Keith Paul Bishop
[redacted]

August 29, 2009

Via Email (rule-comments@sec.gov)

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

Re: File No. S7-13-09

Dear Ms. Murphy:

I am writing to comment on the Securities and Exchange Commission's (the "**Commission**") proposal to amend its rules with respect to proxy disclosure and solicitations.

1. Background.

I am an attorney in private practice in Irvine, California and an Adjunct Professor of Law at Chapman University Law School. I previously served as California's Commissioner of Corporations and in that capacity was responsible for the administration and enforcement of California's securities laws.[1] I am writing in my individual capacity and not on behalf of my law firm, the law school or any of my law firm's clients.

2. The Commission should not amend Form 8-K to require disclosure of the results of shareholder voting.

(a) The Commission has failed to provide any rational basis for its proposal.

The Commission's proposal rests on the mere assertion of the Commission's belief that imposing an additional reporting requirement would "benefit

[1] I have also served as a member of the California Senate Commission on Corporate Governance, Shareholder Rights and Securities Transactions, Co-Chairman of the Corporations Committee of the Business Law Section of the California State Bar and Chairman of the Business and Corporate Law Section of the Orange County (California) Bar Association. As indicated above, this letter is written in my individual capacity and not on behalf of either of these groups.

investors and the market".[2] Because the Commission has failed to provide any authority or analysis whatsoever to substantiate this belief, there is no evidence of a rational basis for the Commission's proposal.

The Commission, moreover, fails to consider the degree to which companies already provide the disclosures that it proposes to mandate.[3] Indeed, current law does not prohibit companies from voluntarily announcing voting results before disclosing voting results in a Form 10-Q. Even a cursory review of recent filings elicits numerous examples of companies voluntarily filing Form 8-Ks to disclose preliminary and final voting results.[4]

The Commission fails to cite (even anecdotally) any particular ways in which investors or the markets have suffered under the current reporting requirements. Given the lack of any substantiating record, the Commission's proposal amounts to little more than a solution in search of a problem.

Finally, the Commission fails to explain why companies would delay release of voting results if the market values immediate disclosure. In other words, the Commission does not explain, or even offer a theory for, why it believes that a market inefficiency exists with respect to company disclosure of shareholder voting results. While it is certain that the imposition of additional reporting requirements will impose significant direct and indirect costs on companies and their shareholders, the Commission's benefits "analysis" is limited to a mere two sentences.

(b) The Commission's proposal fails to take account of the fact that shareholders may have the right to this information under state law.

California already provides shareholders with a right to obtain voting results in a timely manner. For a period of 60 days following a shareholders' meeting, a corporation must upon the written request of a shareholder "forthwith" inform the shareholder of the result of any particular vote. Cal. Corp. Code Sec. 1509. This requirement applies to both annual and special meetings. The corporation must disclose the number of shares voting for, the number of shares voting against, and the number of

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[2] Elsewhere, the Commission claims that disclosure would be "appropriate".

[3] The Commission only notes that under its current rules, disclosure of voting results "could take a few months". While this statement may be technically accurate, it is certainly not complete. The fact that something could happen does not mean that it always will happen.

[4] For example, Central Iowa Energy, LLC filed a Form 8-K on August 26, 2009 disclosing voting results with respect to its meeting of members held on August 19, 2009. TTC Technology Corp. filed a Form 8-K on August 20, 2009 disclosing voting results with respect to its shareholder meeting held on August 11, 2009. CPI Corp. filed a Form 8-K on July 14, 2009 reporting preliminary voting results with respect to its shareholder meeting held on July 8, 2009. On July 23, 2009, CPI Corp. filed another Form 8-K disclosing the final voting results.

shares abstaining or withheld from voting. In the case of election of directors, the corporation is required to report the number of shares (or votes in the case of cumulative voting) cast for each nominee.

Foreign corporations (*i.e.,* corporations not organized under the California General Corporation Law) that are qualified to transact intrastate business in California are required to provide this information at the request of a shareholder resident in California. Cal. Corp. Code Sec. 1510(a). According to the California Secretary of State, there are more than 80,000 foreign corporations qualified to transact business in California. In addition to natural persons residing in California, a shareholder will be considered resident in California if it is a state bank, national bank headquartered in California or any retirement fund for public employees established or authorized by California law. Cal. Corp. Code Sec. 1510(b). Even if the foreign corporation is not qualified to transact business in California, it can be subject to the disclosure requirement if it has one or more subsidiaries that are domestic corporations or foreign corporations qualified to transact intrastate business in California. Finally, California has expansive provisions for determining who is a shareholder for purposes of this requirement. Cal. Corp. Code Sec. 1512.

The California Attorney General has the right to enforce the foregoing rights. Cal. Corp. Code Sec. 1508.

The Commission has cited no evidence that shareholders actually avail themselves of their existing rights under state law or that state law procedures have been ineffective.

(c) The Commission has underestimated the regulatory burden associated with its proposal.

The Commission's proposing release severely underestimates compliance costs. The Commission assumes that only one burden hour will be expended in total. Based on my more than two decades of experience in representing reporting companies, I believe that the time expended by company staff alone will likely exceed this estimate by at least a factor of three or four. The Form 8-K must be initially drafted, reviewed internally in accordance with the company's disclosure controls and procedures, and edited in response to internal comments.[5] Based on my experience, external professional time alone is likely to be at least one hour in addition to the time expended internally. The Commission has also failed to account for costs associated with Edgar filing services and internal and external time that may be expended in responding to Commission staff comments.

[5] Companies subject to the reporting requirements are required to maintain disclosure controls and procedures. 17 C.F.R. § 240.13a–15(e) and § 240.15d–15(e).

(d) The Commission's proposed requirement would result in forced subsidies that will not be Pareto efficient.

As noted above, the Commission's proposing release provides no evidence whatsoever that companies are not already providing voting information within the time frames desired by shareholders or as required by state law.[6] As the Commission notes, imposing this requirement will result in additional costs. These costs will ultimately be borne by all of the shareholders. Even assuming that *some* shareholders desire this change,[7] the Commission offers no rationale for why *all* shareholders should incur costs to meet the desires of some shareholders.[8] The Commission should not support self-interest at the expense of the common interest. The Commission should not proceed with this proposal unless it can adequately justify why it is efficient to impose a non-Pareto efficient allocation of shareholder wealth.

(e) The proposed time frame may be too short and compliance may not be within the control of the registrant.

The Commission would require the filing of a Form 8-K within four business days of the end of a shareholder meeting.[9] Because the Commission has failed to enunciate any reason for its proposal, it is impossible to assess whether there is any rational basis for this time frame (other than it corresponds to other Form 8-K filing requirements). Many corporations appoint inspectors of election who have the

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[6] The Commission argues: "if a matter is important enough to submit to a vote at a meeting of shareholders, it likely is important enough to warrant current reporting of the results on Form 8-K." This assumes that a proposal is equally important to all shareholders. A shareholder who submits a shareholder proposal for consideration at a meeting is likely to be very interested in the outcome. It is possible, if not likely, that the other shareholders have no interest in the proposal. Further, some proposals, such as ratification of the appointment of auditors, are so routine that shareholders are likely to have no interest in an immediate disclosure.

[7] As noted above, the Commission has provided no evidence of unmet shareholder demand.

[8] For example, one shareholder may have a strong interest in a particular voting outcome that is not shared by the other shareholders. Because this shareholder has a special interest, it may be willing to expend its own resources in obtaining information regarding the outcome while other shareholders are not willing to expend their resources. As noted above, the shareholder could submit a written request at relatively minimal cost to the corporation. The Commission's proposal would relieve the shareholder of these costs and transfer them to all shareholders. In other words, the Commission's proposal is in effect a forced subsidy.

[9] Although it is not clear, it would also appear that disclosure would be required when shareholder action is taken by written consent because proposed Item 5.07 is triggered when "any matter was submitted to a vote of security holders, through the solicitation of proxies *or otherwise*". Under state law, the term "vote" is often defined to include action by written consent. *See, e.g.,* Cal. Corp. Code Sec. 194 and NRS 78.010(1)(a).

responsibility for tallying and certifying voting results.[10] On occasion, certification of voting results can be difficult and time consuming. In any event, a registrant is not likely to be able to control the timing of the inspectors' final report. Although the Commission has proposed disclosure of preliminary voting results, there is also no assurance the inspectors will make preliminary results available. The Commission also fails to explain why shareholders would benefit from disclosure of preliminary and possibly misleading voting results. Conversely, the Commission does not offer any reason that shareholders will be prejudiced if preliminary results are not disclosed.

3. <u>Conclusion</u>

The Commission's proposal fails to provide evidence of a rational basis for imposing additional burdens on corporations and their shareholders, fails to consider the existence and effectiveness of shareholder rights under state law, and fails to explain why it is necessary and appropriate to impose burdens on all shareholders for the benefit of some shareholders. The Commission's proposal substantially underestimates the costs of its proposal. Before imposing a costly new requirement, the Commission should consider whether in fact there are market inefficiencies that reasonably justify this type of non-market intervention.

Very Truly Yours,

/s/ Keith Paul Bishop

[10] *See, e.g.,* Cal. Corp. Code Sec. 707.