SOCIETY OF CORPORATE SECRETARIES
& GOVERNANCE PROFESSIONALS

August 10, 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 must 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 – may not be appropriate, and certainly not be in the best interests of all shareholders.

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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 Rule14a-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" 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 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 the 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 1% threshold 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 be overwhelming. 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 provides 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 14-8(c) that a shareholder may submit no more than one proposal to a company for a particular shareholders' meeting. In addition, we believe our

[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.

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 position 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 holdings meet 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, such nominating shareholder's nominee should be withdrawn 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 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, control of 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 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 or a short slate proxy contest using Rule 14a-4(d) (known as the "short slate rule"). 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 either 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 rule entitled "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 candidates from the company's proxy materials that have been nominated under proposed Rule 14a-11.

(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 amendment 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 then 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 companies[3] 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 of any of its affiliates. There are several reasons that this limitation is appropriate.

[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 little chance of success since an individual, a group or another company has majority voting control of the company.

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 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 depositary 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 service guidelines. 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 its 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 three years; provided that such director is nominated by the nominating committee or the board in each such 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 shareholders with the greatest economic interest in the company would have the right to have its nominee 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.

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 as of the last day in the period in which the nomination may be provided.

B. Deadline for Submitting a Nominee under Proposed Rule 14a-11; Excluding a Shareholder Director Nominee that Does Not Comply with the Requirements of 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 require shareholders to submit their nominees for director no later than 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 close to 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) Effect of Disqualifying Event. If a disqualifying event occurs after the company's proxy material has been disseminated, the company should be able to issue supplemental proxy material 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).

We believe these additional disclosures are needed from all nominating shareholders. Absent this disclosure, 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.

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[4]The items to be disclosed are a description of any plans of 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**.**

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 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 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 ballot, 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 now result in an invalid proxy card. This could have the unintended consequences of a company failing to obtain a quorum for the shareholders meeting or perhaps 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 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 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 the proposed Rule 14a-11, the company's nominating committee will be unable to properly 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 properly vet a nominee and his 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.

C. Ownership Requirements. A proxy access proposal will impact a company's long-term operations significantly. 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 amendment 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.

D. 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 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.

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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:

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