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October 2, 2007

Securities Exchange Act Release 56161
Commission File No. S7-17-07

Dear Sirs:

This letter provides comments on the Commission's proposed amendment to Rule 14a-8 under the 1934 Act set forth in the captioned release (the "Proposing Release"). This letter examines a fundamental approach to granting shareholder voice—adoption of a by-law giving the shareholders a role in determining whether a corporation's officers should be retained. For reasons detailed below, the proposed rules would benefit from clarification that they do not inhibit adoption of this approach to enhancing shareholder voice.

Consideration of Such a Proposal May Be Desirable. The efficacy of boards of directors in monitoring managers' performance has, of course, been called into serious question by recent financial failures. Whether executives of public corporations provide their employers value worth what the public corporations pay them has been the focus of great attention in recent years. *See, e.g.*, Capital One Fin. Corp., 2007 SEC No-Act. LEXIS 164 (Feb. 7, 2007) (not concurring with omission of proposal urging board adopt a policy that shareholders be given the opportunity at each annual meeting to vote on an advisory resolution to ratify the compensation of the named executive officers set forth in the Summary Compensation Table); Potomac Electric Power Co., SEC No-Act. LEXIS 145 (Feb. 2, 1993). A focus on making corporate boards more responsive to shareholders' interests provides only indirect control relative to direct shareholder input. A corporation could, for example, require that retention of an executive officer is conditioned on an affirmative vote at the shareholders' annual meeting.

It is entirely possible that this allocation of authority may be efficient. The mere prospect of the exercise of granted removal rights could have a salutary effect. The Commission should not inhibit the ability of market forces to influence adoption of enhanced monitoring of this form without having significant evidence that adoption of this lawful allocation of responsibility is problematic. As noted in the following section, such an allocation of authority may lawfully be memorialized in a Delaware corporation's by-laws.

Delaware Corporate Law Governing Shareholder Participation in the Selection of Officers. In a typical case, a corporation will have delegated to its directors the authority to hire and fire officers and other employees. Where that delegation has been effected, there may well be no good basis for treating shareholder intrusion into hiring and firing decisions differently from other ordinary managerial decisions—subjects, as noted below, exempt by Rule 14a-8(7).

However, Delaware has a statutory provision concerning the selection of officers that is separate from the statutory provisions generally delegating managerial authority to the directors. Delaware General Corporation Law ("DGCL") § 142(b) contemplates that a corporation's by-laws may provide for a method for selecting officers other than election by directors. *Id.* ("Officers shall be *chosen in such manner* and shall hold their offices for such terms *as are prescribed by the by-laws* or determined by the board of directors . . . ."). The eminent treatise, Folk on the Delaware General Corporation Law, § 142.4, notes that until the amendments to the DGCL in the late 1960s, the DGCL expressly referenced the possibility of election of officers by the shareholders. The treatise further notes that no change in the authority of shareholders to elect directors was intended by those statutory amendments. In sum, as that treatise notes, a Delaware corporation's by-laws may provide the officers are subject to election or removal by the shareholders. The next section details why the Proposing Release may be considered to impede adoption of by-laws granting shareholders' participation in decisions to retain officers.

Current Treatment of Selected Proposals; Concern with the Proposing Release. A series of no-action letters has expressed the view of the Commission's staff (the "staff") that shareholder removal of officers is a subject involving ordinary business operations of the type Rule 14a-8(i)(7) allows to be omitted from a public corporation's proxy statement. *E.g.*, Norfolk Southern Corp., 2001 SEC No-Act. LEXIS 150 (Feb. 1, 2001) (proposal urging directors commence a search for experts possessing specified characteristics); U.S. Bancorp, 2000 SEC No-Act. LEXIS 288 (Feb. 27, 2000). Shareholder proposals calling for the removal of identified directors have been omitted on the basis of Rule Rule 14a-8(i)(8). *E.g.*, CA, Inc., 2006 SEC No-Act. LEXIS 491 (June 20, 2006) (indicating no enforcement action would be recommended for omission of the following proposed resolution, "[P]ursuant to section 141(k) of the Delaware Geneal Corporation Law, the shareholders of [the reporting company] hereby remove from the board [two named directors] . . . ."); U.S. Bancorp, 2000 SEC No-Act. LEXIS 288 (Feb. 27, 2000).

On the other hand, the staff has indicated that an issuer's proxy statement cannot exclude a resolution "request[ing] that our Directors take the necessary steps, in the most expeditious manner possible, to adopt and implement a bylaw requiring each director be elected annually." Baxter Int'l Inc., 2005 SEC

No-Act. LEXIS 127 (Jan. 31, 2005) (failing to concur with omission pursuant to, inter alia, Rule 14a-8(i)(8), of the shareholder proposal); *see also*, *e.g.*, Comtech Telecommunications Corp., 1991 SEC No-Act. LEXIS 1163 (Sept. 8, 1991). (Feb. 27, 2000).

There are two concerns with the Proposing Release:

First, any final release should clarify that an executive officer whose retention is subject to the approval of the shareholders is not necessarily a member of an "analogous governing body" of a corporation, as the term is used in the Proposing Release.

Second, any final release should expressly indicate that communication bearing on the desirability of shareholder participation in officer retention does not necessarily question the business judgment of the board. The staff has, in the past, granted no-action comfort under 14a-8(i)(8) where the reporting company argued the matter was governed by Rule 14a-8(i)(8) because the supporting statement appeared to question the business judgment of the board. *E.g.*, Exxon Mobil Corporation, 2002 SEC No-Act. LEXIS 425 (Mar. 20, 2002). The rationale supporting enhanced shareholder participation in decisions to retain executives may well involve the way a board has previously exercised its authority over officer appointment and retention, and might be excludable on this basis.

Adoption of a by-law giving shareholders a veto over executive officer retention does not necessarily require the same level of proxy disclosure that would accompany an independent proxy solicitation. The by-law merely limits the extent to which a board is permitted to re-delegate its authority, by, where used successfully, removing the ability to delegate authority to a particular individual. It does not divest the board from ultimate control, and it won't, by itself, allow a proposing shareholder to take control.

Respectfully submitted,

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