Opportunity Partners L.P., 60 Heritage Drive, Pleasantville, NY 10570
(914) 747-5262 //pgoldstein@bulldoginvestors.com

July 16, 2009

Ms. Elizabeth M. Murphy
Secretary
Securities & Exchange Commission
450 Fifth Street N.W.
Washington, DC 20549-0609

File No. S7-10-09 Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

Does anyone honestly believe that corporate elections are fair? How could they be fair when the incumbents bill their electioneering expenses to the corporation (based on the fiction that their primary purpose is to inform shareholders about corporate affairs) while challengers must use their own funds to have a realistic chance to unseat them? In October 2003, at a symposium on corporate elections held at Harvard Law School Delaware Vice Chancellor Leo Strine acknowledged that the system is broken:

> I happen to believe it is difficult to justify the current election system in its pure form. The idea that the incumbents get to spend money and no one else does all the time is hard to justify and I'm not going to try to justify it.

One would think the Commission would like to finally correct this obvious defect by crafting rules to insure fair, or at least fairer, corporate elections. But that is not what the Commission has done. Instead of rules that reflect a commitment to corporate democracy, the Commission has once again proposed a few tweaks to a fundamentally unfair election process by proposing a limited and highly conditional form of "proxy access." However, the structural impediments frustrate the ability of stockholders who can not attend a meeting to vote for a *bona fide* nominee would remain. As Yogi Berra said, "This is like déjà vu all over again."

Worse, the proposal exceeds the Commission's authority. The 250-page proposing release requests comment on hundreds of questions about minute details of its complex "proxy access" scheme but none concerns its authority to adopt proposed Rule 14a-11. It is not until page 203 that one finds the first – and only – mention of the purported legal basis for the rule:

> We are proposing amendments to the forms and rules under the authority set forth in Sections 3(b), 13, 14, 15, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, and Sections 10, 20(a) and 38 of the Investment Company Act of 1940, as amended.

However, nothing in these sections authorizes the Commission to adopt a rule that says, in effect, "If a stockholder does thus and such, he or she will be entitled to propose a limited number of nominees and to require the issuer to include those nominees on its proxy card; otherwise, the stockholder must solicit his or her own proxies." Since the Commission has no authority to condition a stockholder's right to "proxy access" on a set of non-statutory criteria, the proposal, if it is challenged, will likely be invalidated.

Section 14(a) invites the Commission to establish as level a playing field as possible for contested corporate elections so that stockholders that can not attend a stockholder meeting have the same opportunity to cast an informed vote as stockholders who can attend the meeting. The proposal falls far short of that goal because its focus is on reaching a consensus among a variety of special interest groups rather than on making the proxy a viable substitute for attendance at the meeting. As with the Commission's previous proposals, politics has triumphed over principle.

The noisiest and most influential special interest group consists of incumbent directors and managers and their legal advisors who inevitably oppose any change that might threaten their power or income. They deny that the corporate election system is broken and they view any effort to implement real corporate democracy as akin to allowing the inmates to vote on who runs the asylum.

Then, there are those who favor modest change but only if it does not lead to what they see as undesirable outcomes. They include leaders of government pension plans and labor unions, and social activists. (Unfortunately, it appears that many people at the Commission share their views.) These folks do not view a corporate election as an opportunity for stockholders to vote for a change of control. Rather, they see unfettered corporate democracy as undesirable because it would allow profit-oriented activist stockholders to more easily effect a change of control. Their agenda is often at odds with that of profit-oriented activists and they fear that if stockholders enjoyed full democracy they might be tempted to vote for nominees that advocate shallow goals like increasing a company's stock price in the short term. Consequently, they will not support a right to "proxy access" unless it is conditioned on litmus tests designed to distinguish between benign activists and malignant "change of control" activists.[1]

Others that have a vested interest in the status quo are service providers that print, mail, tabulate and solicit competing proxies, securities lawyers who advise their clients about the Commission's arcane proxy contest rules, and class action lawyers who make a living by litigating intra-corporate disputes. The easier it is to settle intra-corporate disputes democratically, the less need there is for their services.

---

[1] For example, Orin S. Kramer, Chair of the New Jersey State Investment Council said this in a comment letter dated July 9, 2009 to the Commission: "[W]e 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 . . . ."

Finally, the Commission's top brass presumably have an interest in retaining and expanding their own influence and power. A complex proposal that includes a role for itself as the referee to rule on requests from issuers for requests for "no action" if they exclude dissident nominees from their proxy materials (pursuant to the proposed Rule 14a-11) creates work for the Commission's staff and provides a justification for a larger budget than a rule that merely requires issuers to hold fair elections.

No weight whatsoever should be given to these parochial interests. According to its own terms, Section 14(a) assigns to the Commission the responsibility to adopt rules for soliciting proxies "as necessary or appropriate in the public interest or for the protection of investors." In J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964), the Supreme Court elaborated:

> The purpose of 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13. It was intended to "control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders." Id., at 14. "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S. Rep. No. 792, 73d Cong., 2d Sess., 12. These broad remedial purposes are evidenced in the language of [Section 14a] . . . .

To illustrate why the Commission's proposal is inadequate, consider two stockholders who are substantially identical in every respect except (1) Stockholder A did not acquire his shares for the purpose of changing or influencing the control of the issuer but has now become convinced that change is needed in the boardroom while (2) Stockholder B, who was arguably more prescient, bought her shares with the intention of eventually proposing just such a change. Under virtually every state law, each of these stockholders is entitled to nominate directors. However, under proposed Rule 14a-11, only Stockholder A would have the right to demand that his nominees be included on the issuer's proxy card. While Stockholder B may nominate her candidates at the stockholder meeting, that would be an empty exercise because most stockholders would have no practical way to vote for them. Therefore, under this discriminatory rule, stockholders who would like to cast their votes for Stockholder B's nominees will be effectively disenfranchised. Since Rule 14a-11 does not minimize the possibility that the nominees that are elected are the same nominees that would be elected if all stockholders could attend the meeting, it fails to achieve the goal of Section 14(a). Consequently, the Commission should junk its quixotic attempts to create a Rube Goldberg-like mechanism to balance the interests of various special interest constituencies that are less than committed to truly free corporate elections.

A better, simpler and more equitable solution to the problem of inadequate corporate democracy is obvious -- and entirely legal. The Washington D. C. Circuit Court has said that the purpose of the proxy rules is "to give true vitality to the concept of corporate democracy."[2] The Commission needs to stop denying the obvious fact that allowing a proxy to be solicited that does not permit a shareholder to vote for any *bona fide* nominee[3] undermines the stockholder franchise. The Commission can craft a simple common sense rule to require that any proxy card that that excludes the name of any *bona fide* nominee known to the soliciting party is materially misleading and hence a violation of rule 14a-9(a).[4] Rule 14a-8 is based upon the very same premise, i.e., it requires an issuer to include a previously submitted shareholder proposal in its proxy materials because they would be materially misleading if the proposal was omitted.[5]

Tellingly, the very title of the Commission's release, Facilitating Shareholder Director Nominations, is misleading and demonstrates that the Commission does not understand the problem. Rule 14a-11 would not "facilitate" the process of nominating directors one iota. State law, not federal law, governs the nomination process. Although there is little statutory law on point, that vacuum has been filled by a number of courts that have applied common law fiduciary principles when shareholders have challenged heavy-handed attempts by directors to impede them from making nominations. The Commission's limited and highly conditional proposal to make the election of some but not all *bona fide* nominees more electable is a *per se* intrusion into state law that obscures the real problem of unfair corporate elections. For example, in contrast to the Commission's proposal, I know of no state that requires a holding period or a minimum investment before a stockholder can propose a nominee. Why then should the Commission discriminate between long and short-term stockholders or between large and small stockholders? More importantly, there is no legal basis to do so.

Virtually all courts that have considered the question have found the right to nominate synonymous with the right to vote.[6] For example, in an April 27, 2001 opinion, Goldstein

---

[2] *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972)

[3] A nomination that conforms to state law and the issuer's governing documents is deemed to be *bona fide*.

[4] "No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

[5] Even though this premise is correct, Rule 14a-8 is flawed for another reason, i.e., its hodgepodge of criteria to establish which stockholders are entitled to demand that an issuer include a proposal on its proxy card and which proposals merit inclusion has no legal basis. Although rule 14a-8 is worshipped by investors of different stripes, the Commission has no authority to impose more stringent requirements on a stockholder for including her proposal on the issuer's proxy card than state law requires.

[6] *See*, e.g., Harrah's Entertainment, Inc. v. JCC Holding Co., 802 A.2d 294, 310-311 (Del. Ch. 2002) ("Because of the obvious importance of the nomination right in our system of corporate governance, Delaware courts have been reluctant to approve measures that impede the ability of stockholders to nominate candidates. Put simply, Delaware law recognizes that the "right of shareholders to participate in the voting process includes the right to nominate an opposing slate." And "the unadorned right to cast a ballot in a contest for [corporate] office . . . is meaningless without the right to participate in selecting the contestants. As the nominating process circumscribes the range of choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed selection process thus renders the former an empty exercise.") Also, *see* Jewlecor Management, Inc.

v. Lincoln National Convertible Securities Fund, Inc., Judge Jan E. Dubois of the U.S. District Court for the Eastern District of Pennsylvania, ruled that the board of directors of a closed-end fund had breached its fiduciary duty by improperly preventing nominations by stockholders and ordered a disputed "election" set aside and a new election held:

> As observed by the Delaware Chancery Court in Linton v. Everett, 1997 WL 441189, at 9 (Del. Ch. 1997), "[t]he right of shareholders to participate in the voting process includes the right to nominate an opposing slate." See also Hubbard v. Hollywood Park Realty Enterprises, 1991 WL 3151, at *11 (Del. Ch. 1991) (recognizing the fundamental right of shareholders to vote for and nominate candidates for the board of directors). Given the fundamental nature of shareholders' right to nominate and vote for directors, the Court concludes that the directors' decision to preclude plaintiff's nominees was unfair as they acted in the absence of any valid authority and thereby thwarted plaintiff's exercise of his rights as a shareholder.

Just as it is "an empty exercise" to have an election with a closed nomination process, it is also "an empty exercise" to permit nominations while maintaining a closed voting system – as is usually the case with corporate elections. The problem is not that shareholders cannot nominate candidates for director. It is that those nominations must be presented for a vote at a stockholder meeting and very few shareholders find it convenient to attend the meeting. Hence, the vote at most stockholder meetings is predominantly via proxy. Because they receive a proxy card that may not include all *bona fide* nominees, stockholders that do not attend the meeting may not have their votes cast for nominees they would vote for if they attended the meeting. The Commission should have banned "one party" proxy cards years ago. It is obvious that such a proxy card frustrates the free exercise of voting rights because it results in the "election" of directors who might not have otherwise been elected if a proxy card with all *bona fide* nominees was provided to shareholders.

The standard for a fair corporate election was set forth in Aprahamian v. HBO & Co., 531 A.2d 1204, 1206-07 (Del. Ch. 1987):

> The corporate election process, if it is to have any validity, must be conducted with scrupulous fairness and without any advantage being conferred or denied to any candidate or slate of candidates. In the interests of corporate democracy, those in charge of the election machinery of a corporation must be held to the highest standards in providing for and conducting corporate elections.

---

v. Thistle Group Holdings, Co., et al., March, 2002, No. 1623, First Jud. District of PA, Court of Common Pleas of Philadelphia County, ("It is possible to draw a distinction between a shareholder's right to vote in a board election, on the one hand, and the shareholder's right to field candidates and to solicit proxy votes in that election. The Court finds this distinction meaningless in this case and will treat [the plaintiff's] right to solicit proxies and to field the Nominees as concomitant with its voting rights.")

This standard is consistent with the federal standard for elections of officers of labor unions set forth in Section 481 of The Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 481). Section 481 requires that:

- Every labor organization refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution.

- Adequate safeguards to insure a fair election shall be provided [by every labor organization].

- Every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such [labor] organization or any member thereof.

To ensure fair corporate suffrage, the Commission should forget about tinkering with a fundamentally unfair corporate election process. Instead, it should use Aprahamian and Section 481 as a guide to craft proxy rules, substituting "company" for "labor organization" and "shareholder" for "member." That would afford shareholders of publicly traded corporations the same standard of voting rights as union members. Anything less is an endorsement of unfair corporate elections Specifically and most importantly, the Commission should immediately take the position that a proxy card that excludes the name of any *bona fide* nominee known to the soliciting party is materially misleading and hence a violation of rule 14a-9(a).

Conclusion

Over the years, the Commission has exhausted far too much of its resources on trying to devise patches to improve a corporate election process that is fundamentally unfair. The latest of these schemes is a convoluted and flawed "proxy access" proposal that not only fails "to give true vitality to the concept of corporate democracy,"[7] but would probably be invalidated by a court if challenged. Shareholders do not need a mechanism to "facilitate" proposing nominees for director since they already have that right under state law. Instead, the election system needs to be fairer. To this end, the Commission's objective should be to ensure that all shareholders have a meaningful opportunity to vote for the nominees of their choice. A proposal to allow a limited degree of proxy access

[7] *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972)

fails to meet this objective. Therefore, the Commission should abandon it and simply insist that every proxy card must include all known *bona fide* nominees.

Shareholders have waited over seventy years for the Commission to fulfill the will of Congress by adopting rules to "[prevent] the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders." A rule requiring every proxy card to include all known *bona fide* nominees as well as rules modeled after Section 481 of The Labor-Management Reporting and Disclosure Act of 1959 would ensure "the free exercise of the voting rights of stockholders" and would almost certainly be upheld by a court as a valid exercise of the Commission's rulemaking authority.

I urge the Commission to check its moral compass and adopt rules that eliminate the cancer of unfair corporate elections.

Very truly yours,

Phillip Goldstein
President
Kimball & Winthrop, Inc.
General Partner