September 19, 2007

SEC Proposals With Respect to Shareholder Proxy Access

This is the comment letter we filed with the SEC urging that it again reject amending the proxy rules to permit shareholders to have access to a corporation's proxy statement to nominate candidates for election to the corporation's board of directors and to adopt a rule affirming that a shareholder proposal to amend the bylaws to permit shareholder proxy access is excludable from the corporation's proxy statement. Our comments reflect the basic policy considerations we advanced in 2003 in urging the SEC to reject the access proposal it was then considering and the positions we have taken in recent articles about corporate governance arguing against further intrusion into the power of the board of directors to exercise business judgment in the management of the corporation.

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September 19, 2007

VIA E-MAIL

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

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

Dear Ms. Morris:

We are pleased to submit the following comments with respect to the Securities and Exchange Commission's (the "SEC") proposed changes to Rule 14a-8 of the Securities Exchange Act of 1934. The changes outlined in the SEC's Release No. 34-56161 would codify the SEC's existing position that shareholder proposals on proxy statement access for board nominations are categorically excludable under Rule 14a-8(i)(8). In contrast, the proposal in SEC Release No. 34-56160 (the "Access Proposal") would allow shareholders owning 5% or more of a company's voting shares to include in the company's proxy materials a proposal for an amendment to the company's bylaws mandating procedures to allow shareholders to include director nominations in the company's proxy materials. We write in support of the proposal in Release No. 34-56161 and in opposition to the Access Proposal in Release No. 34-56160.

As we stated in our comment letters with respect to the SEC's proposals on proxy access in 2003, we believe that allowing shareholders to use a company's proxy statement for director nominations would be a serious mistake with far-reaching consequences. We refer you to our comment letters of June 11, 2003 and November 14, 2003. Activists' efforts over the last several years to facilitate election contests are part of their broader and ongoing campaign to undo the director-centric model of corporate governance established by state corporate law, a model that has served our public corporations and economy well throughout our country's history. These activists seek to substitute this model with a shareholder-centric model under which the delegation of authority granted to directors in public corporations would be constrained and undermined by the constant threat of dissident and other efforts to replace directors who do not hew to the activists' short-term agenda. We have long believed that the replacement of the director-centric model with a shareholder-centric one would risk severe harm and should be vigorously resisted.

The proponents of shareholder access proposals have failed to demonstrate any need for encouraging election contests or any benefit that facilitating more election contests would confer. While the ability to run an election contest may serve a purpose as a last resort in extreme circumstances, election contests are tremendously disruptive and divert the time and attention of a company's board and management from running the business. When successful, they also can create a dysfunctional and balkanized board. And the proliferation of proxy contests, together with the more general attacks witnessed over the last several years on corporate boards, threaten to deter the most qualified people from agreeing to serve as directors in the first place.

In this letter, we will first comment on the context in which the proposals to facilitate election contests arises, *i.e.*, the ongoing campaign to undermine the director-centric model of corporate governance. We will then summarize some of the costs and risks of proposed amendments that seek to facilitate proxy access shareholder proposals. Finally, we will comment on the lack of any demonstrated need for enhanced proxy access.

I. The Attack on Director-Centric Corporate Governance

In considering the debate over proxy access, and the broader debate over corporate governance generally, it is important to keep in mind the end goals of the public corporation: wealth creation, job creation and long-term investment to produce economic and social prosperity. These goals have been implemented in the United States through a legal framework that delegates initiative and decision-making power to a corporation's board of directors and management. Under this director-centric model of corporate governance, the board moderates and balances the interests of management, employees, creditors, shareholders and others to optimize the long-term success of the corporation. This structure has created the most successful economy the world has ever seen, unequalled in its ability to reward investors, employees and all the corporation's other constituencies by raising overall standards of living through the mobilization of large pools of capital over a long-range time horizon.

For the past twenty years, the activist governance lobby, primarily made up of ISS-type advisors, short-term hedge fund "activists" and academics, and emboldened since 2002 by the Enron-WorldCom scandals and the legislative and regulatory aftermath, has been seeking to destroy the director-centric model of corporate governance. This lobby seeks to replace the director-centric model with a simplistic rule that the shareholders at any given moment own everything and therefore have the power to decide everything in their own interests. The governance lobby uses the "shareholder as owner" refrain as an unspoken axiom to present shareholder power as an intrinsic right. The flaws in this approach are many, as we have previously described in the context of the SEC's 2003 proxy access proposal and in other contexts before that.[1]

[1] *See* Martin Lipton & Steven A. Rosenblum, "Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come," 59 Bus. Law. 67 (2003); Martin Lipton & Steven A. Rosenblum, "A New System of Corporate Governance: The Quinquennial Election of Directors," 58 U. Chi. L. Rev. 187 (1991).

In the shareholder-centric model, the interests of non-shareholder groups are accorded no legitimacy at all. Indeed, the governance lobby and its allies argue that corporate boards have a positive duty to ignore – even damage – the economic interests of employees, managers, creditors and others, if doing so maximizes (short-term) shareholder value. Thus, we see these groups devise campaigns to cause companies to incur debt to pay large special dividends, to divert capital expenditure to equity buy-backs, to engage in transactions that reduce high-rated corporate debt to junk status, and to divest businesses, close facilities and cut employment.

The key elements of the existing corporate governance order have been: (1) centralized professional management; (2) supervision of management by a knowledgeable, largely independent group of directors who help set long-term policy and deal with extraordinary events; (3) a federal regulatory system largely limited to disclosure and punishment for outright fraud; (4) a body of state law that recognizes the critical importance of the business judgment rule and therefore limits judicial intervention to egregious cases; and (5) a role for shareholders that is generally restricted to the periodic election of directors and voting on selected events such as mergers.

In attacking this model, the corporate governance lobby has pursued a double-barreled strategy. First, it has created a long list of "best practices" which constitute micromanagement of board-level issues, which it attempts to impose by holding directors hostage to "withhold" vote campaigns. Second, it has supported a growing number of bylaw amendments which even more directly supplant directorial discretion and judgment by purporting to require the board to do or not do certain things within the board's legal prerogatives (such as to adopt poison pills). The current effort to persuade the SEC to permit shareholder proposals for proxy access bylaws is simply another element in this strategy.

Despite the demonstrated success of the existing director-centric framework, it has been under sustained attack for more than two decades. The reasons for the current demands for change can be traced to the confluence of two trends, long in the building. First is the decades-long obsession of academic observers of corporate law with solving a single problem, namely the "agency" problem, whereby managements' personal interests are assumed to diverge in some persistently material and harmful way from the interests of shareholders. Second is the growth of a large group of corporate governance professionals – individuals who earn their living devising, implementing and monitoring "best practices" that supposedly address the agency problem that the academics have endowed with transcendent importance.

The moving forces behind these attacks – for-profit corporate governance advisors and tenured academics – have no direct stake in the success or failure of American business or American capital markets. These two groups have the least real-world experience of anyone involved with corporate governance, and are the least accountable players in the corporate governance arena. Paradoxically, they have made a prominent place for themselves by calling attention to the supposed lack of accountability of directors and CEO's – persons who are subject to market discipline, government regulation, judicial oversight and press scrutiny.

These activist groups are driven by their own rational self-interest. If you are in the business of selling advisory services to passive investment vehicles, it makes sense that you would create a perceived demand for your product by emphasizing the supposed ills that your advice can cure. If you are a tenured academic (or an academic seeking tenure) who desires professional recognition, leading the charge for "reform" is more likely to draw recognition than analyzing the strengths of the current system. The motivation of these groups is easily understood, and there is no good reason to accept their positions at face value. No real-world crisis has shown that the current system needs radical revision. Five years after Enron and WorldCom, the capital markets are well into a cycle of unprecedented vigor, and no one seriously argues that shareholder activism, governance grandstanding or the Sarbanes-Oxley Act deserves the credit.

Yet the academics and corporate governance professionals would have us believe that the state of American corporate governance is grave if not desperate. In their hyper-critical view, American capital markets are at risk from a laundry list of supposedly poor governance practices, ranging from executive pay practices to poison pills to audit firm relationships. The remedies the corporate governance lobby proposes for these deviations from their own self-proclaimed corporate governance orthodoxy are sweeping: wholesale restructuring of the relationship between shareholders and boards. This is a classic case of proposing radical surgery for a patient without a serious illness, and it happens because the "doctor" needs work.

The constant talk of "best practices" and emphasis on incremental changes, always accompanied with appeals to mom-and-apple-pie concepts like "access," "openness," "dialogue" and "accountability," have been a key component of the governance lobby's success. These words conceal the corporate activists' real agenda. If the principle that shareholder plebiscites can tie the hands of directors on seemingly innocuous issues is established, then it will be only a matter of time before directors find themselves powerless – or, more accurately, with the power of mere agents – while retaining the liability of principals. And the corporate governance debate is not, at bottom, about apparently harmless access, dialogue and openness or even about accountability. It is all about power – is all power in the hands of shareholders because they are the "owners" of the corporation, or is power to run the company to be entrusted to boards of directors, subject to legal and real-world constraints? The corporate governance lobby frames the debate as one in which the corporation is a kind of political democracy in which the ability of the shareholder-voters to decisively and immediately implement their desires is the sole benchmark of success. But what is really being made is a claim to exclusive ownership and control. The appeal to "democracy" is a diversion. The debate is fundamentally about the claim of the shareholder-centric camp that shareholders and only shareholders are entitled to the fruits of corporate success. The shareholder-centrics are thus consistent when they ignore demands to supply concrete evidence that proxy contests, shareholder-imposed "discipline" on boards and management, and corporate governance "best practices," correlate with economic success, because to them, shareholder "ownership" confers absolute control on shareholders without any need for proof of utility.

The best way to understand the error of the shareholder-centric position is to go behind the rhetoric and explore its underpinnings. The shareholder-centric assault on the director-centric model rests on three main propositions: first, that directors have no independent right to do anything but implement the general will of shareholders, based on the axiomatic assertion that shareholders are "owners" and directors are mere "agents"; second, that there is no social or shareholder wealth maximizing purpose to be served by recognizing any directorial power beyond that of an agent; and, third, that directors are prone to abuse any independent power they are accorded by lining their own pockets or those of corporate managers. Each of these propositions is simply false.

Owners vs. agents. A primary purpose of the corporate form is to make clear that shareholders are not active owners; that their share ownership gives them no right to claim or exercise control over a *pro rata* share of the corporation's assets or profits. Shareholders have no right to compel or prohibit the declaration of dividends, to commit corporate assets to investment, or to sell or spin-off corporate investments. Instead, shareholders are entitled to cash payments in the event that the directors decide to liquidate or sell the corporation for cash, *i.e.*, if corporate existence is to be terminated, or determine to pay dividends. The "shareholder as owner" axiom that is fundamental to the shareholder-centric position simply describes inaccurately the legal and economic reality.

Moreover, the existing statutory framework recognizes that power and responsibility are two sides of the same coin. Directors have power, and thus potential liability, while shareholders lack power but are insulated from liability to creditors, employees and other shareholders. This is a fundamental bargain society has authorized, through its legislation, for investors. If you want direct decision-making power as a director (or as a partner or trustee), you cannot avoid liability; you can avoid liability only by ceding power to others. In short, there is a reason that judges, lawyers and legislators describe directors as "fiduciaries" and describe their duties as fiduciary in nature; they are not agents, and they do not owe a legal duty of obedience to principals.

Wealth maximization. Stimulated by the challenge of the shareholder-centric forces, economists have recently developed a persuasive explanation of why – even assuming that maximizing the wealth of shareholders is the major or even sole goal of corporation law – a system that gives independent status and decision-making power to directors is superior to a model in which all power resides with shareholders. Briefly, this economic approach recognizes that large corporations make long-term investments in specialized capital goods, human capital and intellectual property that have value only if the project is brought to fruition. Constituencies other than shareholders, including lenders, employees, management, communities or governments, need some assurance that ultimate decision-making lies not solely in the hands of an ever-changing group that may at any given time have an economically rational incentive to expropriate these investments of non-shareholder stakeholders by, for example, paying large special dividends or cutting off capital investment or laying off key personnel. In other words, other contributors to corporate success must be persuaded that their investment in the corporation cannot be destroyed without compensation by the shareholder "owners." The traditional, director-centric corporation provides such a method. A switch to a shareholder-centric model puts the achievement of the modern corporation – the ability to harness equity, debt and human resources to invest in large projects with long-term profit horizons – in serious danger. Without empowered directors possessing independent powers recognized by law, an optimal form of business organization would become unavailable.[2]

This recognition of the need to protect non-shareholder contributors to the corporation from expropriation by "owners" is built into the statutes that authorize the limited-liability corporate form. These statutes confer independent power on directors and emphatically give directors a status different from "agents" of shareholder "principals." The typical statute, like § 141(a) of the Delaware General Corporation Law, gives directors the "power to control the business and affairs of the corporation," and allows shareholders only limited pro-active rights. And no corporation statute in any U.S. jurisdiction requires that a corporation be organized for the purpose of maximizing shareholder value.

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[2] Two examples of recent scholarship that recognize the value of the director-centric model are: Margaret M. Blair & Lynn A. Stout, "Specific Investment: Explaining Anomalies in Corporate Law," 31 J. Corp. Law 719 (2006); and Stephen M. Bainbridge, "Director Primacy and Shareholder Disempowerment," 119 Harv. L. Rev. 1735 (2006). *See also* Martin Lipton & William Savitt, "The Many Myths of Lucian Bebchuk," 93 Va. L. Rev. 733 (2007); Jonathan R. Macey, "Too Many Notes and Not Enough Votes: Lucian Bebchuk and Emperor Joseph II Kvetch About Contested Director Elections and Mozart's *Seraglio*," 93 Va. L. Rev. 759 (2007).

Untrustworthy directors. An entirely different sort of argument is also used to support the attack on directorial power – the allegation that directors are, as a group, faithless fiduciaries. To this, there are two equally good and sufficient answers. First, as an empirical matter, very few independent directors are ever found, after judicial inquiry, to be derelict in either their duty of care or of loyalty. Second, if there were a social consensus that this is a problem, the legal rules for review of the exercise of directorial power could be adjusted without limiting the scope of power itself. In no other arena would we give credence to an argument that because of a few bad (or negligent) apples, we should chop down all the apple trees.

It is worth noting, also, how out of touch the agenda advanced by the corporate governance lobby is with the genuine problems facing American business. Imbalances caused by globalization, where American companies suffer externality costs that are not imposed on competitors in developing nations, are a much more serious issue than the litany of corporate governance items on which management and directors are more and more forced to spend their time. The academics and corporate governance professionals have not contributed anything to what should be a vigorous debate about how American corporations can remain competitive in the world's rapidly-changing economic landscape, especially when the American regulatory regime is becoming increasingly burdensome and Byzantine, while the rest of the world is streamlining their regulations.

Especially in light of the fundamental error at the heart of the shareholder-centric position, the question remains why the shareholder-governance lobby has been as successful as it has been. Prominent corporations have conceded the notion that it is a good governance practice to meet periodically with self-appointed shareholder representatives, and the custodians of large sections of the investment management universe have outsourced their voting decisions to ISS and its clones. The corporate governance lobby's greatest real-world success has been diversion of attention from two key flaws – lack of support for its key claim that "good governance" improves performance, and the internal conflicts of interest of the governance industry itself.

II. The Costs and Risks of Access Proposals

With this background, the governance lobby's campaign to allow activists to place dissident board nominees in a corporation's proxy statement can be understood as part of the broader campaign to usurp the traditional and legal prerogatives of directors and create more leverage for the activists to impose their will on public companies. It was the governance lobby's campaign that gave rise to the SEC's access proposal in 2003. When that was rightly rejected, the lobby pursued the effort through the courts, and now again through the current Access Proposal, to accomplish the same purpose in the form of shareholder proposed bylaws. The goal of these various forms of access proposals is not only to increase the number and likely success of election contests, but also to increase the ability of activists to push directors to take steps such as leveraged share buybacks or divestitures or putting the company up for sale, with the threat of a proxy contest if the directors do not comply. The Access Proposal, like the access proposals that preceded it, is intended as a tool in the campaign to undermine the director-centric model of corporate governance and replace it with a shareholder-centric model. For the same reasons that this broader campaign is dangerous and should be rejected, as we reviewed in the prior section of this letter, the Access Proposal should similarly be rejected.

Because the governance lobby uses the "shareholder as owner" axiom to posit that increasing shareholder power is an intrinsic good, the proponents of proxy access proposals typically do not try to justify their support of the proposals with evidence that would suggest that increasing the frequency and success of proxy contests would improve the performance of public corporations or otherwise result in any economic or social good. Nor do they take seriously the costs and risks of increasing and facilitating dissident election contests. Instead, they simply repeat the tautological mantra that increasing shareholder power is good, so giving shareholders a greater ability to nominate dissident board nominees must also be good.

From a pragmatic perspective, however, it is clear there are significant costs and risks to the Access Proposal and the prior proposals designed to permit shareholders to include their director nominees in a company's proxy materials. We have reviewed these costs and risks in our prior comment letters and articles, and we summarize them below:

Distraction of management and diversion of corporate resources. Given that director elections go to the heart of corporate governance and can have far-reaching consequences, a public company facing an election contest will typically devote a substantial amount of management time and resources to the contest. As a result, election contests – even for a minority of the board seats – are extremely disruptive and divert considerable resources away from operating the business. Even assuming that the number of election contests resulting from the Access Proposal would be far less than the number of Rule 14a-8 proposals, any real increase in the number of election contests will have an impact. To the extent the SEC's proposed rule changes will shift the costs and responsibility of preparing and disseminating information about shareholders and their nominees to companies in proxy contest situations, these burdens will be exacerbated.

Promotion of special interest agendas. Giving shareholders access to company proxy materials for director nominations will facilitate the election of dissident and special interest directors. Special interest groups would very likely be at the forefront of those proposing and seeking to implement access regimes, and then using access mechanisms to nominate director candidates. It is no coincidence that the most vocal supporters of proxy access proposals tend to be political or union shareholder activists, or hedge funds seeking short-term profits at the expense of long-term interests of a corporation. Directors nominated by these special interest groups will be beholden to such groups, due in part to their personal connections with and allegiance to such groups outside of the boardroom as well as the philosophical and political persuasions for which they were chosen as nominees.

Balkanization of the Board. The general view among directors and others with first-hand experience of board operations is that candid boardroom deliberations, a level of mutual respect and trust among directors, and an ethic of teamwork and cooperation all tend to produce more effective boards. In such an environment, directors feel comfortable discussing and debating the merits and risks of business decisions, opportunities and corporate policy and work together to craft an informed consensus. To the extent the Access Proposal would facilitate the nomination and election of dissident or special interest directors, it will promote balkanization, factions and politicization of boards. This will lead to a breakdown in communications among directors and between management and the board, as individuals become more defensive, more partisan and less open. While politicking, sidebars and efforts to outmaneuver opposing factions may be the operating model we have accepted for certain elected governmental bodies, it is generally not the paradigm that is embraced by business managers for work environments, nor should it be.

Creation of adversarial relationships between companies and their shareholders. Following the wave of hostile takeovers in the 1980s and the adoption of SEC shareholder communication rules in 1992, in many instances shareholders and managers have sought to develop more cooperative relationships. Avenues have opened for shareholders who wish to make their views known to company management and directors, and many companies have become increasingly attuned to the concerns of large shareholders and actively solicit their views. Election contests undermine these efforts to develop cooperative relationships. Even the most tame proxy contest is an adversarial exercise that is fundamentally incompatible with cooperation. And many election contests devolve into personal attacks, creating bitterness and a sense of division that is difficult if not impossible to overcome. Thus, an increase in the frequency of election contests would likely chill efforts towards cooperative communication and reintroduce the adversarial atmosphere and general wariness that was prevalent in the hostile takeover era.

Impact on director recruiting and risk aversion. An increase in the incidence of election contests will likely exacerbate the difficulties companies currently face in recruiting and retaining high quality directors for their boards. A number of hurdles have already surfaced in recent years – including public criticism and skepticism of directors in the wake of Enron, WorldCom and other scandals; the various procedural requirements imposed on boards by recent regulatory developments; and certain court decisions which have created at least the perception that directors may face increased personal liability. The prospect of more frequent proxy contests, with the divisiveness and personal attacks they often entail, would be yet another reason for potential directors to decline nominations or, if they do serve, to be unduly risk averse.

These are among the readily identifiable costs and risks of promoting shareholder access to company proxy statements for director nominations. In contrast, we have seen no evidence to demonstrate that facilitating dissident nominations or increasing the frequency of proxy contests will produce healthier companies, a stronger economy, long-term value or growth, or any other benefits to society or shareholders in general. We continue to believe that if adopted, the Access Proposal and other proposals like it would do far more harm than good.

III. The Lack of a Need for Proxy Access

A further irony of the governance lobby's campaign for proxy access is that shareholders today have more avenues than ever for communicating with boards and management, providing input into the nomination process, and even running their own proxy contests without use of the company's proxy statement. The frequency of proxy contests, particularly short-slate proxy contests of the type that access proposals seek to facilitate, has been steadily climbing. And recent proxy reforms will only make these contests easier. Given that we believe the increase in proxy contests is already having ill effects, we also believe that the last thing a policy maker should want to do is to adopt yet more regulations to facilitate or encourage proxy contests. At a minimum, the fact that it is already easier than ever to run a proxy contest, as evidenced by the increasing frequency of such contests, demonstrates the lack of any need for adoption of the Access Proposal.

Board nomination process. At virtually all public companies today, shareholders who wish to nominate director candidates are encouraged to submit their suggestions to the company's nominating committee. A nominating committee is well positioned to evaluate potential nominees from the vantage point of the best interests of the company and its shareholders as a whole. In 2003, the SEC adopted rules enhancing the required proxy statement disclosure with respect to a company's nominating committee and the procedures followed by the committee in nominating directors. Thus, the nominating process is more transparent to shareholders than in the past, and companies have developed procedures for nominating committee consideration of director candidates proposed by shareholders.

Running a direct proxy contest. Shareholders have long been able to run a proxy contest by filing their own proxy materials and using their separate proxy statement and proxy card to solicit votes for their nominees. While there are some costs to shareholders who wish to pursue this option, the cost of running a short-slate contest has decreased and the frequency of short-slate contests has increased in recent years. In addition, as the SEC has recognized, requiring the dissident to post its own proxy materials enhances clarity and avoids shareholder confusion. In any event, imposing some level of cost on a dissident proxy contest is appropriate. Requiring shareholders to file and take responsibility for separate proxy materials promotes a level of scrutiny, disclosure and accountability that an insert into a company's proxy statement will likely not provide. In addition, imposing some level of cost helps ensure that shareholders will view a proxy contest as more of a last resort rather than business as usual. We also note that the SEC's new rules permitting electronic dissemination of proxy materials are expected to significantly reduce the costs of distributing proxy materials, thus easing the way for shareholders to pursue a standalone proxy contest. While we view this by-product of the rules for electronic dissemination of proxy materials with some concern, it further undercuts the notion that the SEC should take yet more steps to facilitate and encourage proxy contests.

Other corporate governance reforms. In the wake of the Enron, WorldCom and other scandals, there have already been a plethora of other regulatory changes in the past few years focused on increasing the openness and independence of board processes and the ability of shareholders to provide meaningful input. The Sarbanes-Oxley Act and stock exchange rules have strengthened the standards of independence for directors, require a majority of a board to consist of independent directors, and require key committees to consist entirely of independent directors. They also obligate companies to adopt and publicly disclose committee charters, corporate governance guidelines, and codes of conduct and ethics governing directors and employees. Independent directors are required to hold executive sessions on a regular basis, and New

York Stock Exchange rules require listed companies to disclose means by which their shareholders may communicate with their independent directors. Majority voting standards have also gained traction and have now been adopted by a growing number of public corporations. While we believe some of these reforms have been useful, as a general matter we believe the regulatory response to the Enron and WorldCom scandals, in hindsight, has been excessive, creating a risk aversion that has not been healthy for the operation of public companies generally. Again, in any event, the massive regulatory response that has already been implemented further undercuts the argument that yet more reforms are necessary.

Non-regulatory developments. Apart from regulatory changes, developments in the shareholder activist landscape and mobilization of special interest groups have already been facilitating contested elections. Hedge funds and other activist investors have become particularly prominent in recent years and have waged several successful short-slate election campaigns or successfully procured board seats by merely threatening to wage such campaigns.[3] The increasing influence of ISS and other proxy advisory services has also enhanced the ability of shareholders to garner support for their proposals and consolidate their influence. Notably, the rate at which such advisory groups recommend voting "for" rather than "against" shareholder-nominated directors in election contests suggests, to a startling degree, that these groups have an institutional bias towards supporting shareholder nominations irrespective of the qualifications and suitability of individual nominees. In addition, the institutional ownership of public companies has become increasingly concentrated and the influence of these large shareholders has grown, particularly as a result of the recent elimination of broker discretion to vote in uncontested elections where brokers do not receive direction from their clients. Again, we view these developments with concern over the negative impact they have had and may have in the future on the healthy operation of public companies. Furthermore, we believe these developments provide further evidence of why additional regulation, such as the Access Proposal, is not warranted.

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[3] For example, Nelson Peltz captured two board seats at H.J. Heinz Co., Carl Icahn and allies won board seats at ImClone Systems Inc. and Blockbuster Inc., and Third Point LLC captured two board seats at Massey Energy Co.

IV. Conclusion

Proposals to allow shareholders to include director nominations in a company's proxy statement are hardly new. On numerous occasions dating as far back as 1942, the SEC and Congress have considered such proposals and, in each case, rejected them after careful review. As recently as 2003, the SEC again considered and rejected proxy rule reforms which would have facilitated shareholder access to company proxy statements for director nominations.

In contrast, the express carve-out in Rule 14a-8(i)(8) to permit companies to exclude shareholder proposals relating to director elections was enacted in 1947, and the SEC has a long-standing policy of construing this carve-out to cover not only director nominations by shareholders but also proposals for procedures which may result in contested board elections.

We believe the tests of time and experience have firmly established the wisdom not only of the Rule 14a-8(i)(8) exclusion, but also of the director-centric model of corporate governance and the value of an impartial board positioned to balance competing interests to promote long-term shareholder value. Accordingly, we believe the SEC should reject the Access Proposal and instead amend Rule 14a-8(i)(8) to codify its well-established position that a company may exclude shareholder nominations of directors and related bylaw amendment proposals from its proxy statement.

Very truly yours,

Wachtell, Lipton, Rosen & Katz

Wachtell, Lipton, Rosen & Katz