August 21, 2009
Via e-mail: rule-comments@sec.gov

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

Re: "Facilitating Shareholder Director Nominations"
Securities Exchange Act Release No. 60,089
File No. S7-10-09 (June 10, 2029)

Dear Madame Secretary:

The undersigned are all former members of the Senior Staff of the Securities and Exchange Commission, and are taking this opportunity to comment on the Commission's proposed "proxy access" rule (the "Proposed Rule") as described in the above-referenced release (the "Proposing Release"). We write, of course, in our individual capacities, and not as representatives of the organizations with which we are associated.

This is in the nature of a procedural comment, rather than a comment on the substance of the rule itself. Indeed, the undersigned are not of one view on the substantive merits of the Proposed Rule in general. Some think it is entirely appropriate as a measure suitably designed to provide the owners of an enterprise with greater ability to express their views as owners and to have a voice in directing the enterprise's course of conduct. Others view it as a promising idea that may be premature, that the existing

shareholder proposal processes of Rule 14a-8 (coupled with helpful clarifying statutory language in Delaware) should be given more time to see what evolves in this area. Still others view the Proposal as an ill-advised measure that would unnecessarily threaten to bring the worst elements of political campaigns into corporate elections, and would be ripe for abuse. Yet others believe that the corporate voting process is fundamentally flawed by reason of the separation between "record" and "beneficial" ownership, the process of stock loans and short sales, and the corresponding frequency of undervotes, overvotes and other consequences that make the voting mechanism wholly unreliable; as a result of those concerns, they are fearful of putting even more weight on a structure that is unreliable. We also have clients who have each of these views (and others) and in some instances have helped clients craft comment letters expressing their substantive views. As a group, we take no position.

We are, however, concerned that at this particular juncture in its history, it may be a mistake for the Commission to divert its scarce resources to these matters. We are, however, concerned that at this particular juncture in its history, it would be a mistake for the Commission to divert its resources to these matters. Simply put, there are far more important regulatory matters on its agenda. A recent study that we have seen identified no fewer than 25 such initiatives currently announced, under way, or identified in pending legislative proposals. We highlight just a few examples of the regulatory items that are more immediate.

- The Commission has already recognized its obvious need to strengthen and reformat its processes of inspection and examination.
- Under its new Director of the Division of Enforcement, Rob Khuzami, the Commission has committed to a revamping of the Enforcement Division.
- The Commission is seeking, legitimately, greater oversight responsibilities with respect to hedge funds, private equity funds, and venture capital funds (and asking for increased resources to discharge those responsibilities).
- The commission is seeking, legitimately, greater authority to regulate securities-related derivatives markets. Developing a regulatory program, including examination and surveillance functions, for securities-related derivatives will be an extraordinarily complex and time-consuming responsibility.
- The Commission is proposing expanded oversight of the municipal debt market, another complex and resource-intensive priority.

All of these are important. They will, however, inevitably absorb resources of the Commission, and as with all new initiatives, they will absorb a disproportionate amount of the management resources available to the Commission. They will also impose demands on the one resource of the Commission that cannot be expanded, the time of the Chairman and Commissioners.

Importantly, each of these subjects is of far more immediate concern to the SEC than proxy access. Proxy access is a regulatory problem that the Commission has labored to address for virtually the entire history of the Commission. As the proposing release notes, the Commission has considered the problem in virtually every decade, in 1942, 1977, 1980, 1992, 2003, 2007, and last year, in 2008. On each occasion the Commission began with bold proposals to fundamentally revamp the process and concluded with modest actions that, frankly, accomplished little. This disappointing history is not a criticism of past Commissions. Rather it demonstrates that the problem is complex and the Commission's legal authority to act in this area is limited. The substance of corporate governance remains a matter of State, not Federal, law. Absent Congressional action to dramatically alter the Federal / State landscape (which this group does not necessarily endorse), the SEC will never have the ability to change the governance of corporations meaningfully.

In the past two years, the SEC has been subject to virtually unprecedented criticism of its performance; from the Congress, from the public, and from the industry it regulates. It is critical that the SEC regain the public's trust and respect. To achieve this, the Commission must focus on the most important issues. Similarly, the Commission must regain the respect of the appellate courts. For most if its history, the SEC has been well-respected by the judiciary and has benefited from judicial deference when its actions were subjected to challenge and appellate review. In recent years, the SEC has suffered several highly publicized defeats in the appellate courts. Judicial reversal of controversial SEC actions has damaged the regulatory credibility of the SEC. Given the limited legal authority of the SEC in the area of corporate governance, it is entirely possible that any final rulemaking in this area will be challenged in the courts. At best, it will be a time-consuming distraction at a time when the Commission must remain focused. At worst, it will result in yet another appellate rebuke of the Commission and a deterioration of the Commission's standing.

More important in this context than anything else, however, is that, even if a final rule were to be adopted and survive appellate review, implementation and interpretation of the rule will require very substantial staff resources. Questions of access to the proxy statement have historically proven to be among the most contentious with which the very able staff of the Commission has had to deal. One need only consider the experience with Rule 14a-8 to be aware of that fact, and it will inevitably be true that questions surrounding access to the process for nominating directors, and the resultant election process itself, will be far more difficult, and often more contentious, than Rule 14a-8 contests have been. Those difficulties will inevitably drain Commission resources to an extraordinary degree. These processes are inherently difficult to interpret and to administer. Moreover, and to a greater degree than is true with respect to 14a-8 proposals, election contests tend to arouse passions and the Commission—more accurately, the staff of the Division of Corporation Finance—becomes the referee in the ring trying to keep the discourse on a rational level.

Indeed, the proposing release itself suggests the nature of the issues with which the Commission will be faced and that it will need to resolve. The sheer length of the Proposed Rule suggests the administrative difficulties that it will generate. At this early stage one thing is clear: assuming a rule in the order of the Proposed Rule is adopted, that rule will not operate smoothly. Rather, the Commission will find itself having to address difficult issues about which opposing parties, both before the Commission, feel strongly. In most issues addressed by the staff—outside of the proxy rules—the Commission itself *is* the adverse party—a public company registrant, or a regulated entity, seeks to take some action that is arguably prohibited by the relevant rules. If the Commission (or the staff with delegated authority) permits the action to be taken, there is no aggrieved party appearing before the Commission to complain. In issues involving proxies, however, as the history of Rule 14a-8 clearly demonstrates, there is normally a party opposed to whatever decision the Commission makes, and often that leads to disputes and the resolution of those disputes, often through litigation. Thus, not only is the Commission staff required to devote resources to the analyses of the issues presented in a given case, it will also in some significant portion of those cases be out to the burden of defending its initial decision.

Under Chairman Schapiro's very able leadership, the Commission has embarked on a substantial agenda of reform. In response to the financial crisis in which the country now finds itself, additional duties will be assigned to the Commission, and we do not yet know the nature of those duties or the nature of the demands they will make on the staff. We do know that they will be very substantial, surpassing in the resources required even the very difficult period following the adoption of the Sarbanes-Oxley Act of 2002. In the face of those demands, we would strongly urge that the Commission defer action on the Proposed Rule at this time.

Additionally, there is value in waiting with regard to this issue simply because there has been movement on other fronts—most notably including the State of Delaware—in recent periods, and it may well be that allowing the current processes to develop will alleviate the problem without the need for relatively heavy-handed federal regulation.[1]

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[1] As Damon Silvers of the AFL–CIO noted in "Securities and Exchange Commission: Restoring the Capital Markets Regulator and Responding to Crisis, in CENTER FOR AMERICAN PROGRESS ACTION FUND, "Change for America: A Progressive Blueprint for the 44th President," 188 – 203 at 195:

> "While either approach [a mandatory proxy access system or raising proxy access through the shareholder proposal process of Rule 14a-8] is technically feasible, investor opinion seems to have shifted toward the approach of opening up the shareholder proposal process, which allows for more diversity in approaches among companies. . . . [T]his is the direction the next chair should take."

It may be that in a calmer time, when there is less of a crisis atmosphere, the Proposed Rule will appear reasonable and beneficial. It may not. But in the current environment, it cannot be sensible to strain the Commission's resources even more than they are already.

Yours sincerely,

Roger D. Blanc	Alan Dye
James R. Doty	Jonathan Katz
Marty Dunn	Simon M. Lorne
Carrie E. Dwyer	David B.H. Martin

cc: The Hon. Mary L. Schapiro, Chairman
The Hon. Kathleen L. Casey
The Hon. Elisse B. Walter
The Hon. Luis A. Aguilar
The Hon. Troy A. Paredes