

September 2, 2009

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

Re: File Number S7-13-09

Ladies and Gentlemen:

We appreciate the opportunity to comment on one of the Commission's proposed rule changes in its release entitled "Proxy Disclosure and Solicitation Enhancements". We write to suggest modifications to the proposed requirement to disclose shareholder meeting vote results on Form 8-K. William Marsh, is President of IVS Associates, Inc., independent inspectors of election, Alan Miller is Co-Chairman and Managing Director of the proxy solicitation firm, Innisfree M&A Incorporated, Alan Stephenson is a partner with the law firm, Cravath, Swaine & Moore LLP, and Allen Goolsby is a partner with the law firm, Hunton & Williams LLP. We are sending this letter in our individual capacities, rather than on behalf of any of our firms or any client of any of our firms.

The Commission proposes to require that shareholder meeting vote results be reported on Form 8-K rather than on Form 10-K or Form 10-Q, in order to reduce significantly the time between the shareholder action and public reporting of that action. We support the change to Form 8-K and the proposed requirement that in the context of a contested election of directors vote results be reported within four business days after the preliminary voting results are determined with an amended Form 8-K to report the final, certified vote. However, we urge the Commission to reconsider the general requirement that vote results be reported within four business days of the date on which the meeting of shareholders ended.

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As explained in greater detail, we recommend that the four business day filing requirement be tied in all instances to the issuance of the preliminary, if any, and certified report of the inspectors of election rather than to the end of the meeting of shareholders.<sup>1</sup>

As the Commission has rightly recognized, in election contests, even a preliminary report of the inspectors of election will not be available within four business days of the end of the meeting. As one example, we cite CSX Corporation's 2008 annual meeting of shareholders, in which we all were involved. The meeting included a "short slate" election contest as well as several proposed changes to the bylaws. The meeting was held on June 25, 2008. It was adjourned solely for the purpose of receiving the voting results, but the polls were closed immediately prior to the adjournment. IVS Associates, Inc., the independent inspectors of election, issued its preliminary report of the voting results on July 16, 2008, 21 days after the initial meeting date. Such an interval between the closing of the polls and the issuance of a preliminary report by the inspectors of election is, in our experience, the rule, rather than the exception, in proxy contests at companies with large numbers of shareholders. Before July 16, neither the company nor the representatives of the short slate could make more than an educated guess as to the voting results.

Only after the issuance of the preliminary report on July 16, did the representatives of the company and the short slate have an opportunity to review the proxies, ballots and related materials, with both sides working around the clock.. As a product of the review process, IVS Associates, Inc. amended its preliminary report a number of times to reflect changes in the tabulation arising from the "Challenge and Review" of proxies. Its final report was issued on July 31, 2008.

A similar time frame is equally true in other contested matters and, on occasion, in elections where there are no opposition candidates for director and a majority of the votes cast is required for election. Contested shareholder proposals and contested votes on mergers and other fundamental transactions are no different than contested elections. On any matter that is contested, and not just election contests, the preliminary report of the inspectors may not be available within four business days of the end of the meeting and issuance of the final report could be weeks away. For example, issuance of the inspectors' final report in the Hewlett-Packard Company - Compaq Computer Corporation merger took approximately one month.

We note several other reasons for not tying the reporting requirement to the end of the meeting of shareholders. Significantly, we know of no requirement that the closing of the polls

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<sup>1</sup> Delaware requires appointment of an inspector for any meeting of shareholders. Del. Gen. Corp. L. § 231(a). The Model Business Corporation Act requires appointment of an inspector for any meeting of shareholders of a public corporation. Mod. Bus. Corp. Act § 7.29(a).

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be tied to the end of the annual meeting.<sup>2</sup> The Delaware General Corporation Law simply provides that the date and time of the opening and closing of the polls for each matter shall be announced at the meeting. Del. Gen. Corp. L. § 231(c). The Model Business Corporation Act provides that the chair of the meeting shall announce at the meeting when the polls close for each matter voted upon. Only if no announcement is made, are the polls deemed to have closed upon the final adjournment of the meeting. Mod. Bus. Corp. Act § 7.08(d). Note also that the proposed use of the end of the meeting could actually result in an unnecessarily long delay in announcement of some voting results, if the chairman elects to close the polls and then adjourn the meeting to provide time for the inspectors to complete their report.

In light of the foregoing, we recommend that the Commission tie the four business day reporting requirement in all instances (including in uncontested director elections and other matters) to the issuance of the report (as well as the preliminary report, if applicable) of the inspector of elections. A cautionary note regarding the release of the inspectors' preliminary report is appropriate. Notwithstanding that the reported results are preliminary, the side that is ahead in the report will use it as a public relations tool, including to pressure the other side to accept the preliminary outcome and move on. While some might argue that requiring the filing of the preliminary report on Form 8-K may give it additional credibility, we are inclined to disagree, and it is unrealistic to expect that the report would not be publicly disclosed when standard practice for inspectors is, appropriately, to provide the preliminary report to both sides simultaneously.

Finally, we want to emphasize that the final outcome in a contested matter may not be what is reported in the final report of the inspectors. State corporate laws imposes significant limitations on the data that inspectors can consider in determining vote results. Generally speaking, in the absence of an overvote, inspectors can only review proxies and related envelopes, ballots and the corporation's regular books and records. See, Del. Gen. Corp. Law § 231(d); Mod. Bus. Corp. Act § 7.29, Official Comment. But state corporate laws do provide for court review of voting results after the final report of the inspectors has been issued and without being subject to the limitations imposed on inspectors. See, e.g., Del. Gen. Corp. Law § 225; Va. Code Ann. § 13.1-681. We would suggest that the final release should recognize

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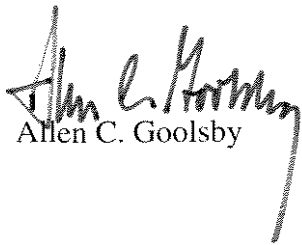
<sup>2</sup> A strong argument can be made that when shareholders vote on a contested matter, keeping the polls open for a specified time period is a better practice than tying the time to vote to the duration of the meeting. With the shift to institutional ownership and the increasing practice of institutions to delegate or outsource portions of the voting process, the likelihood of voting errors has increased significantly. In closely contested matters a significant percentage of the votes often are cast at the last minute. Keeping the polls open for a longer period of time would provide an opportunity for proxy solicitors for both sides to clear up technical errors in the voting of shares.

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that neither the preliminary report of voting results by the inspectors nor the final report is necessarily dispositive and confirm that the issuer is not restricted in addressing the nondispositive nature of those reports in disclosing results on Form 8-K.

We appreciate the opportunity to comment on the proposed rule changes.


Sincerely,




Allen C. Goolsby



Alan C. Stephenson



Alan M. Miller



William A. Marsh