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August 10, 2009

Sent via Electronic and U.S. mail

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

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

Dear Ms. Murphy:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I welcome this opportunity to offer supporting comments on the Securities and Exchange Commission proposal, S7-10-09, to give shareholders access to the corporate proxy to nominate directors.

The AFL-CIO is the country's largest labor federation and represents 11 million members who participate in benefit plans with more than $4 trillion in assets. Union-sponsored pension plans hold about $450 billion in assets.

The AFL-CIO commends Chairman Mary Schapiro and the Securities and Exchange Commission (the "SEC") for revisiting the ability of shareholders to nominate directors on a company's proxy. The nation's worst economic crisis since the Great Depression has prompted serious questions about the colossal failure of corporate directors in overseeing management.

It is apparent that outsized compensation packages played a key role in creating the crisis, prompting financial executives to jeopardize the future of their companies for bonuses, regardless of the outcome. Yet, despite the corporate governance reforms enacted in the Sarbanes-Oxley Act of 2002 following the spate of corporate scandals that resulted in the collapse of Enron Corporation, WorldCom, and Global Crossing, the current financial crisis has exposed the cracks that still exist. Key among them is the failure to ensure truly independent directors who can protect shareholders' interests.

Corporate interests have long expressed concerns that contested director elections would upset the collaborative dynamic of boardrooms. But, it is precisely those cozy relationships between directors and management that are to blame for the pandemic failure of oversight. As Commissioner Roel Campos noted in a January 10, 2005 speech, "Consensus may not be a good thing in the long run for a board. Different views and perspectives may enhance corporate decision-making."

Indeed, as Chairman Schapiro acknowledged at the May 20 open meeting when the Commission proposed the proxy access rules: "The crisis has led many to question whether boards of directors are truly held accountable for the decisions they make."[1] There is no better argument for the need to ensure "fair corporate suffrage."

Pension funds and other institutional investors have pressed the SEC for proxy access for several years. In May 2003, the AFL-CIO formally petitioned the SEC to grant large, long-term investors the right to include director nominees in the company-paid proxy materials. And in July 2009, an investor taskforce on financial regulatory reform endorsed the right of shareholders to place director nominees on the company's proxy.[2]

Unfortunately, the earlier efforts by the SEC to let shareholders exercise this fundamental right to fair corporate suffrage, such as in 2003 under Chairman William Donaldson, were thwarted by vigorous lobbying from business groups. The most vocal of those opposing proxy access were the Business Roundtable, an association of the chief executives of the nation's largest corporations, and the prominent law firm of Wachtell, Lipton, Rosen & Katz.[3] The 2007 changes adopted by the SEC under Chairman Christopher Cox were a huge blow to shareholders' rights, as they barred investors from even broaching the subject with companies through the shareholder resolution process. This denial of shareholder rights occurred even though there were shareholder votes on proxy access that year at three companies with governance problems including Hewlett-Packard Company and UnitedHealth Group. Proposals to implement proxy access at these three companies received support from more than 40 percent of the shares voted, a very high show of support for a first-time proposal.

The SEC's proposal will finally give shareholders the first real shot at ensuring director accountability in the 75 years since the enactment of Section 14 in the Securities Exchange Act of 1934. In addition, it will undo the limitations in the 2007 amendment to Rule 14a-8(i)(8),

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[1] Opening Statement, SEC Open Meeting to Consider Proposal on Proxy Access, *May 20, 2009.*
[2] "U.S. Financial Regulatory Reform: The Investors' Perspective," a report of the Investors' Working Group of the CFA Institute Centre for Financial Market Integrity and the Council of Institutional Investors, *July 2009.*
[3] SEC Comment Letter of the Business Roundtable, *December 22, 2003* and of Wachtell, Lipton, Rosen & Katz, *June 11, 2003.*

which prevented shareholders from even raising the issue with fellow shareholders at the companies in their investment portfolios.

American households lost about $14 trillion in wealth over the last two years.[4] Because of the continuing downturn and badly shaken investor confidence, it is more important than ever before that concerned, long-term investors have the right to nominate board candidates on the company's proxy materials in time for the next annual meeting season. It is vital that the SEC not postpone consideration of this matter, as recommended by a coalition of corporate interests.[5] This is the third time in less than a decade that the SEC has debated this issue, and there are no pressing reasons to further delay the rule. The proposed proxy access rule has been refined and improved since the debate began a few years ago, and the time for final action is now. Any postponement will significantly impede the efforts of concerned, long-term investors to push for change in corporate boardrooms at a crucial time.

There is little doubt about the SEC's clear authority to proceed with the proposal under Section 14(a) of the Securities Exchange Act of 1934. This is not an effort by the SEC to usurp the authority of state law. One of the original assignments of Congress to the SEC was the regulation of the proxy process and disclosure—the "power to control the conditions under which proxies may be solicited" and that this power would be exercised "as necessary or appropriate in the public interest for the protection of investors."[6]

The provision was enacted to end the abusive practices of corporations asking shareholders to sign "blanket authority to vote his shares for wholly undisclosed directors or for any other unspecified subject that might be raised at a meeting. Often it included a wholesale ratification of past acts, without any information about what had been done."[7]

Section 14(a) halted those abuses by requiring management to give shareholders full information on the proxy card about significant corporate matters to be voted on so they could act accordingly. Ensuring that the proxy process works as a substitute for an actual in-person meeting of shareholders is essential because it is the main way for shareholders to learn about key corporate matters and to make their views known to management.

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[4] "Obama Aides See Signs of Recovery but Say it Will be Slow," *The New York Times, August 3, 2009.*

[5] Comment Letter of the Business Roundtable, National Association of Corporate Directors, National Investor Relations Institute, Securities Transfer Association Inc., Shareholder Communications Coalition, U.S. Chamber of Commerce and Society of Corporate Secretaries and Governance Professionals Inc., *June 30, 2009.*

[6] H.R. Rep. No 1383, 73d Congress, 2nd Session.

[7] Speech by SEC Commissioner Robert K. McConnaughey before the American Society of Corporate Secretaries," *November 1948.*

SEC Chairman Ganson Purcell explained this in 1943: "The rights we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on."[8] Because of the dispersion of shareholders, and because votes are typically cast before the annual meeting, "The only opportunity that the stockholder has today of expressing his judgment comes at the time he considers the execution of the proxy form, and we believe...that this is the time when he should have the full information before him and the ability to take action as he sees fit," he explained.[9]

SEC Commissioner Robert K. McConnaughey echoed that sentiment a few years later: The objective of the law "amounted to a direction to the Commission to establish a suitable machinery to keep the ordinary public stockholder from being taken with loaded dice. It was based on the idea that the investor, having put up his money, he ought to have a genuine chance to see what's being done with it, to say whether he likes what he sees, and if he doesn't to propose changes either in the management or in its general policies."[10]

The intervening six decades have only highlighted the wisdom of these comments. Annual meetings are sparsely attended, and institutional investors with holdings in a number of companies must rely on the proxy materials to cast their votes prior to a meeting. Given the importance—and long-established right—of shareholders to propose candidates at an annual meeting, it logically follows that shareholders should be advised of that fact and given an opportunity to vote when serious, long-term investors present an alternative candidate to management's slate for the board, the situation that the Commission is addressing here. In these circumstances, the principles that led Congress to enact Section 14(a) require the company to include information about the alternative candidate in the proxy materials and let shareholders vote on that candidate.

Key Recommendations

Tiered Approach

We support the broad contours of the proposed Rule14a-11 and believe the SEC's tiered approach for defining holders of a "significant, long-term interest" is a sensible one. The significantly higher threshold of 5% ownership for the smallest companies, from 1% for the

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[8] Statement of SEC Chairman Ganson Purcell, Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 before the House Committee on Interstate and Foreign Commerce, 78th Cong., 1st Session at 172, *June 9, 1943.*

[9] Statement of SEC Chairman Ganson Purcell, Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 before the House Committee on Interstate and Foreign Commerce, 78th Cong., 1st Session at 174, *June 9, 1943*

[10] Speech by SEC Commissioner Robert K. McConnaughey before the American Society of Corporate Secretaries, *November 1948.*

largest companies, ensures that only those long-term shareholders who are seriously concerned about the governance of portfolio companies will have a seat at the table.

Holding Period

We also recommend that the SEC extend the holding period requirement to two years as of the date of the shareholder notice on Schedule 14N. As we noted in comments to the SEC on earlier proxy access proposals, the AFL-CIO opposes a one-year holding period because it could enable hedge funds and other opportunistic shareholders to manipulate the proposed Rule 14a-11 and force companies to take short-term measures to pump up their stock price at the expense of long-term shareholder value.[11] In June 2007, the AFL-CIO, along with the Council of Institutional Investors, the Business Roundtable and other leading business and investor groups developed the Aspen Principles to counteract short-term pressure in the capital markets and work toward long-term value creation.[12] The Aspen Principles state that companies constantly forced to react to short-term investors are constrained from creating valuable goods and services, investing in innovations, and creating jobs.[13]

Securities Lending

We also believe that the SEC should clarify its definition of "continuous ownership" to take into account that the holdings of institutional shareholders may fluctuate during any specified period. Institutional investors who hold for the long-term may periodically lend their shares to others, while retaining the right to recall those shares to vote them in specific situations. Those lent shares remain under control of the lending institution, which remains the beneficial owner. It then follows that the right to nominate directors should be based on the number of shares beneficially owned, not shares that are held on loan.

We believe that this clarification is important to address concerns about the accumulation of lent out shares by investors who may not have a long-term stake in a company and who may otherwise be able to engage in the sort of "empty voting" that can distort election results and prevent management from focusing on long-term strategy. Accordingly, we recommend that the SEC's final rule state that shares lent out may be treated as continuously owned by the lending shareholder, so long as the shareholder has the right to recall them in order to vote, and discloses an intention to vote the shares in the proposed Schedule 14N.

We also urge the SEC to clarify the proposed Rule 14a-11 so that the ownership determination is based on the *minimum number* of shares owned during the holding period,

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[11] AFL-CIO Comment Letter to the SEC, *December 19, 2003*.
[12] www.aspeninstitute.org/sites/default/files/content/docs/pubs/Aspen_Principles_with_signers_April_09.pdf.
[13] Ibid.

taking into account the lent shares, as a percentage of the company's outstanding shares listed in the company's latest proxy statement. This clarification would also be useful, given that the number of shares held by institutional investors may not be static during the one-year period prior to giving a company notice of intent to nominate; such a benchmark is also easier to monitor and maintain during the period between notice to the company and the annual meeting.

We agree with Orin Kramer, chairman of the New Jersey Investment Council, who commented on the proposed rule that, as patient, long-term investors, we do not want to "empower corporate raiders" with a short-term focus.[14]

Single Standard

We support adoption of a single standard that would apply across the board to all affected companies, and we would oppose efforts to carve out an exception to accommodate state laws that may not require the same level of disclosure and voting opportunity as the SEC has proposed here. A state law carve-out would represent precisely the sort of blurring of securities law with substantive state corporate law that the SEC has generally sought to avoid.

The SEC's rules implementing Section 14(a) have traditionally sought to establish a floor in terms of the requisite levels of disclosure and the workings of proxy mechanics. We agree with the SEC's analysis of this issue and would not favor a system that would allow companies to substitute a less rigorous standard of disclosure than one approved by the Commission.

First In

Additionally, to make the rule more workable, we also recommend that the eligibility of the shareholder or group of shareholders eligible to nominate directors under Rule 14a-11 be based on the group with the largest holding, rather than the first-in approach suggested by the SEC in the proposal. This approach was followed in the Private Securities Litigation Reform Act for the designation of lead plaintiff and is generally believed to be a substantial improvement over the race to the courthouse approach that preceded it.

We believe that a first-in approach can lead to opportunistic filings that are made for the purpose of achieving tactical advantage. The requirement that candidates file a Schedule 14N that identifies holdings by a fixed deadline makes it easy for the company and other interested parties to determine who is the largest shareholder or shareholder group and to proceed accordingly. A "largest holdings" approach is also consistent with the SEC's goal of empowering shareholders with the greatest stake in the company's long-term financial growth.

[14] SEC Comment Letter by Orin Kramer, chairman, New Jersey Investment Council, *July 9, 2009*.

If the candidate presented by a shareholder or shareholder group fails to meet the eligibility criteria, the nominating shareholder or shareholder group should be allowed to name another nominee.

Rule 14a-8(i)(8)

Finally, we favor amending Rule 14a-8(i)(8) to overturn the 2007 amendment that prohibited shareholder proposals of the sort offered at Hewlett-Packard and UnitedHealth Group, which asked companies to implement such a procedure. We believe that the proposed amendment to Rule 14a-8(i)(8) is appropriate as a supplement to rights granted under the broader proxy access proposal embodied in the release and that this reform should be adopted in any event.

If you have any questions about this letter, please call Daniel Pedrotty, director of our Office of Investment, at 202-637-5379.

Sincerely,

Richard L. Trumka

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opeiu #2, afl-cio