Social Investment Forum

<u>Via Email</u>

Aug. 10, 2009

Elizabeth M. Murphy
Secretary
United States Securities and Exchange Commission
100 F St., NE
Washington, DC 20549-1090

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

Dear Ms. Murphy:

On behalf of the Social Investment Forum (SIF), the U.S. membership association for socially and environmentally responsible investment institutions and professionals, I am writing to express our support for the Securities and Exchange Commission's (SEC) proposed rule, *Facilitating Shareholder Director Nominations*. The current financial crisis underscores both the complacency within some boards to protect long-term shareholders' interests and the need to strengthen accountability of boards and management.

We believe granting long-term shareholders the right to nominate directors, thereby ending the *de facto* monopoly the board and management has in picking director slates, is an important component of achieving the goals of effective oversight of U.S. publicly traded companies' boards and of broad financial reform. Therefore, we concur with the commission that the reforms outlined in the SEC's proposed Rule 14a-11 and revisions to Rule 14a-8(i)(8), following decades of debate over proxy access, are long overdue and should be adopted swiftly. SIF also welcomes the opportunity to comment on points still under consideration.

We agree with the SEC's position that the proposed rule should:

- Permit shareholders to aggregate their holdings to meet the minimum share ownership thresholds.
- Grant only long-term shareowners, those holding stock for at least one year, access to nominate directors.
- Employ safeguards to ensure that access is not used as a takeover mechanism by short-term profit seekers.
- Outline strong independence standards for director nominees.
- Require full and accurate disclosure by nominating groups, including pertinent information about nominated directors.
- Allow nominating shareholders to make statements of opposition against the election of other board members on the company's slate in the proxy statement.
- Authorize shareholders to file resolutions related to the issue of board elections.
- Become effective immediately without a lengthy implementation period, associated triggering mechanism or exemption or delay for smaller issuers.

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We also would like to take this opportunity to comment in greater detail on three features of the proposed rule that are of particular interest to our members:

- **Priority access:** SIF favors an approach whereby the largest beneficial owner or group of owners gain proxy access, as opposed to awarding access to the first shareholder or group of shareholders filing. We are concerned that a first come, first serve approach might force shareholders to rush to file and result in a less thoughtful process than is otherwise possible. In the end, we also believe that the investor or group with the greatest stake in the director election and the company's long-term financial performance should prevail in these situations.

- **Failed nominations and resubmitting candidates:** SIF believes that there should not be any waiting period for resubmitting candidates failing to win election to a board.

- **Shareholder proposals:** We oppose permitting companies subject to Rule 14a-11 to exclude shareholder proposals that they otherwise would be required to include. Our members feel the shareholder proposal rule 14a-8 is an important conduit for opening dialogue between management and shareholders on key ESG policy issues that have significant consequences for long-term shareholder value as well as society. We feel that the rule's associated submission requirement (at least $2,000 worth of stock or 1 percent ownership stake in a company for at least one year) has served shareholders well, should not be changed and should also apply to proposals on director elections.

The U.S. Chamber of Commerce and other critics already have expressed their fierce opposition to the new rule. We suspect that the commission will hear many more similar criticisms during the proposed rule's comment period and would like to take this opportunity to rebut some of the detractors' arguments. The Chamber's July 31 op-ed piece in the *Wall Street Journal* argues that proxy access will give unions, through their pension funds, and other "special interests" inordinate power over board elections and otherwise distract management in ways that will detract from long-term shareholder value. Additionally, they argue that union pension funds will use proxy power and access to promote special interest agendas that do nothing to promote shareowner value.

Access represents a need for accountability to all types of investors, but the Chamber conveniently ignores the broad and deep base of investor support for access. For example, in 2007 when the SEC invited comments on several proposals, a record number of individual and institutional investors submitted comments in an overwhelming indication of support for proxy access. Furthermore, a shareholder nomination would only succeed if a majority of the shares held were to vote for the new director, requiring a very broad coalition of many different types of shareholders. Finally, access will be used selectively, since it is still a time consuming and somewhat expensive process. Similar to the right of investors to call a special meeting, which is an important right rarely used, this reform will not open up the floodgates of endless slates of nominees presented on company proxy statements. Yet, it is an important right to use, as necessary, to hold a board accountable.

In its arguments, the Chamber relies on a study it commissioned from Navigant Consulting that is not only deeply flawed, but also does not address proxy access directly. Instead, the study focuses on shareholder activism by unions and argues that this shareholder activity "provides no benefit for pension plan participants, and may actually reduce shareholder value." We take issue with the study's findings because:

- It fails to identify any causal link between the publication of a shareholder proposal in a company's proxy statement and stock price. In fact, the study makes no attempt to even describe a hypothesis that would account for such a link.

- It also neglects to address the fact that companies targeted by shareholder resolutions are often struggling financially and how a proposal might help to mitigate further declines in stock price.

- A shareholder proposal is filed to encourage a change corporate policy or behavior, or to mitigate risk, not to affect stock price. By failing to examine companies where proposals have been withdrawn, the study effectively ignores all successful proposal filings resulting in corporate reforms and fatally skews the results.

- The study misstates fiduciary duty and is laden with improper assumptions of how fiduciaries should act. The study, for example, implicitly assumes that it would be consistent with fiduciary duty for an investor to expend resources to file a proposal to win a short-term increase in stock price. However, the study does not acknowledge that fiduciaries should be acting to mitigate future risks.

- The study fails to provide a convincing rationale for its selection of the proposals—those listed in the AFL-CIO's *Key Votes Survey*—and ignores a broad spectrum of other types of resolutions not fitting the AFL-CIO's criteria of "representing a worker-owner view of value." The AFL-CIO's 2008 survey, for example, only covered 25 votes on shareholder resolutions, while 192 social and environmental proposals—and many more on governance issues—came to votes in the United States in 2008.

Moreover, the shareholder value argument opposing access put forth by the Chamber could not be further from the truth, as the business case for granting shareholder proxy access is supported by empirical evidence. For example, a recent report from the Investor Responsibility Research Center Institute and Proxy Governance Inc., *Effectiveness of Hybrid Boards*, analyzed 120 companies where activist shareholders had won a limited number of board seats between 2005 and 2008. The study looked at the effectiveness of these so-called hybrid boards formed when shareholders elect dissident directors, but do not win board control, through actual or threatened proxy contests. The study found that hybrid boards:

- Improved shareholder value by an average of 19.1 percent, better than the 16.6 percent generated on average by peers, with more than half of the gains coming within three months of the contest.

- Increased share price by an average of 5 percent during the one year immediately following the board election, 3.6 percentage points better than peers.

- Boosted total share price performance for the 39 months from the three month contest period through the three year anniversary by an average of 21.5 percent—17.8 percentage points higher than peers.

Therefore, we also feel there is a strong financial case for proxy access, in addition to basic issues of equity, good governance, transparency and accountability.

In addition, during open hearings on proxy access, Commissioners Casey and Paredes argued that the SEC shouldn't impose a blanket rule about proxy access, because a one size fits all regime would block experimentation and hinder innovation in corporate governance in the United States. However, when the SEC examined in 2007 whether to allow shareholders to propose bylaw amendments that would grant shareholders proxy access, corporations lobbied fiercely against the introduction of this type of variation in board elections. Ironically, the companies' argument, supported by the SEC commissioners at the time, was that a one-size approach protecting management's control of the proxy ballot was appropriate.

The opposition also fails to acknowledge that proxy access is already the norm in most of Europe. A report by the Investors' Working Group, *U.S. Financial Regulatory Reform, The Investors' Perspective,* published in July 2009, notes that "in the United States, unlike most of Europe, the only way that shareowners can run their own candidates is by waging a full-blown election contest, printing and mailing their own proxy cards to shareowners. For most investors, that is onerous and prohibitively expensive." Meanwhile, the report notes, corporations are free to tap company coffers to fund campaigns and proxy solicitations for their own candidates and to engage in costly litigation to put up further barriers to investors contesting elections. This, we believe, skews the playing field and has contributed to the lack of oversight we see in America's boardrooms today. Proxy access is a matter of fair corporate suffrage, necessary and appropriate for the protection of investors and the greater public good.

In sum, the Social Investment Forum strongly favors the SEC's approach to proxy access and appreciates the opportunity to express its views on this matter.

Sincerely,

Lisa N. Woll

Lisa Woll
CEO
Social Investment Forum