

Written Testimony

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The Society of Corporate Secretaries and Governance Professionals

Representing – The Society of Corporate Secretaries and Governance
Professionals

April 21, 2010

Subcommittee on Capital Markets, Insurance, and Government Sponsored
Enterprises
Committee on Financial Services
U.S. House of Representatives

“Corporate Governance and Shareholder Empowerment”

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**Written Testimony of Robert E. Smith – Member of the Board of Directors of the
Society of Corporate Secretaries and Governance Professionals**

Introduction

My name is Robert E. Smith and I am currently Vice President, Deputy General Counsel & Assistant Secretary for NiSource Inc. NiSource Inc., based in Merrillville, Indiana, is a Fortune 500 energy holding company whose subsidiaries are engaged in natural gas transmission, storage and distribution, as well as electric generation, transmission and distribution. NiSource operating companies deliver energy to approximately 3.8 million customers located within a corridor that runs from the Gulf Coast through the Midwest to New England. NiSource is one of the nation's largest natural gas distribution companies, as measured by number of customers, delivering natural gas to over 3.3 million customers in seven states and operating approximately 58,000 miles of pipeline. NiSource's Gas Transmission and Storage Operations subsidiaries own and operate nearly 15,000 miles of interstate pipelines and operate one of the nation's largest underground natural gas storage systems. Through its subsidiary Northern Indiana, NiSource generates, transmits and distributes electricity to approximately 457,000 customers in 20 counties in northern Indiana and engages in wholesale and transmission transactions. NiSource focuses its business strategy on its core, rate-regulated asset-based businesses.

I am also a member of the Board of the Society of Corporate Secretaries and Governance Professionals (the “Society”), a professional association, founded in 1946, with over 3,100 members who serve more than 2,000 companies. Our members are responsible for supporting the work of corporate boards of directors and their committees and the executive management of their companies on corporate governance and disclosure. At our companies we seek to develop corporate governance policies and practices that support our boards in the important work and that serve the interests of long term stockholders. Our members generally are responsible for their companies’ compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements. The majority of Society members are attorneys, although our members also include accountants and other non-attorney governance professionals.

I have previously practiced corporate law and governance law in the in-house legal departments of two other Fortune 500 companies, Progress Energy, Inc. and Mirant Corporation. As an in-house corporate attorney, I have been exposed to a variety of governance initiatives, shareholder proposals and corporate transactions, and have had the opportunity to observe first-hand the effects of the significant corporate governance enhancements that have occurred in corporate board rooms through-out the past decade.

I am here testifying today on behalf of the Society.

Background

When assessing potential additional corporate regulation, it is important consider the significant governance developments that have occurred over the last decade. These developments are easily seen -- the growth of majority voting for directors and the use of executive compensation structures premised on the long-term health of the company are just two examples -- and evidence a fundamental shift in the nature of public company management and board engagement of, and responsiveness to, shareholders. Significantly, these changes did not come about due to an external mandate; rather, they occurred through the efforts of shareholders and management to choose the governance structure that best created the opportunity for board/shareholder interaction and sustainable, long-term growth. The Society has long supported these developments and strongly supports efforts to continue to expand the ability of shareholders and management to create company-specific approaches to corporate governance that reflect the interests of long-term shareholders and best fit the unique characteristics of their company. It is important to remember that corporate governance is “constitutional law” for corporations. Therefore, when Congress acts, it should do so thoughtfully on clear consensus and strong empirical evidence that changes are needed, while keeping in mind the states’ role as laboratories for democracy, particularly with respect to corporate law.

It is in this context that I address each of the major governance provisions of the various legislative initiatives below.

Majority Vote

Shareholder Engagement Has Resulted in Majority Vote Adoption

Companies are increasingly willing to engage with their shareholders in discussions on a variety of corporate governance issues. There are numerous examples of areas where companies and their shareholders have engaged in a dialog in order to enhance the governance processes at the company. However, the best example of this type of shareholder engagement is the recent trend in changing companies’ by-laws and other governing documents to allow for majority voting of directors in uncontested elections. The plurality vote standard was universal just a few years ago; however, in response to shareholders, particularly labor funds and state pension funds, companies have adopted majority vote provisions with director resignation policies designed to give boards appropriate latitude if a director fails to be elected. In fact, according to a March 15,

2010 press release issued by California Public Employees' Retirement System, as of September 2009, approximately 71% of S&P 500 companies and 50% of Russell 1000 companies had adopted some form of policy for director resignations or majority vote standards for director elections. The majority vote provisions and director resignation policies now in place at a strong majority of the S&P 500 companies are very similar to the provisions set forth in the Peters Bill. We hold this out as an example of a very significant governance change effected through the existing shareholder proposal process that required neither new legislation nor Securities Exchange Commission ("SEC") rulemaking. Rather, shareholders at each company have had an opportunity to evaluate and submit, as they deem appropriate, resolutions enacting majority voting provisions. For this reason, a federal law on majority voting is unnecessary.

Proxy Access

Proxy Access Should Balance the Interests of All Shareholders

The Society strongly believes in – and has consistently supported – good corporate governance practices, which include the right of shareholders to have an effective vote in the election process and the ability to recommend persons for nomination to the board of directors. We want to ensure that the proxy access process is fair to ALL shareholders, not those who hold 1% and who may have short-term interests. We believe that any proxy access process should appropriately balance the interests of all shareholders of a company and, at the same time, not unnecessarily use corporate resources or distract management attention.

Potential for Disruption at Companies if Short-Term Shareholders Use Access to Further Their Agenda

A 1% proxy access law 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. For example, 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 results. The proxy access rule will make it significantly easier and cheaper for these hedge funds to target companies, which will likely increase the number of companies that they target.

Based on recent 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 follows¹:

- Average hedge fund ownership 7.15%

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

- Number of companies with hedge fund ownership at or above 5% 273
- Number of companies with hedge fund ownership at or above 10% 104

This data shows that even at ownership thresholds of 5%, a substantial percentage of large-cap companies could be subject to more frequent contested elections at the burden of the long-term shareholders. Moreover, given their relatively smaller capitalization, small and mid-cap companies would be particularly vulnerable to an activist hedge fund with a narrow agenda.

Companies and their long-term shareholders bear significant costs when a company faces a potential election contest from a sophisticated, activist hedge fund. These costs include (i) the expense associated with the 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. To avoid these potential costs and disruption, proxy access should occur only at those companies where shareholders have determined that proxy access is a necessary and appropriate component of the director election process applying thresholds that are suitable for that company.

Proxy Access Via the Existing Shareholder Proposal Process

In furtherance of the principle of shareholder choice for all shareholders, the Society has supported the amendment of SEC Rule 14a-8(i)(8) to permit shareholders to propose proxy access bylaws at a company via the well-established shareholder proposal process. I note that, given the particular facts and circumstances of a company, the proxy access procedures proposed by shareholders are likely to be different from company to company. In light of this, a federally mandated rule that all public companies be subject to the same process – with identical ownership thresholds, holding requirements, and procedural requirements, among other things – does not seem appropriate, and certainly does not seem to be in the best interests of all shareholders.

The factors contributing to the large diversity of public companies include differences in numbers of shares publicly outstanding, classes of capital stock with differing voting rights, varying levels of retail versus institutional shareholdings, various capital structures, differing board structures (e.g., staggered boards, or required representation on the board pursuant to a shareholders’ agreement or financing arrangement), and different advance notice bylaw provisions. In determining an appropriate shareholder access procedure for a company, consideration of the individual facts and circumstances of the company must be taken into account.

For this reason, companies and shareholders should be able to determine the shareholder proxy access procedure that works best for them (including whether, in lieu of such process, proxy reimbursement would work better for their company and its shareholders). This is true “shareholder empowerment,” rather than forcing all shareholders to adopt the

same rigid governance template regardless of whether the shareholders want it or not. True shareholder choice and empowerment has worked well in other situations, such as majority voting in the election of directors. If shareholders have the right to elect their directors (or determine to vote against, or withhold their vote), surely the same shareholders have the right to determine the appropriate manner and process by which such director-nominees are brought before them for their consideration. Because it is appropriate for shareholders to make choices about the procedures they deem appropriate to permit proxy access, they should be able to choose a form of proxy access that is different than one mandated by Congress or the SEC.

In sum, if proxy access is approved, the Society believes that it should, at a minimum, allow companies and their shareholders to “opt out” in favor of their own access scheme, and have significantly higher ownership thresholds. Please see the attached letters submitted by the Society, SEC File No. S7-10-09, Release No. 34-61161, Facilitating Shareholder Director Nominations, dated August 13, 2009 and January 19, 2010, respectively, each of which is attached hereto.

Independent Chair

CEO/Chair Structure Should Not Be Mandated

The independent chair requirement as proposed in the Peters Bill would prevent shareholders from determining what is needed at their company at any specific time. As discussed above, each company is different in a variety of ways. As a result, for some an independent chair may be appropriate, for some a separate chair and CEO may be the preferred approach, and others may find a lead or presiding director is a better governance approach. This determination may depend on whether or not the company is a newly public company, a company in transition, or a well-performing company. The Peters Bill would require all companies, first, second or later generation, to have a board Chair that has not previously served as an executive officer of the issuer. This provision would not allow a founding CEO to remain as Chair. It also would not allow a board to choose a senior executive as Chair. As an example, it would require that Bill Gates step down as Chair of the Microsoft Board of Directors because he has been an executive officer of the company. Preventing some of our country’s most successful business people from continuing to lead their companies would seem to be bad policy that could discourage young, entrepreneurial companies from accessing public capital markets, discourage founders from continued active involvement with their companies and would disadvantage shareholders who are buying ownership in a company based on a particular individual’s leadership and vision, only to have such leadership deemed inappropriate by law. Such companies often have founding CEOs that are the largest shareholders.

For established companies, the Peters Bill would force unnecessary uncertainty into the succession planning process. For example it would make it unlawful for an exiting CEO to remain as Chairman even for a limited time period to ensure a smooth transition to the company’s new CEO. This would be true even if the transition methodology was determined through an exemplary CEO succession plan.

SEC-Required Disclosure of a Company's Leadership Satisfies Shareholder Needs

It should be noted that the SEC has recently addressed the issue of separation of the chief executive officer and board chair by requiring disclosure of a company's leadership structure, rather than mandating a particular scheme. This approach is consistent with the empowerment of shareholders as transparent disclosure allows shareholders to determine what is appropriate for their company and then suggest changes if the deem such changes necessary. The SEC's recently enacted a new disclosure requirement to Item 407 of Regulation S-K and a corresponding amendment to Item 7 of Schedule 14A requires disclosure of the company's leadership structure and the reasons the company's board believes that structure is best for the company. The Society supported these proposed amendments and acknowledged the Commission's comment that they were not intended to influence a company's decision regarding its board leadership structure. The Society strongly believes that each company should determine for itself whether it is appropriate to separate the CEO and Chair roles and whether or not to have a lead or presiding director. While some view the separation of these roles as optimal, I am aware of no empirical evidence demonstrating that companies with a particular structure consistently have better performance than companies with other structures. Please see also the comment letter filed by the Society in response to SEC File Reference No. S7-13-09, Proxy Disclosure and Solicitation Enhancements, dated September 15, 2010, which is attached hereto.

Say-on-Pay Votes

Advisory "Say-on-Pay" Votes Should be Subject to Shareholder Choice

Variations of the say-on-pay concept have been included in proposed legislation, shareholder proposals and management initiatives, for several years. We believe that careful study should be made of the alternatives to determine the approach that would best serve each company and its shareholders. The Peters Bill would mandate say on pay annually, but some companies have engaged with their shareholders and have learned that this approach may not be what the shareholders actually desire. In fact, at many companies where an annual say on pay has been proposed, a majority of the votes cast were cast against it. Discussions with shareholders have led several large-cap companies to conclude that a multi-year cycle was optimal for say-on-pay votes.

Legislating an annual say-on-pay scheme is not necessary for the following reasons:

- Compensation programs are generally designed to induce and reward performance over a multi-year period. Say-on-pay votes should occur over a similar timeframe or there will necessarily be a mismatch between achievement of corporate strategy and pursuing annual results.
- A multi-year cycle would provide investors sufficient time to evaluate the effectiveness of both short- and long-term compensation strategies and related business outcomes.

- Many large shareholders rely on proxy advisory firms, which evaluate the compensation programs of over 12,000 U.S. public companies, for vote recommendations. Holding say-on-pay votes on a multi-year cycle would help proxy advisory firms provide more detailed and thorough analyses and recommendations.
- Most compensation programs can't be changed overnight. A non-annual approach gives the board and the compensation committee sufficient time to thoughtfully respond to shareholders' sentiments and implement any necessary policy changes.
- Pre-existing board requirements to seek shareholder approval of employee stock plans and other compensation-related matters already give a company's shareholders an opportunity to provide feedback even where say-on-pay votes do not occur.
- IRS Rule 162(m) requires that, in many cases, shareholder adoption of incentive plans be obtained every five years in order to maintain deductibility of the incentive payments.
- Majority voting, coupled with a declassified board, means that every director is up for election every year. This includes all members of the compensation committee. If shareholders are dissatisfied with the compensation structure or alignment as implemented by the compensation committee, then the shareholders at majority vote companies have a direct and effective means of effecting change.

Other Examples of Shareholder Engagement

In the last decade, companies and their boards have engaged more and more frequently with their shareholders. Boards are increasingly more responsive to shareholder concerns, as best evidenced by the implementation of majority voting standards. In addition, Society members have been involved in dialog and change on the following topics, without a legislative mandate to do so:

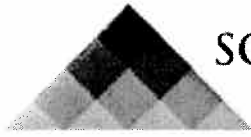
- elimination of supermajority voting provisions;
- shareholder right to call special meetings;
- political contributions disclosure;
- product ingredient safety review disclosure;
- water usage reports;
- sustainability reports;
- retention of independent compensation consultants;
- implementation of stock ownership guidelines for directors and officers;
- strengthening the definition of lead independent director;
- implementation and enhancement of recoupment of incentive compensation "clawback" policies;
- participation in investor/corporate working groups to discuss say-on-pay and executive compensation;
- agreement to limit supplemental executive retirement plan contributions to a multiple of base pay rather than include all incentive pay;
- elimination of other compensation practices, such as perquisites; and
- amendment of compensation plans.

Conclusion

Significant governance developments have occurred, and boards have become increasingly responsive to shareholders in recent years. True shareholder empowerment allows all shareholders to choose what is best for their respective companies. Legislation should be thoughtfully enacted only where there is clear consensus and empirical evidence that change is needed and that such change would support the long-term interests of all shareholders.

Respectfully Submitted

Robert E. Smith



SOCIETY OF CORPORATE SECRETARIES & GOVERNANCE PROFESSIONALS

August 13, 2009

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
Attention: Elizabeth M. Murphy, Secretary
Via e-mail: rule-comments@sec.gov

Re: File No. S7-10-09 (Facilitating Shareholder Director Nominations)

Ladies and Gentlemen:

The Society of Corporate Secretaries & Governance Professionals appreciates the opportunity to respond to the request for comments made by the Securities and Exchange Commission (the "Commission") in its proposed rule entitled "Facilitating Shareholder Director Nominations" (the "Proposed Rules").

The Society of Corporate Secretaries & Governance Professionals is a professional association, founded in 1946, with over 3,100 members who serve more than 2,500 companies. Our members are responsible for supporting the work of corporate boards of directors and their committees and the executive management of their companies regarding corporate governance and disclosure. Our members are generally responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements. The majority of Society members are attorneys, although our members also include accountants and other non-attorney governance professionals.

We strongly believe in – and have consistently supported – good corporate governance practices, which include the right of shareholders to have an effective vote in the election process and the ability to recommend persons for nomination to the board of directors. The comments below on proposed Rule 14a-11 and the proposed amendment to Rule 14a-8(i)(8) are intended to ensure that the proxy access process is fair to all shareholders. Proxy access is not – and we do not view it as – a matter of "corporations versus shareholders"; rather, we believe in the proxy access process, but believe both corporations and shareholders must be mindful that any proxy access process should appropriately balance the interests of all shareholders of a corporation and, at the same time, not unnecessarily use corporate resources or distract management attention.

In furtherance of these principles, we support amending Rule 14a-8(i)(8) to permit shareholders to propose proxy access bylaws for their respective companies. We note that, given the particular facts and circumstances of a company, the proxy access procedures proposed by shareholders are likely to be different from company to company. In light of this, we believe a federally mandated rule that all public companies be subject to the same process – with identical ownership thresholds, holding requirements, and procedural requirements, among other things – is not appropriate, and certainly not be in the best interests of all shareholders. Accordingly, we do not support adoption of proposed Rule 14a-11 as currently proposed. If proposed Rule

14a-11 is adopted, it should, at a minimum, be modified to permit companies and their shareholders to “opt out”; and, in addition, its eligibility thresholds, nominee’s independence and disclosure requirements, and notice and other procedural requirements, likewise should be modified, as further discussed below.

Private Ordering Should Be Permitted

We note that most companies are willing to engage with their shareholders in discussions of corporate governance issues, including potential nominees for director. In fact, many companies actively reach out to their largest shareholders to engage them in discussions regarding corporate governance. Many public companies also have procedures in place for shareholders to submit recommendations for director nominations to the board of directors or nominating committee. But, when it comes to an issue such as nominating persons for the board of directors of a company, a single mandated procedure, even one that is thoughtfully proposed, may not be appropriate for all public companies. The large diversity of public companies include differences in numbers of shares publicly outstanding, classes of capital stock with differing voting rights, varying levels of retail versus institutional shareholdings, various capital structures, differing board structures (e.g., staggered boards, or required representation on the board pursuant to a shareholders’ agreement or financing arrangement), and different advance notice bylaw provisions. In determining an appropriate shareholder access procedure for a company, consideration of the individual facts and circumstances of the company must be taken into account.

For this reason, we believe companies and shareholders should be able to determine the shareholder proxy access procedure that works best for them (including whether, in lieu of such process, proxy reimbursement would work better for their company and its shareholders). This “private ordering” by companies and shareholders has worked well in other situations, such as majority voting in the election of directors. In addition, we believe the concept of private ordering is consistent with the deference due a company’s shareholders; if shareholders have the right to elect their directors (or determine to vote against, or withhold their vote), surely the same shareholders have the right to determine the appropriate manner and process by which such director-nominees are brought before them for their consideration. Because it is appropriate for shareholders to make choices about the procedures they deem appropriate to permit proxy access, they should be able to choose a form of proxy access that is different than the one mandated by proposed Rule 14a-11.

Nevertheless, we are also mindful that the Commission is concerned that a company-proposed shareholder access bylaw could create undue complexity to, and cause delay in, a shareholder’s right to nominate directors and have those nominees included in the company’s proxy materials. In order to balance more appropriately these concerns, we recommend that if proposed Rule 14a-11 is adopted, companies and their shareholders be permitted to “opt out” of proposed Rule 14a-11 by adopting and implementing their own form of proxy access, as discussed under “Proposed Rule 14a-11, Section II” below.

In furtherance of our recommendations, we also believe that shareholders should have the full range of options available to them regarding the nature of proxy access at their companies, and, as such, the requirement to include proposals under the proposed amendments to Rule 14a-8(i)(8)

should not be limited only to those proposals that would not conflict with proposed Rule 14a-11. We believe shareholders should be permitted to suggest the type of shareholder proxy access that is appropriate to their company—regardless of whether that level is more or less restrictive than under proposed Rule 14a-11. Accordingly, we believe that the Commission should provide in its final rules that a shareholder proposal submitted under Rule 14a-8(i)(8) should not be limited as currently proposed.

Given our belief that private ordering is the most appropriate and, therefore, the preferable route by which to provide proxy access for shareholders, we strongly recommend companies and their shareholders be afforded some period of time to adopt their own form of proxy access and/or proxy reimbursement. Accordingly, we suggest proposed Rule 14a-11, if adopted, first apply to companies that have not “opted out” through a shareholder-approved process by the time of their regular annual shareholders meeting in the year following the Commission’s adoption of proposed Rule 14a-11. In this way, private ordering would be encouraged, and companies and their shareholders could determine for themselves the most appropriate approach to proxy access in light of the particular facts and circumstances of their company.

Proposed Rule 14a-11

If the Commission nonetheless does adopt proposed Rule 14a-11, we request that it consider the following additional modifications. As noted above, these modifications are intended to: (i) make proposed Rule 14a-11 work in a more efficient and effective manner; and (ii) better balance the benefit to shareholders in being able to participate more fully in the nomination and election process and the cost and potential disruption to companies and their other shareholders as a result of such process.

I. Eligibility to Use Rule 14a-11. Proposed Rule 14a-11 provides that shareholders who beneficially own 1% (for large accelerated filers) or 3% (for accelerated filers) of a company’s securities for one year may nominate a director and have their nominee included in the company’s proxy materials. For the reasons set forth below, we believe these thresholds are too low.

A. Ownership Threshold. Shareholder proposals, of all types, have a financial impact on all shareholders, as they generally require substantial attention and resources of a company, including its in-house legal and investor relations staff, outside securities and state-law counsel, senior management, and the board of directors. Proxy access goes well beyond other shareholder proposals as it inevitably entails a proxy contest which, in general, will be more time-consuming, expensive and disruptive to management and the board of directors than other types of shareholder proposals.¹ As such, we believe, the Commission should set the minimum threshold at a level that ensures that the nominating shareholder or group (hereinafter, referred to as the “nominating shareholder”) have a substantial economic interest in the company.

¹ On average, the BRT Survey (as defined herein), found that if a company does have to include a proxy nominee, it would cost approximately \$1.3 million, including nearly \$75,000 or 78 hours in company personnel time, nearly \$23,000 or 21 hours in director time, and nearly \$1.2 million in outside counsel, proxy solicitor, and printing and mailing costs.

(i) Nominating Shareholder Must Own 5% and a Group Must Own 10%. We believe that the appropriate threshold should be the beneficial ownership of 5% of the company's securities that are entitled to be voted on the election of directors at a meeting of shareholders for single nominating shareholders, and should be 10% where a group of shareholders are nominating the director. The 5% and 10% thresholds are intended to be responsive to the Commission's concerns of ensuring the thresholds are not so high as to impose undue impediments to proxy access, while being sensitive to the real costs that such proposals impose on a company and its shareholders. In the United Kingdom, shareholders must own at least 5% of the company's securities (or be part of a group of at least 100 shareholders) in order to submit a nominee for inclusion in the company's proxy materials.

The proposed thresholds of 1% for large accelerated filers and 3% for accelerated filers are simply too low. The Commission itself noted that nearly all large accelerated and accelerated filers have two or more shareholders that meet that threshold. Thresholds at the 1% or 3% level would mean companies could have multiple nominating shareholders, without taking into consideration any aggregation at all and, when shareholders aggregate into groups, the numbers of potential nominating shareholders could expand significantly. Further, as we have seen in "just vote no" campaigns, the Internet and social media sites make it very easy for shareholders to communicate with other shareholders, and the Proposed Rules include an exemption from the proxy rules for communications made in connection with forming a group of nominating shareholders so long as they are limited in content and filed with the Commission. As a result, we believe that it will not be difficult for shareholders to communicate their intent to use proposed Rule 14a-11 and aggregate their holdings.

For these reasons, we believe the thresholds need to be raised and believe a 5% threshold for a single nominating shareholder and a 10% threshold for a group of nominating shareholders provide the appropriate balance between permitting shareholders who have a substantial economic interest in the company to utilize proxy access, on one hand, and limiting the potential cost and disruption to companies and their shareholders, on the other. In a proxy access survey recently conducted by the Business Roundtable and the Society to gauge CEO and company views and opinions regarding the Proposed Rules (the "BRT Survey")², roughly 36% of the survey participants stated that the appropriate ownership eligibility threshold (based on outstanding shares) for nominating shareholders should be 5%, while 25% favored a threshold of 10%, and 22% favored a threshold in the range of 15-25%.

(ii) Shareholders may not be Members of More than One Nominating Group. We support the right of shareholders to aggregate their holdings for the purpose of nominating a director. However, we believe a shareholder should not be permitted to be a member of more than one nominating group. In the absence of such a prohibition, shareholders could form multiple groups, claiming that so long as the identity of each group was not precisely identical each group was a different proponent. We believe the proposed modification is consistent with the basic and fundamental construct of Rule 14a-8(c) that a shareholder may submit no more than one proposal to a company for a particular shareholders' meeting. In addition, we believe

² Of roughly 151 member CEOs on the Business Roundtable, 70 participated in the BRT Survey. Roughly 10% of Roundtable companies are not directly affected by this issue (e.g., privately held, not regulated by the Commission, etc.) and these companies did not participate. Therefore, more than half of the Business Roundtable companies potentially affected by this issue participated in the survey.

our proposed restriction would help prevent abuse of proposed Rule 14a-11, while at the same time, not imposing undue burdens upon shareholders who support a particular nominee.

B. Holding Period Requirements.

(i) Nominating Shareholders Must have Held their Shares for Two Years. In seeking to balance shareholders' ability to participate more fully in the nomination and election process against the potential cost and disruption to companies subject to the proposed new rule, the Commission is proposing that only holders of a significant, long-term interest in a company be able to rely on proposed Rule 14a-11 to have disclosure about their nominees for director included in a company's proxy materials. We support the Commission's position, and believe that long-term shareholders are more likely to have interests that are aligned with other shareholders and are more likely to take a long-term view of the company and its operations.

We do not share the Commission's view, however, that shareholders who have held their shares for only one year are long-term shareholders. We believe that the nominating shareholder should be required to have beneficially owned the securities that are used for purpose of determining the ownership threshold for at least two years as of the date of the shareholder notice on Schedule 14N. In the case of a nominating group, each member of the group should have held the securities for at least two years as of the date of the shareholder notice on Schedule 14N. In addition, when the Commission in 2003 proposed a two-year minimum holding period as a requirement for proxy access, "the majority of commentators that addressed the topic support[ed] the proposed holding period." (see, the Proposed Rules at p. 51). In the BRT Survey, 54% of the survey participants stated that the minimum holding period should be two years, while 30% thought it should be three years or longer.

(ii) Beneficial Ownership Should be Defined as Ownership of the Actual Securities. We believe that the concept of beneficial ownership for purposes of proposed Rule 14a-11 needs to be clearly specified. Given the prevalence of derivatives in the equity markets and the ability to de-couple economic interest from voting rights, we believe proposed Rule 14a-11 should require possession of the full voting interest in the securities and should specify that the nominating shareholder have a net long beneficial ownership position during the entire two-year holding period for the purpose of submitting a nominee. The nominating shareholder should also be required to produce evidence from its broker-dealer or custodian that the continuous net long beneficial ownership requirement has been met. We do not believe that the record holder is in a position to make this certification and, thus, proposed Schedule 14N should be revised accordingly.

(iii) Nominating Shareholders Must Hold Shares through the Date of the Shareholders' Meeting. We believe that the nominating shareholder should be required to continue to hold the amount of securities necessary to meet the ownership thresholds through the date of the shareholders' meeting. A nominating shareholder's intent not to sell existing at the time of a Schedule 14N means little, if the nominating shareholder can change its mind and sell sufficient shares to fall below the nominating threshold during the period between the filing of the Schedule 14N and the shareholders' meeting. We believe that the nominating shareholder, if requested by the company, should be required to produce evidence from its broker-dealer or custodian certifying that its net long beneficial ownership position meets the requirements

through the date that is within 5 days of the shareholders' meeting to ensure its continued eligibility to nominate a director. If any nominating shareholder does not remain eligible, the company should be permitted to withdraw such nominating shareholder's nominee from consideration for election at the shareholders' meeting. In this way, both companies and their shareholders are ensured that the nominating shareholder has, as the Commission has suggested, the appropriate commitment to the nominee and the election process.

C. Resubmission Threshold. In 2003, the Commission solicited comment on whether a proxy access rule should include a provision that would deny eligibility for any nominating shareholder that has previously had a nominee included in the company's proxy materials and where such nominee did not receive a sufficient percentage of votes. We believe that proposed Rule 14a-11 should similarly include a "resubmission threshold." If the nominating shareholder's nominee fails to receive 25% of the vote at the meeting at which such nominee's nomination is being voted upon, the nominating shareholder (and, if applicable, all of the members of the nominating group) should be prohibited from submitting another nominee for a period of two years. We believe this is appropriate, as that nominating shareholder would not have demonstrated sufficient support from other shareholders to indicate that it would in the following year be successful in having its nominee elected to the board and thereby justify repeated use of the company's proxy materials. In addition, the nominee should not be eligible for nomination for a similar two-year period. The purpose of these proposed resubmission thresholds is two-fold: first, it would be inappropriate to require the company to again expend the significant resources involved in including the nominee in its proxy materials where the nominee did not garner significant support from the shareholders of the company; and, second, this would provide an opportunity for other shareholders to submit nominations for consideration. The need for a resubmission threshold under Rule 14a-11 is more critical in this context than under Rule 14a-8 because the economic costs of a proxy contest are so much higher. The resubmission threshold would also ensure that other shareholders would be given a chance to suggest nominees who may be more satisfactory to the company's shareholders and who therefore might garner a larger vote.

D. Nominating Shareholders must Certify that they are not seeking to Change Control of the Company. We agree with the Commission that only shareholders who are not intending to seek or affect control of the company should be eligible to use proposed Rule 14a-11. However, a nominating shareholder's intent is subjective and is subject to change. Further, a controlling influence over a board of directors may be obtained without a shareholder having the ability to influence an actual majority of the board members. We therefore believe that, to ensure the Proposed Rules are used as intended by the Commission, it is necessary to add the following additional objective safeguards.

(i) Nominating Shareholders May Only Submit One Nominee. Each nominating shareholder should only be permitted to nominate only one director, rather than up to 25% of the board of directors as proposed. We believe that the right to nominate a director is very different from nominating a "bloc" of directors through the company's proxy materials. We believe the control opportunities of being permitted to nominate a "bloc" of directors through proxy access are serious, and should be prevented. We note that most contests for "control" of a company today do not involve a change in the majority of the membership of a board of directors. Dissident shareholders often seek to influence or affect the company's business and

operations by the nomination of “short slates”, which are a “bloc” of directors consisting of less than a majority of the board membership. Therefore, we believe that shareholders who intend to nominate a bloc of directors should be required to conduct a traditional proxy contest pursuant to Regulation 14A. We also believe that by limiting each nominating shareholder to one nominee, it is more likely that multiple nominating shareholders may have the opportunity to nominate members for election to the board of directors. In the BRT Survey, 61% of the survey participants stated that the nominating shareholder should only be able to nominate one director.

(ii) Proxy Access Shareholder Nominees May Not Constitute More than 15% of the Board. While we agree with the Commission that using a fixed percentage will promote ease of use and alleviate concerns that a company may increase its board size in an effort to reduce the effect of a shareholder nominee elected to the board, we believe that having shareholder-nominated directors constituting 25% of the board of a company is too high a percentage. As noted above, we believe that 25% represents a significant portion of the board, and can have a strong influence on control of the company. Having as many as up to 25% of the directors of the board nominated by persons who may not share the board’s overall philosophy or approach with respect to the management of the company may also result in a less cohesive board – a result that is not in the interests of all shareholders generally. As a result, we propose that the maximum number of directors nominated by shareholders constitute no more than 15% of a board.

(iii) Proxy Access Shareholder Nominees Are Not Permitted if There is a Traditional Proxy Contest. Shareholders should not be permitted to nominate directors pursuant to proposed Rule 14a-11 if a company becomes subject to a traditional proxy contest (including a short slate proxy contest) in that same year. To permit otherwise would mean that proposed Rule 14a-11 could have the effect of changing control of the company. When a company is facing shareholder-nominated directors from multiple sources, the combination of shareholder nominations (including those nominated pursuant to proposed Rule 14a-11) could result in a change of a majority of the company’s board of directors. In light of the recent Amylin Pharmaceuticals no-action letter issued by the staff of the Division of Corporation Finance (letter to Eastbourne Capital LLC dated March 30, 2009, and letter to Icahn Associates Corp. dated March 30, 2009) and the Commission’s proposed amendment to Rule 14a-4(d)(4), as set forth in “Proxy Disclosure and Solicitation Enhancements” (Proposing Release No. 33-9052, dated July 10, 2009), a traditional dissident shareholder could “round out” its short slate proxy card by including proxy access shareholder nominees. Moreover, we believe that proposed Rule 14a-11 would not bar the dissident from actively soliciting for the proxy access shareholder nominees. Since a basic premise of proposed Rule 14a-11 is that it not be used in connection with a threatened or actual change of control, we believe it is appropriate not to permit the use of proposed Rule 14a-11 in situations involving a potential change of control. Further, the fact that there are differing groups of shareholders who are simultaneously proposing different directors for presumably different purposes (i.e., control and non-control) could lead to substantial confusion for other shareholders. Accordingly, at any time a company’s board receives notice that an insurgent is planning to wage a proxy contest, the company should be permitted to exclude any proxy access candidates from the company’s proxy materials (and, if the proxy materials have already been distributed, to issue supplemental proxy materials eliminating the proxy access nominees from the company’s materials).

(iv) Nominee must be Independent of the Nominating Shareholder. As we explain in more detail below, we also believe that to help assure that proposed Rule 14a-11 is not used as part of a control contest, the final rule should provide that to be eligible for proxy access the nominee must be independent from the nominating shareholder.

II. Companies Should be Permitted to “Opt-Out” of Proposed Rule 14a-11. As noted above, we recommend that companies and their shareholders be permitted to “opt out” of proposed Rule 14a-11 by adopting and implementing their own form of proxy access. Under our suggested approach, a company could propose a proxy access procedure to its shareholders, or shareholders could propose a proxy access procedure pursuant to the proposed amendments to Rule 14a-8. In either case, if such proxy access proposal receives the affirmative vote of a majority of the shares of stock present in person or by proxy and entitled to vote on the proposal, the proxy access proposal would apply in place of proposed Rule 14a-11. In this regard, we would note that it would be possible for shareholders to vote affirmatively that they don’t want proxy access, or they could vote on procedures that would provide a level of proxy access that is more or less restrictive than under proposed Rule 14a-11, and they would be free to make that decision. We believe that requiring shareholder approval of a board’s proposed proxy access procedures should alleviate concerns that boards might attempt to overreach in proposing such procedures, as shareholders would refuse to ratify such board proposed proxy access procedures. We do, however, believe that in the interests of “workability”, boards be given the right to adopt or amend existing proxy access procedures, subject in every case to ratification by shareholders at the next annual meeting. In this way, boards could address issues and problems arising between annual meetings to preserve and enhance effective corporate governance—but would always be subject to the requirement of shareholder approval for their actions. We believe this approach appropriately balances the Commission’s concern of ensuring proxy access is available to shareholders of public companies³ who desire it, while encouraging private ordering and enabling companies and their shareholders to make appropriate choices as to the form of proxy access best suited to their individual company.

III. Nominee Requirements.

A. The Nominee Must be Independent of the Nominating Shareholder. We believe it is very important that proposed Rule 14a-11 provide that the nominee be independent of the nominating shareholder. Specifically, we recommend that proposed Rule 14a-11 provide that the nominee may not be (i) a nominating shareholder, (ii) a member of the immediate family of any nominating shareholder, or (iii) a partner, officer, director or employee of a nominating shareholder or any of its affiliates. There are several reasons that this limitation is appropriate. First, we believe it is consistent with the intended purpose of proposed Rule 14a-11 that it not be used to effect control of a company. By ensuring that the nominee is independent of the

³ We believe that proposed Rule 14a-11 should provide an exception for, and not be applicable to, controlled companies. For this purpose, the Commission should consider the definition of “controlled company” adopted by the New York Stock Exchange in its Section 303A Corporate Governance Rules: a “controlled company” is a company of which “more than 50% of the voting power is held by an individual, a group or another company.” NASDAQ has a similar rule. We believe that this is appropriate as it will minimize costs to the company for shareholder nominations that have no chance of success since an individual, a group or another company has majority voting control of the company.

nominating shareholder, it is less likely that proposed Rule 14a-11 will be used by those shareholders who are seeking to control the company. Second, the independence requirement will make it more likely that the shareholder nominee will discharge his or her director's fiduciary duties to all shareholders and not be unduly obligated to represent or be influenced by the interests of the nominating shareholder. Third, it will help ensure the confidentiality of board meetings by reducing or eliminating the pressure or employment requirement that the proxy access director share otherwise confidential board information with the nominating shareholder. We note that in 2003, the Commission proposed a limitation on relationships between a nominating shareholder and the director nominee in response to concerns about the possibility of "special interest" or "single issue" directors that would advance the interests of the nominating shareholder over the interests of shareholders as a group. We believe the requirement that the nominee be independent of the nominating shareholder will not impose an undue burden on the nominating shareholder and will help ensure the proper functioning of the board.

B. The Nominee Must Meet Valid Bylaw Qualifications and Director Guidelines.

The Proposed Rules require a representation that, to the knowledge of the nominating shareholder, the nominee meets the objective criteria for independence set forth in the rules of the relevant national securities exchange or national securities association. However, most state laws permit companies to establish qualifications for directors in their bylaws. Many companies have adopted such additional non-discriminatory director qualifications in their bylaws. Some companies in regulated industries, such as broadcast, maritime shipping and aviation, have imposed U.S. citizenship requirements for their directors. Other regulated industries, such as gaming or defense, may require their directors to meet specific licensing or national security requirements. Similarly, for depository institutions, there may be director interlock prohibitions. Many of these bylaw provisions are different from and, in some cases more stringent than, the objective criteria of the applicable securities exchange or association. We believe that such non-discriminatory director qualifications set forth in a company's governing documents are valid as a matter of state law with respect to all directors. We therefore believe it is appropriate that such eligibility standards be applicable to all shareholder nominees. We also believe that the shareholder nominee, once elected to the board, should be required to comply with a company's non-discriminatory board service guidelines, such as mandatory retirement age, share ownership requirements and the maximum number of other boards and board committees on which directors may serve.

Once elected to the board, a shareholder-nominated director has the same fiduciary obligations to the company's shareholders as any other director; and, as noted above, we see no basis for any distinction among directors with respect to valid, non-discriminatory board director qualifications or service guidelines. There should not be different standards for company-nominated and proxy access directors. We therefore recommend the Commission make these principles clear in the final rules.

C. The Nominee Must Complete a Company's Standard Directors' and Officers' Questionnaire. As noted above, we believe it is important for a shareholder nominee to meet the company's non-discriminatory director qualification and service requirements. Accordingly, we believe that proxy access shareholder nominees should be required, at the request of the company, to complete the company's standard "director and officer questionnaire" prior to the printing and mailing of the proxy statement. The questionnaire would provide the company with

information to help the company determine if the nominee is independent based upon the stock exchange rules and the company's own corporate governance guidelines. This is the same purpose for which companies collect information each year from their current directors, and thus would not impose upon the shareholder nominee any obligations that are not imposed on the company's board-nominated directors. If, based on the information provided in the questionnaire, the board determines that the nominee does not meet the applicable stock exchange's independence standards or the company's own corporate governance guidelines, we believe it would be important, and appropriate, for the company to notify shareholders of that fact in the proxy statement. While the lack of independence may not be a disqualifying factor for board service, it is important for shareholders to know how many of their directors are independent and whether they can serve on the audit, compensation or nominating committee. Independence will also affect the governance quotients that companies receive from board evaluation services (such as RiskMetrics) and the voting recommendations that are made by RiskMetrics and others. Finally, a board's determination that the proxy access candidate lacks independence may also inform the nominating committee and full board at the time it finalizes the board slate of directors of the balance of independent and non-independent directors and the company's compliance posture with respect to the independence requirements under stock exchange listing rules and the Sarbanes-Oxley Act.

D. Nominees that Count Against the Proxy Access Director "Cap".

(i) Proxy Access Shareholder Nominee status continues even if endorsed by the Board. Under proposed Rule 14a-11, a nominating shareholder is required to represent that no relationships or agreements exist between the nominee and the company and its management, and between the nominating shareholder and the company and its management. If any such agreement exists, the nominee would not count towards the maximum number of nominees that could be nominated pursuant to proposed Rule 14a-11. We believe if, at any time prior to the shareholders' meeting, the board decides to endorse the nominating shareholder's nominee and include the nominee on the board's slate, the nominee should nevertheless continue to be treated as a proxy access shareholder nominee for purposes of determining the maximum number of proxy access shareholder nominees to be included in the company's proxy materials for that year. This will help facilitate discussions between boards and nominating shareholders, as a board may be more likely to come to an accommodation concerning a nominating shareholder's nominee knowing that, if it were to do so, it would not need to then begin the process of negotiating all over with yet another nominating shareholder because the "endorsed" nominee will not count towards the cap on proxy access shareholder nominees. If proposed Rule 14a-11 is adopted as currently proposed, we believe it is likely to have a chilling effect on desirable negotiations between nominating shareholders and boards or nominating committees regarding shareholder nominees.

(ii) Proxy Access Shareholder Nominee status continues for Three Years following Election to the Board. The Proposed Rules do not adequately address the situation where management includes in its slate a director who was elected as a shareholder nominee at the previous meeting. We believe that, as drafted, the Proposed Rules may incentivize the nominating committee or the board not to re-nominate the director in order to avoid that person becoming a "management" director and thereby allowing another nominee to be put forth by shareholders under proposed Rule 14a-11. Therefore, we believe that proposed Rule 14a-11

should be revised to provide that any company nominee that was initially elected as a shareholder nominee shall reduce the number of nominees that may be nominated pursuant to proposed Rule 14a-11(d)(1) for a period of an additional two years; provided that such director is nominated by the nominating committee or the board in each such additional year. Imposing a three-year status as a proxy access director would also have the merit of replicating the practical effect of the proxy access cap at companies with staggered boards, where proxy access directors are elected for three-year terms and retain their status as such for purposes of the proxy access cap under proposed Rule 14a-11. After such three-year period, such director would cease to have the status of a proxy access director for purposes of the cap and his or her re-nomination would not reduce the number of nominees that may be nominated pursuant to proposed Rule 14a-11(d)(1).

IV. Notice, Disclosure and Procedural Requirements.

A. Largest Shareholders Should Be Allowed to Nominate; Window Period. Pursuant to proposed Rule 14a-11, the nominating shareholder that first provides notice to the company will be permitted to include its nominee in the company's proxy materials. However, proposed Rule 14a-11 does not specify the earliest date that a nominating shareholder can file a notice on Schedule 14N. We believe that, as proposed, Rule 14a-11 could have the unintended consequence of resulting in a race by shareholders to be the first to provide their notice to the company. That is because, as soon as a company completes its annual meeting, a nominating shareholder could file a notice on Schedule 14N for the next annual meeting. This dynamic could discourage potential nominating shareholders from engaging in constructive dialogue with the board in an effort to achieve its objectives without a proxy access election contest. This dynamic would also create burdens for boards and companies, as they could potentially be in the position of having to address shareholder nominations throughout the year. We therefore recommend that the Commission, in its final rules, provide for a specific window within which nominating shareholders can make a nomination pursuant to proposed Rule 14a-11 (e.g., no earlier than 150 calendar days and no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting).

In addition, we believe that where there is more than one eligible nominating shareholder, the nominating shareholder with the largest holdings should be entitled to include its nominee in the company's proxy materials. This approach would ensure that those nominating shareholders with the greatest economic interest in the company would have the right to have their nominees included in the company's proxy materials. The interests of such shareholders are more likely to be aligned with the interests of the other shareholders. This approach would be consistent with the Commission's approach in its 2003 proposal. As the Commission noted in the Proposed Rules, the persons that commented on that approach in 2003, while limited, did not generally object to such a standard. In the Proposed Rules, the Commission suggests that a first-in approach might be better as a holdings-based approach might be difficult for companies to administer because it would lack certainty. We believe, however, that if there is a window period, as we have suggested, companies will have a date certain by which all nominations must be received, and will at the end of the window period be able to determine which nominating shareholders have the largest stock holdings based on their Schedule 14N filings.

We suggest that, for uniformity of application, the percentage ownership of a nominating shareholder both for purposes of the requisite percentage threshold and for purposes of determining the size order of shareholders be determined based on their Schedule 14N filings.

B. Deadline for Submitting a Nominee under Proposed Rule 14a-11; Excluding a Shareholder Director Nominee that Does Not Comply with the Requirements of Proposed Rule 14a-11.

(i) Deadline for submitting a Nominee pursuant to Proposed Rule 14a-11 should be the same as the Deadline for submitting a Proposal pursuant to Rule 14a-8(d). Many companies have advance notice bylaws that permit shareholders to submit their nominees for director as late as 60-90 calendar days prior to the anniversary date of the previous years' annual meeting. Under proposed Rule 14a-11, a notice on Schedule 14N of an intent to require a company to include a nominating shareholder's nominee in the company's proxy materials must be filed by the date specified in the company's advance notice provisions, or, where no such provision is in place, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting (which would typically be 150 to 165 days prior to the annual meeting). The procedure outlined in the Proposed Rules by which a company would seek a no-action letter from the staff of the Commission in order to exclude a shareholder nominee under proposed Rule 14a-11 could take as much as 120 days. Thus, for companies with standard advance notice bylaws that permit shareholders to submit their nominees for directors as late as 60 or 90 calendar days prior to the shareholders' meeting, the no-action procedure could not be accommodated within the available time.

If a company attempts to amend its advance notice bylaw to take into account the required time to comply with the proposed Rule 14a-11 no-action procedures, increasing the minimum notice period might well be held invalid under Delaware law (and perhaps the laws of many other states), on the grounds that the period is unreasonably long and would have the effect of unduly constraining shareholders' right to nominate directors. To resolve the almost certain conflict between standard advance notice bylaws and the no-action letter dispute resolution process, we recommend that the Commission, in its final rules, provide that the deadline for submitting a nominee pursuant to proposed Rule 14a-11 be the same as the deadline for submitting a proposal pursuant to Rule 14a-8(d), which does not include a reference to other time periods provided in advance notice bylaws.

(ii) No Substitute Proxy Access Shareholder Nominees. If a shareholder nominee is excluded by a company following the receipt of a no-action letter from the staff of the Commission pursuant to proposed Rule 14a-11 or the nominating shareholder withdraws its nominee as a result of the procedure for determining eligibility specified in proposed Rule 14a-11(f), we believe the company should not be required to include a substitute proxy access shareholder nominee in its proxy materials, as the company would not have sufficient time to seek to exclude such new nominee if such new nominee fails to meet the requirements set forth in proposed Rule 14a-11.

(iii) Effects of Disqualifying Event. If a disqualifying event occurs after the company's proxy materials have been disseminated, the company should be able to issue

supplemental proxy materials and new proxy cards that remove the disqualified nominee, and the company should be entitled to disregard any votes cast for the disqualified nominee.

C. Additional Required Disclosures. We support the Commission's efforts to provide transparency and facilitate shareholders' ability to make informed decisions on shareholder nominees. While we appreciate that the currently proposed Schedule 14N is intended to provide disclosures regarding the nominating shareholder and the nominee, we believe there is additional information that is important and material to shareholders in making a determination as to whether to vote for a proxy access shareholder nominee. We recommend that the Commission require the following additional disclosure in the Schedule 14N:

- a description of (1) any material transaction between the nominating shareholder or any of its affiliates and the company or any of its affiliates within the 12 months prior to the filing of the Schedule 14N, and (2) any discussion regarding the nomination between the shareholder and a proxy advisory firm;
- any holdings of more than 5% of the securities of any competitor of the company (i.e., any enterprise with the same SIC code);
- any meetings or contacts, including direct or indirect communication by the shareholder, with the management or directors of the company that occurred during the 12-month period, other than with respect to the proposed nomination;
- the items required by Item 4 of Schedule 13D regarding the purpose or plans of the nominating shareholder in respect of the nomination (nominating shareholders that beneficially own 5% or more of a subject class of securities should have the option of disclosing this information on their Schedule 13D, as discussed below)⁴;
- a description of any contracts, arrangements, understandings or relationships (legal or otherwise) between the nominating shareholder or any of its affiliates and any other person with respect to any securities of the company; and
- if adopted, the same information that a company would be required to disclose in its proxy statement regarding its nominees for director pursuant to the Commission's proposed new rules set forth in "Proxy Disclosure and Solicitation Enhancements" (Proposing Release No. 33-9052, dated July 10, 2009).

⁴The items to be disclosed are a description of any plans or proposals which the nominating shareholder or group may have which relate to or would result in: (i) the acquisition by any person of additional securities of the company, or the disposition of securities of the company; (ii) an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the company or any of its subsidiaries; (iii) a sale or transfer of a material amount of assets of the company or any of its subsidiaries; (iv) other than as a result of the election of the nominating shareholder's or group's nominee, any change in the present board of directors or management of the company, including any plans or proposals to change the number or term of directors or to fill any existing vacancies on the board; (v) any material change in the present capitalization or dividend policy of the company; (vi) any other material change in the company's business or corporate structure, including but not limited to, if the company is a registered closed-end investment company, any plans or proposals to make any changes in its investment policy for which a vote is required by Section 13 of the Investment Company Act of 1940; (vii) changes in the company's charter, bylaws or instruments corresponding thereto or other actions which may impede the acquisition of control of the company by any person; (viii) causing a class of securities of the company to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association; (ix) a class of equity securities of the company becoming eligible for termination of registration pursuant to Section 12(g)(4) of the Securities Exchange Act of 1934; or (x) any action similar to any of those enumerated above.

We believe these additional disclosures are needed from all nominating shareholders. Absent these disclosures, a nominating shareholder could obtain significant representation and influence on a company's board of directors without the other shareholders having information regarding the nominating shareholder's plans and purposes that is necessary and appropriate to make an informed decision.

D. The Proposed Exemption from Schedule 13D is Not Appropriate. We disagree with the Commission's view that the nomination of one or more directors pursuant to proposed Rule 14a-11, soliciting activities in connection with such a nomination, or the election of such a nominee as a director under proposed Rule 14a-11, should not result in a 5% or greater nominating shareholder losing its eligibility to file on Schedule 13G. The Commission states that "[c]entral to Schedule 13G eligibility is that the shareholder be a passive investor that has acquired the securities without the purpose, or the effect, of changing or influencing control of the company." (see, the Proposed Rules at 136). We believe that any nomination of a director by a nominating shareholder pursuant to proposed Rule 14a-11 is for the purpose or will have the effect of influencing control of the company and that the nominating shareholder is, therefore, by definition, not a passive investor. The Commission acknowledges in the Proposed Rules that "if a nominating shareholder is the nominee, and is successful in being elected to the board of a company, the shareholder would most likely be ineligible to continue filing on Schedule 13G because of its ability as a director to directly or indirectly influence the management and policies of the company." (see, the Proposed Rules at 137). It is inconsistent for the Commission to suggest that a nominating shareholder's formation of a group, nomination of a director, and nomination and soliciting activities are not also for the purposes of influencing a company's board of directors or management. Therefore, a nominating shareholder should be required to report its holdings, plans, proposals, intentions and other interests either as part of the Schedule 14N or on a Schedule 13D. We believe that the additional disclosure required by Schedule 13D is both necessary and appropriate, and should not be unduly burdensome on nominating shareholders.

E. Universal Proxy Card. We are concerned that there is a significant possibility of shareholder confusion in any election in which a shareholder nominee is included in the company's proxy materials. We also believe that shareholders may be confused by the use of a universal proxy card, which will contain the names of both the company's nominees and shareholder's nominees. For instance, shareholders, relying on common practice, may execute a blank proxy card without checking the boxes for any of the nominees, which we believe would, under the Proposed Rules, result in an invalid proxy card. This could have the unintended consequences of a company failing to obtain a quorum for the shareholders meeting in addition to disenfranchising these shareholders. Also, certain shareholders may mistakenly check all boxes, including the boxes for both the company's nominees and the proxy access shareholder's nominees, with uncertain results. Finally, shareholders may not check boxes equating to a full slate of nominees.

To address any confusion that would result from the use of a universal proxy card, we recommend requiring a clear delineation in the proxy statement and in the proxy card of the company slate and the shareholder nominees. In addition, there should be included on the face of the proxy card in bold letters the following statement: "In order to vote for a shareholder nominee, you must check the box for that nominee and strike a candidate from the company

slate.” We believe that this disclosure will minimize the risk that a shareholder will either vote for all nominees - thus rendering the proxy invalid - or vote for only a partial slate - which will partially disenfranchise the shareholder with respect to such shareholder’s vote on the full slate of directors.

Proposed Rule 14a-11 would also prohibit the grant of authority to vote for the company’s nominees as a group on a proxy card if the proxy card includes a shareholder’s nominee, and we are concerned that this will further complicate the proxy voting process. Boards and nominating committees put considerable effort into selecting the company’s complete slate of nominees, taking into account the expertise, experience and independence of the board as a whole. Shareholders should be permitted to vote for the company’s nominees as a group if they so desire. For this reason, we recommend that the Commission revise the Proposed Rules to provide that any proxy that includes shareholder nominees that is voted in blank (that is, without checking the boxes for the nominees) continue to be deemed to be a vote for the entire board-nominated slate.

F. Liability of the Company. We believe that given the time constraints of proposed Rule 14a-11, the company’s nominating committee will be unable to thoroughly vet a shareholder nominee for inclusion in the company’s proxy materials. Even if the nominee provides a director’s and officer’s questionnaire as discussed above, it often takes several months for large companies with multiple operations and locations to vet a nominee and the nominee’s family members to determine whether the nominee meets the independence standards of the company.

The Proposed Rules indicate that the company would have liability if it “knows or has reason to know that the information is false or misleading.” We believe that this is inappropriate, as the company does not have sufficient time to investigate the statements made by the nominating shareholder and the nominee, and it also does not necessarily have the means to determine whether the statements are false or misleading. Furthermore, even if the company had reason to believe – for example, based on information received in the questionnaire – that the information provided by the nominating shareholder or group or the nominee is false or misleading, the company does not have the right under proposed Rule 14a-11 to exclude the information from the proxy statement.

Pursuant to existing Rule 14a-8(l), a company is not responsible for shareholder proposals or supporting statements. We also note that the Commission’s 2003 proxy access proposal provided that the company had no liability for the statements of the nominating shareholder or group. The purpose of proposed Rule 14a-11 is to provide “access” – a means by which shareholders may use the company’s proxy materials to facilitate their nomination of directors. This purpose is not undermined by providing that the company has no liability for the nominating shareholder’s statements that the company is required to include in its proxy materials. To the extent that the “knows or has reason to know” language contained in proposed Rule 14a-11(e) and 14a-19 suggests that companies have some duty to investigate or otherwise confirm the accuracy of the information provided by the nominating shareholder or group, we believe this is an inappropriate shifting of liability to companies for statements made by nominating shareholders or their nominees. There is no compelling reason why a company should have any liability for a nominating shareholder’s or nominee’s statements.

For the foregoing reasons, we believe a company should be entitled to explicitly state in the proxy statement that “the company takes no responsibility for the accuracy or completeness of the information supplied to it by the nominating shareholder or group or the nominee for director.”

Proposed Amendments to Rule 14a-8

We support the adoption of the proposed amendments to Rule 14a-8(i)(8) that would permit shareholders to make proposals regarding the election of directors. We believe that the use of amended Rule 14a-8(i)(8) to allow shareholders to propose and adopt procedures for access to the company’s proxy materials is an appropriate way for companies and their shareholders to determine a proxy access procedure that is tailored for the particular circumstances of the company.

A. Private Ordering/Conflict with Proposed Rule 14a-11. As we discussed above, we believe that shareholders should have the full range of options available to them regarding the nature of proxy access at their companies, and, as such, the requirement to include proposals under the proposed amendments to Rule 14a-8(i)(8) should not be limited only to those proposals that would not conflict with proposed Rule 14a-11.

B. Treatment of Incremental Changes to Proxy Access Procedures as “Substantially Implemented”. If a company is subject to proposed Rule 14a-11 or, if as we have suggested, has “opted out” of the Rule 14a-11 proxy access procedure, it would be inappropriately disruptive to require a company thereafter to include in its proxy materials shareholder proposals that seek only incremental changes to that procedure. Such incremental changes would subject companies to annual uncertainty as to the specific nature of their director-election process. Accordingly, the Commission should provide clear guidance regarding the application of the “substantially implemented” standard in Rule 14a-8(i)(10). In this regard, the “substantially implemented” standard should appropriately balance a company’s proxy access procedure against the potential disruption of a yearly shareholder access proposal. We would therefore propose that, unless the Rule 14a-8(i)(8) shareholder access proposal is designed to materially amend the company’s current procedure, the proposal should be properly excludable.

C. Cap on Number of Nominees. We believe that the Commission should specifically permit companies to exclude from their proxy materials any shareholder proposal that would create a proxy access procedure that could result in the election of shareholder nominees to more than a majority of a company’s board of directors. We believe this is consistent with the Commission’s intended goal that proxy access through a company’s proxy materials should not be used by shareholders who are seeking control of a company.

D. Ownership Requirements. A proxy access proposal could have a significant impact on a company. We believe that the existing \$2,000 standard fails to require an interest in the company that is commensurate with this potential impact. As such, the ownership of a shareholder that may require the company to include such a proposal should be significantly beyond the ownership standard for other proposals under Rule 14a-8. We believe that the ownership standard for a proxy access proposal under the proposed amendments to Rule 14a-

8(i)(8) should be at least 1% of the company's voting stock. While this ownership threshold is higher than for other proposals under Rule 14a-8, it is lower than the proposed ownership threshold under proposed Rule 14a-11 in recognition that the shareholder is proposing a proxy access procedure, rather than nominating a particular person as a director-nominee.

E. Disclosures required for a Nomination pursuant to an Applicable State Law Provision or a Company's Governing Documents. For the reasons discussed above under "Rule 14a-11, Section IV.C", we believe that the disclosure required for a proxy access nomination pursuant to an applicable state law provision or a company's governing documents should include all of the disclosures that would be required for a nomination under proposed Rule 14a-11.

* * *

We appreciate the opportunity to comment on these important proposals and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,

The Society of Corporate Secretaries & Governance Professionals

By: Neila B. Radin
Chair, Securities Law Committee

cc: Mary L. Schapiro, Chairman
Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
David M. Becker, General Counsel



SOCIETY OF CORPORATE SECRETARIES
& GOVERNANCE PROFESSIONALS

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% 104¹

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 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

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,

A handwritten signature in cursive script that reads "Paula C. Stulkey". The signature is written in dark ink and is positioned above the printed name of the sender.

The Society of Corporate Secretaries & Governance Professionals

cc: Mary L. Schapiro, Chairman
Kathleen L. Casey, Commissioner
Luis Aguilar, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance



SOCIETY OF CORPORATE SECRETARIES
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September 15, 2009

File Reference No. S7-13-09
Proxy Disclosure and Solicitation Enhancements
Release No. 33-9052

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

Dear Ms. Murphy:

The Society of Corporate Secretaries & Governance Professionals appreciates the opportunity to respond to the request for comments made by the Securities and Exchange Commission (the “Commission”) in its proposed rule entitled “Proxy Disclosure and Solicitation Enhancements” (the “Proposed Rules”).

The Society of Corporate Secretaries & Governance Professionals is a professional association, founded in 1946, with over 3,100 members who serve more than 2,500 companies. Our members are responsible for supporting the work of corporate boards of directors and their committees and the executive management of their companies on corporate governance and disclosure. Our members are generally responsible for their companies’ compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements. The majority of Society members are attorneys, although our members also include accountants and other non-attorney governance professionals.

I. Introduction

We support the Commission’s goal of providing enhanced disclosure to shareholders in the proxy statement. We note, however, that more disclosure is not necessarily better disclosure. We are also concerned that the Proposed Rules will result in an increase in both the length and complexity of proxy statements. And, as proxy statements get longer, we believe that there is a very real risk that retail investors will not read them. Therefore, we believe that the Commission should take a principles-based approach that focuses on whether the additional information that is being required would be meaningful to shareholders in determining how to vote or whether the information is merely incremental or general information. Our recommendations and comments, which are set forth below, are based on this principles-based approach. In addition, the Commission should permit companies to refer to other documents to the extent the requested information is disclosed elsewhere (e.g., Form 10-K or company website). As described below, some of the disclosure requested in the Proposed Rules is already disclosed in other publicly

filed documents. In addition, in certain instances, we believe that it would be better for investors to have disclosure of some of the requested information on company websites rather than in the proxy statement itself.

II. Enhanced Compensation Disclosure

The CD&A Should Not Be Expanded to Include Employees Generally

The proposed amendments to Regulation S-K Item 402(b), Compensation Discussion and Analysis (CD&A), would require a company to discuss and analyze its broader compensation policies and overall compensation practices for employees generally, if risks arising from those compensation policies or practices “may” have a material effect on the company. For the reasons described below, we do not believe that it would be appropriate to expand the scope of the CD&A beyond the named executive officers (NEOs) to include disclosure of the company’s compensation policies and practices for employees generally. Expanding the CD&A to employees generally would represent a fundamental shift: as Instruction 1 to Item 402 states, “The purpose of the Compensation Discussion and Analysis is to provide to investors material information that is necessary to an understanding of the registrant’s compensation policies and decisions **regarding the named executive officers.**” Instruction 2 continues “The Compensation Discussion and Analysis should be of **the information contained in the tables** and otherwise disclosed pursuant to this Item.” We believe that shareholders would be ill-served by including disclosures of a registrant’s overall compensation program for employees as it relates to risk management in the CD&A. Such disclosure would likely be general in nature and therefore not meaningful to investors. Such disclosures also would not necessarily relate to the NEO information contained in the Summary Compensation Tables, and as such could be confusing because the discussion would be presented out of context. The proposed inclusion of material risk disclosure in the discussion of NEO compensation instead of in a company’s other risk-related disclosures would mean that shareholders would have to consult two different disclosure documents in order to obtain a full understanding of a company’s risks. Moreover, this disclosure would add length and complexity to the proxy statement, which could make it more difficult for shareholders to understand a company’s explanation of the policies and decisions relating to the compensation of the NEOs. We are also concerned that if the disclosures resulting from the Proposed Rules were to be focused on a specific company group or function, the requested information would likely require the disclosure of confidential information which could result in competitive harm. For example, it might be necessary for a company to disclose the specific business strategies and associated compensation levels and mix.

Risk Disclosure is Already Required, Appropriately, in the MD&A

We believe that there are other existing disclosure requirements that would provide more meaningful information about the effect of the registrant’s compensation policies on its risk profile and risk management. We believe that if a company has risks arising from its compensation policies or practices that may have a material effect on the company, then the company is already required to disclose those risks in its risk factor disclosures, in the management’s discussion and analysis of financial condition and results of operations (MD&A), and quantitative and qualitative disclosures about market risks. Disclosures relating to overall

compensation programs and policies as they relate to risk management would not be meaningful if isolated from the company's overall risk disclosure, and therefore, are more appropriately discussed in the context of the company's overall risk disclosure in the annual 10-K and quarterly 10-Q filings. If the purpose of the Proposed Rules is to encourage disclosure of the relationship of a company's overall compensation policies and practices and risk taking, we believe that a more meaningful approach would be for the Commission to remind companies of their obligation to disclose such material risks in their risk factor disclosure, MD&A or in quantitative and qualitative disclosures about market risks, rather than in expanding the existing required compensation disclosure.

The Standard for Disclosure Should be "Likely" Rather Than "May"

If, however, the Commission nevertheless elects to adopt the proposed amendment to the CD&A, we believe that the Commission should replace the words "may have a material effect" with "is likely to have a material effect" in Item 402(b)(2). The instructions to the CD&A currently provide a materiality standard for the disclosures. Thus, Instruction 1 to Item 402(b) provides that the purpose of CD&A is to "provide to investors material information that is necessary to an understanding of the registrant's compensation policies, while Instruction 2 to CD&A provides that CD&A should "focus on the material principles underlying the registrant's executive compensation policies and decisions." We are concerned that the proposed wording would expand the scope of CD&A to include discussion of items that "may" have a material effect. We believe that a "likely to have a material effect" standard would provide investors with meaningful disclosure and not speculation about items that are unlikely to occur.

III. Summary Compensation Table and Director Compensation Table

We Support the Reporting of Stock and Option Awards at Aggregate Grant Date Fair Value under FAS 123R

The Proposed Rules would amend the Summary Compensation Table and Director Compensation Table to require companies to report stock and option awards at their aggregate grant date fair value computed in accordance with FAS 123R. We support this change. The aggregate grant date fair value is generally used by compensation committees in determining the amount of stock and options to award, whereas the current disclosure requirement confusingly focuses on accounting considerations that may have no bearing on compensation decisions. For example, awards that vest over time are disclosed over the vesting period rather than in the year of the grant, unless the executive was retirement eligible, in which case they are reported in the year of the grant. Thus, two executives might receive the same amount of stock or option awards, but have different values reported under the current requirements because one is retirement- eligible and the other is not.

In supporting this change, we recommend the following three modifications/additions:

Awards Granted for Prior Fiscal Year Performance Should be Included. The Summary Compensation Table and Director Compensation Table should be further amended to enable companies to report stock and option awards granted for services with respect to the relevant

fiscal year, even if the awards were granted after fiscal year-end. It is the practice of many companies to award incentive compensation in the first three months of the fiscal year based on performance metrics met for the prior fiscal year. This information is more relevant to shareholders as it will provide the best picture of an executive's total compensation for services in a given fiscal year. Matching the awards granted to the time frame in which the performance is measured will also eliminate confusion, and we believe this approach would be consistent with the way that compensation committees view and analyze information when making compensation decisions. This approach would also be consistent with the reporting of amounts earned under non-equity incentive plans. To avoid any risk of abuse, we recommend that this approach be limited to awards granted in the first three months after the fiscal year end with respect to services performed in the applicable fiscal year or performance periods that ended during the fiscal year.

Companies Should Not Be Required to Recompute Values for Previous Years. The Proposal asks for comment on whether companies should be required to present recomputed disclosure for each preceding fiscal year to show the full grant date fair values. We do not believe that requiring recomputation is necessary or appropriate. The summary compensation table data showing the amounts for the preceding two fiscal years has already been disclosed to investors and requiring that companies now present different (recomputed) amounts for those previous years would serve only to confuse investors. Instead, companies can clearly indicate by footnote or other disclosure that the equity values shown for the most recent fiscal year are based on full grant date fair values in accordance with the new rules, and that the equity values shown for the previous fiscal years were based on amounts recognized for financial reporting purposes in accordance with the previous rules.

Calculation of Grant date Fair Value in accordance with FAS 123R. We recommend that in its final rule release, the SEC include a clarification regarding equity valuation as discussed below, that we believe is necessary because previous guidance issued by the staff of the Division of Corporation Finance appears to be inconsistent with the Proposed Rules. The SEC's current proposal would require companies to include in the Summary Compensation Table and Director Compensation Table the "aggregate grant date fair value computed in accordance with FAS 123R". Calculating this value for performance-based equity awards (e.g., performance share units) is more complicated than for other equity grants. Performance-based awards often have a "target" level, as well as a "threshold" level (lower than target) and a "maximum" level (higher than target). For such awards, FAS 123R requires that the company consider which is the "most probable" scenario.

For example, if the company determines that the "maximum" level is not the most probable outcome, then the company would not use the maximum amount to determine the grant date fair value under FAS 123R. Instead, if the company determined that at the time of grant, the "target" level was the most probable outcome, then the company would use the target level to determine the initial fair market value (i.e., the value at the time of grant).

Our concern arises because the Division of Corporation Finance suggested in guidance issued earlier this year that under FAS 123R a company would be required to use the "maximum" level for purposes of determining the initial grant date fair value under FAS 123R, without regard to

whether the maximum level was determined by the company to be the most probable. Specifically, the "Compliance & Disclosure Interpretations: Regulation S-K" (C&DI) contain the following question and answer:

“Question 120.05 (Grants of Plan-Based Awards Table)

Question: An incentive performance plan will pay out at different levels depending upon the actual performance results over the relevant performance period. Is the grant date fair value reportable in column (I) of the table determined based on threshold, target or maximum performance?

Answer: The grant date fair value reportable in column (I) is determined based on maximum performance, so that investors can see the maximum grant date fair value numbers that were authorized in granting the award. [May 29, 2009]”

This guidance directly conflicts with FAS 123R, which requires that if a company determines that target performance (not maximum performance) is most probable, then the company must use target performance to determine the initial grant date fair value. We acknowledge that this guidance was given in the context of the Grants of Plan-Based Awards Table. However, under the Proposed Rules, the full grant date fair value of awards would be required to be disclosed in the Summary Compensation Table rather than the Grant of Plan-Based Awards Table. Therefore, we are concerned that the guidance will be considered relevant when companies are determining the initial grant date fair value for purposes of reporting equity awards in the Summary Compensation Table and Director Compensation Table. This is significant because these amounts would now be included in the "Total" compensation columns. If companies are required to value performance-based equity awards at "maximum," this will mislead investors about the intention of the compensation committees when the awards were approved.

In sum, we request that if the Commission adopts this proposal, it include a clarification in the narrative discussion acknowledging that for performance-based equity grants, the grant date fair value computed in accordance with FAS 123R should take into consideration, among other things, the probability that certain performance levels will be achieved. Alternatively, or in addition, the Commission could direct the staff of the Division of Corporation Finance to remove this specific C&DI.

IV. Enhanced Director and Nominee Disclosure

We Support Additional Disclosure of Board Memberships and Legal Proceedings

We support the proposed amendment of Item 401 of Regulation S-K to expand the disclosure requirements regarding the past directorships held by directors and nominees and the time frame for disclosure of legal proceedings involving directors, nominees and executive officers. We also support expanded disclosure regarding a director's or nominee's experience, qualifications and education beyond the brief biographical information that is currently required.

Disclosure of "Attributes and Skills" is Not Meaningful as They are Intangible Qualities

However, we believe that it is not appropriate to require disclosure of “attributes and skills” as it would be very difficult to describe in a meaningful way the intangible qualities that many good directors possess. **It goes without saying that the best directors are those with good critical thinking skills, the ability and willingness to ask questions, and the courage to challenge management when necessary.** In addition, many directors possess the same attributes, which could result in companies providing the same disclosure for multiple directors, which would not be meaningful. Further, a well-assembled board consists of a diverse collection of individuals who have a variety of complementary skills, and focusing on an individual director’s attributes and skills fails to take this into account.

We Do Not Support Disclosure That Would “Pigeon-Hole” a Director or Committee Member

Moreover, we note that board composition is an art rather than a science, and companies typically look at directors as a group with complementary skills at any given time. Thus we do not support any disclosure that would “pigeon hole” a particular director or indicate that he or she fits a certain “slot”. For the same reason, we also do not believe that it is appropriate to require disclosure of specific experience, qualifications or skills that qualify a person to serve as a member of a particular committee. Other than having a least one member of the board with “financial expertise” satisfying the requirements for the audit committee, companies generally do not select—and should not be encouraged by disclosure rules to select—individuals to serve on the board based on what committee they will serve on. In fact, many companies will rotate directors among several committee positions during their tenure on the board.

Last, we believe that companies should be required to disclose the requested information in their proxy statements only when the director is first nominated. Given our concerns stated at the outset about more disclosure not necessarily being better, requiring disclosure of the nominee’s background once will help to keep the length of the proxy more manageable.

V. New Disclosures about Company Leadership Structure and the Board’s Role in the Risk Management Process

We Support Additional Disclosure of a Company’s Leadership Structure

The Proposed Rules would add a new disclosure requirement to Item 407 of Regulation S-K and a corresponding amendment to Item 7 of Schedule 14A that would require disclosure of the company’s leadership structure and why the company believes it is the best structure for it at the time of the filing. We support these proposed amendments to Item 407 and we acknowledge the Commission’s comment that they are not intended to influence a company’s decision regarding its board leadership structure. We strongly believe that each company must determine for itself whether it is appropriate to separate the Chairman and Chief Executive Officer roles and whether or not to have a lead or presiding director. We note that while some proxy advisory firms view the separation of these roles as optimal, we are aware of no empirical evidence demonstrating that companies with a particular structure consistently have better performance than companies with other structures.

We Support Additional Disclosure with respect to the Board's Role in Risk Management

The Commission also proposes to require additional disclosure in proxy and information statements about the board's (or board committee's) role in the company's risk management process. We read this to mean the board's role in risk management **oversight**, as is noted in the questions posed for comment. We do not oppose this proposal, and we note that companies that received TARP funds are currently required to disclose information about their risk management process. Finally, we believe that the Commission should provide in its final rule that if the required disclosure is included in another document (such as the MD&A of the Form 10-K), the company may include a reference to that document rather than repeating the information in its proxy statement.

VI. New Disclosure Regarding Compensation Consultants

Disclosure of Fees Should Only Be Required for Consultants Advising on Executive Compensation

The proposed additions to Regulation S-K Item 407(e)(3)(iii) would require disclosure of fees paid to compensation consultants when they play any role in determining or recommending the amount or form of executive and director compensation, if they also provide any other services to the company. It would also require disclosure regarding the nature and extent of all additional services such consultant provides. The proposing release (at page 40) expresses a concern that the provision of additional services by a compensation consultant "may create the appearance, or risk, of a conflict of interest that may call into question the objectivity of the consultant's executive pay recommendations." While we acknowledge this concern, we believe that these disclosure requirements should only apply to compensation consultants directly engaged by the compensation committee to provide advice on executive compensation. Under our approach, a company would not be required to include any disclosure regarding consultants who only provide data or information about compensation programs in particular industries, or for companies of a specific size, etc., as these consultants would not be providing advice or recommendations regarding executive compensation. Similarly, where a compensation consultant is retained by management and does not provide advice to the compensation committee, we do not believe that the concerns expressed in the proposing release would call for disclosure of additional services provided by, and fees paid to, such consultant. We also believe that it would be appropriate for the Commission to establish a disclosure threshold based on the amount of the fees for the non-executive compensation related services, such as \$120,000 per year, which is analogous to the disclosure threshold under Regulation S-K Item 404 for related person transactions.

VII. Reporting Voting Results on Form 8-K

Disclosure of Voting Results Should be Allowed on Websites

The Proposed Rules would transfer the requirement to disclose the vote results of any matter submitted to shareholders from Form 10-Q and Form 10-K to Form 8-K, in order to make them more timely. We generally support such a change; however, we believe that companies should

be permitted to post their voting results on their website within the required time period in lieu of filing a Form 8-K. This is consistent with the SEC's stated goal "to encourage the continued development of company Web sites as a significant vehicle for dissemination to investors of important company information."¹ We note that the Proposed Rules would carve out an exception for contested director elections and we believe this should apply to any proposal where the outcome has not been definitively determined within four business days of the meeting. Accordingly, under our recommendation, a company would be required to furnish (either on its website or Form 8-K) preliminary results on contested elections and proposals that are "too close to call" within four business days of the meeting and final results within four business days after the results become final.

Assuming companies are permitted to furnish preliminary results for contested elections and on proposals that are "too close to call" (as we recommend), then an amendment to General Instruction I.A.3(b) of Form S-3 to add an exception to the S-3 eligibility requirements for reporting voting results would not be necessary.

VIII. Proxy Solicitation Process

Rule 14a-2(b) provides an exemption from the proxy rules for any solicitation by any person who does not, at any time during such solicitation, seek the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization.

The Rule 14a-2(b) Exemption Should Be Maintained and Third Parties Must Publicly File Solicitation Materials

The proposed amendment to Rule 14a-2(b) provides that a person who supplies a shareholder with a blank, unmarked copy of a management proxy card and requests the shareholder to return the proxy card directly to management does not, by doing so, lose the exemption from the proxy rules under Rule 14a-2(b) for solicitations. Rather than adopting the proposed amendment, we urge the Commission to retain the existing requirements pursuant to which third parties that wish to engage in soliciting activities, including the distribution of copies of the company's proxy card, must publicly file their soliciting materials. We are concerned that allowing third parties to engage in soliciting activities and send a form of revocation without providing the shareholders with the information required under the federal securities laws will deprive those shareholders of information they need in deciding whether to revoke their proxy, including information about the identity and economic interests of the person providing the proxy and information about the effect of executing such subsequent proxy.

The Commission's proposed amendment is inconsistent with the Second Circuit's decision in MONEY Group, Inc. v. Highfields Capital Mgmt. L.P., 368 F.3d 138 (2d Cir. 2004). In MONEY, the Second Circuit recognized that providing a blank copy of management's proxy was a potentially abusive practice and held that in the case of a proxy vote to authorize a proposed merger under Delaware law, a duplicate of management's proxy card, when included in a

¹ SEC Release No. 34-58288, "Commission Guidance on the Use of Company Web Sites" August 7, 2008, 73 Fed. Reg. 45,862, available at <http://www.sec.gov/rules/interp/2007/34-58288fr.pdf>.

mailing opposing a proposed merger, was a form of revocation under the rule. We agree with the Second Circuit and we believe that it is disingenuous to suggest that a person is not furnishing a form of revocation when that person provides a shareholder with a unmarked copy of management's proxy in connection with a "just vote no" campaign, knowing that the execution of the blank proxy will revoke a prior proxy. In fact, the Second Circuit in MONY noted that the only "goal in sending out the duplicate proxy cards must be to encourage shareholders who have already voted for the merger to revoke their votes." We also note that the Commission's April 1993 interpretation of Rule 14a-2(b) acknowledged that providing a shareholder with a blank management's proxy card could have the effect of a revocation of an earlier dated proxy submitted by the same shareholder.

In addition, we also believe that Rule 14a-6(g) should be expanded to require all persons that rely on Rule 14a-2(b)(1), not just those who beneficially own more than \$5 million in market value of securities of the class that is the subject of the solicitation, to furnish a Notice of Exempt Solicitation to the Commission pursuant to Rule 14a-103. This would give the Commission an opportunity to comment on the soliciting materials and give the public information regarding the identity and economic interest of the people involved in a "just vote no" campaign, as well as provide notice to the company that a solicitation is taking place.

Rule 14a-4(d) Should Not Allow Soliciting Persons to "Round Out" a Short Slate with Management Nominees

The proposed amendments to Rule 14a-4(d) would codify an existing no-action position (*Application of Rule 14a-4(d)(4) to Solicitation for Proposed Minority Slates of Carl Icahn and Eastbourne Capital L.L.C.*) that a soliciting person can round out its short slate with nominees named in a non-management proxy statement in the same manner as already permitted by the rule for a soliciting person to round out its short slate with nominees named in management's proxy statement. As we believe that different shareholder groups may form stealth 13(d) groups, we agree with the Commission's requirements that soliciting persons intending to "round out" their short slate with a company's or another persons' nominees be permitted to do so only so long as such soliciting person: (1) does not form a group with the other persons as determined under Section 13(d)(3) and in Regulation 13D-G; (2) is not a participant in the other persons' solicitation; and (3) includes a representation in its proxy statement that it has not agreed and will not agree to act, directly or indirectly, as a group or otherwise engage in any activities that would be deemed to cause the formation of a group as determined under Section 13(d)(3) and in Regulation 13D-G. However, for the reasons set forth in the Society's letter to the Commission regarding Facilitating Shareholder Director Nominations, the Commission should not permit a shareholder to "round out" its short-slate with directors nominated pursuant to proposed Rule 14a-11 (if adopted) or pursuant to a proxy access by-law provision.

IX. Other Requests for Comment

Finally, the Commission states that it is exploring other ways in which it could improve proxy disclosures, and proposes some possible reforms at the end of the Release (the "Possible Reforms"). While we support the Commission's efforts to improve disclosure, we do not believe that it should pursue the Possible Reforms at this time for the following reason: as we have

noted above, proxy statements are becoming longer and more complex each year, and we are concerned that the time will come that they will be so complex that shareholders will stop reading them. We believe that these concerns will be exacerbated to the extent that the Commission's rule proposals result in additional required information that provides only incremental changes to the overall disclosure.

Thus, we believe that the Commission, in exploring ways to improve proxy disclosure, should take a principles-based approach that focuses on whether the additional information that is being considered would be meaningful to shareholders in determining how to vote or whether the information is merely incremental or general information. In this regard, we believe that the Commission should ensure that the proxy statement should not become an amalgam of discrete disclosures in response to "issues du jour".

We note the following examples of such additional disclosure and our views on such disclosure:

- Requiring the Compensation Committee Report to be "filed" would not be meaningful for shareholders in deciding whether to vote for directors, as the company's certifying officers already have liability for the contents of the CD&A;
- Expanding the CD&A to cover all executive officers (not just the named executive officers) would not be meaningful for shareholders because shareholders have been, and will continue to be able to, evaluate directors based in part on the compensation policies and practices in place for the NEOs, and the proposed expansion of the CD&A would only increase the compensation disclosure without providing much in the way of additional meaningful disclosure regarding the compensation committee's policies and procedures;
- Requiring disclosure of performance targets regardless of the potential competitive effect on a company may result in adverse consequences to a company that would outweigh any meaningful information such disclosure would provide shareholders in deciding whether to vote for directors;
- Requiring disclosure regarding whether a member of the compensation committee has expertise in compensation matters could have the unintended consequence of creating an implication that any directors on the committee that lacked such "expertise" were not qualified to serve. As described above, directors have broad knowledge and experience and use that to make judgments on a variety of issues affecting a company, including its compensation practices. Therefore, a member of a compensation committee that lacks such "expertise" may nevertheless add a tremendous amount of value to compensation decisions; and
- Requiring disclosure of whether the amounts of executive compensation reflect any considerations of internal pay equity would not be meaningful for shareholders in deciding whether to vote for directors as this disclosure is just one small element of the compensation analysis. Companies and their compensation committees are already required to address the material elements of their compensation program and the material

factors underlying their compensation policies and decisions, which may include internal pay equity.

We appreciate the opportunity to comment on these important proposals and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,

The Society of Corporate Secretaries & Governance Professionals

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