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August 23, 2010

The Honorable Mary Schapiro
*Chairman*
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: **Proposed Rule: Facilitating Shareholder Director Nominations**

Dear Chairman Schapiro:

I am writing this letter in anticipation of the SEC's meeting on August 25, 2010 to consider adoption of a federal proxy access rule. Over the last year and a half I have appreciated your willingness to meet with leaders of the business community and many of the actions you have already taken and are undertaking to ensure the stability of our financial markets and address some fundamental issues in the proxy voting system. However, unlike many of the actions the SEC has already implemented to provide greater disclosure to shareholders and ensure stability to the financial markets, I remain genuinely concerned that a proxy access rule would:

- encourage shareholders with a short term focus to mount proxy campaigns;
- encourage single interest shareholders to mount annual political and policy campaigns against the company by seeking a place on the Board;
- inappropriately affect the quality, diversity and competency of the Board; and
- divert company resources from focusing on increasing shareholder value for all shareholders over the long term.

**Background**

With our recent acquisition of Affiliated Computer Services, Xerox is now a $22 billion (2010) technology and services enterprise and a leader in the global document and business process services markets. We currently have over 135,000 employees and approximately 44,000 registered shareholders. We are keenly aware that we are accountable to our shareholders and we strive to maintain a constructive, ongoing dialogue with our shareholders. At Xerox, we have taken a number of steps to enhance communication with shareholders and ensure that their voices are heard, including the following:

- We annually publish our Global Citizenship Report, which discusses our corporate social responsibility principles, policies and practices, including governance and ethics, customer privacy and satisfaction, employee diversity and development and environmental sustainability initiatives;
- We maintain a website (www.xerox.com), where we post extensive information about Xerox, including our certificate of incorporation, by-laws, ethics and human rights policies, corporate governance documents, management and director biographies, environmental information and much more;
- We annually meet face to face with shareholders that represent at least 75% of our outstanding shares and we meet quarterly with our five largest shareholders;
- We conduct regular shareholder surveys;

- We hold regular investor conferences; and
- Shareholders have access to independent directors via direct access to the chairman of our Corporate Governance Committee.

There is strong evidence that our shareholders believe they currently have an adequate voice in director elections, as 87.37% of our outstanding shares were voted at our May 2010 annual meeting of shareholders and each of our director nominees received at least 88% of the votes cast for his/her election (6 of 9 directors received over 98% of the votes cast for his/her election). Further, over the course of many years, we have received very few shareholder recommendations for director nominees.

In addition to enhanced communication opportunities, our shareholders have numerous safeguards to ensure that their voices are heard, including the following:

a. Xerox does not have a classified Board and instead provides for annual elections of directors;
b. There is majority voting for directors in uncontested elections;
c. Our shareholders have the right to recommend candidates for nomination as directors, which are evaluated by our Corporate Governance Committee;
d. Our Corporate Governance Guidelines require that a substantial majority of the Board should consist of independent directors and our Board is currently 88% independent (8 of 9 directors are independent);
e. We have a lead independent director;
f. Our directors meet in executive session, without management representatives, at every regular board meeting;
g. We routinely receive shareholder proposals under Rule 14a-8(i)(8) and actively engage with the proponents in an attempt to arrive at a mutually acceptable resolution of the issues presented;
h. We have never failed to adopt a shareholder proposal that was approved by a majority of our company's shareholders;
i. Our Corporate Governance Committee, composed entirely of independent directors, selects and nominates only the most qualified directors with the highest level of integrity, independence of judgment, diversity, and willingness to devote adequate time and effort to Board responsibilities, as well as the particular skills, expertise and experience necessary to guide Xerox forward; and
j. Shareholders may communicate with non-management directors by directly contacting the chairman of the Corporate Governance Committee.

These opportunities for dialogue, as well as the related structural safeguards, are effective tools for ensuring that shareholder concerns are both heard and appropriately addressed. In light of our experience at Xerox, and for the reasons discussed above, I do not believe that a mandatory, universal "one size fits all" proxy access system is necessary or appropriate. I urge the Commission to refrain from adopting a federal proxy access system.

## A. Federal Proxy Access

As I have explained in this first part of this letter, I do not believe that a mandatory, federal "one size fits all" proxy access system is necessary or appropriate. To the extent, however, that the Commission decides to adopt a federal proxy access rule as proposed in Release Nos. 33-9046, 34-60089, IC-28765 (June 10, 2009), I believe it is absolutely essential that the rule be workable and adequately balance the attendant costs and potential unintended consequences against the potential benefits and protect the interests of ***all*** shareholders to the greatest extent possible.

***1. The proposed ownership requirements need to be revised to ensure that proposing shareholders have a significant, long-term interest in the Corporation – both before and after submitting a director***

***nominee – to justify the considerable cost and disruption to the corporation and the other shareholders of proxy contests.***

*(a) Raise the minimum ownership threshold of large accelerated filers to at least 5% for shareholders acting alone and 10%, aggregated, for shareholders acting in concert.*

In recognition of the cost and disruption to companies faced with a contested election, I believe that it would be better to create thresholds designed to ensure a minimum level of *broad-based* support for director nominees nominated in reliance on Rule 14a-11. Accordingly, I believe that the minimum ownership percentage thresholds for large accelerated filers should be raised to at least 5% for shareholders acting alone and 10% in the aggregate for shareholders acting in concert (though no one shareholder should be permitted to be a part of more than one group of nominating shareholders). These higher thresholds would ensure that a reasonably significant percentage of shareholders is supporting a Rule 14a-11 nominee and would provide the appropriate balance to protect against Rule 14a-11 proxy contests that place significant cost burdens on other shareholders while having little chance of actual success.

*(b) Raise the minimum required holding period to two or three years.*

Proposed Rule 14a-11 would require the minimum ownership position to have been held for a minimum of one year. I believe that the proposed one year holding period is too short and fails to meet the Commission's stated desire that "only holders of a significant, long-term interest in a company be able to rely on Rule 14a-11." Accordingly, I believe that a two or three year holding period would be a more appropriate indication of long-term interest to trigger the significant entitlement to have nominees included in a corporation's proxy statement.

*(c) Require that the minimum ownership be of a net long position and disclosure of all positions.*

The Commission's recent action against Perry Corp. illustrates that shareholders have in the past amassed significant voting stakes in companies, while at the same time hedging the financial exposure from such ownership, for the sole purpose of influencing specific shareholder votes.[1] Given the demonstrated ease and effectiveness of this practice, shareholders can be expected to replicate this in the future and the Commission should act to provide sufficient assurance that this practice will not distort the director election process.

In order to ensure that proposing shareholders in fact have a true, long-term interest, the Commission should require that each nominating shareholder represent that it has not hedged or otherwise divested itself of economic interest in the requisite shares during the holding period. Additionally, the Commission should require that each nominating shareholder disclose its *total* position in the corporation's stock rather than just long positions. Disclosure should also be required of any arrangement that affects the proponent's voting or economic rights. Given the possibility of the de-coupling of economic interests from voting rights, other shareholders need to be aware of this information about the proponent in order to have a clear and complete understanding of each nominating shareholder's interest in the corporation.

*(d) Require that the minimum shareholding be held for a period after a Schedule 14N is filed.*

Any rule should protect a corporation and its shareholders from the election of directors with a "single issue" interest or goal. Therefore, any Rule should require each nominating shareholder to continue to hold the corporation's securities for some minimum period beyond election if its nominee is elected – such as the initial term of service of the director (*i.e.*, one year for a director elected annually, or three years for a director on a classified board). A holding requirement beyond election would discourage the nomination of "special interest" directors who would focus on single issues and not the broader, long-term interests of the corporation.

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[1] *In the Matter of Perry Corp.*, Securities Exchange Act of 1934 Release 60351, July 21, 2009.

***2. The "first in" rule has significant shortcomings that need to be addressed.***

*(a) When multiple nominations can claim "first in" status, priority should be given to shareholders who have held shares for the longest continuous period of time*

Any rule should give priority to nominating shareholders according to the order in which nominations are received. For a corporation with no defined start date for the Rule 14a-11 nomination period, shareholders would be able send in nominations at a time arbitrarily far in advance of the meeting to "lock in" their nomination right, which may not be in the best interests of all shareholders. For a corporation with a defined start date for the nomination period, the "first in" priority approach will likely result in multiple nominations being received by the corporation on the start date, and, due to the uncertain process of determining time of "receipt", it may well be impossible for a corporation to determine which nomination was actually the "first in" for purposes of Rule 14a-11. To address this significant issue, I believe that the Commission should grant priority to the shareholders who have held the corporation's shares for the longest continuous period of time.

*(b) If the "first in" nomination is later withdrawn, the "second in" nomination cannot step into its place because there would be insufficient time to process the second nomination.*

Any proposed rule should be sufficiently clear as to whether the elimination or withdrawal of the "first in" nomination would cause the "second in" nomination, which would otherwise be ineligible, to later become eligible. We believe that the answer must be that withdrawal of a "first in" nomination would not then allow the "second in" nomination to become eligible for "first in" status under Rule 14a-11. As a purely practical matter, the timing provisions of the rule would not allow for multiple successive elimination processes to occur in a single proxy season – once a corporation has gone through the process of confirming with the Commission staff that a nominee can be excluded, there would be insufficient time to evaluate and, if necessary, raise eligibility issues with the Commission about the next candidate.

***3. Absence of a role for the board nominating or governance committee presents significant concerns and may result in the election of special interest directors.***

The absence of a prescribed role for the independent nominating or governance committee in a Rule 14a-11 contest could adversely impact the diversity, quality and overall composition of a corporation's board and serve to promote special interest directors who may not necessarily represent the best interests of all shareholders. As noted by the New York Stock Exchange, "[a] nominating/corporate governance committee is central to the effective functioning of the board. New director and board committee nominations are among a board's most important functions. Placing this responsibility in the hands of an independent nominating/corporate governance committee can enhance the independence and quality of nominees."[2] Eliminating a corporation's nominating or governance committee from the director selection and nomination process removes the oversight and judgment provided by the members of the committee and eliminates any comprehensive board-endorsed review process for shareholder-nominated director candidates. Accordingly, if adopted, Rule 14a-11 should require that a Rule 14a-11 nominee submit the same information to the corporation's independent nominating or governance committee as would be required from any other director nominee. We believe that the judgment of the nominating or governance committee is needed for it to make a recommendation to all the corporation's shareholders as to the election and qualifications of a Rule 14a-11 nominee.

***4. Nominee qualification requirements focus primarily on independence and are not broad enough to encompass other regulatory requirements applicable to some corporations.***

[2] New York Stock Exchange, Listed Company Manual, commentary on Rule 303A.04.

Any proposed rule should consider other legal requirements that are applicable to some, but not all, corporations. For example, under Section 8 of the Clayton Act, companies are required to conduct a comprehensive analysis of potential competitive concerns prior to nominating a director for election. Such an analysis can involve a detailed review of the corporation's businesses and the businesses where the potential director is an officer or a director, including completion of questionnaires by the potential director; gathering revenue information for any competing businesses; quantifying potential revenue overlap areas; working with legal counsel of each of the businesses with which the potential director nominee is associated to gather corresponding information for each of those businesses; and aggregating and compiling the information for analysis by antitrust counsel. This process must be conducted for each director candidate and the considerable time necessary to complete this process does not fit within the timeframe contemplated by proposed Rule 14a-11. Similar issues can arise with respect to Department of Defense and Department of Energy certification requirements, among others.

***5. The Rule should allow adequate time for corporations to review and evaluate Schedule 14N and to challenge the inclusion of shareholder nominees where appropriate.***

*(a) The Rule should establish a uniform federal requirement providing a minimum of 150 days prior to the date of the prior year's proxy statement for submission of Schedule 14N.*

The filing of Schedule 14N would trigger the time period during which a corporation must evaluate a shareholder nominee, discuss the nominee with senior management and all of the members of the board of directors, determine whether to accept or challenge the inclusion of the individual in the corporation's proxy materials, send communications to and receive communications from the Commission as needed, notify the proposing shareholder of the corporation's decision and then prepare and deliver its proxy materials. A corporation must have adequate time to complete this process, 150 days prior to the date of the proxy for the preceding year is a reasonable time period.

*(b) The Rule must provide both a beginning date and an end date for submission of Schedule 14N.*

We believe the time period for submission of Schedule 14N to a corporation should be limited both as to the first date for submission as well as the last date for submission, thereby creating a "window period" rather than simply a deadline for submission. The limit on the first date for submission is essential in order to clarify that a corporation is not required to treat late submissions from the prior year as submissions for the current year and to allow the corporation to have adequate controls for determining the sequence of submissions. The rules also need to establish, or allow corporations to adopt, ordering rules to determine both what constitutes "receipt" and priority of receipt where more than one Schedule 14N is received on the same date.

***6. The Proxy Access Rule must be subject to reasonable restrictions on resubmission.***

A proxy access rule should contain adequate safeguards to ensure that unsuccessful nominees are not repeatedly resubmitted to the detriment of better qualified potential nominees who are more likely to receive broader shareholder support and actually be elected to the board. A shareholder director nominee who does not receive at least 25% of the vote should be barred from being nominated again, by any shareholder or the corporation, for a period of three years following the meeting at which the director nominee was defeated. Similarly, a shareholder who either (i) nominates a director who does not receive at least 25% of the vote or (ii) nominates a director who is actually elected to the board, should be barred from being able to nominate the same individual, or any other individual, as the case may be, for a period of three years.

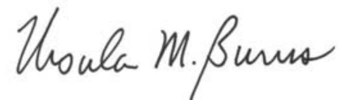
There are several reasons supporting this position. First, a director nominee who does not receive at least 25% of the vote clearly has not received the support of the shareholders and another shareholder should have the

opportunity to propose a director nominee who may be more acceptable to the other shareholders. Second, assuming the proposed “first in” rule is adopted, a shareholder who nominates an unsuccessful director candidate could keep re-nominating that individual year after year and, if that shareholder is the first to nominate a director each year, this would effectively “lock out” other shareholders from proposing other director nominees. Third, preventing an unsuccessful director nominee from being re-nominated would avoid the situation where a “special interest” shareholder, whether an individual holding sufficient shares or a special interest group holding sufficient shares, keeps nominating the same person again and again when that person does not have sufficient support from the other shareholders to actually be elected. Finally, if a shareholder is successful in having his/her nominee elected to the board, then that shareholder has obtained representation on the board and another shareholder should have an opportunity to attempt to gain representation on the board without competition from the first shareholder. This would help prevent the board from being over-weighted in favor of any one special interest group, particularly in the situation where a corporation has a handful of shareholders who own large blocks of shares (and thus would be able to easily nominate directors), and the remaining shares are held by a large number of individuals who each hold a small amount of shares and would have a more difficult time aggregating a block of shares sufficient to nominate a director.

**Conclusion**

Shareholders must have a significant, effective voice in their corporation, as they are the corporation’s owners. At Xerox, I believe that our shareholders currently *do* have a significant, effective voice. Therefore, I continue to oppose a federal proxy access rule because I believe it would incent a short term focus and short change the ability of management to focus on long term value and prosperity of the corporation and all its shareholders for the benefit of a few. At a time when our nation is working hard to maintain this fragile economic recovery, proxy access will create another layer of uncertainty and unpredictability that will divert company resources and attention from ensuring sustained economic growth of the company and our nation.

Sincerely,



Ursula M. Burns

c: Hon. Luis A. Aguilar, Commissioner
Hon. Kathleen L. Casey, Commissioner
Hon. Troy A. Paredes, Commissioner
Hon. Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
Kayla J. Gillan, Deputy Chief of Staff