July 9, 2009

Chairman Mary L. Schapiro
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Comments on Political Contributions and Pension Funds
Comments on File No. S7-10-09: Facilitating Shareholder Director Nominations

Dear Chair Schapiro:

I am writing on behalf of the New Jersey Investment Council, which oversees the State's $63 billion public pension system, with respect to two issues on the Commission's agenda.

First, our understanding is that the Commission may impose limitations on political contributions from money managers and placement agents to candidates and elected officials exercising investment oversight regarding public pension systems. In New Jersey, the Investment Council has essentially prohibited all contributions above $250 from asset management firms and their employees managing or seeking to manage pension fund assets. That prohibition extends to any candidate for State office, state committees, legislators, or legislative committees. The prohibitions regarding money managers also pertain to any placement agents or intermediaries those managers might retain. There are, in fact, no elected officials with pension investment responsibility in New Jersey. Nonetheless, since our rules cover more than 120 elected officials and their political committees, our understanding is that our regulations are substantially more restrictive than those in place or proposed for any other State.

We are not making a judgment about the scope of whatever limitations on political contributions the Commission might impose. There is an argument that rules as comprehensive as ours discourage certain high quality managers from doing business with New Jersey for fear of an inadvertent regulatory violation. However, since we are unaware of any public discussion of limitations remotely as restrictive as ours, we would respectfully suggest that the Commission's standards not pre-empt any existing state regulations more restrictive than those the Commission might impose.

On a different matter, we are delighted that the Commission under your leadership is revisiting the critical issue of shareholder proxy access for director nominations. We would make several points.

First, shareholder democracy – our capitalist core belief that shareholders will pursue their economic interests in choosing directors to serve as their agents – has been for years our highest corporate governance priority. As Prof. Adolph Berle taught us 75 years ago, the separation of ownership from management creates a potential agency problem. We've addressed that problem with a series of theoretical constructs: directors are our agents, they oversee management and in an arm's length process establish terms of compensation on our behalf, directors act independently of management to nominate additional directors who will serve our interests, and annual elections of directors act as a check to assure our interests are truly served. The reality is that there is sometimes a disconnect between that theory and practice. If a significant number of shareholders believe that disconnect has grown to substantial proportions, they should have the opportunity through a shareholder slate to determine whether a majority of owners share their view.

Second, we believe there ought to be meaningful hurdles for shareholder nominations: minimum required holding periods for shareholders making nominations, meaningful levels of shareholder support for such nominations, and limits on the percentage of the board subject to contested elections in any given year. We do not want a regime where the primary effect is to empower corporate raiders with a short-term focus, and we are flexible on specific hurdle rates for length of ownership or the percentage of shareholder support necessary to trigger a contested vote.

The purpose and effect of changing the legal framework would not be to precipitate large numbers of contested elections. Anyone who has been an activist institutional shareholder knows that a contested election is a nuclear confrontation signifying the failure to reach a privately negotiated accommodation. The purpose of legal change is twofold. First, to give concrete expression to the proposition that directors are agents of and effectively accountable to owners. Second, to recalibrate the balance of power between shareholders and their putative agents, which in turn will make directors more independent and provide leverage to owners in their negotiations with management in situations where shareholder interests in maximizing value are not being served. Simply put, shareholders need access to the vote because in instances where management has a record of destroying shareholder value, the majority of shareholders today have no cost-effective recourse. And that fundamental reality conditions every discussion that every aggrieved shareholder has ever had with an unresponsive board or management.

We do not believe in fixed rules that can be applied mechanically across corporations on contentious issues such as compensation. Indeed, we are troubled by the proliferation of rigid prescriptive responses – a new Robert's Rules of Corporate Governance – which are costly, time-consuming, unresponsive to the individual fact settings surrounding specific companies and industries, and which may correlate only randomly with the creation of shareholder value.

For those of us leery of the potential emergence of an intrusive and regimented rule-based regime, or what might be called check list corporate governance, the appropriate response when owners perceive that a board has failed in its fiduciary duty is not to usurp the authority of management and the board. The answer is a legal framework which gives owners leverage to induce the board to change its behavior or, as a last resort, to elect new directors. The counterpoint to tightly regimented mores of corporate governance is a regime where boards retain broad operational flexibility, but where the owners have the ability to throw them out when they abuse that authority.

The most pervasive argument against shareholder nominees is that splinter groups of shareholders will nominate and elect directors motivated by some narrow economic or political interest, and that every director's election could turn into a divisive proxy contest. In the past, comment letters to the SEC sketched out a vision of corporate America being dragged into an interminable political campaign against the bearers of some social agenda.

What is striking in that critique is its implicit lack of confidence in corporate management and basic principles of capitalism. We do not believe that the average corporation has been so mismanaged that 1) a credible shareholder group would seek a coup, and 2) that the average shareholder is so disenchanted that large numbers of management teams would face a credible threat of losing an election. As to the real fear – which is that social activists will be elected to boards – we would say that institutional investors frequently make investment mistakes, but we do not know any institutional investor who has ever consciously made any investment decision with any objectives other than risk avoidance and profit maximization. People with various political agendas would undoubtedly want board representation, but a nominee will not be a credible candidate unless he or she is perceived as maximizing the purely economic interests of a majority of shareholders.

On a personal note, I found the Treasury meeting on compensation with Secretary Geithner, Fed Governor Tarullo and yourself to be enlightening and productive, and we are certainly supportive of the reforms you outlined in that discussion.

Sincerely,
Orin S. Kramer
Chair
New Jersey State Investment Council
50 West State Street, Box 290
Trenton, New Jersey 08625