Cornish F. Hitchcock
Attorney at Law
1200 G Street, NW • Suite 800
Washington, D.C. 20005
(202) 489-4813 • Fax: (202) 315-3552
conh@hitchlaw.com

2 October 2007

Ms. Nancy M. Morris, Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File Number S7-16-07

Dear Ms. Morris:

By a notice of proposed rulemaking entitled *Shareholder Proposals*, Release No. 34-56160, 72 Fed. Reg. 43466 (3 August 2007) (the "Notice"), the Commission requested comments on a series of proposals to permit shareholders to submit "proxy access" proposals under certain specified circumstances. In addition, the Commission has requested comments on rule changes intended to facilitate the use of "electronic shareholder forums." Finally, the Commission has sought comment on whether it should revise the current rule governing shareholder proposals to permit companies to adopt bylaws that would forbid shareholders from submitting non-binding or "precatory" shareholder proposals.

In response to that Notice, the Amalgamated Bank LongView Funds (the "LongView Funds" or the "Funds") submit the following comments. These comments will complement those that are being filed in File Number S7-16-07.

The LongView Funds.

The LongView Funds are a family of index funds with approximately $10 billion under management on behalf of pension fund clients. Over the past 15 years the LongView Funds have sought to add value to the Funds' holdings by pursuing a program to improve corporate governance at portfolio companies. The Funds use various means of communicating with managements and directors of portfolio companies, including shareholder resolutions submitted under Rule 14a-8.

The LongView Funds view as one of the most important governance issues

the accountability of directors to the shareholders who elect them. To that end, the Funds have sponsored and supported proposals to have all directors elected annually rather than in staggered classes. The Funds have also sponsored and supported proposals to have directors elected by a majority of shareholder votes cast, rather than the default plurality vote system. The Funds have also paid close attention to "vote no" campaigns sponsored by other shareholders and have supported measures to reform practices that come within a board's purview, such as designing compensation programs that match pay to performance.

The LongView Funds support the concept of "proxy access" as a means of promoting director accountability. By "proxy access," we mean proposals under which shareholders may nominate candidates for the board, and the names of those candidates would appear in the company's proxy materials, along with an opportunity to vote for or against those candidates. The LongView Funds filed comments generally supporting this concept when the Commission requested comments on a similar proposal in 2003, and the Funds continue to believe in that concept.

<u>The Importance of Proxy Access to Investors.</u>

There may be times when corporate boards would be well served by adding a director or directors with a fresh perspective and no prior ties to management or incumbent directors. As a practical matter, the only way that shareholders can make that happen at present is by running one's own slate in a proxy contest. Proxy contests can be expensive and time-consuming, so much so that the shareholder sponsoring the slate might conclude that the only way to make the effort cost-effective is to seek control of the board, even if a more modest reform would be useful.

Proxy access thus provides a middle course through which shareholders can attempt to change the composition and operation of a board in a more measured fashion. As a result, shareholder proposals asking a company to adopt such a proxy access regime would seem a reasonable proposal for shareholders to debate and consider.

The Funds recognize that the Division of Corporation Finance (the "Division") has concluded in recent no-action letters that proposals asking a company to adopt a proxy access regime are barred by the "director election" exclusion in Rule 14a-8(i)(8). Although the Division's reasoning has shifted over the years, its current view is that such proposals might lead to contested director elections without an assurance that shareholders would receive the sort of disclosures that are normally required in independent director contests.

The U.S. Court of Appeals for the Second Circuit rejected that interpretation of Rule 14a-8(i)(8) in *AFSCME Pension Plan v. American International Group*, 462 F.3d 121 (2d Cir. 2006) ("*AIG*"). The Second Circuit concluded that this (i)(8) exclusion could be invoked to exclude proposals relating to specific elections for specific board seats, but not matters relating more generally to the election process. Indeed, over the years, the SEC and the Division have rejected company arguments that the (i)(8) exclusion permits the omission of proposals dealing with board declassification, independent directors, splitting the positions of board chairman and chief executive officer, board diversity, stock ownership requirements for directors and a range of similar issues.

In the companion rulemaking proceeding, the LongView Funds argue against overruling *AIG* and against reinterpreting or rewriting the (i)(8) exclusion so as to forbid proposals asking a company to put in place a proxy access regime. The Division has allowed proxy access proposals for most of the 1990s without the adverse effects that are now predicted from some opponents. In addition, at companies where proxy access was proposed earlier this year, there was strong shareholder support: a majority vote at Cryo-Cell International and more than 40 percent support at two companies that have experienced governance challenges in recent years, Hewlett-Packard and UnitedHealth Group.

<u>The Commission's Proposals.</u>

The Commission has proposed a series of rules to govern the submission of proposals requesting the establishment of a proxy access regime and, should a candidate be nominated under such a regime, the disclosures to be made in connection with that individual's candidacy. Although the LongView Funds oppose overruling the *AIG* decision, the Funds would not oppose a regulatory change to clarify situations in which proxy access proposals could be brought forward. Nonetheless, the Funds are concerned that the Commission has set the bar too high and that few, if any, proposals would be filed if the proposed rules were finalized.

In addition, the LongView Funds strongly oppose any effort that would allow companies to "opt out" of their current responsibility to consider and allow shareholders to vote on non-binding proposals that satisfy Rule 14a-8. The LongView Funds regard non-binding proposals as an important means of communication between shareholders, on the one hand, and the management and board of directors of their portfolio companies. There is no suitable substitute available, and eliminating this form of communication would be disadvantageous to shareholders.

There are four major topics covered by the Commission's proposal, and the LongView Funds will address them in order.

A. Eligibility to Submit a Proxy Access Proposal.

Reduced to its essentials, the Commission's proposal would limit eligibility to submit a proxy access proposal to shareholders who are eligible to file a Schedule 13G and who have held more than five percent of a company's shares for at least a year.

The LongView Funds believes that the 5% threshold is too high to be of practical use in many instances. To understand why this is so, it is important to ask two questions: Who is likely to submit a shareholder proposal in the first place? Of that universe of shareholders, who is likely to hold enough shares to meet the five percent threshold?

Among institutional investors, the shareholders most likely to file shareholder proposals (regardless of the topic) are public pension funds. However, as research by the Council of Institutional Investors has disclosed, those funds often hold no more than a small percentage (0.5% or less) of a company's shares. Indeed, the Council noted that the top ten public fund investors at a range of companies (including large cap, mid cap, small cap) held only 3% of outstanding shares. Thus, the only way that a proxy access proposal could be filed at many companies is if shareholders collaborate – and with ownership so diffused, that would be a difficult task.

The dispersion of ownership and the difficulty in achieving an initial threshold underscores an important point about any proxy access regulation: It is critically important to let investors communicate with each other in order to see if it is even possible to meet whatever threshold may be in effect. Accordingly, any proxy access rule should be explicit that attempts to reach the requisite threshold are exempt from mandatory "shareholder communication" requirements, EDGAR filing requirements and the like until a group meeting the threshold is formed. The "investor protection" concerns that underlie current shareholder communication rules are really not applicable in this situation. A shareholder trying to achieve a regulatory threshold will inevitably focus on larger holders in order to hit the target. Also, any shareholder who is solicited to join a group will become subject to various disclosure requirements once it is clear that there is enough support to proffer a proxy access bylaw and once the bylaw is proffered.

We note that the 5% threshold is significantly higher than the 3% threshold in *AIG*, and 3% was also the threshold in the 2003 proposed rule that the Commission proposed on proxy access. It appears that the 5% figure was selected because it is in sync with the filing requirements for Schedule 13D or Schedule 13G. As we discuss in the next section, however, the Schedule 13G model does not fit well with the complex disclosure regime contemplated by the Notice.

B. Proposed Filing Requirements and Disclosures.

The Commission has proposed that participants in a shareholder group that is offering a proxy access proposal must make disclosures on what would be a revised Schedule 13G. The LongView Funds have reviewed the proposed disclosures and believe that they are more onerous than are necessary to provide investors with critical information. Indeed, many of the items are more detailed and intrusive than would be required if one were planning to seek control of a company and thus had to file a Schedule 13D.

The Funds would urge the Commission to rethink the Schedule 13G model because the core concepts and the proposed text set out in the Notice do not mesh with current deadlines for Schedule 13G filings. Under the current rule governing Schedule 13G filings, passive investors such as pension funds must file an initial Schedule 13G within 45 days after the close of the year when those passive investors acquired a 5% holding. The proposed rule does not explicitly amend this rule. The proposed new text for Rule 14a-8(i)(8) does suggest that a shareholder group filing a proxy access bylaw must file an initial Schedule 13G no later than the time the Group submits its bylaw, but the exact timing for such a filing is never specified. If the Commission is going to impose an obligation to file a Schedule 13G, it should amend the pertinent regulation explicitly, not make oblique references in a new Rule 14a-8(i)(8).

Moreover, the vagueness problem is compounded because the proposed rule is silent on the key question of what is required with respect to filing an *amended* Schedule 13G. Again, passive investors normally wait to make such a filing until 45 days after the fiscal year is over. Under the proposed rule, however, there will likely be various events that occur after the initial Schedule 13G is filed. It is not clear when or whether an amended filing would be required. It is also not clear whether there is any kind of "materiality" requirement with respect to the need to file an amended schedule. Failure to address these issues can result in complex and burdensome filing requirements.

The Notice does not address these issues in a concrete way. Thus, shareholders are not able to comment in a meaningful fashion, and the Commission cannot plausibly estimate the paperwork or other obligations that it may be imposing. The analysis in the SEC's Paperwork Reduction Act discussion does not address these points, nor does it estimate the cost of complying with Schedule 13G under what would be a very different set of circumstances than now exist for Schedule 13G filers.

This concern relates as well to the point made previously about the practical aspects of shareholders joining efforts to achieve whatever threshold the

Commission may establish. It appears that the Notice contemplates that every participant in a group must make its own Schedule 13G filing or join in a unified filing. Assuming that one could even assemble a group of the requisite size, the paperwork burden could be crushing. Nothing in the Commission's Paperwork Reduction Act analysis or related regulatory analyses explicitly considers the fact that compliance with the proposed rule would require considerable joint effort by a number of independent actors. Thus, assumptions about how much time is ordinarily taken to complete a new or amended Schedule 13G offer little if any guidance, given the qualitative and quantitative differences in the new filing obligations being proposed.

These, then, are some of the practical problems with using Schedule 13G as the template for what would be a very different exercise from the current uses to which Schedule 13G is put. We turn now to the specifics of what the Commission would have participants disclose. Here too, the effect of the proposed rule would be burdensome, particularly with respect to the benefits to be derived.

– The proposed disclosures are sweeping in nature and are not limited to "material" items. Indeed, they appear to allow no exception, *e.g.*, the proposal to require disclosure in "[r]easonable detail" of "any meetings or contacts, including direct or indirect communication" with management or a director.

– Each participant in a shareholder group would have to calculate not only its holdings in the company being considered, but also every other enterprise in the same Standard Industrial Classification Code and add up those figures; if the total exceeds 5% (or whatever threshold is determined) on the date the plan to submit a bylaw is formulated, that holding would have to be reported.

– It is not clear from the Notice how to calculate the date when a plan to submit a bylaw is formulated, particularly if a number of participants must join in any effort. This omission is serious, since a number of reporting obligations are keyed from that date.

– The Notice would require extensive recordkeeping duties. For example, suppose that a pension fund representative speaks with a director of Company A in May 2007 about matters affecting Company A. Suppose too that this director serves on the board of Company B. In March 2008, ten months after the encounter, the fund in question helps file a proxy access proposal at Company B in time for that company's September 2008 annual meeting. The Notice would impose recordkeeping and disclosure requirement on the fund and on the director.

– The Notice is also vague as to the "person or persons" about whom five enumerated categories of information must be disclosed? For institutional

shareholders, the proposal to submit a proposal may be initiated at the staff level, but any action requires approval by a group of trustees or similar body. Who when would be the responsible "person or persons"? The staff person who first formulated the idea? All the members of a fund's board of trustees? Or only those who voted to undertake the action? Regardless of what individuals may have to report, what does the SEC mean when it says that there must be disclosure of the "qualifications and background" of these individuals that is "relevant to the plans or proposals"? Is election to a fund's board of trustees by fund participants a "qualification"? Does that confer the relevant "background" necessary for a trustee to endorse a proxy access proposal? If not, what does?

– The need for more precision is particularly important, given that a person signing a Schedule 13G must certify as to the accuracy of its contents. That task may be relatively straight-forward when it comes to disclosing objective information such as the number of one's shares and whether one has a contract or other material relationship with a company. The task become more difficult, however, when the Notice uses vague formulations such as one's "qualifications" or "background."

In short, the LongView Funds submit that the proposed disclosures go too far. It is one thing to ask a shareholder submitting a proxy access proposal to provide information about the shareholder or shareholder group that would be required under a Schedule 14A disclosure regime, *e.g.*, identity of the shareholder or group, the shares owned, any contracts or litigation or other material interests involving the company. The extent of disclosure required under the Notice, however, goes far beyond what would be useful to other shareholders, much less straight-forward to present.

C. Electronic Shareholder Forums.

The Notice proposes allowing companies or individual shareholders to use the Internet to set up electronic shareholder forums, provided that such forums otherwise comply with federal and state law. The goal here is remove legal ambiguity that might inhibit shareholders and companies from using this technology to enhance communications between each other. The Notice seeks to encourage the use of such forums by providing that there would be no liability under federal securities laws for any statements made by a third party on such an electronic forum.

The LongView Funds are unsure as to the likelihood that such forums would actually come into being or that they would be a useful resource for shareholders. Testimony at the Commission's May 2007 roundtable suggested that companies are unlikely to sponsor such sites on their own, and it is not likely that a private site

involving a single company would be widely consulted by shareholders. Although the Funds routinely submit shareholder proposals to portfolio companies, it is not like that the Funds would set up Internet sites to aid in that effort. It would be difficult to communicate to shareholders the existence of such a site, and it is not clear who would respond.

The Funds do have one major concern about this proposal, however. The Notice suggests that if electronic forums are created, they might be a substitute for non-binding shareholder proposals. The theory appears to be that there is only limited value in voting non-binding resolutions at a company's annual meeting, and if shareholders want to communicate their concerns about a given issue by means other than submitting a bylaw proposal, electronic forums might be an adequate alternative.

As we discuss in more detail in the next section, the LongView Funds would strongly oppose this proposal if electronic shareholder forums are seen as a Trojan Horse to undermine the current method of shareholder communications. There is no validity to any comparison between the type of communications that occur in an Internet forum – where participation among eligible shareholders may be limited or hit-and-miss – and the type of communications that occurs when a written proposal and a written response are delivered into the hands (or e-mail inbox) of every shareholder and are then voted at the annual meeting.

D. Precatory Shareholder Proposals.

Finally the Commission has requested comments as to whether the Commission should adopt rules under which a company could propose – and its shareholders could adopt – a bylaw restricting the ability of shareholders to offer non-binding shareholder resolutions.

The Notice acknowledges that this same idea was offered in a 1982 rulemaking, but was withdrawn after significant opposition from across the spectrum. The Commission asks whether it is time to take another look at the concept, given developments since 1982 that "diminished the concerns about shareholders' ability to act as a group," including the "increasing importance of institutional investors in contemporary capital markets," the significant role of proxy advisors such as Institutional Shareholder Services, the prevalence of voting guidelines for market participants, and enhanced opportunities for collaborative discussion between companies and their shareholders.

The LongView Funds strongly oppose amending Rule 14a-8 in a manner that would dilute the current rule. Precatory proposals are an important means of shareholder communication with portfolio companies, and non-binding proposals

are perhaps the best way for shareholders, as a group, to communicate their views to management and the board.

The Funds are not alone in this view. The May 2007 SEC roundtables saw support for the current system from across the spectrum, the theory being that non-binding shareholder proposals play a useful role in letting shareholders communicate with management and the board.

The LongView Funds typically offer 25 to 30 shareholder resolutions each year on a range of governance and other issues. Many times, these proposals are used as a means of opening a dialogue with companies. For example, in 2006 the Funds submitted shareholder proposals to ten companies identified as being investigated as part of the options backdating scandal. These proposals served as a useful way to have a dialogue on the steps that are being taken by companies to assure that backdating does not recur in the future. Seven of the ten proposals were withdrawn after a dialogue that was helpful in advising shareholders as to what policies these companies have or will adopt to address the issue. One proposal is still pending, and of the two that came to a vote, they received support of 47% of the shareholders.

The Funds also submit shareholder proposals on other executive compensation issues, such as limitations on golden parachutes, proposals to tie executive pay more closely to performance, and others. These proposals serve as a useful way to have a dialogue on compensation policy. Particularly if these proposals are adopted at the shareholder meeting, the Funds have usually found that a company is willing to meet and negotiate over the requested policy. The ultimate policy that results from those discussions is often posted on the company website or discussed in a proxy.

Could not the Funds achieve the same results by writing letters or calling the investor relations department at portfolio companies? The LongView Funds have tried writing letters to portfolio companies on topics of interest, but found that approach to be limited in its usefulness. Sometimes companies will respond, but some do not. Also, it is all too easy for a company to write a polite response that says very little and commits to no change affecting the policy in question.

By contrast, the pendency of a shareholder proposal is often a useful catalyst for discussions that might not otherwise take place. If there is a productive exchange, the proposal may be withdrawn. If the proposal goes to a vote and the shareholders do not agree, they will vote against it. However, if the proposal is seen as having merit, shareholders may well urge adoption of the requested policy.

The Funds question the proposition that things have changed so significantly

since 1982 that an idea that was roundly rejected then should be adopted now. The problem is not now (and was not then) an inability of shareholders to act as a group, as the Notice posits. What has changed over the past two decades is the willingness of shareholders to buck management recommendations and to support shareholder proposals to the point where many proposals (at least on some topics) now command a majority. That is not a valid reason to let companies shield themselves from accountability to their shareholders.

If anything, a significant change that the Commission did not mention since 1982 is the rise of indexed investment vehicles, such as the LongView Funds themselves. As a practical matter, indexed investors are not able to "vote with their feet" by selling shares of underperforming companies. Attempting to have a dialogue with such companies through the use of non-binding resolutions is, as a practical matter, one of the more effective tools available to investors in trying to improve performance. Ironically, if an opt-out provision were to be made available, it could be most easily voted at companies with two-tier stock structure or a governance structure under which public shareholders hold a minority of the voting power. To the extent that public shareholders hold shares because the company is included in a popular index such as the S&P 500, these indexed shareholders will have no options available to them if they are dissatisfied with the company's performance.

Finally, apart from the factors cited above, there are practical arguments against moving towards an opt-out regime, namely, the fact that the constraints can easily be evaded if a proponent simply takes a non-binding resolution and recasts it as a bylaw. As a practical matter, some topics simply make more sense to be considered as a request to adopt a certain policy, rather than as an amendment to company bylaws. It is one thing for a proposal to ask the board of directors to take certain action on global warming, for example. It is another thing to say that the only a way a shareholder can raise that issue is through a bylaw proposal mandating certain actions by the board on that issue. Allowing issues to be presented as a non-binding resolution avoids what might otherwise be an odd result.

In short, any proposal to permit companies to opt out of shareholder votes on non-binding shareholder resolutions would appear to be a solution in search of a problem. The current system has worked well for decades. It survived scrutiny during the 1982 rulemaking on this subject. It survived similar scrutiny when the SEC took another look at the Rule in 1997. The Commission should not alter the right of shareholders to offer and to vote on non-binding recommendations under Rule 14a-8.

Very truly yours,

Cornish F. Hitchcock
Attorney for Amalgamated
Bank LongView Funds