CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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January 19, 2010

Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Facilitating Shareholder Director Nominations
Release Nos. 33-9086; 34-61161; IC 29069
File No. S7-10-09

Dear Ms. Murphy:

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness (the "CMCC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve this objective, it is an important priority of the CMCC to advance an effective and transparent corporate governance structure. Accordingly, the CMCC is pleased to provide further comment on the amendments to the proxy rules under the Securities Exchange Act of 1934 (the "Exchange Act") proposed by the Securities and Exchange Commission (the "SEC") on June 10, 2009, in the release entitled "Facilitating Shareholder Director Nominations" (the "Proposal"), as supplemented by the SEC's request for further comment on December 14, 2009, in a similarly entitled release.

The CCMC filed its initial comment letter on this proposal on August 14, 2009, (the "August letter") and is pleased to be able to participate in this second round of comments.

As you know, the August letter expressed serious reservations regarding the Proposal and requested that it be withdrawn. The CCMC believes that, since then, the basis for our concerns have grown and have been further validated. Accordingly, the CCMC once again urges the SEC to withdraw the Proposal.

The CCMC continues to believe that the Proposal is unwise, unnecessary, and exceeds the SEC's statutory authority. As explained in detail in the August letter, this position is predicated on the following premises:

- the Proposal exceeds the SEC's authority under Section 14 of the Exchange Act;
- adopting the Proposal would be costly and disruptive to companies;
- adopting the Proposal will impair the functioning of boards of directors to the detriment of all shareholders;
- there has been no compelling or objective showing of need for the new rules; and
- the SEC has failed to address significant issues in the proxy process, including the ability of activist investors to "rent" the voting interests of a large number of shares.

Before addressing these concerns and the materials referenced in the December 14, 2009, release, the CCMC would like to enter into the record a report authored by Professor Brian R. Cheffins of the University of Cambridge, entitled, *Did Corporate Governance "Fail" During the 2008Stock Market Meltdown? The Case of the S&P 500* ("the Cheffins report").[1] The Cheffins report concludes that in 2008, during the most severe financial crisis since the 1930's, the corporate governance systems of those companies that were most impacted by the crisis generally worked and did not contribute to the demise of those companies. Viewed differently, these companies were impacted by a financial crisis rather than a corporate governance crisis, and the case for dramatic governance reform has not been made. The CCMC believes that

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[1] The study was authored by Brian R. Cheffins, S.J. Berwin Professor of Corporate Law, Faculty of Law, University of Cambridge. The article appeared in *The Business Lawyer*, vol, 65, November 2009.

the SEC should consider the implications of the Cheffins report as it continues its deliberations on the Proposal

Additionally, a number of issues exist concerning proxy voting systems. Adding additional stress to voting systems through proxy access, while the system attempts to cope with the repeal of the broker vote, is a recipe for disaster. This is particularly true when coupled with the SEC ignoring pressing issues such as the disenfranchisement of retail shareholders and renting of voting interests. This would hurt public companies and send shockwaves throughout an economy trying to recover from the worst economic crisis in 75 years. While the CCMC's concerns are listed in more detail below, we wish to reiterate that the SEC should withdraw this rulemaking.

I. The Business Roundtable Reports

The SEC has requested additional comment on the two reports submitted by the Business Roundtable: *Report on the effect of Proposed SEC Rule 14a-11 on Efficiency, Competitiveness and Capital Formation in Support of Comments by Business Roundtable* and *Why Did Some Banks Perform Better During the Credit Crisis? A Cross-Country Study Impact of Governance and Regulation* ("the Business Roundtable reports").

The CCMC believes that these reports present ample additional evidence that the Proposal is unworkable, will harm investors, undermine the management of companies, and erode shareholder value.

As these reports indicate, if the Proposal were to be adopted, it would result in less qualified boards of directors, potentially lead to "activist" board members whose goals could be inconsistent with the fundamental objectives of maximizing shareholder value, create a significant disincentive for companies to incorporate or operate in the United States, and impede capital formation. The negative ramifications of the Proposal would be felt throughout the economy, resulting in lower growth rates, less job creation and, ultimately, lower tax revenues.

Further, management will be distracted from their principal purpose and managerial time and focus will be diverted to the annual director election process, taking attention away from running the business. This possibility may lead to greater "short-termism" on the part of shareholders as they look for companies that are not

dealing with such distractions. Both of these possibilities will harm shareholders and corporations alike.

The CCMC also notes that greater shareholder involvement in the director selection process is not a safeguard against catastrophic market events and may leave companies and their boards of directors ill-equipped to effectively respond to sudden and potentially adverse developments. For example, it appears that financial institutions with shareholder-friendly boards did not fare as well as other financial institutions during the 2008 financial crisis. The CCMC believes that the assumptions underlying the premise that shareholder-comprised boards are more effective are dubious assumptions, and warrant further review and reconsideration. In this regard, the Cheffins report, as well as the final report of the Financial Crisis Inquiry Commission expected later this year,[2] should provide additional data which the SEC should consider.

Finally, it should be remembered that, as the utility of the corporate form becomes more problematic, alternative means of business and capital formation—sole proprietorships, partnerships, private equity, etc.—become more attractive. Similarly, this uncertainty enhances the attractiveness of other jurisdictions as a domicile, an ever-present concern in an increasingly global economy. As the disincentives to operating a public company in the United States continue to grow, the risk of businesses relocating to more hospitable locations or choosing an alternative business structure through which to operate also increase. Over the past decade there has been a trend of the number of public companies falling in the United States and the number of public companies rising in other jurisdictions. As has been repeatedly noted, this will reduce capital formation within the United States (ultimately preventing the economy from reaching its full growth potential or stimulating job creation) and limit opportunities for investors.

II. The Shareowners Education Network and Council of Institutional Investors Report

The report submitted by Shareowner Education Network and Council of Institutional Investors, *The Limits of Private Ordering; Restrictions on Shareholders' Ability to*

[2] The Financial Crisis Inquiry Commission ("FCIC") was established by Congress to uncover the causes of the 2008 financial crisis and issue recommendations. The first hearings of the FCIC were held on January 13, 2010. http://www.fcic.gov/

Initiate Governance Changes and Distortions of the Shareholder Voting Process (the "CII report") centers upon private ordering. Essentially, this report calls for a "one-size-fits-all" approach to shareholder access to the corporate proxy materials.

The CCMC believes that investors have benefited from the diversity of choice that the State corporate law system has created. Shareholders and directors can choose structures that work best for a particular company, while investors can base their investment decisions, among other things, on the type of corporate governance framework that they believe will lead to the largest return or satisfy their other investment objectives. As was discussed in the August letter, over the years this system has proven sufficiently flexible to allow for experimentation with and adoption of a variety of governance reforms. While these reforms may differ from jurisdiction to jurisdiction, they share one common feature—they were created through a robust shareholder-director dialogue without governmental mandates or incentives.

The CCMC further believes that the current State law system has led to reforms that, in the long-run, are likely to be more effective than any universal proxy access framework. As we noted in the August letter, Delaware has enacted a law that allows a company to include a provision in its bylaws that requires the company, under certain circumstances, to reimburse a stockholder for the expenses incurred in soliciting proxies in connection with the election of directors. The Delaware statute permits companies to fashion the terms and conditions of this bylaw within certain broad limits. The CCMC believes that this approach, which can be tailored to a company's specific situation, as determined by management, the board of directors, and shareholder, will be more effective in responding to the underlying objective of board access than a universal proxy access framework that would force companies to accommodate numerous generalized requirements that may not work within their existing corporate governance systems and unfairly favors institutional investors over retail investors.

While a "one–size-fits-all" approach may have appeal to some, ultimately investors will have less choice, shareholders and directors will lose the ability to experiment and innovate. This will force corporate governance to operate through a centralized "command and control" approach rather than the organic process that has led to the most productive economy in world history. Such a system will harm shareholders and investors alike and lead to a smaller rate of return. It may be a truism, but shareholders hold the ultimate power in their dealings with a corporation-

the right to sell. This is a power that has received scant attention during the deliberations of the proposal.

III. The SEC Should Consider the Cheffins Report in its Deliberations

In its original release of the proposal, the SEC stated that "[i]n light of the current economic crisis and these continuing concerns, the Commission has determined to revisit whether and how the federal proxy rules may be impeding the ability of shareholders to hold boards accountable through the exercise of their fundamental right to nominate and elect members to company boards of directors."[3]

As was noted earlier, the Cheffins report analyzed companies within the S&P 500 during 2008, with a special focus on those companies that experienced the most stress during the financial crisis.

The Cheffins report found that, during a time of severe financial stress, the governance systems of these companies worked relatively well—their boards of directors were very active in managing the company and dealing with the crisis. The report also notes that the United Kingdom, which has a more liberal shareholder access regime, experienced a steeper drop in shareholder value than in the United States. The report goes on to conclude that a case for governance reform has not been made.

The Cheffins report calls into question the SEC's intent in revisiting these rules and again demonstrates the failure of the SEC to provide compelling reasons to federalize access to the company proxy, overturn 150 years of State corporate law, and endanger shareholder rights and board management. The costs of the proposed new requirements clearly outweigh the benefits and, as the Cheffins report suggests, the Proposal is a solution in search of a problem.

IV. Impact of Potential Financial Regulatory Reform Legislation Upon the Resources Needed to Monitor and Regulate Corporate Elections

Since the end of the Proposal's initial comment period, various legislative proposals that would reform corporate governance practices have been debated by

[3] Federal Register, Volume 74, No. 116, Thursday, June 18, 2009, Proposed Rules at 29025.

the House of Representatives and the Senate as part of their ongoing examination of the financial services regulatory system. While the House of Representatives has passed H.R. 4173 the "Wall Street Reform and Consumer Protection Act of 2009," the Senate has only begun deliberations and the process is expected to go on for some time.[4] The House bill contains more than 20 new mandates for the SEC that will require substantial increases in staff, expertise, and resources. It is unclear how any Senate bill or final bill will impact the duties and resources of the SEC.

Nevertheless, it is appropriate for the Proposal to be considered in the context of these legislative considerations. If the Proposal were to be adopted, the SEC would be responsible for monitoring and regulating proxy access for nearly 15,000 public companies in the United States. The CCMC is concerned that the SEC currently does not have the resources or experience to undertake this responsibility. Consequently, its proxy access duties will have to compete for resources with the inevitable new responsibilities imposed on the SEC as part of the restructuring of our financial regulatory system.

This competition for resources and knowledge will have an adverse impact on corporate elections at a time when any new access requirements are just being implemented; further harming the rights of investors. In short, the SEC will be taking on too much too quickly and shareholders and the economy will suffer as a result.

V. Conclusion

The CCMC appreciates the opportunity to provide additional comment to the SEC on the Proposal and would be pleased to discuss any questions the SEC may have with respect to this letter. Based on the forgoing, it is the conclusion of the CCMC that the SEC has failed to demonstrate a compelling need for this rule-making or how capital markets will be made more efficient by its adoption. Indeed, the CCMC believes that the reports identified by the SEC, as well as the Cheffins report, provide strong evidence to support this view. If the Proposal were to be adopted, it will undoubtedly result in unintended consequences that would harm corporate governance practices, shareholder value, and future economic and job growth in the United States.

[4] The House Bill, H.R. 4173, the Wall Street Reform and Consumer Protection Act was passed in December, 2009

Accordingly, the CCMC again respectfully requests that the SEC withdraw the Proposal and engage in other projects that will assist the safety and soundness of the capital markets in these trying times.

Sincerely,

David Hirschmann