January 19, 2010

Re: File No. S7-10-09
Release No. 34-61161
Facilitating Shareholder Director Nominations

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Ms. Murphy:

In Commission Release No. 34-61161, the Commission re-opened the comment period with regard to its proposals to amend the federal proxy rules set forth in its Release No. 34-60089 (the "proxy access proposal"). The Society of Corporate Secretaries & Governance Professionals (the "Society"), a professional association, founded in 1946, with over 3,100 members who serve more than 2,000 companies, appreciates the opportunity to respond to the Commission's request for additional comments with regard to this proposal.

We are providing this letter to the Commission for two purposes: 1) to submit data on the share ownership of S&P 500 companies by hedge funds and to elaborate on why some of these funds are likely to benefit disproportionately from the proposed rule to the detriment of other stockholders, and 2) to provide survey data from our membership regarding the likely use of an opt-out procedure and to underscore the Society's support for an opt-out provision that would allow shareholders and companies to determine the best proxy access procedure given each company's unique facts and circumstances.

I. Hedge Fund Ownership Data

We are concerned that the proposed rule will make it much easier for certain activist hedge funds to influence companies to adopt strategies that are not in the long-term interest of stockholders. While not all hedge funds are the same, many hedge funds seek to direct the operations of a company with a view to short-term profitability or otherwise to the detriment of the long-term interest of companies and their shareholders. Typically, such "activist" hedge funds and private equity funds "push for changes the activists believe will boost the stock's value in the short-term." *See* "Short Term Shareholder Activists Degrade Creditworthiness of Rated Companies," Moody's Investors Service: Global Credit Research (June 2007) (the "Moody's Report"). For example, as the Moody's Report notes, short-term shareholder activists pressure companies to adopt increases in share buy-back programs or declare special dividends, often resulting in a downgrade of the company's credit ratings. Such hedge funds currently use proxy contests, or the threat of proxy contests, to effect these changes. The proxy access rule will rule make it significantly easier and cheaper for them to target companies, which will likely increase the number of companies that they target.

Based on data from Bloomberg using a conservative view of the definition of "hedge fund," the current hedge fund ownership of the S&P 500 is as follows:

- Average hedge fund ownership 7.15%
- Number of companies with hedge fund ownership at or above 5% 273
- Number of companies with hedge fund ownership at or above 10% 104[1]

These data show that even at ownership thresholds of 5%, a substantial percentage of large cap companies could be subject to more frequent contested elections at a significantly lower cost. Moreover, given their relatively smaller capitalization, small and mid-cap companies would be particularly vulnerable to an activist hedge fund with a narrow agenda.

The potential unintended consequences that could flow from the proposed rule are not necessarily cured by the safeguard of a company having in place even the most diligent board of directors. Companies and their ongoing shareholders bear significant costs when a company faces a potential election cost from a sophisticated, activist hedge fund. These costs include (i) potentially millions of dollars in direct legal, proxy solicitation, public relations, and investment banking fees, (ii) the loss of shareholder value due to harm to reputation among the public and investors; and, perhaps most importantly, (iii) even greater opportunity costs due to the time and attention that a contest waged by a sophisticated hedge fund can divert from a board pursuing important strategic and operational opportunities. A board of directors, acting in the faithful exercise of its fiduciary duties, could very reasonably conclude that it would be in the company's best interest to accede to some or all of the demands of a hedge fund (even if agreeing to those demands cause a substantial loss of shareholder value), rather than face potentially greater lost value that could occur due to a contested election as a result of proxy access. [2]

Further, these are costs are likely to be asymmetrical as between a large company and a sophisticated, activist hedge fund. A company may face much greater direct and opportunity costs than a hedge fund that is a geared up for conducting a director election contest as part of its

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1 Statistics based on public institutional ownership data for July - September 2009, via Bloomberg LP.

2 For example, in the fall of 2003, the investment firm Thomas H. Lee Partners ("THL") purchased Simmons Bedding Company. A year later, in December 2004, Simmons issued debt to repay THL a special dividend of $137 million. By November 2009, the company filed for bankruptcy as a result of debt incurred for the THL acquisition and the special dividends to THL. In total, THL recouped its initial investment and made an additional $77 million in profit in the form of special dividends and fees. *See* "Profits for Buyout Firms as Company Debt Soared," New York Times (Oct. 5, 2009). Similarly, William Ackman, the founder of Pershing Square Capital Management LP, recently pressed Target Corp. to implement a real estate lease-back program and launched a proxy contest when Target's management rejected the proposal. At the time of the proxy contest, Pershing Square Capital Management LP held 7.8%, and had held between 7.8% and 9.7% for at least eighteen months preceding the proxy contest. If the proxy access rule as proposed was in effect at the time of the proxy contest, William Ackman could have used the rule to pressure Target to make changes to its board of directors – even though shareholders in this case ultimately rejected the board slate put forth by Ackman. *See* "New Law Gives Shareholders More Power," *BusinessWeek* (July 30, 2009). Similarly, Pershing Square Capital Management LP was able to pressure McDonald's Corp. to sell 1,500 company-owned restaurants and buy back $1 billion in stock while owning 4.9% of the company. *See* "Attack of the Hungry Hedge Funds," *BusinessWeek* (Feb. 20, 2006). Recently, Genzyme Corp. named a director to its board after pressure from Relational Investors LLC, despite the hedge fund owning only 2.6% of Genzyme. *See* "Genzyme Names Director After Hedge-Fund Pressure," *The Wall Street Journal* (Dec. 10, 2009). Each of these activist funds would have fit within the ownership threshold as proposed in the proxy access rule, and could have used the rule as an additional means to pressure the company.

ongoing strategy and that has a relatively small investment in a company. The proposed proxy access rule simply tilts the scale further in favor of activist hedge funds.

Nor are these concerns effectively addressed through the proposed stock ownership and holding requirements. The Moody's Report explains that shareholder activists often hold their shares for up to 24 months, increasing their ownership stakes over time. At most, the requirements in proposed Rule 14a-11 may simply require hedge funds to hold their positions slightly longer, or align themselves with additional like-minded activists, *before* striking. They would do nothing to discourage the hedge funds from pursuing short-term strategies when they decide to threaten a contest. Nor would they lessen the losses that may occur at any company that is targeted by an activist hedge fund.

Thus, proposed Rule 14a-11 could subject an inappropriately large number of public companies to significant additional pressure by short-term investors seeking immediate or near-term actions that are not necessarily in the long-term interests of all shareholders. Proxy access thereby gives one more tool to those who do not need it, to potential the detriment of shareholders at large.

II. An Opt-out Should Be Available to Companies and their Shareholders

As we said in our earlier letter, the Society strongly believes that companies and their shareholders should have the ability to develop and implement a proxy access approach that is tailored to the particular company's existing state law, classes of stock, board size and structure. An opt-out from proposed Rule 14a-11 would allow shareholder choice (aka "private ordering") on whether or not a proxy access right is desirable at a company, and if so, under what circumstances and with what process. Moreover, a survey conducted by the Society of its member companies shows that, if available, a large majority--approximately two-thirds--would seek to implement an opt-out from the proposed rule.

Some institutions have argued that private ordering would be burdensome, costly and complex for shareholders, particularly those institutions with portfolios of thousands of companies. This argument misses the point for several reasons. First, other than some activist investors who have a particular agenda that they seek to impose broadly on companies, most responsible, long-term institutional stockholders are unlikely to propose director candidates at large numbers of companies at once. Therefore, it would not be too burdensome for the investor to understand the access process at a particular company at which it seeks to nominate a director. Indeed, this should be a small part of the information one would need to understand about a company before recommending a candidate.

Furthermore, if a shareholder did intend to nominate many directors at many companies, this would be yet another unintended and unwelcome consequence of Rule 14a-11 and individual "privately ordered" shareholder approved schemes would help deter such investors from launching campaigns at many companies at once. Finally, the argument against opt-outs fails to take into account that, it is quite likely that a few different basic models of proxy access would emerge through private ordering. Some degree of standardization is likely to come about through a dialogue over time between major stockholders and companies, as well as through the standards set by proxy advisory firms. This was the case in the closely aligned area of majority-vote standards, where a few basic approaches have emerged. For these reasons, the argument against the complexity of opt-outs not only fails, but also supports the proposition that an opt-out should be available under any mandatory federal scheme.

We thank you for the opportunity to submit this additional comment letter.

Respectfully submitted,

Darla C. Stuckey

The Society of Corporate Secretaries & Governance Professionals

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