schedule 14N where the nominating shareholder or group has no plans or proposals regarding significant changes at the company or relationships with other parties regarding securities of the company. However, in cases where the nominating shareholder or group has more complicated relationships or intentions relating to the company or its securities, the Schedule 13D filing would provide useful additional

information to shareholders, as it is intended to do, and disclosure of such information on Schedule 13D should be required in such circumstances.

For a nominating shareholder or group that has otherwise purely passive investment intent, we believe that the Schedule 13D would likely be triggered no later than the submission to the company of the requisite notice to nominate a person, since by that time they have formally manifested intent to affect the composition of the company's board of directors. Once the nomination process is over – whether because the nominee was deemed to be ineligible or was withdrawn, or because the shareholder meeting has occurred – then the nominating shareholder or group member could once again be deemed to be a passive investor, absent any other non-passive intent or effect. If the shareholder was a Schedule 13G filer prior to making the nomination and if following the election it resumed its passivity, then under Rule 13d-1(h) the shareholder would once again be permitted to file on Schedule 13G. In the case of the members of a nominating group whose beneficial ownership collectively exceeded 5% and who thereby became Schedule 13D filers, as and when the members ceased acting in concert, the members could terminate the Schedule 13D filing obligations through an exit filing.

During the course of the nomination process, while the nominating shareholder or group is a Schedule 13D filer, the information required by Schedule 13D would normally not be significantly more burdensome than the disclosure in proposed Schedule 14N, and much of the 13D disclosure could be incorporated by reference to Schedule 14N. The Schedule 13D disclosure would include more details on the nominating group's plans or proposals for the company, specific securities transactions, and relationships and arrangements relating to the company's securities, but there is no reason to deprive other shareholders of the same disclosure that they would receive in the case of another 5% non-passive shareholder. In addition, while Schedule 14N would be required to be amended for material changes, all parties would benefit from the greater clarity associated with Schedule 13D reporting and amendment requirements and practices.

B. Any Schedule 13G Eligibility Carveout Will Inevitably Raise Difficult Interpretive Issues

As proposed, the scope of the Schedule 13G eligibility carveout is not clear. Section III.D.1 of the Proposing Release indicates that the intent is to provide that a nominating shareholder will not lose Schedule 13G eligibility due to "formation of a shareholder group solely for the purpose of nominating one or more directors pursuant to proposed Rule 14a-11, the nomination of one or more directors pursuant to proposed Rule 14a-11, soliciting activities in connection with such a nomination (including soliciting in opposition to a company's nominees), or the election of such a nominee as a director under proposed Rule 14a-11." However, the proposed rule change itself refers broadly to activities "in connection with" a Rule 14a-11 nomination. This could be read much more broadly than the specific list of activities referred to above and could include, for example, negotiations with management about whether the

shareholder will seek to include a Rule 14a-11 nomination and what management would need to do in order to convince the shareholder not to propose a nominee. Many actions that are arguably "in connection with" a nomination may be far from passive, and should not be captured by the carveout.

More broadly, however, we believe that any amendment to Rule 13d-1 to carve out nomination-related activities, no matter how narrowly phrased, will raise difficult interpretive issues and will cause every discussion and interaction between nominating shareholders and management to be subject to analysis as to whether it crosses whatever line is drawn. For example, if the nominating shareholder or group bases its solicitation on a fundamental change in the business or operations of the company, is that conduct exempt notwithstanding that it is far from passive in intent and is clearly trying to "influence" the policies of the Company? In sum, we think it is clear that a shareholder seeking to include a nominee in the company's proxy materials should not get the benefit of an absolute "safe harbor," such that other attempts on its part to influence the company do not result in a loss of Schedule 13G eligibility. Even if the nomination activities do not "solely" result in the loss of Schedule 13G eligibility, it seems clear that the nomination activities should be considered as part of the facts and circumstances relevant to the passivity determination.

Moreover, a shareholder that is nominating and soliciting for a director candidate seems so close to the Schedule 13G passivity line that literally any additional action, such as discussions between the shareholder or group members and management about the perceived governance deficiencies, strategy, etc., or any affiliation between the nominee and the nominating shareholder, would properly raise the concern of loss of Schedule 13G status. In order to be sure that it can obtain the benefit of the Schedule 13G eligibility carveout, a nominating shareholder may therefore be hesitant to participate in mutually beneficial and productive discussions with management of the company, which we assume is not an intended consequence of the proposed carveout. This inevitable complexity in applying and interpreting the carveout supports our recommendation that the Schedule 13G eligibility change should not be made.

C. Eligibility Change Should Not Apply Outside the Rule 14a-11 Context

We agree with the Commission that it would not be feasible to address the Schedule 13G eligibility standards in the context of a proxy access process provided by a company's governing documents or applicable state law. Given that we don't know what the thresholds or requirements would be and whether they would be indicative of a non-passive intent, this would need to remain a facts-and-circumstances test (as we believe it should remain in the Rule 14a-11 context).

D. No Integration of Section 13(d) and Rule 14a-11 Filings

The Proposing Release requests comment on whether the Schedule 13D or 13G and Schedule 14N filings should be integrated. We see no reason for doing so, given that the forms have different purposes and different content. Schedules 13D and 13G are not required to include the various nomination-specific representations and certifications, and Schedule 14N is not required to include detailed information about particular securities transactions. Permitting some shareholders to file only Schedule 13D or 13G, some to file Schedule 14N, and some to make a combined filing would make it more difficult for other shareholders and interested parties to find the relevant information. To the extent that there is overlapping information in a Schedule 14N filing and in a Schedule 13D or 13G, the reporting person could avoid duplicative disclosure by incorporating the Schedule 14N information by reference into the Schedule 13D or Schedule 13G filing.

VIII. Issues under Section 16

We support the Commission's decision to subject nominating shareholders and groups to the same Section 16 analysis as other shareholders and groups. The 10% ownership threshold for Section 16 purposes is significantly above the proposed ownership levels for Rule 14a-11 purposes and would thus not serve as a deterrent for shareholders to utilize the proposed proxy access rule.

We also agree that the Commission should not propose any standards for determination of whether a director nominee is a "deputized director" for Section 16 purposes. The concept of deputization under Section 16 was developed through case law as a matter of statutory interpretation, beginning with the U.S. Supreme Court decision in *Blau v. Lehman*. Understandably, the Commission and its staff have historically been unwilling to interfere through rulemaking with the highly fact-specific analysis set out by case law, and we see no reason to do so here.

IX. Affiliate Status

We do not believe that the Commission should provide a safe harbor from affiliate status for a nominating shareholder without dealing with the issue of affiliate status more broadly. Courts interpreting control status under the securities laws have stressed the broad nature of the inquiry and the importance of focusing on the purpose behind the particular application of the term. As long as the Commission follows the historical practice of leaving the determination of "affiliate" status as a facts-and-circumstances determination in every other context, it should apply the same practice in the shareholder nomination context.

Furthermore, we do not believe that, as practical matter, the proposed Instruction 1 to proposed Rule 14a-11(a) significantly reduces the interpretive analysis necessary to determine

whether a nominating shareholder is an "affiliate." No matter how such a safe harbor is drafted, there will inevitably be interpretive issues around whether the safe harbor applies – it will rarely be clear that a nominating shareholder's relationship with the company is "solely" its nomination and solicitation activities. As discussed above in connection with Schedule 13G status, the nominating shareholder will often have had some discussions with management or other shareholders about its concerns as to strategy or governance matters, and there will often be questions about whether the shareholder has some "relationship" with the nominee (and questions about what constitutes a "relationship" for purposes of the safe harbor). Also, the shareholder, of course, will, by definition, have some level of share ownership that weighs into the control analysis. These questions will entail essentially the same level of inquiry and facts-and-circumstances analysis as a standard assessment of affiliate status. In addition, it seems likely that the existence of this safe harbor may in fact discourage nominating shareholders from participating in potentially fruitful discussions with the company about its overall concerns and observations, for fear of being seen as having taking actions that go beyond "solely" nominating and soliciting for a director candidate.

X. Registered Investment Companies

We believe that the access proposal, as applied to open-end registered investment companies, creates significant issues and could increase costs to fund shareholders without corresponding benefit and result in unwieldy and undesirable board structures.

Registered investment companies have unique features that are not typically present with traditional operating companies. For example, investment company boards must by statute consist of at least 40 percent of directors who are not "interested persons" of the company (as defined in section 2(a)(19) of the Investment Company Act of 1940, as amended). Investment companies that rely on any one of a number of exemptive rules, among other things, must have boards that are comprised of at least 50 percent of directors who are not "interested persons." Many investment companies have, in addition, adopted best practices that require them to have boards that consist of two-thirds or three-quarters of directors who are not "interested persons" of the investment company.

Moreover, Section 16 of the Investment Company Act, in relevant part, provides that investment company directors must be elected by shareholders, except that the board itself can fill vacancies if immediately after filling any such vacancy, at least two-thirds of the directors then holding office shall have been elected by shareholders.

Many open-end investment companies are organized as Maryland corporations, Delaware statutory business trusts or Massachusetts business trusts. These structures typically do not require registered investment companies to hold annual meetings of shareholders.

We question whether the proposed regulatory regime would be appropriate for most open-end investment companies. Many funds, such as money market funds, are held by shareholders on a short-term basis and involve frequent and significant turnover of investors. The long-term continuous ownership feature for access eligibility would not be characteristic of many funds. Similarly, the percentage of ownership interest in a fund would not be an appropriate standard for eligibility to seek access because many of these funds are established for the purpose of liquidity, and the standard measures of ownership are not relevant to the purpose of shareholder access.

Requiring open-end investment companies to hold shareholder meetings when they are not otherwise required could result in significant costs to shareholders. The costs of soliciting shareholder votes of open-end investment companies can be high because many shareholders may redeem their shares after the record date but before the actual meeting date. The Commission should make it clear that registered investment companies that are not required to elect directors at an annual meeting (or special meeting in lieu of an annual meeting) will not be required to hold costly director elections when they would not otherwise be required to do so.

The boards of most open-end investment companies consist of at least a majority of directors who are not "interested persons" of the funds. Those open-end funds that rely on any one of several exemptive rules must commit nomination of new directors to the existing directors who are not "interested persons." Thus, open-end funds enjoy an added layer of independence that the Commission has not addressed in its proposals. We suggest that different access procedures are needed for open-end companies for this reason. Moreover, the proposed rules would require any nominating shareholder or group of shareholders of a registered investment company to represent that its nominee to the board is not an "interested person" of the investment company. Should that representation be incorrect, the consequences could be severe (e.g., invalidity of material contracts). At the very least, the proposed rule should clarify that other shareholders or service providers would not be disadvantaged if a representation regarding the nominee's status as an "interested person" turns out to be incorrect.

Many investment companies are organized as individual corporate entities that exist within a "family of funds" or "fund complex" with common service providers, e.g., investment adviser, principal underwriter and transfer agent. Investment companies within a family of funds typically are structured with "cluster boards" – that is, one board of directors would serve across multiple investment companies. Cluster board structures create many efficiencies, such as concurrent meetings among several or many different investment companies that have similar interests, issues and economies of scale that result from being part of a family of funds. The proposals, if adopted, could have the unintended consequence of forcing one investment company in a family of funds to constitute its board differently from all the others. For example, a family of funds with 25 investment companies may be served by one unitary board consisting of eight directors. Taken to an extreme, if each of those investment companies were required to hold a shareholder meeting to elect a director nominated by shareholders, the family of funds

would then host board meetings attended by 25 new directors, each new director representing only one investment company in the family of funds. These funds boards would then have to meet separately, thereby eliminating any benefit to the "cluster board" structure. Either that, or joint board meetings would become unwieldy, attended by a revolving door of new directors with responsibilities to only one of the funds.

As the Proposing Release notes, some voting rights for some registered investment companies are based upon the net asset value of the shareholder's securities rather than the number of securities. We believe that the proposed rules do not provide adequate guidance as to how they would apply to investment companies in this situation.

Closed-end funds, many of which are traded on securities exchanges, present additional considerations. Shareholder access may be appropriate for certain kinds of closed-end funds, and not appropriate for others. Unlike operating companies, closed-end funds share many characteristics of open-end funds. While many closed-end funds are listed on securities exchanges and are subject to the rules that apply to listed operating companies, many of the regulatory requirements that apply to open-end funds also apply to closed-end funds (e.g., board composition and independence of directors).

We understand the Commission's reluctance to exclude registered investment companies from the shareholder access requirements. Nonetheless, we urge the Commission to recognize the unique role and structure of investment companies — both open-end and closed-end — and that their unique regulatory structure may already satisfy the Commission's concerns. Accordingly, we believe that a one-size-fits-all shareholder access rule as applied to funds would not accomplish the Commission's purposes, for reasons discussed above. We therefore believe that the rules, as currently proposed, should not apply to investment companies, and that the ownership threshold determinations do not address the special concerns of investment companies as stated above.

XI. Conclusion

We commend the Commission for addressing the important corporate governance issue of proxy access in such a comprehensive and thoughtful way. This has been, and continues to be, a difficult and controversial issue for the Commission and the corporate and shareholder communities.

We support the Commission's proposal to eliminate the exclusion for proxy access proposals under Rule 14a-8(i)(8), although we recommend that this be done in a targeted way and in two stages, by first permitting only non-binding proposals in order to give companies time to develop their own workable access regimes before binding proposals are permitted. With the Commission having placed proxy access front and center on the corporate governance agenda,

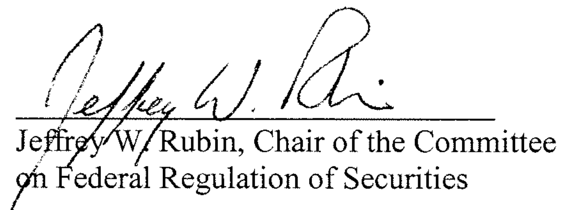
we believe that this will go a long way toward enabling the momentum for creation of proxy access rights to be sustained.

We do not, however, believe that proxy access, because of its complexities, is susceptible to a prescriptive Commission rule, as proposed in Rule 14a-11, and certainly not without great difficulty. In addition, any Commission access rule should have a clear definition of its purpose and should allow companies and their shareholders to tailor an access regime to fit their own circumstances or to decide that proxy access is not right for them. In any event, giving private ordering an opportunity to operate at least through the upcoming proxy season under an amended Rule 14a-8(i)(8) will provide valuable information to better inform the Commission and the corporate and shareholder communities on access issues while furthering the Commission's objectives.

* * *

The Committee appreciates the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the comments and recommendations set forth above. Members of the Committee are available to discuss them should the Commission or the staff so desire.

Respectfully submitted,



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