



National Investor Relations Institute

8020 Towers Crescent Drive, Suite 250, Vienna, VA 22182  
(703) 506-3570 FAX (703) 506-3571  
Web site: www.niri.org

August 13, 2009

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

Re: Proposed Exchange Act Rule 14a-11 and Amendment to Rule 14a-8(i)(8)  
File No. S7-10-09

Dear Ms. Murphy,

This letter is submitted on behalf of the National Investor Relations Institute (NIRI). NIRI is the professional association of corporate officers and investor relations practitioners responsible for communications among corporate management, investors, securities analysts and other financial community constituents. Founded in 1969, NIRI is the largest professional investor relations association in the world with more than 4,000 members. Members are predominantly from the United States; however membership spans more than 40 other countries. Members represent 2,000 publicly held companies and approximately \$5.4 trillion in stock market capitalization.

NIRI is pleased to have the opportunity to comment on the proposed Exchange Act Rule 14a-11 and amendment to Rule 14a-8(i)(8). Beyond its Rule-related comments below, NIRI believes more fundamental changes are needed to ensure the U.S. proxy voting system is as fair and transparent as possible including improved public disclosure of share ownership so public companies know who their shareholders are, and an improved system of direct communication with these shareholders.

**Proposed Exchange Act Rule 14a-11**

The ability for shareholders to nominate directors (proxy access) is generally considered to be an important element of good corporate governance. NIRI believes the proper approach to proxy access adoption is at the state level, as has been implemented in states such as Delaware. NIRI does not believe the SEC should impose proxy access by superseding state law, specifically state corporate bylaws, and therefore NIRI does not support the proposed Exchange Act Rule 14a-11. The proposed rule represents a substantive change to the proxy system, federalizing shareholder rights currently under the states' domain.

NIRI believes that change proposed in a “one size fits all” fashion is dangerous and likely to have unintended consequences. Possible side effects of a federal proxy access rule include increased costs to public companies to ensure valid nominations are included on the proxy, an increased influence of activists with narrow economic interests that run counter to that of long-term shareholders, a continued reduction of individual investors’ proxy voting influence and the possibility for decreased board effectiveness.

#### Cost

The cost of the annual shareholder meeting will likely rise due to an increase in the expense associated with preparing proxy materials, employing proxy advisory/solicitation services in order to obtain quorum, and other proxy voting costs leading to questions regarding the best use of corporate capital and return on investment from annual meeting administrative spending. While competition exists among proxy advisory firms to ensure services are priced competitively, the increased revenue and influence of proxy governance firms continues to highlight the potential for conflicts of interest between governance advisory and consulting services.

#### Activists

Shareholder activists will likely have more influence in corporate matters including proposing director nominees leading to concerns regarding decisions based on the narrow, often short-term self-interest of these activist individuals/firms versus the long-term interest of all shareholders and other important constituents.

#### Retail Shareholders

A substantial number of retail shareholders choose not to vote on either routine or non-routine matters. NIRI believes this proposal will exacerbate the retail vote decline trend due to the additional complexity of proxy access. Ultimately this will continue to increase the growing influence of large institutional investors and proxy governance firms (who advise institutional investors) in determining corporate governance matters, as these investors generally vote their proxies at much higher response rates than individual investors.

#### Board Effectiveness/Competitiveness

The skills and capabilities of the board of directors may be inhibited by both the presence of shareholder-nominated directors, as well as the increased threat of their possible election, as the election becomes politicized and some directors refuse to serve. Additionally, we believe the SEC must ensure this change does not create a void of capable new board members willing to serve our public companies. NIRI also believes the proposed rule may limit the effectiveness of some corporate boards to set the strategic vision of the company and serve the best interest of long term shareholders.

### **Amendment to Exchange Act Rule 14a-8(i)(8)**

NIRI believes that reform *is* called for at the company specific level, and therefore does support the amendment to Rule 14a-8(i)(8) which would allow shareholders to participate in amending the company's own director nomination process. This amendment will facilitate shareholder nominations, improve corporate governance and respect the diverse needs of corporations and their shareholders, without overstepping state law.

### **Comprehensive Proxy and Ownership Transparency Review**

In addition to the Rule 14-8(i)(8) amendment, there is a need for immediate changes in ownership transparency and shareholder communication regulations. Public companies must be able to accurately identify and communicate directly with *all* shareholders to ensure they are making informed decisions in the best interest of all owners.

NIRI urges the Commission to consider a comprehensive review of the proxy system and ownership transparency regulations to make immediate improvements that focus on:

1. **Shareholder Reporting.** Public companies currently operate in an environment of great transparency governed by federal, state and stock exchange rules and regulations. However, current SEC rules generally only require certain institutional investors to disclose share ownership positions on a quarterly basis (Form 13F), with an exception made for those that petition the SEC to delay these disclosures on the basis of confidentiality. Quarterly reporting was established many years ago before technology advances made reporting much easier. It is proper that the reporting scheme for disclosure and new governance standards for voting should be aligned. This reporting scheme should be similar to what now occurs with retail investors - receiving investment reports on a monthly basis within a few days of the end of the month. Companies should expect a similar monthly accounting of true ownership of all shares owned, including changes due to share lending, coordinated as a utility function for the financial markets. Institutional holders, including hedge funds, should abide by the same frequent public reporting scheme and abandon the quarterly requirement. Reporting rules should be strictly enforced with meaningful penalties for non-compliance.
2. **NOBO and OBO Classification.** Public companies should have access to contact information for all of their beneficial owners and should be permitted to communicate with them directly. The NOBO (non-objecting beneficial owner) and OBO (objecting beneficial owner) classification for beneficial owners should be eliminated.

Communications with beneficial owners should be limited to purposes involving corporate or business affairs. Federal privacy regulations should apply to the use of beneficial owner information received from a broker or bank. Those beneficial owners wishing to remain anonymous should be permitted to register their shares in a nominee account with their broker, bank, or other third-party intermediary.

3. Beneficial Owner List Compilation. NIRI believes that reform should address ownership transparency and shareholder reporting positions. NIRI members overwhelmingly support this concept. In this regard, NIRI recommends that the lists of beneficial owners used for shareholder meetings and other communications purposes should be maintained as an industry non-profit utility by a data aggregator. The data aggregator would obtain beneficial owner contact information from all brokers, banks, and other intermediaries, but no information about any intermediary relationship with a customer would be provided.

Beneficial owner positions should be fully reconciled as of a specified record date for a shareholder meeting, including shares on loan and any “failure to deliver” shares. All intermediaries would be required to reconcile beneficial owner and other positions back to their total holding position at DTCC or another depository institution.

4. Integrity of Proxy Voting Process. The proxy voting process should be fully transparent and auditable, starting with the compilation of a reconciled list of beneficial owners eligible to vote and ending with the final tabulation of votes cast at a shareholder meeting. Proxy votes should continue to be counted and tabulated using the current practices governed by state law, including, when necessary, the services of an independent inspector of elections.

Brokers and other financial intermediaries engaged in share lending (or with “failure to deliver” positions) should be required to reconcile their share positions as of the record date for each shareholder meeting. This reconciliation should occur before an intermediary transmits record date beneficial owner information to the data aggregator discussed above and before proxy forms are mailed to beneficial owners and registered shareholders. All record date positions maintained by financial intermediaries should be reconciled early in the voting process, to avoid distributing proxies to ineligible shareholders and to avoid discrepancies in tabulating final vote counts.

The vote counts on matters before a shareholder meeting should be auditable and capable of third-party verification, so that a validation of the final tabulation of the votes of both registered and beneficial owners can occur.

### **Conclusion**

NIRI hopes that these comments are helpful to the SEC as it deliberates the proposed Exchange Act Rule 14a-11 and amendment to Exchange Act Rule 14a-8(i)(8). As stated, the ability of shareholders to nominate directors is a critical part of good corporate governance. However, NIRI does not believe the SEC should usurp state authority to implement substantive changes to the proxy system and does not support the proposed Exchange Act Rule 14a-11. NIRI does believe that shareholder participation in the proxy nomination rule-making process is subject to the authority of the SEC and will promote good corporate governance. Therefore, NIRI does support the proposed amendment to Exchange Act Rule 14a-8(i)(8).

NIRI also strongly urges the SEC to immediately undertake a comprehensive review of the U.S. proxy voting and shareholder ownership transparency systems to ensure they are cost-effective models of good governance relied on by informed and involved investors. Thank you for your consideration on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey D. Morgan". The signature is fluid and cursive, with the first name "Jeffrey" and last name "Morgan" clearly distinguishable.

Jeffrey D. Morgan, CAE  
President & CEO

Cc: The Honorable Mary Schapiro  
The Honorable Kathleen Casey  
The Honorable Elisse Walter  
The Honorable Luis Aguilar  
The Honorable Troy Paredes  
Meredith Cross  
Brian Breheny  
Kayla Gillian