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September 27, 2007

Nancy M. Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F St., N.E.  
Washington, D.C. 20549

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

Dear Ms. Morris:

I am writing on behalf of the California Public Employees' Retirement System (CalPERS) regarding *Shareholder Proposals Relating to the Election of Directors*, SEC Rel. No. 34-56161 (Jul. 27, 2007) (the "Release").

CalPERS is the largest public pension plan in the country with nearly \$250 billion in assets under management. CalPERS provides retirement benefits to over 1.5 million members who work in state and local government. CalPERS, which holds shares in more than 7,500 publicly-traded domestic companies, views the regulation of director elections as an issue of vital importance to investors and thanks the Commission for the opportunity to provide public comment.

The Release includes proposed amendments to paragraph (i)(8) of Rule 14a-8, the elections exclusion, as well as interpretive guidance regarding the application of Rule 14a-8(i)(8) to shareowner proposals that seek to allow shareowners to make nominations to a company's board of directors. Under this interpretive guidance, a company may exclude from its proxy materials any proposal that would result in an immediate election contest (by nominating persons for the board for the upcoming election of directors) or that would set up a process for shareowners to conduct an election contest in the future by requiring the company to include shareowners' director nominees in the company's proxy materials for subsequent meetings. The proposed amendments codify this interpretive guidance.

CalPERS opposes adoption of the proposed interpretation and amendments. This proposal will effectively nullify the existing right of investors to adopt director election procedures through shareowner proposals. This right – as recognized under state law – is crucial to protecting the interests of shareowners by ensuring fair director elections and director accountability to the owners of the company.<sup>1</sup> The purported justification for the proposal – increased disclosure – is easily met through adoption of a rule applying existing disclosure

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<sup>1</sup> "A shareholder's ability to participate in corporate governance through the election of directors is a fundamental part of our corporate law." *Preston v. Allison*, 650 A.2d 646, 649 (Del. 1994).

requirements for director elections to these types of shareowner proposals. Instead, the Commission's apparent intention is to eliminate the rights of shareowners to vote on and adopt director election procedures. CalPERS urges the Commission to reject this proposal.

### The Proxy Rules Should Advance Corporate Suffrage

Congress enacted Section 14(a) of the Securities Exchange Act of 1934 to promote "fair corporate suffrage" in corporate communications between management and shareowners. In its observance of the principles underlying Section 14(a), the SEC has adopted a number of rules and regulations that prescribe the form, content and manner by which public companies conduct proxy solicitations. Rule 14a-8 is one of those rules. Rule 14a-8 fulfills the principles underlying Section 14(a) by providing shareowners with an opportunity to bring matters of importance before their fellow shareowners. Since its adoption, Rule 14a-8 has been one of the primary mechanisms by which shareowners have advanced important corporate governance topics, including independent boards, shareowner rights to approve poison pills, confidential voting, auditor independence, stock option expensing, executive compensation and a host of other issues. As we have pointed out to the Commission, Rule 14a-8 provides an economically efficient manner for shareowners to communicate not only directly with other shareowners, but also with board of directors and management.

The proxy rules also serve another purpose. They allow shareowners to vindicate their rights under state law through the proxy machinery. Indeed, as noted by the Commission in the proposing release *Shareholder Proposals*, SEC Rel. No. 34-56160 (Jul. 27, 2007) (the "Shareholder Proposal Release"), the proxy rules "have been designed to facilitate the corporate proxy process so that it functions, as nearly as possible, as a replacement for an actual, in-person gathering of security holders, thus enabling security holders 'to control the corporation as effectively as they might have by attending a shareholder meeting.'"<sup>2</sup> Rule 14a-8 was intended to serve this same purpose.<sup>3</sup> When Rule 14a-8 was first adopted, only proposals

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<sup>2</sup> See *Shareholder Proposals*, SEC Rel. No. 34-56160 (Jul. 27, 2007) (citing to *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990)).

<sup>3</sup> In 1940, when it adopted amendments to the rule that preceded Rule 14a-8 to require the disclosure of a shareowner proposal that a company knew was going to be brought from the floor of a meeting, the SEC stated that:

The Commission has been seriously concerned regarding the responsibility of corporate management to communicate to security holders information with respect to matters which minority groups have indicated will be brought up for action at a proposed meeting. The principal amended rules designed to meet this situation (amended Rule X-14A-2; amended Rule X-14A-9(i)) require that in any solicitation of proxies which are to be used either to vote upon a matter expected to be brought up by other persons or to provide a quorum to enable voting thereon, the matter thus expected to be brought up shall be described as in the case of matters proposed by the persons making the solicitation, and means shall be provided whereby the person solicited is afforded an opportunity to specify the action which he desires to be taken pursuant to the proxy on such matter.

See SEC Rel. No. 34-2376 (Jan. 12, 1940).

that concerned proper subjects for security holder action under state law could be submitted in reliance on Rule 14a-8.<sup>4</sup> Although the SEC has adopted additional substantive bases for excluding a shareowner proposal, state law continues to be integral to the application of Rule 14a-8.

#### The Proposed Amendments are Inconsistent with the Principles Underlying Section 14(a)

The interpretation and proposed amendments are at odds with these principles. Under the corporate law of most jurisdictions, a shareowner has the right to make nominations from the floor of the annual meeting unless prohibited by a company's bylaws or certificate of incorporation. Although shareowners have this right, the interpretation and proposed amendments to Rule 14a-8(i)(8) would preclude shareowners from exercising it. We urge the Commission to take the opportunity to reconsider the impact of the interpretation and proposed amendments on shareowner suffrage and consider alternatives to its proposals.

#### An Alternative Way to Achieve the Goals of the Proposed Amendments Without Compromising Shareowner Rights

As articulated in the Release, the SEC is adopting the interpretation and proposed amendments "to prevent the circumvention of other proxy rules that are carefully crafted to ensure that investors receive adequate disclosure and an opportunity to make informed voting decisions in election contests." We agree that many of the disclosure and filing requirements imposed by the election contest rules are important.

However, the interpretation and proposed amendments do not seem to be aimed at this issue. Indeed, the Shareholder Proposal Release reflects a method by which the SEC could allow shareowners to exercise the rights afforded them under state law through Rule 14a-8 without compromising other proxy rules. Although we disagree with other aspects of that rulemaking, we agree with the principle that a shareowner should be able to submit nominations to the board of directors or procedures for such nominations if such shareowner provides the information that ordinarily would accompany a proxy contest. In fact, it was this principle that served as the basis for the SEC's last attempt at addressing shareowner access.

Instead of permitting the exclusion of *all* shareowner proposals that will allow shareowners to vote on procedures governing shareowner nominations to the board, the Commission should adopt a rule permitting the exclusion of shareowner proposals that fail to satisfy the disclosure requirements applicable to election contests.

This approach would be more consistent with the language of Rule 14a-8(i)(8) and the principles underlying the rule. It would also ensure that shareowners always receive the same level of information about nominees to the board of directors and the persons making the nominations. Finally, this approach also would be more consistent with the goals of corporate suffrage underlying Section 14(a) and the rights afforded shareowners under state law.

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<sup>4</sup> See SEC Rel. No. 34-3638 (Jan. 3, 1945) (the purpose of the rule is "to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation; that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders' action under the laws of the state under which it is organized").

Conclusion

CalPERS asks that the Commission reject the proposal.

We again thank the Commission for the opportunity to express our viewpoint and look forward to a continuing discussion on these important issues.

Sincerely,

PETER H. MIXON  
General Counsel