**United States of America**
**Securities and Exchange Commission**

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| **Facilitating Shareholder Director Nominations** | ) | **SEC Release Nos. 33-9046, 34-60089, and IC-28765<br>File No. S7-10-09** |

## Comments of the Edison Electric Institute

## I. Introduction

The Edison Electric Institute ("EEI") appreciates the opportunity to comment on the Securities and Exchange Commission's (the "Commission's") proposed rule amendments (the "rule changes") regarding shareholder nominations for directors under the Securities Exchange Act of 1934 (the "Exchange Act"). The Commission published the proposed rule changes at 4 Fed. Reg. 29026 on June 18, 2009, and invited comments.

EEI is the association of the United States shareholder-owned electric companies, international affiliates, and industry associates worldwide. Our U.S. members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry, and 70 percent of all electricity utility ultimate customers in the nation, and generate almost 60 percent of the electricity produced in the United States.

EEI supports improvement of the director election process. However, we believe that the regulation of corporate governance falls outside the Commission's purview under the Exchange Act and are concerned that the proposed rule changes may result in unnecessarily disruptive elections.

The following comments will further detail EEI's concerns with the Commission's proposed rule changes and a number of suggested alternatives.

## II. EEI Comments on the Commission's Proposals

### A. The Proposed Rules Unnecessarily Preempt State Law and Corporate Prerogatives

We view the primary role of the Exchange Act as providing investors accurate and timely information regarding companies. As the legislative history of the Exchange Act makes clear, the Exchange Act was not intended to substantively regulate corporate affairs. Rather, for the last seventy-five years that has been left to individual states and stock exchanges, and it is no coincidence that during that period the U.S. has developed many of the leading companies and the premier capital market in the world.

The proposed rule changes significantly modify this long-standing framework. They impose on companies an obligation to include within their proxy statements, and on their proxy cards, nominees who the boards of directors have not, in the exercise of their fiduciary duties, thought should be included.

We believe that investors would be better served by letting the individual states and stock exchanges enhance their requirements in response to traditional free market forces. Several states already are doing that -- e.g., Delaware -- and we believe that continuation of that process over time will provide appropriate improvements.

### B. The Access Thresholds Contained in the Proposed Rule are Too Low

Proposed Rule 14a-11 provides that shareholders who beneficially own as little as 1% (for large accelerated filers) or 3% (for accelerated filers) of a company's outstanding equity securities may have their nominees included in the company's proxy materials. For the reasons set forth below, EEI believes that these thresholds are too low.

Under Rule 14a-8, EEI members routinely receive proposals from shareholders who fairly are described as "single interest" shareholders and who often do not reflect the views or best interests of a company's overall shareholder base. Responding to these proposals is time consuming and costly for EEI's members and distracts management from its core duties. Because the thresholds contained in the proposed rules are so low, EEI believes that they would enable "single interest" shareholders to request that their, presumably "single interest," nominees be included in a member's proxy materials.

A company and its directors have a fiduciary duty to take seriously any challenge to its nominees. For planning purposes, a company has to assume that RiskMetrics and the other proxy advisory firms will recommend against the company's nominees and in favor of the shareholders' nominees. This assumption is necessary because a company will not know what the firms' recommendations are until after its own proxy materials are distributed and shortly before the scheduled meeting date. As a consequence, the mere presence of a shareholder nominee in a company's proxy materials will require the company to expend both time and money in preparation for a significant proxy solicitation effort. EEI believes that this cost is an unfair burden to impose on a company and its collective shareholders where a nominee has been supported by only 1% or 3%, as the case may, of the company's securities.

There is no objective standard for the determination of the perfect thresholds, but EEI believes that the thresholds should be much higher, and advocates 5% (where an individual shareholder is nominating the candidate) and 10% (where a group of shareholders are nominating the candidate) as appropriate. For a credible candidate, these thresholds are eminently achievable; for other candidates, they will lessen the chance that company resources will be expended unnecessarily.

### C. Nominees Must Meet Reasonable Qualifications

Many companies have concluded that their shareholders are best served by directors meeting certain qualifications. For instance, many nominate only individuals who are independent or who do not have any potential conflicts of interest. These requirements are intended to benefit shareholders as a whole and should be encouraged.

Where a company has director qualifications in its bylaws or other governing documents and applies the qualifications on a nondiscriminatory basis, shareholder nominees should be required to meet those qualifications as well. These would include requirements for share ownership, director retirement age or term limits, compliance with corporate policies and codes of conduct, and response to D&O questionnaires.

We urge the Commission to include this concept in any final rules.

### D. Shareholder Nominees Should Count Against the Cap Even if Endorsed

It is unclear under the proposed rule changes what happens if a shareholder nominee ultimately is endorsed by a company. This could occur following negotiations between the nominee and the company, and should be encouraged, not discouraged. The proposed rule needs to be revised to clarify that a shareholder nominee continues to count toward the proposed "cap" despite being endorsed, or not opposed, by the company. In addition, should a shareholder nominee desire to stand for reelection, that nominee should continue to count against the cap, at least for several election cycles, even if again endorsed. Otherwise, companies will be forced to propose an alternative to that nominee and require a qualifying shareholder to reinitiate the nomination process. This consequence seems disruptive both to the functioning of the board, given the potential (and needless) acrimony associated with such a chain of events, and to the deliberation of longer-term corporate planning and strategy, given the potential for a succession of single-termed directors.

## III. <u>Conclusion</u>

In summary, while we support the improvement of the director election process, we believe the changes in corporate governance are best left to individual states and the stock exchanges and that the proposed rule changes will cause undue disruption in the director election process. If the Commission determines that some form of the proposed rule changes are necessary, we would request the

Commission consider the alternatives discussed above in order to minimize any adverse impact.

If the Commission has any questions about these comments, please contact either me or Richard McMahon at (202) 508-5571. Thank you.

Respectfully submitted,

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August 31, 2009

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