COMMENT LETTER OF NINE SECURITIES AND GOVERNANCE LAW FIRMS IN SUPPORT OF FACILITATING DIRECTOR NOMINATIONS BY SHAREHOLDERS AND RESPONDING TO THE LETTER SUBMITTED BY SEVEN CORPORATE DEFENSE FIRMS ON AUGUST 17, 2009

August 25, 2009

Via email: rule-comments@sec.gov

U.S. Securities and Exchange Commission
One Station Place
100 F Street, NE
Washington, DC 20549

Attention: Elizabeth Murphy, Secretary

Re: File No. S7-10-09: Release Nos. 33-9066; 34-60089; IC-28765
Facilitating Shareholder Director Nominations

Ladies and Gentlemen:

On behalf of the nine law firms listed below (the "Submitting Law Firms"), we are writing in response to a request for comments issued by the Securities and Exchange Commission ("SEC" or the "Commission"), relating to the SEC's release entitled "Facilitating Shareholder Director Nominations" (the "Proposal"), published on June 18, 2009. The Submitting Law Firms routinely represent domestic and foreign institutional investors with large interests in the equities of publicly held corporations. Our clients take an active interest in the quality and integrity of the management of the companies in which they choose to invest and advocate for corporate governance changes that will benefit all investors.

The Submitting Law Firms understand that the Commission requested comments on the Proposal by August 17, 2009. Nevertheless, due to the importance of this issue, and in particular to address certain of the arguments set forth in the letter dated August 17, 2009, submitted to the Commission by seven law firms representing various corporate interests,[1] the Submitting Law Firms respectfully submit this brief letter in support of the Commission's Proposal. As explained below, the Submitting Law Firms believe that the Proposal – including both the proposed amendment to Rule 14a-8(i)(8), and the adoption of the new proposed Rule 14a-11 – would establish reasonable and appropriate disclosure requirements for corporations, would encourage director accountability, and would facilitate the ability of shareholders to exercise their rights under state law as the owners of corporations. We disagree that any aspect of the Proposal would impede the shareholder franchise or improperly conflict with state law. The

[1] *See* Letter dated August 17, 2009, from Cravath, Swaine & Moore LLP, Davis Polk & Wardwell LLP, Latham & Watkins, LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, Sullivan & Cromwell LLP, and Wachtell, Lipton, Rosen & Katz (available at http://www.sec.gov/comments/s7-10-09/s71009-212.pdf)

Proposal should be adopted in whole, and no provision should be added to permit corporations to "opt out" of the disclosure requirements that would be established under the proposed amendment to Rule 14a-8(i)(8) or Rule 14a-11.

The Submitting Law Firms join in the carefully reasoned position adopted by the Bi-Partisan Group of Eighty Professor of Law, Business, Economics or Finance (the "Submitting Professors") in their letter submitted August 17, 2009.[2] Like the Submitting Professors, the Submitting Law Firms urge that the SEC act immediately to remove the impediments to shareholders' abilities to nominate and elect director candidates, and to establish minimum requirements for corporations to disclose, on the company's proxy materials, the identity of director candidates nominated by shareholders under certain circumstances. Shareholders, as the owners of the companies, should have a simple and straightforward method for nominating director candidates, and the SEC's proxy disclosure rules should not impede the shareholders' rights in this regard. Moreover, when shareholders act consistently under state law to nominate a director candidate, the SEC's rules appropriately should establish minimum requirements which, if satisfied, would provide shareholders with the opportunity to place director candidates on the company's proxy ballot card.

1. The Proposed Amendments To SEC Rule 14a-8(i)(8) Should Be Adopted

It is imperative that the Commission act to reverse the amendments to Rule 14a-8 adopted in December 2007, which unnecessarily impair the rights of shareholders and unwisely reduce the accountability of directors of U.S. corporations. *See Shareholder Proposals Relating to the Election of Directors*, SEC Release No. 34-56914; IC-28075; File No. S7-17-07, Fed. Register, Vol. 72, No. 237 ("Release No. 34-56914"). In *AFSCME Employees Pension Plan v. American International Group, Inc.*, 462 F.3d 121 (2nd Cir. 2006) ("*AFSCME*"), the United States Court of Appeals for the Second Circuit held that a corporation could not, under the version of SEC Rule 14a-8(i)(8) in effect at the time, refuse to publish a shareholder proposal that advocated the adoption of a bylaw that would have required that corporation to publish the names of director candidates nominated by shareholders. In the wake of the *AFSCME* decision, however, the Commission acted swiftly to amend Rule 14a-8(i)(8) to overturn the result in that case, by expressly permitting corporations to block efforts by shareholders to advocate for the implementation of a "proxy access" regime through the introduction of shareholder proposals. The Commission's decision to do so was ill-advised at the time, and remains inequitable now. By amending Rule 14a-8(i)(8) to bar shareholder proposals related to election procedures, the Commission acted to affirmatively insulate corporate directors from true accountability to shareholders, and inserted the SEC's proxy disclosure rules as a needless obstacle to shareholders' ability to exercise their rights under state law. The amendments to Rule 14a-8(i)(8) suggested in the Proposal appropriately reverse the 2007 amendments, and facilitate the ability of shareholders to utilize the 14a-8 process to exercise the rights to impact the governance of their corporations that are vested under state law.

[2] *Available at* http://www.sec.gov/comments/s7-10-09/s71009-282.pdf.

2. Proposed Rule 14a-11 Should Be Implemented As Published And Without Further Amendment

Consistent with the SEC's historic role of regulating the content of proxy solicitation materials, Proposed Rule 14a-11, as drafted, sets minimum requirements for disclosures that apply if shareholders exercise their rights under state law to nominate candidates for election to a company's board of directors. In drafting Proposed Rule 14a-11, the Commission appropriately acknowledged that the right of shareholders to nominate directors must emanate, in the first instance, from state law. But *if* shareholders of a particular corporation are permitted under the operative law of the state where that company is incorporated to nominate candidates for election as directors, Proposed Rule 14a-11 establishes reasonable and necessary minimum requirements that a company must satisfy in disclosing the identities of, and soliciting votes for (or against), such candidates. The arguments raised by critics of the Proposed Rule are unpersuasive and merely perpetuate corporate interests bent on maintaining the status quo and insulating entrenched management and incumbent directors from true accountability to shareholders.

First, the argument that Proposed Rule 14a-11 somehow would improperly establish an inflexible "one size fits all" approach misses its mark. *Every* disclosure regulation issued by the Commission establishes minimum requirements applicable to all publicly traded corporations and, in that regard, establishes a "one size fits all" approach. *See*, *e.g.*, *Maldonado v. Flynn*, 597 F.2d 789, 796 n.9 (2d Cir. 1979) ("Schedule 14A sets minimum disclosure standards"); *Zell v. Intercapital Income Sec., Inc*., 675 F.2d 1041, 1044 (9th Cir. 1982) (same). Proposed Rule 14a-11, therefore, cannot be criticized simply because, if implemented, it would establish a federally mandated minimum level of disclosures). In supporting the 2007 amendments, some of the very same critics who now voice opposition to Proposed Rule 14a-11 did not suggest that a rule designed to permit corporations to bar shareholders from proposing the adoption of proxy access regimes tailored to individual companies was improperly "inflexible." *See*, *e.g.*, Letter dated September 19, 2007, from Wachtell, Lipton, Rosen & Katz (available at http://www.sec.gov/comments/s7-16-07/s71607-190.pdf); Letter dated October 2, 2007, from Sulivan & Cromwell (available at http://www.sec.gov/comments/s7-16-07/s71607-458.pdf). The argument that Rule 14a-11 somehow is objectionable simply because it would establish clear minimum requirements applicable to all publicly traded corporations, therefore, is disingenuous.

Second, the idea that individual corporations should be given the right to "opt out" of the proposed regulations through bylaws or otherwise is contrary to the Commission's entire regulatory scheme. *See* 15 U.S.C. § 77n ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."). Indeed, any modification to Proposed Rule 14a-11 to permit such variance would subvert the proposed rule entirely. Corporations already have the ability to voluntarily adopt measures like those set out in the Proposal. Not only have corporations generally refused to do so (with very few exceptions), but entrenched corporate interests have fiercely opposed the implementation of any proxy access rule, voluntary or otherwise, for over twenty years. A rule that public corporations could choose to ignore would thus be no rule at all.

Third, Proposed Rule 14a-11 does not improperly conflict with state law. The fact that under state law corporations may enact bylaws regulating proxy access does not mean a federal law that would establish minimum disclosure requirements conflicts improperly with such state law.

As drafted, Proposed Rule 14a-11 represents an appropriate compromise in establishing minimum disclosure requirements. While providing regulations that would require corporations to disclose and accept votes for (or against) shareholder-nominated director candidates, Proposed Rule 14a-11 strikes a balance between the need for complete disclosures against the interests of preventing overly complex proxy materials and preventing strategic investors seeking to effect a change in control from avoiding compliance with the existing proxy solicitation rules. The fact that, in reaching this balance, corporations (and indeed shareholders) may be prohibited from adopting bylaws that would establish thresholds for disclosures above the minimum requirements established by the proposed rule, therefore, does not mean that the Proposed Rule 14a-11 is improper and objectionable, but merely that the proposed rule represents a carefully balanced policy choice of the Commission, well within its regulatory function.

In case we could be useful in any way to the deliberations of the staff or the Commission on this subject, please contact any of the firm representatives for the signatories to this letter, at the telephone numbers provided with the list of submitting law firms set out below.

Sincerely yours,

/s/ Labaton Sucharow LLP
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/s/ Kaplan Fox & Kilsheimer LLP
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cc: Chairwoman Mary L. Schapiro
Commissioner Luis Aguilar
Commissioner Kathleen L. Casey
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