COMMENT LETTER OF THIRTY-NINE LAW PROFESSORS
IN FAVOR OF PLACING SHAREHOLDER-PROPOSED BYLAW AMENDMENTS
ON THE CORPORATE BALLOT

October 2, 2007

VIA E-MAIL
Ms. Nancy M. Morris
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20459-1090

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

I am filing this comment letter on behalf of the group of thirty-nine law professors listed below. Members of our group are affiliated with twenty-four universities around the country.[1] We all teach and/or write about corporate law and securities law.

We are submitting this comment letter (in our individual rather than institutional capacities) to urge the Securities and Exchange Commission not to adopt either the proposal in Release No. 34-56161 or the proposal in Release No. 34-56160. In our view, both proposals would produce unnecessary and undesirable impediments to shareholders' exercise of their right under state law to initiate bylaw amendments concerning shareholder nomination of directors.

There is substantial disagreement among us regarding the substantive merits of proxy access bylaws and thus as to whether shareholders would benefit from adopting such bylaws. Whereas some of us view such arrangements as benefiting shareholders by making directors more accountable and more attentive to shareholder interests, others among us believe such arrangements would commonly not benefit shareholders. We are unanimous, however, in our strong belief that shareholders should be allowed to make the decision on this subject for themselves, and that companies should not be allowed to make the decision for them by excluding proposed bylaw amendments from the corporate ballot.

[1] The universities with which one or more of us are associated are: Berkeley, Boston University, Brigham Young, Brooklyn, Case Western Reserve, Chicago, Columbia, Duke, Emory, Fordham, George Washington, Georgetown, Harvard, Houston, Michigan, Minnesota, NYU, Ohio State, San Diego, Stanford, Temple, Texas, Virginia, and Yale. Our university affiliations are listed below for identification purposes; we do not represent or speak for our institutions.

One of the basic elements of the corporate structure created by state law is shareholders' power to adopt bylaw amendments including amendments concerning director elections. Forcing shareholders who consider initiating such a bylaw amendment to bear the costs of obtaining proxies from other shareholders will greatly impede the initiation of such proposals. Thus, if companies are permitted to exclude bylaw amendments concerning election procedures that are valid under state law, shareholders' power under state law to initiate such amendments will become largely irrelevant. Permitting such exclusion thus would undermine the proxy rules' goal of ensuring that shareholders are able to communicate with other shareholders on matters of significant importance.

Furthermore, there is a widely held view that for corporate governance "one size does not fit all." According to this view, companies should be allowed to tailor governance arrangements to the companies' particular needs and circumstances. Blocking or impeding shareholder-initiated bylaw amendments concerning election procedures would greatly undermine private ordering in this important area.

In our view, the election exclusion of Rule 14a-8(i)(8) should be limited to proposals that relate to a particular election over particular candidates. This provision should not permit the exclusion of proposals that do not relate to any particular election but rather to the procedural rules to which all future elections would be subject. Such proposals do not require a different type of disclosure than is required for proposed bylaw amendments that relate to other aspects of the company's governance.

Expanding the election exclusion of Rule 14a-8(i)(8) to allow exclusion of shareholder access bylaws in some or all circumstances would impose an outside preference against some governance arrangements permitted under state law. The proxy rules should not be used to impose such an outside preference.

Some of the comment letters already submitted in favor of allowing companies to exclude some or all proxy access proposals expressed concerns that proxy access arrangements would have undesirable effects. While some of us view these concerns as valid and deserving the attention of shareholders voting on a proxy access proposal, we all believe that these concerns do not provide a basis for using the proxy rules to exclude such bylaw proposals. Although one could identify many proposals for bylaw amendments whose adoption would be widely viewed as undesirable, the proxy rules do not allow companies to exclude such proposals. The proxy rules, as they should, leave the choice whether to adopt such bylaw provisions to shareholders.

The concerns about the effects of proxy access arrangements expressed in comment letters included concerns about the potential adverse effects of facilitating contested elections. But the proxy rules have long allowed shareholders to include in companies' proxy materials various proposals that may make contested elections more likely. For example, shareholders have long been permitted to include proposals to de-stagger the board or introduce cumulative voting. There is no reason to exclude proposals that make contested elections more likely by providing proxy access while permitting proposals that make such elections more likely by introducing annual elections or cumulative voting.

In the end, shareholder proposals concerning director nomination are similar in nature, and in the type of information and disclosure they require, to shareholder proposals on other aspects of companies' governance arrangements. Shareholders wishing to exercise their state law right to initiate bylaw amendments concerning director nomination should not face higher hurdles than shareholder wishing to initiate other governance bylaws. [2]

In case members of our group could be useful in any way to the deliberations of the staff or the Commission on this subject, please contact me at (617) 876-6071 or by writing to bebchuk@law.harvard.edu or 1545 Mass. Ave., Cambridge, MA 02138.

Sincerely,

Lucian Bebchuk

LIST OF LAW PROFESSORS ON BEHALF OF WHOM
THIS COMMENT LETTER IS FILED:

Ian Ayres
William K. Townsend Professor of Law
Yale Law School

Michal Barzuza
Associate Professor of Law
University of Virginia School of Law

Lucian A. Bebchuk
William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics and Finance
Harvard Law School

Laura N. Beny
Assistant Professor of Law
University of Michigan Law School

[2] For elaboration of some of the points discussed in this comment letter, see the Harvard Law School Professors' brief that was submitted by several of us to the Second Circuit in the case of AFSCME v. AIG and is available at http://www.law.harvard.edu/faculty/bebchuk/Policy/AmicusCuria_Brief.pdf.

Lisa E. Bernstein
Wilson-Dickson Professor of Law
University of Chicago Law School

Bernard S. Black
Professor of Law
Hayden W. Head Regents Chair
for Faculty Excellence
University of Texas Law School

William W. Bratton
Professor of Law
Georgetown University Law Center

Richard Buxbaum
Jackson H. Ralston Professor of
International Law
Boalt Hall School of Law
University of California at Berkeley

William J. Carney
Charles Howard Candler Professor of Law
Emory Law School

Stephen Choi
Murray and Kathleen Bring Professor of
Law
New York University School of Law

John C. Coffee, Jr.
Adolf A. Berle Professor of Law
Columbia Law School

James D. Cox
Brainerd Currie Professor of Law
Duke Law School

Lawrence A. Cunningham
Professor of Law
George Washington University Law
School

George W. Dent, Jr.
Schott - van den Eynden Professor of
Business Organizations Law
Case Western Reserve University School
of Law

Einer R. Elhauge
Carroll and Milton Petrie Professor of Law
Harvard Law School

James A. Fanto
Professor of Law
Brooklyn Law School

Allen Ferrell
Harvey Greenfield Professor of Securities
Law
Harvard Law School

Jill E. Fisch
T.J. Maloney Professor of Business Law
Fordham University Law School

Merritt B. Fox
Michael E. Patterson Professor of Law
Columbia Law School

Tamar Frankel
Professor of Law
Boston University School of Law

Jesse M. Fried
Professor of Law
Boalt Hall School of Law
University of California at Berkeley

Jeffrey N. Gordon
Alfred W. Bressler Professor of Law;
Albert E. Cinelli Enterprise Professorship
Columbia Law School

Henry Hansmann
Augustus E. Lines Professor of Law
Yale Law School

Jon D. Hanson
Professor of Law
Harvard Law School

Peter H. Huang
Harold E. Kohn Chair Professor of Law
Temple University James Beasley School of Law

Marcel Kahan
George T. Lowy Professor of Law
New York University School of Law

Vikramaditya S. Khanna
Professor of Law
University of Michigan Law School

Reinier H. Kraakman
Ezra Ripley Thayer Professor of Law
Harvard Law School

Donald C. Langevoort
Thomas Aquinas Reynolds Professor of Law Georgetown University Law Center

Louis Lowenstein
Simon H. Rifkind Professor Emeritus of Finance & Law
Columbia Law School

Steven G. Marks
Professor of Law
Boston University School of Law

Dale Arthur Oesterle
Professor of Law
J. Gilbert Reese Chair in Contract Law
Moritz College of Law
Ohio State University

Richard W. Painter
S. Walter Richey Professor of Corporate Law
University of Minnesota Law School

Frank Partnoy
Professor of Law
University of San Diego School of Law

Katharina Pistor
Professor of Law
Columbia Law School

Robert A. Ragazzo
University of Houston Law Foundation Professor of Law
University of Houston Law Center

Kenneth E. Scott
Ralph M. Parsons Professor of Law and Business, Emeritus
Stanford Law School

D. Gordon Smith
Professor of Law
J. Reuben Clark Law School
Brigham Young University

Guhan Subramanian
Joseph Flom Professor of Law and Business
Harvard Law School