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August 17, 2009

Via email: rule-comments@sec.gov

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

Re: Proposed Rules Relating to Facilitating Shareholder Director Nominations (File No. S7-10-09)

Dear Ms. Murphy:

We are pleased to respond to Release No. 34-60089, 74 Fed. Reg. 29,024 (June 18, 2009) (the "Release"), in which the Securities and Exchange Commission (the "Commission") solicited comments on its proposed rules designed to facilitate shareholder nominations of candidates for election to a public company's board of directors. As a signatory to the letter, co-written with Cravath, Swaine & Moore LLP, Davis Polk & Wardwell LLP, Latham & Watkins, LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, and Wachtell, Lipton, Rosen & Katz (the "Seven Law Firm Letter"), we fully support the views expressed therein. We are writing separately to make some additional recommendations and observations that are not included in the Seven Law Firm Letter, including a number of technical comments.

I. We Support the Adoption of the Amendment to Rule 14a-8(i)(8) in lieu of Proposed Rule 14a-11.

We are not convinced that "proxy access" is either necessary or beneficial from a policy perspective, but are certain that if the Commission decides to engage in rule-making in this critical area—involving the corporate governance of every U.S. publicly-traded company—that it should do so in a manner that allows shareholders and the marketplace to ultimately determine the type of access that is right for each company. As described further below, we believe it is essential that the Commission's rules be structured to encourage the development of proxy access mechanisms in a flexible and shareholder-directed manner, rather than imposing a single, rigid structure that applies to all shareholders and companies, regardless of the issuer's size, capital structure, or board arrangement. We note that many of the issues raised in this letter and in the Seven Law

Firm Letter do not have easy answers, and that different companies and their shareholders might seek to resolve them in different ways and, importantly, adjust them over time, all of which supports our view that a one-size-fits-all approach is not advisable.

A. The adoption of the amendment to Rule 14a-8 will allow for the development of flexible, shareholder-directed approaches to the question of proxy access.

We believe that the Commission can accomplish its objective of removing federal impediments to the development of proxy access simply by amending Rule 14a-8(i)(8) as proposed. Such an amendment will encourage the development of appropriate proxy access processes in a shareholder-directed manner through the adoption of shareholder proposals or management-supported alternatives. For example, shareholders may prefer different ownership and eligibility thresholds than those proposed by the Commission under Rule 14a-11, or to propose an alternative mechanism to facilitate shareholder director nominations, such as a proxy expense reimbursement by-law. Alternatively, shareholders may, in fact, determine to opt out of proxy access to avoid the management distraction that will inevitably be associated with “proxy contests” generated by shareholders with, as proposed under Rule 14a-11, less than a significant ownership interest in the company. In addition, shareholders may determine that adopting proxy access would increase the prevalence of contested elections, and therefore undermine the application of the company’s majority voting provisions, which usually apply only in uncontested elections.

There is persuasive evidence that an approach that allows for the development of corporate law through private ordering is an effective means to create meaningful change. In recent years, the corporate governance practices of many public companies have undergone tremendous change in response to the demands and concerns of shareholders, including a shift to provide for majority voting, the termination of “poison pills” and the elimination of classified boards and supermajority voting provisions. Importantly, none of these changes were imposed by uniform law or regulation; instead, each company and its shareholders determined which developments made sense for it in light of its particular circumstances. This practice has allowed market practice to evolve and develop over time, and we believe that the Commission’s rules should encourage the same type of organic growth to occur in the realm of proxy access.

B. We do not believe that the adoption of a uniform federal proxy access right under proposed Rule 14a-11 is the way to accomplish the Commission’s objectives in light of recent developments in corporate law, and we believe that the Rule will be a significant burden on issuers.

Recent developments in corporate law have generally lessened the need for a prescriptive proxy access regime such as that proposed under Rule 14a-11. First, an increase in proxy contests and majority voting provisions, a reduction in classified boards and the growing influence of proxy advisory firms with strong corporate governance agendas have made it much easier for shareholders to hold boards accountable on an annual basis, which the Commission asserts as a basis for providing federal proxy access. Moreover, the recently proposed amendment to New York Stock Exchange ("NYSE") Rule 452 to eliminate broker discretionary voting with respect to all director elections would, if adopted, substantially reduce what has traditionally been cited as an impediment to shareholder director nominations—the prohibitive cost of preparing and mailing proxy materials.[1]

In addition, we respectfully submit that the Commission has significantly underestimated the burden that the adoption of proposed Rule 14a-11 would have on issuers subject to the proxy rules, including registered investment companies ("RICs"). As a general matter, issuers will expend considerable time and expense to understand and comply with the newly proposed rules. At the ownership thresholds currently proposed, and with the permissible aggregation of an unlimited number of shareholders in order to meet the applicable threshold, issuers will likely experience a tremendous increase in shareholder director nominations and the attendant burdens of management disruption and cost. Moreover, shareholder nominations of directors at open-end RICs have historically been rare, as most open-end funds benefit from state law provisions that do not require annual shareholder meetings unless a meeting is required under the Investment Company Act of 1940.[2] Many RICs (both open-end and closed-end) have also long benefited from "common" boards serving multiple funds that meet simultaneously and the election of shareholder-nominated directors to the board of such an RIC would make it impracticable to hold simultaneous board meetings, resulting in increased costs and burdens on the board and management of the RIC. A significant increase in shareholder nominations, encouraged by the minimal ownership criteria of proposed Rule 14a-11, is therefore likely to result in an even greater and disparate burden on RICs (as compared to other Exchange Act reporting companies) than the Commission currently contemplates.

For these reasons, we do not believe that the adoption of a uniform federal proxy access right under proposed Rule 14a-11 is the way to accomplish the Commission's objectives. Instead, the Commission should permit state law

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1 Under the previous NYSE rules, broker discretionary voting with respect to the election of directors was prohibited by the NYSE only in contested elections. In order to obtain a NYSE determination that a particular election was contested, and thereby eliminate the ability of brokers to exercise their discretionary authority, a nominating shareholder was generally required to disseminate proxy materials to all shareholders. With the amendment of Rule 452, this effort will no longer be necessary and a shareholder can conduct a more targeted campaign with substantially reduced printing and mailing costs.

2 For example, the Investment Company Act generally requires a shareholder vote to approve:

- an advisory contract or certain amendments thereto;
- a Rule 12b-1 plan or material amendments thereto;
- modifications to fundamental investment policies and objectives or the classification of a company; and
- the election of directors whenever less than two-thirds of the directors have been elected by shareholders.

developments and private ordering to shape the type and scope of proxy access that is most appropriate for individual public companies, including investment companies.

II. Recommendations with respect to Rule 14a-11, if Adopted

As noted above, we do not believe that the imposition of a uniform proxy access standard under proposed Rule 14a-11 is the way to advance the development of proxy access as a corporate governance practice. Setting aside the important policy question of whether shareholders should be denied the ability to exercise their collective judgment as to what the right access approach for a given company may be, the level of complexity associated with the adoption of a uniform rule, which seeks to address the numerous substantive and procedural issues necessarily inherent in such a proposal and would apply to every public company, makes such an endeavor a daunting task, to say the very least. The Seven Law Firm Letter highlights a number of important issues in that respect and, while neither that letter nor our submission purports to be exhaustive, we have set forth below several other specific issues that we believe would need to be addressed if the Commission were to proceed with Rule 14a-11.

As an initial matter, we note that we fully support the recommendations in the Seven Law Firm Letter that, if Rule 14a-11 is adopted, it should be (1) a default rule that permits companies to opt out with shareholder approval and (2) deferred to 2011 to permit shareholders to propose, vote on and adopt alternatives during the 2010 proxy season.

A. Rule 14a-11 should be narrowed to exclude from its application companies which either do not pose governance or accountability issues or for which application of the Rule would be burdensome or present significant practical difficulties.

Registered Investment Companies

As discussed in Section IV, Registered Investment Companies, below, the adoption of Rule 14a-11 would result in unique and disproportionate burdens on RICs. We therefore recommend that Rule 14a-11, if adopted, should not apply to RICs.

Non-U.S. Companies

Even if the Commission determines to set a national proxy access standard, we would discourage the Commission from setting an internationally applicable proxy access standard. Although foreign private issuers are exempt from the Commission's proxy rules pursuant to existing Rule 3a-12, we believe the Rule should specify that it also will not apply to companies organized outside of the United States that do not meet the foreign private issuer definition. Similarly, all references to state law conflicts contained in the rules and amendments proposed in the Release should also refer to non-U.S. law and the laws of U.S. possessions and territories, and all references to stock exchanges should include non-U.S. exchanges.

Private Companies and Voluntary Filers

We do not believe Rule 14a-11 should apply to private companies with listed debt or to voluntary registrants. Private companies should not be subject to rules applicable to public companies simply by virtue of having taken advantage of the public debt markets. This would significantly deter private companies from accessing the public debt markets. Moreover, private companies typically have shareholder agreements and other arrangements in place that address the election of directors. These carefully crafted arrangements should not be overridden by the federal proxy rules. In addition, the Commission should not penalize issuers who voluntarily register under the Exchange Act by requiring compliance with proposed Rule 14a-11. These voluntary filers are, for the most part, private companies that at one time had issued debt securities publicly. In our view, these issuers should be treated the same as private companies with public debt.

IPO Companies

Application of Rule 14a-11 to newly public companies would be burdensome and unnecessary. To allow sufficient time for the company to develop its operations and management style as a public company and for the board to develop a suitable track record on which to be judged, we believe the Rule should not apply to a newly public company for three years from the date of its initial public offering.

Multiple Classes of Stock

The Rule should also be adjusted for companies that have multiple classes of common stock each of which vote separately for the election of directors. In these circumstances, we recommend that the Rule apply only to the largest class, as measured by the number of directors elected.[3] Similarly, the proposed Rule should not apply to elections by preferred shareholders at Exchange Act reporting companies where the preferred shareholders vote as a separate class to elect directors.[4] In these cases, the preferred shareholders are typically entitled to elect two directors in the case of a dividend arrearage; this is not the type of situation where Rule 14a-11 should apply.

B. Eligibility of nominating shareholders

As an initial matter, we would support an amendment to the eligibility criteria of the Rule to provide that a shareholder is ineligible to submit a Rule 14a-11 nomination if the shareholder (or any member of a shareholder group) has filed a

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3 We support the recommendation in the Seven Law Firm Letter that Rule 14a-11 should not apply to "controlled companies," since voting at these companies is pre-determined by the sizable voting block held by the controlling shareholder. Consistent with this recommendation, the Rule should not apply to an issuer with multiple classes of common stock where the largest class is held by a controlling shareholder.

4 Our proposed exclusion would not apply where the preferred shareholders vote together with the common shareholders in the election of directors.

Schedule 13D or an amendment thereto with respect to the relevant issuer in the last five years. The submission of a Schedule 13D filing indicates an underlying control intent and reflects a recent history with the issuer that makes it unlikely that the shareholder's interests are aligned with those of shareholders generally. This potential control intent undermines the Commission's crafting of Rule 14a-11 to provide proxy access only where the shareholder is not seeking to change control of the issuer or to gain more than a limited number of seats on the board.[5]

1. The Commission should not allow shareholders to aggregate their holdings and form nominating shareholder groups.

One aspect of proposed Rule 14a-11 we believe poses the greatest problems and potential conflict with existing state law and contractual provisions is the Commission's proposal to allow shareholders to aggregate their holdings and form nominating shareholder groups in order to meet the Rule's ownership requirements. The Seven Law Firm Letter aptly describes many of the unintended consequences that result from the group concept and how the creation of a Rule 14a-11 group may also create a host of unintended consequences under state law, governing documents and contractual arrangements—such as state anti-takeover provisions and "poison pill" plans. Coupled with the Commission's proposal to permit nominating shareholder groups to file a Schedule 13G, which unlike a Schedule 13D filing would not require shareholder groups to disclose relationships with each other, the issuer or other third parties, the creation of unlimited shareholder groups also undermines the Commission's intent not to allow Rule 14a-11 to become a mechanism for control.

For each of these reasons, we suggest the Commission should not permit shareholders to aggregate their holdings and form nominating groups under Rule 14a-11. If the Commission nonetheless decides that aggregation is appropriate, we strongly support the recommendations in the Seven Law Firm Letter that are intended to avoid the formation of large shareholder groups. In addition, the Rule should make clear that no shareholder can be a member of more than one nominating group. We expect this is the Commission's intent, but believe that the proposed Rule does not make this point clear.

2. Issuers should be able to require re-certification of a nominating shareholder or shareholder group's eligibility to use Rule 14a-11.

We support the recommendation in the Seven Law Firm Letter that, if a nominating shareholder loses eligibility prior to the meeting, the nominee should become ineligible for election to the board of directors and (if prior to mailing) be removed from the issuer's proxy. Consistent with this recommendation, the Rule should provide that an issuer may request a re-certification of eligibility once, at any time of its choosing up to 10 days prior to the meeting, from the nominating shareholder or group. If the certification is not provided within 10 days of the issuer's request, the issuer should be

[5] Release, 74 Fed. Reg. at 29,301.

permitted to omit that shareholder's nominee(s) from its materials (if prior to mailing) or refuse to nominate the nominee(s) at the meeting. We believe this recommendation will pose little or no additional burden on the shareholder or shareholder group, but will provide an important enforcement right to issuers to ensure that Rule 14a-11 is being used appropriately.

3. Issuers should be able to limit the form of ownership of nominating shareholders.

Beneficial ownership can take many forms, and standardized proof of such ownership is difficult to obtain. Accordingly, the Rule should provide issuers, pursuant to a provision in their by-laws or other governing document, with the ability to limit shareholder eligibility to (a) record holders, or (b) holders through accounts at specified regulated entities, such as registered broker-dealers or banks. Under Rule 14a-11, particularly under the "first-in" concept as proposed, a mistaken determination of the eligibility of one shareholder would lead to a wrongful determination of the ineligibility of the second shareholder. Regardless of the final form the Commission's proposal takes, confusion as to appropriate shareholding should be minimized given the importance of director nominations. As a shareholder controls its form of ownership, compliance with any such issuer-imposed shareholding requirements would merely be an administrative step for the shareholder.

4. For companies with a high-vote/low-vote capital structure, the ownership requirement should be based on voting power.

Rule 14a-11 is available to shareholders who beneficially hold a certain percentage of an issuer's securities entitled to vote for the election of directors. In the case of a company with different classes of stock, each of which has a different voting power but which vote together on the election of directors, the Rule should clarify that the ownership requirement is based on the percentage ownership of total voting power, not the percentage ownership of voting shares. Implementation of this recommendation will more accurately reflect the shareholder's voting stake in the company.

C. Nominee eligibility and independence requirements

As noted in the Seven Law Firm Letter, we believe that director qualification requirements codified in an issuer's governing documents or corporate governance guidelines should continue to apply in the Rule 14a-11 context. These requirements are often the result of reasoned judgment by an issuer, its board or its shareholders that a director with particular attributes is better suited to serve the needs of the company and its shareholders. For example, some companies require nominees to satisfy certain educational or age requirements, or not to have certain connections to competitors. We believe the Commission should defer to director requirements developed under state law or by proper action of a board or its shareholders, rather than supplant these existing requirements.

1. Nominee independence requirements should be expanded to include the requirements of Rule 16b-3 and Rule 10A-3 of the Exchange Act, and Section 162(m) of the Internal Revenue Code.

We support the Commission's proposal to require a nominating shareholder to include in its Schedule 14N filing a representation that its nominee(s) meets the objective criteria for independence of applicable securities exchanges. The lack of a robust independence requirement creates the risk of a board beholden to a "special interest director," and may create problems of compliance with the independence requirements of securities exchanges, which require a majority of a board to be independent. In light of the increasing SEC focus on risk management and compensation, and to facilitate the ability of a shareholder nominee to serve on an issuer's audit and compensation committees, we propose that nominees should also be required to be independent for the purposes of Rule 10A-3 under the Exchange Act, to meet the definition of a "non-employee director" under Rule 16b-3 of the Exchange Act and to be an "outside director" for the purposes of Section 162(m) of the Internal Revenue Code.

Compliance with the requirements of Rule 10A-3 would prevent the election of directors with financial ties to the issuer and ensure that the nominee, if elected, would be eligible to serve on the issuer's audit committee. Likewise, compliance with the eligibility requirements of Rule 16b-3 and Section 162(m), which require certain compensation decisions be approved by a committee of "non-employee" or "outside" directors, will permit the shareholder nominee to sit on the compensation committee. In our experience, many compensation committee charters require their members to meet the requirements of Rule 16b-3 and Section 162(m). Without our proposed modifications, shareholder nominees may be unable to fulfill the increasingly critical role of an independent director at a public company or serve on two of the issuer's most important committees.

2. The limit on the maximum number of nominees to be included in the issuer's proxy materials should include incumbent 14a-11 and shareholder-nominated directors and should be measured on the first date of the nomination period.

The Seven Law Firm Letter recommends limiting the number of Rule 14a-11 nominees to one per shareholder or group, and recommends counting incumbent 14a-11 directors towards the current maximum number of nominees eligible for shareholder nominations, for a period of at least two years. We support each of these recommendations and submit that any director that was nominated by a shareholder should be counted towards the 14a-11 cap, including a director who was nominated under a shareholder-adopted proxy access by-law (or by-law adopted by the board and approved by shareholders) or other state law provision. These recommendations are driven by the concern that the Rule could be used by shareholders as a mechanism, over time, to replace all or a significant portion of the incumbent directors on the board and effectuate a "creeping change of control." If the Commission declines to adopt these recommendations, we suggest that the overall cap on the number of eligible shareholder nominees should be reduced from 25% of the board to 15%, in order to avoid any "creeping change of control" issues.

In addition, the Rule should clarify that the size of the board for the purpose of calculating the 25% limit should, as an initial matter, be based on the board size as of the first day of the nomination window.[6] If a reduction in board size occurs prior to the mailing of the proxy, the 25% limit should be recalculated and reduced if necessary (subject to the floor of at least one nominee).

D. Schedule 14N disclosures should require additional information from the nominating shareholder(s) and nominees.

Rule 14a-18 requires certain representations and disclosures to be filed by a nominating shareholder on a new Schedule 14N, including information relating to the proposed nominee(s). As noted in the Seven Law Firm Letter, we support the Commission's proposal to require these disclosures, which will encourage a transparent nomination process and provide shareholders with consistent information about all director nominees.

However, we believe additional disclosures are necessary to provide adequate information regarding certain relationships of the nominating shareholder or nominee and potential conflicts of interest, and to enable issuers and shareholders to properly evaluate potential nominees. First, each nominating shareholder should be required to disclose any interests in or arrangements with respect to securities of the issuer, consistent with the requirements of Items 5 and 6 of Schedule 13D. Disclosure of such arrangements is important to ensure shareholders have full and complete information about the interests of the shareholder or shareholder group in the issuer. For example, the disclosures under Item 6 of Schedule 13D would pick up any derivative positions of the shareholder that may have the effect of reducing the shareholder's economic interests in the issuer. In addition, Schedule 14N should include disclosures with respect to a nominee that are consistent with Items 2(c)-(f) of Schedule 13D, to provide additional background information about the nominee.

Second, Schedule 14N should require disclosures about all other directorships or officer positions held by the nominee, so that an issuer can assess whether any law prohibiting director interlocks applies, such as Section 8 of the Clayton Antitrust Act of 1914 (the "Clayton Act"), the Depository Institutions Management Interlocks Act ("DIMIA"), or any comparable state or federal statutes, provisions or regulations applicable in other industries. For the purposes of Clayton Act analysis, such information would include disclosure of every board the nominee sits on or any positions held as an officer with any business (including the name and address of such entity) and

[6] We note that in the Seven Law Firm Letter, we have advocated that the Commission adopt a defined window during which shareholders may submit director nominations, rather than merely a deadline.

detailed information on every line of business and business activities such entity is involved in. Likewise, if the nominee holds a director, advisory director or officer position at a depository institution or depository holding company (as such terms are defined in DIMIA), the nominee would need to disclose the name and address of such entity, the location of its principal or branch office and the entity's total assets (measured on a consolidated basis).[7] In order to perform a complete Section 8 or DIMIA analysis, additional information may be necessary. Thus, we believe that Schedule 14N must also include an undertaking by the nominee to provide any additional information reasonably necessary to determine the ability of the nominee to serve as a director under state, federal or other applicable law, upon request by the issuer.[8] We would view our proposal as uncontroversial, since this information is generally solicited from all director nominees through questionnaires or interviews.

Finally, we believe Rule 14a-18 should require a representation by the nominee that he or she has read and will abide by the issuer's published corporate governance guidelines and any published policies relating to serving on the board, and that the nominee will (in a timely manner, prior to proxy mailing) complete any D&O questionnaire that other directors of the issuer are required to complete. This requirement would ensure consistent treatment of all director nominees and not represent a significant additional burden for the shareholder nominee, who, if elected, will be required to abide by the issuer's by-laws and corporate governance provisions.

III. Recommendations with respect to Rule 14a-8

A. The Commission should clarify how proposals under 14a-8(i)(8) will be treated in light of the other bases of exclusion under Rule 14a-8.

If Rule 14a-8(i)(8) is amended to permit shareholder proposals relating to proxy access and other election procedures, issuers will need to determine whether one of the other bases for exclusion under Rule 14a-8 exist when evaluating a proposal. For example, we would expect the SEC staff to immediately be faced with questions as to whether a particular proxy access proposal "directly conflicts" with a management proposal for proxy access, or if the company has already "substantially implemented" the proposal, for example, by adopting a proxy access provision with different eligibility requirements or a proxy expense reimbursement by-law. If management has accepted a shareholder proposal for inclusion in its proxy materials and multiple shareholders submit proxy access proposals with different criteria and requirements for consideration at the

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7 We note that the definition of "depository institution" under DIMIA includes the U.S. branch or agency of a foreign commercial bank.

8 For example, an issuer evaluating a nominee's directorship at a competing company under the Clayton Act will need information regarding revenues earned in connection with the entity's business activities, and whether the capital, surplus and undivided earnings of such entity exceed the thresholds set forth in Section 8.

same meeting, would all subsequent proposals be deemed "duplicative" under 14a-8(i)(11)?

These questions will be pivotal and will determine the manner in which proxy access develops through the use of shareholder proposals. As such, it is in the best interest of all involved—shareholders, issuers and the Commission—for these questions to be clearly resolved at the outset. We recommend that the Commission clarify that companies need not include multiple proxy access proposals (whether proposed by management or shareholders) in a single proxy statement. Having multiple proxy access proposals in the proxy materials would be confusing to shareholders, and could result in the adoption of none of the proposals (if votes are split among them) or multiple proposals (which could lead to conflicting regimes being put into place). We also urge the Commission to clarify that the "substantial implementation" exclusion provision of 14a-8(i)(10) will be satisfied if an issuer has already enacted a proxy access or reimbursement by-law and a shareholder submits either a proxy access or reimbursement by-law proposal. In this regard, we believe that it is critical for the Commission to acknowledge that a reimbursement by-law is the equivalent of a proxy access by-law, since the reimbursement by-law will solve the shareholder expense issue identified by the Commission.

B. Higher ownership thresholds should apply to shareholder proposals under 14a-8(i)(8).

Under Rule 14a-8, a shareholder is eligible to submit a proposal if the shareholder has held at least $2,000 of the voting securities of an issuer for a one-year period, a standard that has been in place since 1998. We agree that a broad range of a company's long-term shareholders should be eligible to submit shareholder proposals, and that this right should not be limited to large shareholders. However, we also believe that the ownership threshold should be set high enough so that it is not economically feasible for a shareholder activist to own a minimal stake in a large number of companies solely for the purposes of advancing a particular agenda. The 14a-8 threshold should ensure that the interests of shareholder proponents are aligned with the financial interests of all shareholders.

While we believe that a higher threshold may make sense for shareholder proposals generally, it is particularly important for proposals relating to proxy access and other nomination procedures. We therefore think $100,000 would be a more appropriate level in the case of proposals relating to nomination and election procedures under Rule 14a-1(i)(8). These proposals will have particularly direct and dramatic effects on the relative rights of all shareholders, and it is especially important that the proponent have a meaningful alignment of interests with other shareholders. At this level, any public company would have more than enough shareholders who could put forth a proposal.

C. Rule 14a-8 should provide issuers with the ability to contact shareholder proponents.

We support an amendment to Rule 14a-8 to provide issuers with the ability to contact shareholder proponents about their proposals. In our experience, shareholder activists acting as proxy for or agent of other shareholders of a company, who qualify to make a proposal under Rule 14a-8, have instructed issuers to contact only the agent (not the shareholder proponent) with any questions about the proposal. As asserted in the Seven Law Firm Letter with respect to Rule 14a-11, we believe all parties benefit from discussions between a company, its management and directors and a nominating shareholder. A similar rationale supports the encouragement of meaningful discussions between an issuer, on the one hand, and each shareholder proponent of a Rule 14a-8 proposal, on the other, about the shareholder's proposal. Such discussion would help the issuer understand the proponent's rationale, discuss alternative ways to address the proponent's concerns, and negotiate a mutually acceptable solution. Accordingly, we recommend that the Commission add a new sentence to Rule 14a-8(b)(1) specifying that, to be eligible to submit a Rule 14a-8 proposal, the proponent must include in its proposal submission the direct contact information for (and permission to contact) the shareholder (if a natural person) or an officer, director, employee, trustee, partner or person in a similar role of the shareholder (if an entity). This eligibility requirement will ensure the shareholder proponent is reachable for mutually beneficial communications with the issuer.

IV. Registered Investment Companies

A. Rule 14a-11 should not apply to RICs.

As noted above, open-end RICs do not typically hold annual shareholder meetings at which shareholders may nominate directors, so subjecting open-end RICs to Rule 14a-11 would be particularly burdensome on them. The application of Rule 14a-11 to RICs also poses unique practical difficulties from that of other Exchange Act reporting companies. For example, a shareholder nomination under Rule 14a-11 would cause the RIC's election to be "contested" and, under NYSE rules, brokers would not be able to vote client shares for nominees on a discretionary basis.[9] Since the shareholder base of most RICs is exclusively retail, it is generally difficult, time consuming and expensive for RICs to obtain votes from retail shareholders and they typically rely on brokers voting on behalf of clients who have not provided voting instructions in order to achieve a quorum and elect directors. Shareholder nominations pursuant to Rule 14a-11 would thus materially, adversely and disproportionately affect RICs, making it difficult and vastly more expensive for investment companies to elect any directors.

[9] While RICs are exempt from the recently adopted amendments to NYSE Rule 452 to eliminate broker discretionary voting in uncontested director elections, the existing NYSE prohibition on discretionary voting in *contested* elections still applies to RICs.

Moreover, in the case of a fund complex that utilizes one board for multiple funds (an almost universally observed best practice that operates to the great benefit of RICs and their shareholders), a shareholder nominee, if elected, would sit on only one fund board, making it impossible for the board of the fund complex to hold their usual simultaneous board meetings, greatly increasing costs to the RICs in the affected complex (particularly the RIC with the shareholder-nominated director(s)) and unreasonably burdening their directors and management.

As such, the need to allow for flexible, shareholder-directed approaches to proxy access to be developed is even more apparent for RICs. Therefore, we support the adoption of Rule 14a-8(i)(8) as amended and believe that, if Rule 14a-11 is ultimately adopted by the Commission, it should not apply to RICs. We note in support of this recommendation that the NYSE and the Commission have recognized the special situation of RICs in the recent decision to exempt them from the changes to NYSE Rule 452. More generally, RICs, unlike most reporting issuers, have very limited business activities and are subject to comprehensive regulation under the Investment Company Act. We also note that the Commission has supplemented the Investment Company Act's provisions regarding corporate governance by conditioning an RIC's ability to rely on ten important exemptive rules on its compliance with a series of governance requirements.[10]

If the Commission nonetheless decides that Rule 14a-11 should apply to RICs, we urge that, at a minimum, it should not apply to open-end RICs, which do not generally hold regular meetings and for which compliance would be particularly burdensome.

B. If some form of Rule 14a-11 is adopted that applies to RICs, the Commission should modify the Rule to account for the special circumstances of RICs.

There are a number of RIC-specific issues that we believe the Commission must consider in adopting a final rule that is applicable to RICs.

Series Investment Companies

In our experience, the board of a series fund is always elected by the shareholders of all of the series voting together as a single class. Accordingly, the net asset value ("NAV") and the percentage of outstanding shares tests under Rule 14a-11 should be based on the NAV and shares outstanding of *all* series of the series fund. We recommend that the Commission clarify that the series of a series fund will be aggregated

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10 *See* the definition of "fund governance standards" in Rule 0-1(a)(7) under the Investment Company Act. Most RICs rely on a number of these exemptive rules, so the Commission has already effectively imposed governance standards on RICs that it believes are appropriate, something the Commission has not done for other Exchange Act reporting companies.

for the purposes of calculating the NAV and ownership thresholds under Rule 14a-11 (rather than apply these tests to each individual series).

Closed-end Funds that Trade at a Discount to Net Asset Value

We also note that it is inherent to the closed-end RIC structure that the shares of closed-end RICs will normally trade at prices other than NAV. We are concerned that the application of Rule 14a-11 to such funds will make it significantly easier for short-term traders to target a closed-end fund whose shares are trading at a discount, and seek to cause the fund to take actions that benefit the short-term trader at the expense of the fund and its long-term shareholders (such as demanding that the fund convert to an open-end fund, liquidate, make large tender offers at NAV, or conduct large buybacks of its shares). We urge the Commission to consider that facilitating short-term traders is not in the best interests of closed-end RICs or their shareholders generally. We therefore recommend that, if Rule 14a-11 as adopted applies to closed-end RICs, a shareholder who seeks to cause the closed-end fund to take such actions should be ineligible to nominate a director under the Rule. To enforce this recommendation, Schedule 14N should be revised to include a representation on behalf of the nominating shareholder or shareholder group that it does not have such an intent. We also recommend that a shareholder of a closed-end RIC be required to have held the requisite percentage of shares for a longer period of time than one year (e.g., three years) in order to demonstrate that the shareholder is a long-term investor.

Preferred Shareholders

Section 18(a)(2) of the Investment Company Act provides that the preferred shareholders of a closed-end RIC must have the right to elect two directors of the fund. Preferred shareholders of companies other than closed-end RICs do not normally have such rights. Under state law, the rights of preferred shareholders are primarily contractual in nature such that it would appear that ordinarily the common shareholders would have a greater interest in nominating directors than the preferred shareholders. We recommend that, if Rule 14a-11 as adopted applies to closed-end RICs, the Commission clarify how the Rule would apply to their preferred shareholders.

Ownership Thresholds and Holding Periods

As noted above, RICs are subject to numerous special considerations, and shareholder nominations are particularly costly and burdensome for RICs, to the detriment of the RICs' long-term shareholders. Accordingly, to the extent RICs are subject to Rule 14a-11, we recommend that the ownership thresholds for nomination be significantly increased, and that the required holding periods also be extended. We recommend that the Commission require a minimum holding period of three years and, with respect to the ownership thresholds applicable to shareholders of RICs, a minimum percentage of no less than the 5% threshold recommended in the Seven Law Firm Letter.

V. Costs and Burden of the Commission's Proposal on Issuers

As noted above, we believe the Commission has underestimated the costs and burdens proposed Rule 14a-11 would have on issuers. Once a nominee has been proposed under the new Rule, the issuer (or its corporate governance committee) will likely undertake a lengthy process before determining whether to support the candidate, similar to that undertaken by issuers in response to dissident proxy contest campaigns. This process may include investigation or verification of information regarding the nominee provided in the shareholder's Schedule 14N, research into the nominee's background, analysis of the relative merits of the shareholder nominee as compared to the slate of directors to be nominated by management, and multiple meetings of the relevant committee.

An issuer will also need to analyze whether a nominating shareholder and its nominee are eligible under the proposed Rules, and if the nomination would conflict with any applicable state or federal law. In light of the increased focus on director oversight of risk management and compensation and on director experience, including newly proposed SEC rules,[11] undertaking these processes will be a time-consuming and painstaking endeavor. Furthermore, the consideration of director eligibility issues under other regulatory regimes, such as Section 8 of the Clayton Act and DIMIA will, in most cases, require extensive review and the involvement of outside counsel, and the attendant expenses associated therewith. In our experience, Clayton Act and DIMIA analysis can take considerable time for both inside and outside counsel, as well as for the internal accounting department, to conduct.

The Commission estimates that the burdens associated with including a nominee in the proxy materials of an Exchange Act reporting company or RIC will be 30 hours per nominee, which we submit significantly miscalculates the amount of time necessary for issuers to fully and completely evaluate shareholder nominees. This estimate consists of 5 hours to prepare the notice to the nominating shareholder that the issuer will include the shareholder's nominee, 5 hours of "annual disclosure burden" to include the nominee in its proxy statement and proxy card and 20 hours to prepare the issuer's statement about the nominee to include in its proxy statement, including time spent to research the nominee's background, preparation of the written statement, and internal review of the statement by, among others, its nominating committee and legal counsel.[12] The Commission also assumes that the burden of preparing a notice to the nominating shareholder and the SEC of an issuer's determination not to include a nominee in its proxy materials will be 65 hours.[13]

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11 *See* Proxy Disclosure and Solicitation Enhancements, Releases 33-9052 and 34-60280, 74 Fed. Reg. 35,076 (July 17, 2009).

12 Release, 74 Fed. Reg. at 29,064-65.

13 *See* Release, 74 Fed. Reg. at 29,065.

However, the Commission's estimates of these paperwork burdens on issuers do not account for the time that will be required to evaluate a nominating shareholder or group's eligibility under the Rule, or the candidate's eligibility under applicable state and federal law. Instead, the Commission's estimated 30-hour burden begins only once a company has already determined to include the nominee. These eligibility determinations are an integral part of evaluating whether the issuer should include or exclude the nominee from its proxy materials and, as described above, will require considerable time and expense to conduct. Nor do the Commission's estimates account for the burdens on RICs as a result of their unique circumstances. As described above, subjecting RICs to Rule 14a-11 will result in significant administrative burdens on open-end funds and fund complexes, and increased costs, none of which are included in the Commission's paperwork burden estimates.

Moreover, if an issuer determines not to include a shareholder nominee as part of the slate proposed by management in its proxy materials, the Commission's estimates do not account for the significant costs and enormous amount of time that management and the board will likely spend on the proxy contest itself, responding to points and counterpoints made by the nominating shareholder or group in the election debate, hiring proxy solicitors, engaging in discussions with large shareholders and proxy advisory firms, and preparing and filing any additional solicitation materials with the Commission.

VI. Technical Comments with respect to the Commission's Proposed New Rules and Amendments

We also have a number of technical comments for the Commission's consideration. Note that, for this section, we have commented on the Commission's proposals and amendments as contained in the Release and these technical comments do not reflect or implement our substantive comments contained above.

<u>Rule 14a-2:</u>

1. Paragraphs (b)(7) and (b)(8): Change "shareholder" to "security holder" in each place where it appears to conform to the language used in Rule 14a-2.

2. Paragraph (b)(7): Add the word "written" before "solicitation" in the introductory language to the rule.

3. Paragraph (b)(7)(i)(A): Substitute "one or more" for "a" before the word "director" and add an "s" to director.

4. Paragraph (b)(7)(i)(C): Delete the word "or" and insert the word "and" after "beneficially owns" and before "the aggregate". Disclosure should provide information regarding the beneficial ownership of each individual shareholder as well as the aggregate ownership of any group to which the shareholder belongs.

5. Paragraph (b)(7)(ii), second sentence: In the second sentence, delete "and registered" since registration of listed securities is pursuant to Section 12(b) of the Exchange Act.

6. Paragraph (b)(8)(iii), second sentence: Make conforming change to that suggested in comment 5.

Rule 14a-6(a)(4) and Note 3:

7. Delete "as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials." This phrase is duplicitous and unnecessary in this context.

Rule 14a-9:

8. Amendment lead-in: It is unclear to us what the reference to "removing the authority citation following its section" refers to. We suggest new paragraph (c) should precede the "Note" in existing Rule 14a-9.

9. Paragraph (c): It is unclear to us whether the language "as they relate to including shareholder nominees for director in registrant proxy materials" is intended to limit the scope of liability under new paragraph (c). We suggest deleting this phrase to avoid any confusion. Paragraph (c) should apply to all information provided by the nominee, nominating shareholder or shareholder group for inclusion in an issuer's proxy statement.

Rule 14a-11(a):

10. In the second parenthetical:

    a. Insert "a foreign private issuer or" after the words "other than", to clarify that "registrant" also does not include foreign private issuers.

    b. Insert "securities" after "debt" and before "registered".

11. Cross-reference: Change the cross reference to Rule 14a-18(e)-(l) to a reference to "Rule 14a-18(g)-(l)". Paragraphs (e) and (f) do not require disclosure in the proxy materials.

12. Add a sentence at the end of the paragraph and before Instruction 1 clarifying that the failure to satisfy one or more of the provisos in paragraphs (a)(1) through (6) is grounds for an issuer to exclude a nominee from its proxy materials. We suggest the following language:

> "If any of the conditions listed in subsections (1) through (6) above is not satisfied, the registrant will not be required to include the name of the shareholder nominee(s) in its proxy statement and form of proxy and must provide notice to the nominating shareholder or nominating shareholder group of its determination in accordance with paragraph (f)(3)."

13. Instruction 1 to paragraph (a): At the end of the second sentence, add the phrase "or engaging in those activities" after "director", to clarify that all of the specified activities may be undertaken without triggering affiliate status.

Rule 14a-11(b):

14. Paragraph (b)(1)(iii): Delete the words "For non-accelerated filers as defined in §240.12b-2, and investment companies registered under the Investment Company Act of 1940 with net assets of less than $75 million" and insert the words "For other registrants" at the beginning of the subsection.

15. Instruction 1 to paragraph (b): Delete the words "unless the nominating shareholder or nominating shareholder group" in both places where they appear and insert the words "unless the nominating shareholder or any member of the nominating shareholder group" in their place. A "nominating shareholder group" can only have "knowledge" or "reason to know" based on the knowledge of its members.

Rule 14a-11(f):

16. Paragraph (f)(2): Delete the second sentence. The timing of the receipt of notice should be irrelevant where the registrant is including the shareholder nominee in its proxy.

17. Paragraph (f)(5): Delete the phrase ", as required by paragraph (f)(4) of this section". It is unclear what this reference is seeking to accomplish.

18. Paragraph (f)(14): It is unclear to us what the purpose of this provision is. We note that Rule 14a-8 does not include a similar provision.

Rule 14a-18:

19. First paragraph, second sentence: Insert "or other governing document" after "advance notice bylaw" and before "provision", to encompass charters and partnership and limited liability company agreements.

20. Paragraph (c) and Instruction to paragraph (c): Change references to "national securities association" to "inter-dealer quotation system", to conform to the language used in Item 407(a) of Regulation S-K.

21. Paragraph (g):

    a. The reference to Item 7(b) should exclude Items 404(b), 405, 407(d)(4) and 407(d)(5) of Regulation S-K, as these matters relate only to the registrant.

    b. The reference to Item 7(c) should be modified by adding the parenthetical, "(to the extent required by paragraph (c) of Rule 14a-18)", to reflect the limited nature of the independence determination required under Rule 14a-18(c).

c. The reference to Item 22(b) should exclude subsections (13)-(17) thereof, as these matters relate only to the registrant.

22. Paragraph (j): Strike the word "and" between "group" and "nominee" and insert the word "or", to be consistent with the language used in subsections (1), (2) and (3) thereof.

<u>Rule 14a-19:</u>

23. First paragraph, second sentence: Insert "bylaw or other governing document" after "advance notice" and prior to "provision". See comment 19 above.

24. Paragraph (b): Make conforming changes to those suggested in comment 21 above.

25. Paragraph (e):

    a. Make conforming changes to those suggested in comment 22 above.

    b. Subsection (e)(3): Insert a period after "disclosed" and delete "; and".

<u>Schedule 14A:</u>

26. Item 7(e) and Item 22(b)(18): Make conforming changes to those suggested in comment 11 above.

27. Item 7(f) and Item 22(b)(19): Delete reference to paragraphs (a)-(f) of Rule 14a-19 and simply refer to the Rule.

<u>Rule 14n-1:</u>

28. Paragraph (b)(1), first sentence: Insert "with respect to the same director nominee or nominees" after the parenthetical "(§240.14n-101)", to make it clear that only members of a shareholder group supporting the same director nominee(s) may file a joint Schedule 14N.

29. Paragraph (b)(1), last line: Delete the words "knows or has reason to know" and insert the words "knows or has reason to believe", to conform to the language used in Rule 13d-1(k)(1)(ii).

<u>Rule 14n-2:</u>

30. Paragraph (b): Substitute the word "securities" for the word "shares".

Schedule 14N:

31. Cover page: Insert the words "(however, see the Notes)" at the end of the last paragraph and before the period, to clarify that Section 18 liability will apply to information that is included in the Schedule 14N through a cross-reference to the cover page. This change is consistent with the cover page to Schedule 13D.

32. Notes: Insert prior to "Special Instructions for Complying with Schedule 14N" the same paragraph as appears prior to Special Instructions for Complying with Schedule 13D, in Schedule 13D.

33. Special Instructions for Complying with Schedule 14N: At the end of the second sentence in the first paragraph, insert the words "and their director nominee(s)" before the period.

34. Item 3: We suggest the inclusion of an instruction indicating that beneficial ownership and the percentage of the securities beneficially owned should be determined in accordance with Rule 13d-3.

35. Item 4: Please revise to also cover the situation where one member of the shareholder group has left the group, but the group has not been dissolved or terminated. We suggest the following language to replace the existing language in Item 4:

    "Item 4. Notice of Dissolution or Change in Membership of Group

    Notice of dissolution of a nominating shareholder group or the termination of a shareholder nomination shall state the date of the dissolution or termination. Notice of a change in the membership of a group shall specify the names of each member(s) who is no longer a part of the nominating shareholder group and the date on which each such member ceased to be a member of the group."

36. Item 5(a): At the beginning of the second sentence, insert the words "the nominating shareholder, or each member of the nominating shareholder group, must" after the word "Otherwise,".

37. Item 8:

    a. In the last paragraph, insert the words "or influencing" after "changing" and before "control", to conform to the language in Item 10 of Schedule 13G.

    b. In the last paragraph, delete the words "a limited number of seats on the board" and insert the words "the number of directors permitted by Rule 14a-11", for clarity.

Form 8-K:

38. Item 5.07(a): Please revise this paragraph to require the registrant to provide notice of the upcoming meeting date (not the date by which a nominating shareholder must submit a notice pursuant to Rule 14a-11(c)), since Rule 14a-11(c) does not specify a precise date by which a shareholder's notice of its intent to nominate a director must be provided.

39. Item 5.07(b): Insert "(a)" after "18f-2" in the first parenthetical.

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We appreciate the opportunity to comment on the Release, and would be happy to discuss any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to James C. Morphy (212-558-3988), Robert W. Reeder (212-558-3755) or Glen T. Schleyer (212-558-7284) in our New York office.

Very truly yours,

/s/ SULLIVAN & CROMWELL LLP