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October 2, 2007

VIA E-MAIL
Ms. Nancy M. Morris, Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-1090

Re: Shareholder Proposals Relating to the Election of Directors (File No. S7-17-07); Shareholder Proposals (File No. S7-16-07)

Dear Ms. Morris:

We are pleased to submit the following comments with respect to the Securities and Exchange Commission's (the "Commission") proposed changes to Rule 14a-8 and related rules under the Securities Exchange Act of 1934. The changes outlined in the SEC's Release No. 34-56161 would codify the SEC's existing position that shareholder proposals on proxy statement access for board nominations are categorically excludable under Rule 14a-8(i)(8). In contrast, the proposal in SEC Release No. 34-56160 (the "Access Proposal") would allow shareholders owning 5% or more of a company's voting shares to include in the company's proxy materials a proposal for an amendment to the company's bylaws mandating procedures to allow shareholders to include director nominations in the company's proxy materials, and would also otherwise facilitate and deregulate election contests. We write in support of the proposal in Release No. 34-56161 and in opposition to the Access Proposal in Release No. 34-56160.

We oppose the Access Proposal because it will allow dissident shareholders to effectively conduct an election contest without complying with the existing disclosure and antifraud requirements applicable to such contests. The Access Proposal does this by:

- amending Rule 14a-8 to require companies to include in the company's proxy statement a shareholder proposal to establish a procedure by which persons nominated for election as directors by a shareholder-proponent must be included in the company's proxy statement,
- amending Rule 14a-8 to require companies to include in their proxy statements the names and other information of shareholder-nominees for election as directors nominated pursuant to such a bylaw,[1] and
- deregulating communications among shareholders to the extent made electronically such as on an electronic forum, with minimal limitations.

[1] Rule 14a-8(b)(8) as proposed literally does not prohibit a registrant from excluding a *nomination* made by 5% shareholder; rather, it only prohibits the registrant from excluding a *bylaw proposal* regarding how nominations are made. This appears not to be what the Commission intended based on its discussion of *AFSCME v. AIG*. The Commission should add the words "or a nomination pursuant to such a bylaw" in Rule 14a-8(b)(8) following the phrase "except for a proposal to establish a procedure by which shareholder nominees for election of directors would be included in the company's proxy materials."

We believe that the interests of shareholders are best served when shareholders are provided with full and fair disclosure on contested issues, and we are concerned that the cumulative effect of the proposed changes will be to foster a short-form proxy contests, especially for director elections. We think the Commission's proposed rule changes in the Access Proposal are a step in the wrong direction towards deregulation of soliciting communications and less disclosure. The Access Proposal replaces time-tested and balanced rules governing election contests. It favors the convenience of dissident shareholders owning as little as 5% of a company's securities over the interest of all other shareholders who are deprived the benefit of full and fair disclosure of the merits of such a contests and the nominee(s)'s plans for the company. Also, the Access Proposal if adopted likely will create confusion among shareholders regarding which nominees or proposals are supported by incumbent management, in conflict with the current prohibition in Rule 14a-9 which prohibits a contestant from failing to clearly distinguish its soliciting material from the soliciting material of another person.

In addition to the problems created by the new rules, we also oppose the proposed rules because further access to the Company's proxy statement simply is not needed.

- For example, SunTrust has a bylaw which has allowed shareholders to nominate directors (although our bylaw does not guarantee that a shareholder's nominee will be named in the company's proxy statement). For at least the last 10 years we have not received a single shareholder nomination, while over the same period we have received a number of shareholder proposals on a variety of other issues. Simply stated, no shareholder has ever been denied access to our proxy statement for such shareholder's nominee.

- In recent years, companies have seen increased shareholder activism and participation. In fact, a single institutional shareholder and a single proxy advisory firm operating under existing proxy rules have succeeded in changing the voting standard for directors from a plurality to a majority at a majority of the S&P 500 companies (by market capitalization). This is a testament to the significant power of institutional shareholders under existing proxy rules, and the responsiveness of companies to such shareholders. The success of a single institutional shareholder accomplishing such changes in such a short time begs the question of whether existing proxy rules give such shareholders and advisory firms disproportionate power relative to their economic investment in such companies, and strongly suggests that efforts to further tilt the playing field in the direction of institutional shareholders are not warranted.

- Recent amendments to NYSE Rule 452 regarding discretionary voting by brokers will become effective during the coming proxy season, and many commentators expect that this rule change will further shift voting power from individual investors to institutions.

- Increasingly, technological advances allow companies opportunities to communicate with and provide appropriate information to shareholders and other interested parties. Many companies regularly hold conference calls and webcasts. The ability to do this and more will likely increase as communication costs decline and technology improves.

- Finally, the modest impediments to conducting an election contest are easily overcome by a 5% shareholder and are not so great that the safeguards accompanying proxy contests should be abandoned. Any shareholder group owning 5% of a publicly-traded company is in the position to fend for itself and should provide its fellow shareholders with full disclosure of its plans for the company and related proxy contest disclosures.

If the Commission is interested in enhancing dialogue between registrants and shareholders, we think there are many better steps the Commission might take. For example, in 2004 the Commission amended Items 7(d)(2) and 7(h) of Schedule 14A to require disclosure in company proxy statements regarding nominating committees and shareholder communications with directors. More recently, the Commission adopted rules to facilitate the electronic delivery of proxy statements. The Commission can expand upon these efforts to improve communications between companies and shareholders in incremental ways after they have been given time work. Other opportunities for improvement are fixing the byzantine rules governing how companies communicate with

shareholders who own shares through a nominee such as a bank or broker. These are all examples of improvements that would not reduce the information provided to shareholders in an election contest but which might improve communications between companies and their shareholders. These efforts should be given a fair chance to work before discarding the Commission's time-tested and balanced approach to election contests.

Short-Form, Unregulated Proxy Contests and Disclosures on Schedule 13G

We believe the Commission underestimates the significance which the nomination of a dissident director will have upon companies. We believe that such nominations will amount to back-door, unregulated proxy contests, and that the additional disclosures which the Commission proposes for Schedule 13G fall far short of both what is currently provided to shareholders in a proxy contest and what is needed to protect investors.

For example, under the Access Proposal, a group of dissident shareholders could nominate a shareholder who intends to cause the company to become more highly leveraged, declare a special dividend to benefit shareholders in the short-term, spin-off a significant division, terminate a significant number of employees or close plants, or relocate headquarters or plants to different states or countries. While a single director cannot accomplish this alone, and the approval of the full board is required for such actions, a nominee's plans such as these nevertheless should be disclosed to investors. The Access Proposal creates a method where such nominees will be included in registrant proxy statements and may be elected to boards of directors without such disclosures. This is a serious loophole which the Commission should close.

The obvious way to close this loophole is to not create it in the first place. That is, the Commission should not approve the Access Proposal because it will seriously compromise the amount of information provided to shareholders in many proxy contests. It will also unfairly allow dissidents to effectively conduct unregulated proxy contests against incumbent boards which themselves are subject to the proxy rules. The Commission's proposed expansion of the disclosure requirements under Schedule 13G is inadequate to offset these drawbacks of the Access Proposal because such disclosures are more limited than what is currently required in a proxy contest and are not mailed to shareholders.

If the Commission does approve the Access Proposal, it should significantly enhance the disclosures required of the shareholder proponent, the nominee, and their respective affiliates. Most importantly, the rule should require disclosure of the dissident group's future plans for the company. Because one's plans for the company essentially disclose whether one intends to influence or control the company, by requiring disclosure of the group's plans (as well as periodic updates and certification of the truthfulness of the statements), the Commission would need not decide the question of whether the act of seeking a director-election bylaw itself is a control act. This disclosure requirement should be broad enough to include all board action presently contemplated by the dissident group, even if the group does not believe it will control a majority of the board of directors if successful. This should be disclosed because these plans are material to investors' individual decisions in election contests, and because incumbent directors may view the election of a single dissident nominee to be a sort of referendum on a particular issue and as a result them may be more receptive to such plans after a dissident's nominee is backed by a sufficient number of shares to be elected to the board of directors.

Further, compliance with the expanded Schedule 13G requirement should be a precondition to access to the company's proxy statement, both at the time when an election bylaw is proposed as well as when access to the company's bylaw is requested pursuant to such a bylaw for the election of any particular nominee(s). Disclosure at the time of nomination is as important or more important that at the time the bylaw is proposed because information about the nominating shareholder group is what is most relevant to the registrant's shareholders. Natural persons who are a part of the group should be required to disclose at least as much information as registrants are required to disclose regarding their incumbent directors, including information about potential conflicts of interests, business interests, related parties, litigation, and criminal convictions. *Compare* proposed Items 8A, 8B, and 8C of Schedule 13G to Items 7(a) and 7(b) of Schedule 14A. Corporations and other entities which are part of such group should be required to disclose similar information, as well as sufficient information about the persons who control them to allow shareholders to identify all control persons.

Voting Rights Separate from Economic Rights. Another abuse in contested elections has been the practice of empty voting, or the exercise of votes with respect to shares for which the shareholder no longer holds or bears the economic risk of ownership. This practice is accomplished in various ways, including borrowing shares, purchasing voting rights, and purchasing shares while hedging the economic risk of ownership. Many of the Commission's rules and policies assume that voting power is the same as one's economic investment in a registrant, so any discrepancy can have profound policy consequences.

While the issue of empty voting is an important and broad issue, the proposed amendments to Schedule 13G are an opportunity for the Commission to take its first step towards identifying and ameliorating this problem. Because empty voting is believed to be practiced primarily by hedge funds and similar groups who are likely to utilize the Access Proposal, we encourage the Commission to update its reporting requirements under Section 13 to ensure that persons or groups with a filing obligation are required to disclose any discrepancy between their economic rights and their voting rights. This obligation should apply both when soliciting material is filed, as well as on any relevant registrant record dates. The Commission should also make conforming changes to its descriptions of the thresholds in Rule 14a-8 to make clear that such ownership thresholds apply to one's economic, un-hedged investment in a registrant.

Also, many commentators have noted that there is little teeth to Section 13(d) of the Exchange Act, and enforcement of violations by the Commission has been sporadic and essentially inconsequential. If the Commission deregulates election contests as contemplated by the Access Proposal, prompt reporting of changes in ownership levels, group membership, and plans for the company will become particularly important. The Commission could ensure compliance with Section 13(d) reporting requirement by tying a shareholder(s)'s rights under Rule 14a-8 to access the company's proxy statement with its compliance with the filing requirements under Section 13(d), including all necessary amendments. It should also require the group to attach a Sarbanes-Oxley style certification to the filing, or to include such a signed certification at the time the information (bylaw proposal or nomination) is requested for inclusion in the company proxy statement. The certification should include:

- a statement that the information in the schedule does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;
- a statement that the group has complied with the requirements of Schedule 13G, and has previously and timely filed all necessary amendments; and
- an undertaking to promptly file an amendment regarding any material change to the information.

Additionally, the Commission should add an instruction to Rule 14a-8 and Schedules 13D and 13G reminding shareholders that, after making a proposal or director nomination, their communication may constitute solicitations subject to Rule 14a-9. We believe this is particularly appropriate because many hedge funds have used their filings under Section 13 of the Exchange Act to impugn the character of incumbent boards of directors and managements contrary to the prohibitions in Rule 14a-9. Prohibiting such attacks in Section 13 filings is particularly important because often the individuals so attacked do not have an opportunity to defend themselves via a responsive filing.

Proposed Registrant Disclosures

The Commission has proposed a new Item 24 of Schedule 14A which requires registrants to include certain disclosures about shareholder proponents. We oppose increasing the reporting burdens placed on companies, and urge the Commission to limit a registrant's obligation under this item to information known to it.

Disclosures by Nominating Shareholders, Proposed Rule 14a-17

Rule 14a-17(b) requires a nominating shareholder to disclose certain Schedule 13G and Schedule 14A

information, but requires registrants to immediately post this on the registrant's website. We oppose shifting the responsibility for these disclosures to the registrant. Those interested in influencing critical corporate policies should be willing to follow the Commission's procedures for filing on EDGAR. Also, it would make finding this information difficult and unorganized. A better solution is to require the nominating shareholder file under Section 13. Further, registrant website disclosure of nominating shareholder information is inconsistent with current SEC policy that registrant disclosures on its own website are inadequate for Regulation FD purposes.

Preliminary Proxy Statements

Registrants which include a shareholder-nomination in the registrant's proxy statement should not be required to file a preliminary proxy statement. That requirement was based on the premise that contested elections would involve significant written disclosures to shareholders which the Staff of the Commission would review for compliance with Rule 14a-9. The Access Proposal is a clear departure from this type of proxy contest. Therefore, imposing a preliminary filing requirement would provide no benefit to shareholders and would only decrease the solicitation period by 10 days. We believe the decreased solicitation period will reduce the time available for shareholders to respond to proxy solicitations. At the margins, this will depress shareholder participation rates (primarily among retail investors) and effectively dampen the exercise of the shareholder franchise.

Electronic Shareholder Forum, Rule 14a-2(b)(6) and Rule 14a-18

We also oppose proposed Rules 14a-2(b)(6) and 14a-18. These proposed rules will have the effect of de-regulating many proxy contests by sanctioning proxy campaigns without the filing or delivery of a proxy statement. The only limits on such campaigns are that they be conducted on an electronic shareholder forum and be limited to communications occurring more than 60 days prior to the relevant meeting. Such rule dramatically de-regulates proxy contests and makes possible significant soliciting activity. Under the rule as proposed, such activity will take place:

- without notice to the adverse contestant, as is effectively provided under current Rule 14a-6;
- without any filing with the Commission, as currently required by Rule 14a-6;
- without limitation for false, misleading, incomplete statements, which are presently prohibited by Rule 14a-9;
- presumably will allow statements that impugn the character, integrity or personal reputation of adverse contestants, which are presently prohibited by Rule 14a-9; and
- presumably will allow statements which make charges concerning improper, illegal or immoral conduct or associations without factual foundation, which are presently prohibited by Rule 14a-9.

We believe that all such communications should be filed with the Commission as soliciting material and be subject to Rule 14a-9. Both the filing requirement and the antifraud requirement are time-tested safeguards that have protected the interests of both incumbents and dissidents.

We concur with implicit statement of the Commission that most or all of such communications are likely to constitute solicitations, even if they do not include a specific request to execute a proxy. This is because they are designed to persuade shareholders when making decisions about whether or not to grant a proxy. The fact that such communications may be negative – that is, a request to not execute a proxy in favor of management to vote for incumbent directors – does not take it outside of the definition of a solicitation in Rule 14a-1.

Also, as noted by the Commission, "myriad uses of the Internet to facilitate shareholder communication are already well under way." Technology already allows for communication among shareholders provided that such communications do not constitute solicitations under current proxy rules, and shareholders presently may communicate with registrants via mail or by participation in investor conference calls. Therefore, it seems that the sole purpose of the Access Proposal is to promote communications among shareholders that constitute solicitations under current rules. A better approach towards facilitating communications between shareholders and registrants is embodied in NYSE Listed Company Manual Rule 303A.03 (commentary, third paragraph), which requires

NYSE-listed registrants to disclose methods by which interested parties may communicate with directors.

We do not concur with the Commission's implied rationale that shareholders do not need the benefits of rules regulating proxy contests when the solicitation is segregated into its component parts—that is, where one party nominates the director, another party wages a communications campaign in support or against particular candidates, and another solicits the proxy.

In any election contest, we believe that communications which are intended to persuade a shareholder's view on a particular issue should be filed with the Commission. This ensures that the Staff of the Commission have an opportunity to review such communications for compliance with Rule 14a-9 and provides the registrant with notice and an opportunity to respond. In sanctioning an electronic communications forum, the Commission should ensure that such communications are subject to Rule 14a-9 and that the registrant have access to such communications forums.

For the reasons stated above, we oppose this aspect of the Access Proposal. In the event it is adopted, the Commission should extend the quiet period for sanctioned communications from 60 days prior to the meeting date to at least 120 days prior to the meeting date. It should do this because communications prior to the meeting are likely to affect how shareholders vote. Yet, a quiet period of any length will not be an adequate solution. If the sanctioned communications are stored on a computer server, printed, or otherwise recorded, the quiet period with respect to those communications effectively will be reduced to zero days. Similarly, on an electronic forum, the quiet period should apply to both when a communication is originated as well as for how long it is broadcast or published. Another problem with a quiet period approach is what happens if a communication becomes false and needs to be corrected during the quiet period?

Amendment to Rule 14a-8

In the event that the Commission deregulates election contests, we favor a meaningful ownership standard as a prerequisite to access to the Company's standard. The level of ownership should be significant both in duration and amount invested.

With regard to election contests specifically, we believe that an ownership level of 5% for at least 1 full year should be the absolute minimum. Since the ownership threshold may be satisfied by the formation of a group, the ownership period should be measured from the time the group first reaches 5%, as evidenced by the filing of a Schedule 13G by the group. We do not believe disparate ownership at less than a 5% level, followed by the formation of a group of 5% or more shareholders, should suffice. In the latter case, the registrant could be provided no notice of the group's intention. Also, a requirement that the holding period be measured from the date of the filing of the group's Schedule 13G would also enhance compliance with the disclosure requirements applicable to such shareholders under Section 13.

With respect to the number of words a shareholder-proponent out to be able to include in the company's proxy statement we recommend that the Commission retain the 500-word limit. We have noticed that frequently proposals under Rule 14a-8 are poorly worded, use poor grammar, are unclear, or otherwise confusing to shareholders. The Staff of the Commission understandably is flexible in what it will accept from shareholder-proponents. Nevertheless, concision is a virtue and relaxing the 500-word limit is not likely to improve shareholder disclosures. Expansion of this limit would impose additional burdens on companies and exacerbate the likelihood of investor confusion regarding the sponsor of the proposal. See generally note (c) to Rule 14a-9. Failure to expand this limit would not significantly affect the rights of shareholders since they still may prepare and file their own proxy materials.

Conclusion

In conclusion, we believe the Access Proposal will impose significant burdens on registrants and deprive shareholders of important information in election contests. These only benefits to be garnered by the proposal is to

facilitate election contests by 5% shareholders, parties fully able to bear the costs of such contests under current rules.

Very truly yours,

David A. Wisniewski,
Associate General Counsel,
Group Vice President and Assistant Secretary

DAW/dlj

cc: Raymond D. Fortin, General Counsel