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Dear Ms Morris,

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

I am writing as the acting chair of the Shareholder Rights Committee of the International Corporate Governance Network (ICGN), which as you may know is a global membership organisation of institutional and private investors, corporations and advisors. Our membership spans over 40 countries and the investor members are responsible for global assets of $15 trillion, $4.5 trillion of which is invested in the US market. The aim of the ICGN is to contribute to raising standards of corporate governance through the exchange of ideas and information across borders and the development of best practices. We therefore welcome this opportunity to submit to the SEC our comments on the changes it is considering to its approach to shareholder proposals relating to directors.

The ICGN believes strongly that board directors collectively and individually are fiduciaries of all shareholders and thus should be accountable to them. In our view, this requires that shareholders can play a meaningful role in the appointment *and removal* of directors. Shareholders, in turn, have responsibilities to use the rights afforded them in a disciplined and thoughtful way. In this regard, please see the statement of principles on shareholder responsibility formally approved at our AGM this July (www.icgn.org) . Regulators, companies and investors should be working together to ensure a policy and regulatory framework that reinforces accountability. At present we believe there are a number of impediments to this in the US and we do not believe that either of the SEC's current proposed approaches removes these.

The most significant impediment is that shareholders do not have an over-arching right to remove directors by a simple majority (i.e. 50% + 1 shares) of votes. This means that shareholders in most US public companies cannot sanction underperforming directors in any meaningful way. Whilst we welcome the steps taken by some US companies to introduce so-

called majority voting in one form or another, as is often the case with leadership in governance matters, those are generally not the companies about which investors have concerns. Arguably, engagement in the US market would be much less confrontational and public than at present if there was a stronger sense of direct accountability to shareholders on the part of directors, something enabled by majority voting.

The right of shareholders to remove directors, who are after all their agents or fiduciaries, exists in most major markets outside the US[1]. It is not our experience that this right is used very often and we are not aware of instances where it has been abused: it is highly unlikely that a majority of shareholders would vote against a director's election on frivolous or spurious grounds. Investors, many of them fiduciaries themselves, are not going to act against the interests of the company in which they invest. Generally shareholders start from the position of wanting to support the directors of the companies in which they invest and consider removing them as an extreme measure required in only a very small number of situations. But the right to vote against those directors who underperform or who disregard shareholder concerns acts as a powerful accountability mechanism. Although obviously outside the remit of the SEC we believe it might be timely for state legislators to consider (re)-introducing legal provision for the removal from the board of directors of members proposed for re-election who fail to get the support of at least half the shareholder body.

Absent the right to remove directors who fail to meet shareholder expectations, the ICGN believes it is even more important that shareholders are able to nominate their own candidates to the board through a relatively straightforward and predictable process. Again, this is a right that shareholders have in many markets outside the US and is one that tends to be used *in extremis*. Internationally, most shareholders concerned about board composition tend to engage with the nominations committee or the board chairman rather than launch a nominations campaign of their own. However, their ability to submit resolutions to that effect is the backdrop to the engagement.

We are concerned that the proposed changes (File No. S7-17-07) to the wording of Rule 14a-8(i)(8) exclude shareholders from using the company's proxy materials to submit resolutions on director nominations and related issues to the shareholder meeting. This would severely limit the ability of shareholders to influence the composition of the board of directors and would in our view be a retrograde step at a time when there is increasing demand from shareholders for director accountability.

It also seems likely that some of the procedural requirements, particularly the five per cent share ownership threshold, will significantly reduce the ability of shareholders to participate in the proxy process. We agree strongly that it is important that director nominations are properly conducted but would again note that shareholders are unlikely to enter into the process

[1] Note a recent survey of ICGN members confirmed this and we would be pleased to provide SEC staff with more details. 82% of respondents considered that shareholders should have the right to nominate directors.

on spurious grounds or to damage the company in which they invest. In the US context, where for the most part shareholdings of even major investors tend to be a fraction of a per cent of the total issued capital of a company a five per cent threshold seems difficult to attain.[2] Perhaps having a lower threshold for a test period of one or two annual general meeting seasons would help the SEC assess the appropriate level at which to set ownership thresholds for proposing resolutions relating to director nominations?

In addition, we encourage the SEC to review the alternative approach (File No. S7-16-07) it suggests to the process for shareholder proposals relating to director nominations. The process as proposed seems overly complex and imposes unduly onerous disclosure and procedural requirements on shareholders. We do not believe that the case has been made that the disclosure of such detailed information on proponents and their relationship with the company enhances the process. Much of the required information seems either immaterial or something that the company or the proponents would disclose voluntarily if it were material to the decision-making process of the wider shareholder body.

A further concern about the proposed approach is that it seems to require significant input from SEC staff in interpreting shareholder proposals on matters relating to director nominations and in assessing the compliance of proponents with the disclosure requirements. Not only is this a drain on SEC resources but it potentially leads to more uncertainty in outcome for both shareholders and companies.

There are two other topics on which we would like to comment. Firstly, we agree with the SEC that electronic shareholder forums have played a significant role in making it easier for shareholders and companies to share information and discuss governance matters. However, we consider this an enhancement to rather than a replacement for more formal channels of communication between shareholders and companies, such as the general meeting of shareholders and the proxy process.

Secondly, we do not support the proposal that companies should be able to introduce bylaws on non-binding or precatory resolutions. Many ICGN members propose or support precatory resolutions at investee companies. Such resolutions are considered one of the key tools available for promoting governance dialogue in the rather limited tool kit of shareholder

[2] The ICGN survey reports that threshold levels in other major markets are lower than the SEC levels proposed or offer alternatives to the % requirement. Examples include Japan (1% or 300 units held for 6 months), Germany (500,000 Euro holding), the Netherlands (1%), the UK (5% or 100 shareholders representing £10,000), Canada (1%).

rights in the US market. We believe it is important that all shareholder resolutions are considered within the criteria of Rule 14.8-a to ensure as consistent an approach as possible is taken across the market.

We welcome the SEC's commitment to facilitating the exercise of shareholders' rights as provided for within company bylaws and state law. However, we believe that the approaches to shareholder proposals on director nominations outlined in File No.s S7-17-07 and S7-16-07 are more likely to inhibit rather than facilitate the exercise of shareholder rights. We ask therefore that the SEC does not adopt either proposal but reconsiders its position in light of investor concerns.

International experience of shareholder access to the proxy suggests that such rights are used responsibly and constructively. Given that international investors now own close to one fifth of the share capital of US listed companies, their experience may well provide some comfort to those concerned about how greater access would work. We believe it is fundamental to the success of the US market that regulators and others trust that shareholders' intentions are good and in support of the companies in which they invest significant amounts of capital, often on behalf of others for whom they in turn are fiduciaries. Regulation developed on this basis is likely to do more to enable the proper exercise of ownership rights by responsible long-term shareholders.

We thank you for the opportunity to comment on this very important issue. If you would like to discuss any of these points, please do contact our Executive Director, Anne Simpson, by telephone on either + 44 20 7612 6098 or by email at execdirector@icgn.org.

Yours sincerely,

Michelle Edkins
Acting Chairman
ICGN Shareholder Rights Committee

cc: John Wilcox
Alastair Ross Goobey