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May 25, 2007

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F St., N.E.
Washington, D.C. 20549

Re: File No. 4-537: Roundtables Regarding Stockholder Rights and the Federal Proxy Rules

Dear Ms. Morris:

Introduction

Thank you for the opportunity to submit comments related to the U.S. Securities and Exchange Commission ("SEC") roundtable discussions on shareowner rights and the federal proxy rules. During the first roundtable meeting on May 7, 2007, there were extensive discussions regarding the appropriate role of Rule 14a-8. We want to take this opportunity to highlight and expand upon the importance of Rule 14a-8 and to address some of the concepts and issues raised by panelists during the May 7 discussion.

Rule 14a-8 Promotes Good Corporate Governance

Rule 14a-8 plays an integral role in facilitating communication between corporations and their shareowners – which is the underlying purpose of the proxy rules. The shareowner proposal rule provides an economically efficient manner for shareowners to communicate not only directly with other shareowners, but also with board of directors and management. We also know that Rule 14a-8 is an effective tool in this regard. For example, as Professor Grundfest noted, majority-supported proposals are now three times more likely to be implemented by corporate boards then they were in 2002. This provides a sound indication that corporations are listening to shareowners' concerns expressed through the provisions of Rule 14a-8. In addition, it is widely acknowledged that shareowner proposals submitted through Rule 14a-8 have been a source of significant progress in corporate governance, as many of the prevailing "best practices" were first introduced through precatory proposals. Majority voting and independent board committees, for example, were first introduced to the investing public through precatory proposals. In this regard, Rule 14a-8 has not only been an important and effective tool in fostering communications on matters of vital importance to the investing public, but it has proven to be an effective means of promoting the development of sound corporate governance practices.

Precatory Shareowner Proposals Are Consistent With State Law

Given the vital role that Rule 14a-8 has played in fostering effective and constructive communication between shareowners and the corporations they own, it comes as some surprise that various voices at the roundtable discussion raised some question regarding the propriety of so-called precatory proposals under state law. We submit the question is *not* whether precatory proposals are specifically authorized under state law, but whether the applicable state law affirmatively precludes such proposals. And clearly this is not the case. State corporation law, like its federal counterpart, is designed to *encourage* communication, not stifle it. As R. Franklin Balotti, director at Richards, Layton, and Finger, P.A. pointed out, DGCL § 211, which regulates annual meetings, states: "[a]ny other proper business may be transacted at the annual meeting." It is clear that communication between shareowners and directors is not only proper, but also encouraged by Delaware courts. *See Hoschett v. TSI Intern. Software, Ltd.* 683 A.2d 43, 44-45 (Del. Ch. 1996) (holding that one important purpose of the annual meeting is to foster "communication and participation" by shareowners). Courts in other states have also specifically affirmed the legality of precatory proposals. *See Auer v. Dressel* 306 N.Y. 427, 432 (N.Y. 1954) (holding that stockholder proposal where stockholders expressed approval of former president's conduct, and demanded that directors place the former president back in office was proper under state law).

Precatory Proposals Allow For Efficient Implementation

Allowing shareowners to only submit and consider binding proposals via Rule 14a-8 would be inefficient and unduly restrictive, in addition to being at odds with state law as discussed above. The details of implementation of particular recommendations are often better left to the members of the board of directors who are intimately familiar with the company's governing documents, policies, historical practices, and competitive position. In addition, the 500-word limitation on shareowner proposals imposed by Rule 14a-8 may provide a reasonable limitation for purposes of managing proposals in general, but it also imposes a significant constraint on the ability of binding proposals to address the unique issues that may face a particular company, especially when considering that the word limit includes the supporting statement.

Shareowners Should Be Able To Communicate Regarding Board Decisions

The ability of shareowners to make formal recommendations through precatory proposals also provides the shareowners with an opportunity to ask their directors to exercise certain rights that, as a matter of state law, can only be exercised by the directors themselves even though they do not involve the day-to-day business operations of the company. For example, under Delaware law, classified boards are formed through specific provisions in a corporation's certificate of incorporation. Any effort to declassify a board, therefore, requires an amendment to the company's certificate of incorporation. Yet under Delaware law, the certificate of incorporation may only be amended if the directors first make such a recommendation to the shareowners. See 8 Del. C. Sec. 242(b) and also Section 10.03 of

the Model Business Corporations Act. Thus, if shareowners of a particular company would like the company's board to be declassified, precatory proposals provide a means by which shareowners can act collectively to urge corporate boards to exercise the specific rights vested in the directors under Delaware law to take the first step necessary to effect an amendment to the company's certificate of incorporation. Precatory proposals urging a board of directors to take certain action, therefore, provide the shareowners with a means for communicating their collective voice on matters of great importance to the governance of their corporations without running afoul of state law. This point is even more important in jurisdictions and companies where shareowners are not provided with the right to amend the bylaws. Our research indicates that approximately 5 percent of the S&P 500 and Russell 1000 do not allow shareowners to amend bylaws, leaving precatory proposals as the only realistic way that shareowners can exercise any kind of collective voice to formally communicate with directors.

Voting Rules Should Be Reformed

Finally, the practical difference between precatory proposals and binding proposals are often irrelevant since binding proposals often require a majority or supermajority of votes of all outstanding shares in order to "pass." Given broker voting rules, abstentions, and management controlled shares, achieving a supermajority of outstanding shares in favor of a proposal is often unrealistic. In fact, achieving a majority of outstanding shares can be difficult even with votes cast in favor of the proposal achieving seventy, eighty, or even ninety percent of votes cast. The Commission should take steps to make voting fairer for shareowners and prevent vote manipulation as discussed by the panelists.

New Communication Tools Should Supplement Rule 14a-8 Not Replace Rule 14a-8

While CalPERS believes it is worth considering whether technology can be utilized to improve Rule 14a-8 or better effectuate the public policy purposes that led to the adoption Rule 14a-8, CalPERS strongly believes that a formalized and secure chat-room of shareowners should not replace shareowner's current ability to utilize 14a-8 to file precatory shareowner proposals. Rule 14a-8 is too important and valuable to the corporate and shareowner community to replace it with an unproven chat-room concept that is riddled with concerns. The value of Rule 14a-8 is that it provides formal and public input on issues of concern to shareowners. While precatory proposals are arguably informal as well, history has shown that precatory proposals are taken seriously by companies and other shareowners and have served as a breeding ground for corporate governance best practices. It is doubtful that a chat-room even with informal voting could adequately replace the precatory proposal as allowed under Rule 14a-8.

CalPERS does applaud corporations that are voluntarily utilizing technology to increase shareowner communications such as ExxonMobil's recent efforts to use the web to field questions for the annual meeting. If public corporations over time voluntarily adopt technologically-based processes to increase shareowner communication and input, a reexamination of precatory proposals may be appropriate. Until then it would be premature

and reckless to upend the precatory proposal process that has served corporations and shareowners so well.

AFSCME v. AIG, 462 F.3d 121 (2nd Cir. 2006)

CalPERS appreciates and applauds the Commission's interest in addressing the efficacy of Rule 14a-8. But the fact that the discussions were spawned from the recent decision of the Court of Appeals for the Second Circuit on proxy access raises some serious questions. In *AFSCME v. AIG*, 462 F.3d 121 (2nd Cir. 2006), the Second Circuit held that, under the existing proxy rules, shareowners cannot be precluded from introducing proposals to amend corporate bylaws (in a manner consistent with state law) to require corporations to publish the names of shareowner-nominated candidates for director positions. After the decision was issued, certain members of the business community expressed strong criticism of shareowners' right to proxy access.

The fact that these concerns are misplaced is demonstrated by what has happened since the Second Circuit's decision. Although widely hailed as a "holy grail" of corporate governance, the nation has not seen an unchecked proliferation of proxy access proposals at American corporations, and the country has not witnessed the havoc that many argued would occur. Indeed, although some corporations have voluntarily adopted a proxy access policy, at other companies – and at Hewlett-Packard in particular – shareowners that were given the opportunity to adopt a proxy access policy declined to do so. This demonstrates not only the effectiveness of Rule 14a-8 as a means of providing shareowners with an opportunity to communicate regarding a proposed course of action both with each other and with management, but also the fact that shareowners, as responsible investors, carefully consider and weigh corporate governance proposals put before them for a vote.

Accordingly, the Commission should take great care to preserve the ability of shareowners to use Rule 14a-8 to foster communication and dialogue with corporate boards and should proceed carefully and conservatively in adopting any changes to the Rule. It is of critical importance that no amendments to Rule 14a-8 are adopted that inhibit the open and frank communication the proxy rules were intended to facilitate. Indeed, the Commission promulgated Rule 14a-8 to insure that shareowners had "[a]ccess to management proxy solicitations to sound out management views and to communicate with other shareowners on matters of major import . . ." *Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d 416, 421 (D.C. Cir. 1992); *see also Lovenheim v. Iroquois Brands, Ltd*., 618 F. Supp. 554, 561 (D.D.C. 1985). CalPERS' respectfully submits that this Commission should not distinguish itself as the one to affirmatively *inhibit* the kind of open and effective communication the proxy rules are designed to protect. Therefore, to the extent that the Commission deems it necessary to adopt amendments to Rule 14a-8 to "ensure uniformity" it should do so in a manner which fosters – rather than inhibits – effective communication between and among shareowners and management.

Conclusion

We again thank the Commission for the opportunity to express our viewpoint and look forward to the future roundtables and continuing public discussion on these important issues.

Sincerely,

PETER H. MIXON
General Counsel