Michael S. Asato

October 1, 2007

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
Attn: Nancy M. Morris, Secretary

Re: Shareholder Proposals Relating to the Election of Directors
(Release No. 34-56161; IC-27914; File No. S7-17-0703)

Ladies and Gentlemen:

This comment letter is submitted in support of the Commission's proposed rule ("no access") that would codify the SEC's existing position that shareholder proposal on proxy statement access for board nominations are categorically excludable under Rule 14a-8(i)(8).

According to founder of positive political theory (i.e., rational choice theory including the application of game theory to political science) William H. Riker, one should not only consider 'rhetoric' (i.e., the art of verbal/written persuasion), but also 'heresthetics' (i.e., the direct manipulation of a political structure to win a specific outcome). As described in his landmark *The Art of Political Manipulati*on (Yale University Press, 1986), three categories of heresthetical strategies are:

- Agenda control: manipulating the agenda for favorable voting outcomes
- Strategic voting: using voting procedures to control outcomes
- Manipulation of dimensions: redefining the situation to create a stronger coalition.

Through strategic voting, proponents of shareholder access bylaws seek to change the political rules of the game (i.e., the procedure for board nominations) so that they can win in the future. Given this heresthetic manipulation, the more appropriate regulatory regime is Rule 14a-12 for contested elections rather than Rule 14a-8 for shareholder proposals. Thus the Commission should revise the Rule 14a-8(i)(8) exclusion to read: "If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election."

Moreover, for the alternative "shareholder access" rule (Release No. 34-56160), I conclude that it would

- Do great harm: Change the incentive structure of U.S. corporations from long-term economic performance to short-term economic performance
- Not be measured and incremental: Radically restructure Delaware's form of corporate governance from a 'corporate republic' to a direct democracy
- Frustrate the exercise of state law shareholder voting rights: Proxy cards are not functionally designed to be absentee ballots
- Require a new regulatory regime for full and fair disclosure: Shareholder access proponents should disclose relationships with hedge funds and private equity funds
- Be superfluous (i.e., majority voting standard now provides fair corporate suffrage).

For details, I encourage the Commission to look at my October 1, 2007 comment letter (File No. S7-16-0703).

In its deliberations the Commission should ask, Is the U.S. corporate governance system really broken? (And if it is, exactly what concrete problems need to be solved?). At least according to former Delaware Supreme Court Chief Justice E. Norman Veasey in "The Stockholder Franchise Is Not A Myth: A Response To Professor Bebchuk" (*Virginia Law Review*, May 2007), it is not broken:

> I do not agree, however, with Bebchuk's assertion [in "The Myth of the Shareholder Franchise"] that today, two decades later, "the shareholder franchise does not provide the solid foundation for the legitimacy of directorial power that it is supposed to supply." Rather, in my opinion, the stockholder power to hold boards accountable and to effect meaningful change has strengthened incrementally since the mid-1980s and into the twenty-first century. This has happened over time through an appropriate blend of increased director responsibility, investor influence, modest law reform, and new mores. What is not needed at this juncture is a lurching change in the name of "reform" that might upset the existing balance of law and culture.

Regarding fair corporate suffrage, the Commission should explicitly recognize the adoption of the majority voting standard by leading corporations that had been independently proposed by Joseph A. Grundfest and Ira M. Millstein at the SEC Roundtable on Security Holder Director Nominations in March 2004. Specifically, this standard has created a new and very powerful shareholder voting right: i.e., the negative majority power of dismissal where Election Day is now a political Day of Judgment where shareholders can hold directors accountable for their corporate stewardship. The issue before the Commission is to decide whether this negative majority power is enough, or whether the positive majority power of appointment—with its prospect of inviting what James Madison called the "mischiefs of faction" in *Federalist* #10 (e.g., heresthetic manipulations) into Delaware's corporate republicanism—is needed. Chairman Cox has stated that his intention is "to have a clear, unambiguous rule in place in time for the next proxy season." I agree with Chief Justice Veasey that now is not the time for a "lurching change in the name of reform;" instead, the Commission should provisionally select the no-access proposal and monitor whether the majority-voting standard is working. It is only when a concrete, non-abstract problem has emerged that the Commission should then take action.

Sincerely,

Michael S. Asato

cc: Congressman Barney Frank, Chairman, House Committee on Financial Services
Senator Christopher J. Dodd, Chairman, U.S. Senate Committee on Housing, Banking and Urban Affairs