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VIA EMAIL: rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

File No. S7-10-09: Proposed Rules on Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

I am the Executive Vice President, Chief Legal Officer and Secretary of Assurant, Inc., a diversified insurance company with shares listed on the New York Stock Exchange. For 32 years, my practice has involved the representation of public companies in securities, disclosure and corporate governance matters, among other things; for the past 17 years, I have been a senior legal officer of such companies.[1] I write to comment on the proposed proxy access rules.

A. The Proposed Rule 14a-8 Amendments Are Appropriate and Would Allow Shareholders to Adopt Their Own Proxy-Access By-Laws.

The proposed amendment of Rule 14a-8 would appropriately advance the goal of opening new avenues for shareholders to nominate director candidates and requiring issuers to include their nominees' names on the issuers' proxy cards and information about their nominees in the issuers' proxy statements in appropriate circumstances. The adoption of proposed Rule 14a-8 amendments would advance shareholders' rights in this area, while wisely continuing to maintain an appropriate role for private ordering by individual company action and for state law.

[1] I am also the General Editor and a principal author of CORPORATE GOVERNANCE: LAW AND PRACTICE (Lexis/Nexis Matthew Bender, 2005, two volumes, with annual updates)

It would also obviate any need for the adoption of proposed new Rule 14a-11, which raises a number of issues, some of which are discussed below.

B. If the Commission Were to Adopt Proposed Rule 14a-11, the Text Should Be Adjusted to Avoid Unintended Consequences That Would Undermine the Interests of Shareholders.

If, however, the Commission were to adopt some version of the proposed new Rule 14a-11, several adjustments should be made to avoid unintended consequences that would undermine the interests of shareholders. The following changes would not in any way hinder proxy access generally, but they would promote the continued orderly governance of public companies and prevent special interest shareholders that do not represent the broad shareholder base from misusing the new rules for their own private purposes:

- Allow Shareholders, by Majority Vote, to Adopt Conditions or Procedural Protections. Rather than making the federal rule the single and invariable proxy-access procedure for all U.S. public companies, the Commission should allow companies, by a majority of the shares voted, to adopt different conditions and requirements (including any of those protections proposed below if the Commission were to proceed with federal rule-making without incorporating them in the final rule).

- Allow the Board's Independent Nominating and Corporate Governance Committee (or, in the Case of NASDAQ-Listed Companies with No Such Committees, the Board's Independent Directors) to Interview and Comment on (But Not to Veto) Any Shareholder Nominees. Shareholder nominees should be required to submit to an interview by the same independent directors who are responsible for board nominations generally (the Nominating/Corporate Governance Committee in the case of NYSE-listed companies and either the nominations committee or the independent directors as a group in the case of NASDAQ-listed companies). The important purpose of such an interview would be to allow such independent directors to form an opinion on the proposed nominees, which might be based on a variety of tangible and intangible factors beyond those that can be assessed solely on the basis of the information included in the proposed Schedule 14N. Independent directors should not have a veto right, but they should have the same opportunity to interview director candidates they would have in the case of company-nominated candidates, and a chance to express their views to the shareholders. The timetable for such an interview could easily be accommodated within, and fit into, the proposed timetable set forth by the proposed rule.

- Increase the Ownership Threshold for Nominations for Large Accelerated Filers from One Percent (as recommended) to Five Percent. The proposed ownership threshold of one percent for large accelerated filers and registered investment companies with net assets of $700 million or more is so low that it will encourage special-interest holders to run their candidates – or, as one of my previous clients experienced with shareholder proposals promulgated by special interest shareholders, to offer to withdraw their nominations if the issuer accedes to unrelated demands.[2] If the Commission proceeds

[2] The number of companies that would immediately be faced with such risks is high. According to the Staff's own analysis, over 99 percent of all large accelerated filers, for example, currently have at least one shareholder that

with federal substantive rulemaking in this area, it should restore the more appropriate threshold of five percent ownership included in its 2003 proxy-access proposal.

- Restore the Independence Requirement from the 2003 Proposal, and Require Nominees to Meet All of the Company's Independence Standards (Not Just the NYSE Objective Standards) and to Make Other Independence Disclosures. Implicitly recognizing the universal corporate law principle that directors have a duty to serve the interests of *all* shareholders, rather than the special interests of any one of them, the 2003 proposal wisely would have precluded the nomination of nominees who (or whose family members) have been employed during the then-current or immediately preceding calendar year by a nominee that is an entity or by a member of a nominating security holder group. If the Commission were to adopt proposed Rule 14a-11, something along these lines should be included, but the precluded employment affiliations should not be limited to nominating shareholders that are entities. Such provisions are important to ensure the independence of nominees from special-interest shareholder groups. Also, in addition to making the disclosures in Schedule 14N specified under proposed Rule 14a-18, the nominating shareholder should be required to disclose all business, economic or other relationships or affiliations between the nominee and (a) the nominating shareholder or group or the nominee (b) other shareholders, (c) prospective investors or groups, and (d) any other constituent with any existing or expected relationship with the company (*e.g.*, labor unions and social advocacy groups).

- Replace the Proposed First-in-Time Regime with One that Gives Nominating Priority to Larger Shareholders. The proposed first-in standard would encourage special-interest holders to submit nominations at the earliest possible moment, thus creating a "race to the proxy statement." A more rational and representative procedure would allocate the number of slots available for shareholder nomination according to the respective ownership stakes of competing nominating shareholders.

- Clarify That the SEC Will Enforce the "Substantially Implemented" Exception to Rule 14a-8 to Deter Sequential Filing of Shareholder-Access Proposals.

  While shareholders should have opportunity to make proxy-access proposals, subject to appropriate protections for the company and other shareholders, it is important not to encourage duplicative proposals year after year that may vary in only limited respects. For example, if a company were to implement a proxy-access by-law with a two-percent ownership threshold, it would not be appropriate for a shareholder to make a proxy-access proposal with a one-percent threshold the following year. Similarly, if the Commission were to adopt proposed Rule 14a-11, a proposed by-law provision with slightly less stringent ownership or procedural requirements would not be a proper subject for shareholder action. While companies can always seek no-action relief for such duplicative proposals under Rule 14a-8(i), Question 9, Paragraph (10), to avoid confusion and to obviate the need for companies to go to the trouble and expense of

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would qualify under the one-percent threshold test, and an even larger number have two or more shareholders that have held at least 0.5 percent of voting securities over the holding period and therefore could easily aggregate their holdings to meet the threshold.

making no-action requests in a situation when the principle should be clear it would be helpful and appropriate for the Commission to address this point in its adopting release.

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I would be please to discuss these comments with the Staff and to answer any questions. You can reach me during business hours at (212) 859-7063.

Respectfully submitted,

Bart Schwartz