Comment Letter of a Bi-Partisan Group of Eighty Professors of Law, Business, Economics, or Finance in Favor of Facilitating Shareholder Director Nominations

August 17, 2009

VIA E-MAIL: rule-comments@sec.gov

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

Re: File No. S7-10-09
Release No. 34-60089
Facilitating Shareholder Director Nominations

Dear Ms. Murphy:

This comment letter is submitted on behalf of a bi-partisan group of eighty professors of law, business, economics, or finance whose names appear below (the "Submitting Professors"). The Submitting Professors are affiliated with forty-seven universities around the United States.[1] All of the Submitting Professors have research or professional interests relating to how publicly traded firms are run and how their affairs are governed by corporate and securities laws. The Submitting Professors welcome the opportunity to provide comments to the Securities and Exchange Commission (the "SEC") on its proposed rule *Facilitating Shareholder Director Nominations* (the "Proposed Rule").

There is substantial variance among the views of the Submitting Professors on many corporate governance matters. However, all of the Submitting Professors support the SEC's proposals to remove impediments to the exercise of shareholders' rights to nominate and elect directors and to enable shareholders to place proposals regarding nomination and election procedures on the corporate ballot. All of the Submitting Professors urge the SEC to adopt a final rule based on the SEC's current proposals, and to do so without adopting modifications that could dilute the value of the rule to public investors. While all of the Submitting Professors share the views expressed in this paragraph, each individual professor may not endorse each and every statement below.

[1] The Submitting Professors submit this comment letter in their individual, not institutional, capacities; institutional affiliations are listed below for identification purposes only.

The ability of shareholders to replace directors is supposed to play a key role in the governance structure of public companies. However, shareholders seeking to replace directors face considerable impediments. One significant impediment to replacing directors is incumbents' control of the company's proxy card – the corporate ballot sent by the company at its expense to all shareholders. We believe that providing shareholders with rights to place director candidates on the company's proxy card, as the SEC proposes doing, would improve director accountability.

Providing shareholders with minimum rights of access to the company's proxy card, and allowing companies to provide shareholders with additional rights but not to take away the set minimum, is consistent with the long-standing and established role of the proxy rules (and the securities laws in general) and the division of labor between them and state corporate law. The proxy rules (and the securities laws in general) have long provided mandatory arrangements establishing a minimum level of protection for public investors, with companies being free to add additional protections but not to reduce investors' protections below the established minimum.

We also believe that incumbent directors should not have an effective monopoly power to set the corporate arrangements governing their own election, and that it is therefore desirable to facilitate shareholders' ability to amend – within the limits set by state and federal law – corporate arrangements governing the nomination and election of directors. Accordingly, we support the SEC's proposal to amend Rule 14a-11 to enable shareholders to place proposals related to such arrangements on the corporate ballot.

In designing the final rule, the SEC should be careful to avoid eligibility or procedural requirements that would undermine or unnecessarily detract from the Proposed Rule's value for investors. In evaluating these requirements, it is important to keep in mind that, no matter how moderate eligibility or procedural requirements may be, shareholder nominees must still meet the demanding test of getting elected before they can join the board. A shareholder nominee will join the board only if the nominee obtains more votes than the incumbents' candidate in an election in which incumbents, but not the shareholder nominee or the nominator, may spend significant amounts of the company's resources on campaign expenses.

In evaluating eligibility and procedural requirements, the SEC should also keep in mind that many institutional investors lack incentives to invest actively in seeking governance benefits that would be shared by their fellow shareholders. Accordingly, the final design of the rule should avoid imposing any unnecessary hurdles or costs on shareholders organizing or joining a nominating group.

The SEC was authorized by Congress to prescribe rules to regulate the use of proxies "as necessary or appropriate in the public interest or for the protection of investors." Adopting the SEC's proposals, while ensuring that the final rule does not impose eligibility or procedural requirements that would dilute its value for investors, will advance the public interest and the protection of investors.

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In case we could be useful in any way to the deliberations of the staff or the Commission on this subject, please contact Lucian Bebchuk at (617) 495-3138 or at bebchuk@law.harvard.edu.

Sincerely yours,

Professor Lucian A. Bebchuk

cc: Chairwoman Mary L. Schapiro
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