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November 3, 2003

Via e-mail: rule-comments@sec.gov

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Attention: Jonathan G. Katz, Secretary

Re: Security Holder Director Nominations
(Release No. 34-48626; IC-26206; File No. S7-19-03; RIN 3235-A1932

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law (the "Committee")[1] in response to the Commission's request for comments on the above-identified Release issued October 14, 2003. It was prepared by the Committee's Task Force on Shareholder Proposals.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, they do not represent the official position of the ABA Section of Business Law, nor do they necessarily reflect the views of all members of the Committee.

[1] References herein to "we" and "our" refer to the committee.

INTRODUCTION

This letter primarily addresses the use and application of current Rule 14a-8 with respect to shareholder proposals for the 2004 proxy season to "opt-in" to the director nomination procedure that the Commission has proposed for comment in the Release. We raise this matter in advance of our more detailed comments on the Release because of the immediacy and significance of the issues that will be implicated by the process for dealing with these shareholder proposals, as discussed in the Release, and the corresponding uncertainty and controversy that may result. We believe that these issues are of fundamental significance, involving matters of compliance with existing SEC rules and interpretations, fairness to registrants, the integrity of the comment process and the ability of shareholders to make voting decisions on an informed basis.

In practice, permitting the inclusion in management's proxy statement of an opt-in shareholder proposal before the Commission has completed its rulemaking will result in an unmanageable implementation process and will not be in the best interests of investors. Calendar year companies are preparing for their annual meetings of shareholders to be held in the Spring of 2004, and the deadline for receipt of shareholder proposals under Rule 14a-8 is, in most cases, between November and January. We believe it would impose a significant and unnecessary burden on boards of directors to attempt to evaluate and respond to opt-in proposals before the Commission takes final action after consideration of public comments. The content of a final rule will not be known and thus it will be impossible to make a reasoned response to the shareholder proposal. Similarly, nearly insuperable disclosure problems will be created if shareholders are to make informed voting decisions on such "pre-effective date" proposals.

For the reasons set forth below, we believe the existing requirements of Rule 14a-8 will not be satisfied by such proposals. Further, notice and rulemaking issues are raised under the Administrative Procedure Act ("APA") with respect to the changes the Commission proposes in the application of Rule 14a-8.

Accordingly, we urge that no proposal under Rule 14a-8 be used or be effective as a "triggering event" until a *final* rule is adopted and duly noticed. We also urge that the proposed "35% withheld vote" triggering event of proposed Rule 14a-11(a)(i) should not be effective until a final rule is adopted and duly noticed.

It is important to resolve now issues concerning the retroactive effect of the proposed rules and to institute an orderly process for any changes that are to be made in the director selection process. Accordingly, we recommend that any new rule

concerning shareholder access to company proxy materials become effective commencing with the annual meeting of shareholders of the company held not less than six months after the new rule is adopted. This will enable any opt-in proposals to be processed in accordance with the 120 day notice and other procedural requirements of Rule 14a-8. We urge the Commission to announce this change of effective date at the earliest practicable time.

Nothing contained in this letter is intended to address the other proposals or commentary contained in the Release, including the merits of providing access to company proxy materials to shareholders or the proposed triggering events for access. We will provide comments on other aspects of the Release by separate letter.

THE CURRENT SUBMISSION OF AN OPT-IN PROPOSAL WILL NOT CONFORM TO THE REQUIREMENTS OF RULE 14A-8

The Commission has proposed in the Release that a 1%shareholder be permitted to use company proxy materials under current Rule 14a-8 to present for a vote at any annual meeting of shareholders to be held after January 1,2004 a proposal that the company opt-in to the new director nomination procedure that the Commission has proposed. This procedure would be set forth in a new rule, to be designated Rule 14a-11, and a favorable shareholder vote on an "opt-in proposal" would be one of the "triggering events" for shareholder access. We understand the Release to indicate that, contrary to existing practice, such "opt-in proposals" submitted by shareholders presently will be permitted under Rule 14a-8 and, if proposed Rule 14a-11 is ultimately adopted and if such a shareholder proposal receives the requisite favorable shareholder vote, a triggering event will be considered to have occurred. Accordingly, companies receiving such opt-in proposals will now be required to process them in accordance with Rule 14a-8 and may seek to exclude them under the procedures of that rule.

The critical concern raised by the Commission's position in the Release that a Rule 14a-8 proposal made in the next several months would serve as a triggering event is that it puts the "triggering event cart before the rule adoption horse.'' This, in our view, is not consistent with sound policy or existing legal requirements. We note that, in order to satisfy the 120 day initial notice requirement under Rule 14a-8 for a shareholder proposal to a calendar year company, it usually will be necessary for notice of a shareholder proposal to be furnished to the company between November and early January. The comment period for the proposal expires December 22,2003. Given the numerous questions posed by the Commission in the Release, the complexity of the subject and the differences of opinion about shareholder access to company proxy materials, it is not realistic to assume that the

Commission would adopt a final rule until some weeks after the comment period ends, when it has had time to consider carefully all comments.

Assuming a final rule is not effective until mid-spring, the proxy materials for many companies' 2004 annual meeting will then already have been prepared, their nominating process will long since have been completed and their proxy materials will have been mailed to shareholders – and in some instances the meeting may have been held. Even if the effective date of new rules can be accelerated, the time sequence does not comport with the requirements of Rule 14a-8 for shareholder proposals. Therefore, for the current year, at the time an "opt-in proposal" is made as contemplated by proposed Rule 14a-11(a)(ii), no new proxy solicitation rules will be in effect.

Pursuant to Rule 14a-8, a shareholder who submits a "proposal" for inclusion in a company's proxy material must "state as clearly as possible the course of action that you believe the company should follow." Voting to opt-in to a rule that, though proposed, is not in effect does not in our view comply with that requirement. The content of any final rule on access will be relevant and material to the position and action taken by the company with respect to an opt-in proposal and to the voting decision shareholders will be asked to make on such a proposal.

Indeed, until Rule 14a-11 is adopted, companies will likely argue that an opt-in proposal is excludible under Rule 14a-8(i)(3) as inherently vague and uncertain in violation of Rule 14a-9 because shareholders voting on the proposal would not be able to determine with any certainty what actions could be taken under the proposal.[2] We know of no precedent where a shareholder proposal was considered to be includible in a proxy statement where its most material elements were not identified. Under existing practice, a shareholder proposal must meet the criteria for inclusion in

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[2] See, e.g., Johnson & Johnson, SEC No-Action Letter (February 7,2003) (the Staff permitted the exclusion of a proposal requiring the company to prepare a report based on the Glass Ceiling Commission's recommendations; company arguing that the proposal did not describe the recommendations and that shareholders would not be able to vote in an informed manner); H.J. Heinz Company, SEC No-Action Letter (May 25,2001) (the Staff permitted the exclusion, for vagueness, of a shareholder proposal which sought implementation of the "Social Accountability Standards" established by the Council of Economic Priorities; company arguing that the proposal did not set forth the requirements of such Standards and merely incorporated them by reference, such that shareholders could not reasonably understand what obligations they would be placing on the company were the proposal adopted).

a proxy statement at the time it is submitted. The only recognized exception permitting a change is when the Staff permits modification of the proposal from a binding to a precatory form, but otherwise without substantive change. Without this requirement, the timetable for processing proposals under Rule 14a-8 would become meaningless.

We recognize that the Release indicates that the Staff intends to apply Rule 14a-8(i)(8), presumably effective immediately, as permitting shareholder proposals which seek to opt-in to proposed Rule 14a-11. In effect, such proposals would not be considered to relate "to an election for membership on the … board of directors." We do not believe this reinterpretation of Rule 14a-8(i)(8), which is contrary to the position taken at least twice by the Commission in the past year[3], is appropriate, particularly since it is justified only by a proposed change by the Commission in its own rules. At this point, Rule 14a-11 is only a proposal. In the Release, the Commission has asked numerous questions regarding its proposed changes to the proxy rules, including several variations on its proposals. It is entirely possible, if not likely, that even if the Commission determines to change the proxy rules and provide for shareholder access to company proxy materials for shareholder nominations, the terms of the rules adopted, including terms of access, will differ from what has been proposed in the Release. Further, it is difficult to see how an opt-in proposal is not related to a director election particularly if it is intended to have a current effect as a triggering event.

In addition, proposed Rule 14a-11(a)(2)(ii) imposes different requirements on security ownership for a proposing shareholder from those that currently apply to proposing shareholders under Rule 14a-8, again raising an issue as to whether such a proposal conforms to Rule 14a-8. While we concur with the view that a holder of only $2,000 in market value of securities should not be a qualified proponent for triggering event purposes, we believe that Rule 14a-8 must be officially amended before the proponent of a proposal submitted under the rule who is less than a 1% stockholder can be disqualified. The proposed new requirement is inconsistent with the specific requirements of current Rule 14a-8. Changing it before the rule is amended would raise rulemaking and notice issues under the APA. Consider whether companies will be required to process an opt-in proposal under Rule 14a-8 from a less than 1% shareholder, even if that proposal would not be effective (if Rule 14a-11 is adopted as proposed) to opt-in to Rule 14a-11's requirements. This would

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[3] *See*, e.g., Citigroup Inc., SEC No-Action Letter (Jan. 31,2003); AOL-Time Warner Inc., SEC No-Action Letter (Feb. 28, 2003).

be confusing in the extreme. This is not the kind of rulemaking result contemplated by the APA or the procedures commonly employed by the Commission. It also reinforces our view that all such proposals are currently excludible under Rule 14a-8(i)(8).

Other issues are raised by this aspect of the Release. How is a valid shareholder proposal to be framed with respect to a proposed SEC rule? If the proponent frames it in terms of Rule 14a-11 as proposed and changes are made during the adoption process, will the proposal be operative as a triggering event notwithstanding the changes between the proposed form of a rule and the terms of an adopted rule? Would the answer be different if the proposal referred instead to an SEC rule substantially in the form of proposed Rule 14a-11? If so, who would determine what "substantial" means? Does the Commission intend to resolve these matters? If so, by what means? Or would this be left to the courts? What if the proponent sought to solve these interpretative problems by couching the resolution in terms of "any shareholder access rule of the type proposed by the SEC" or just any "shareholder access rule that is adopted"? Would vague proposals such as these be sufficient both to constitute a triggering event and to satisfy the requirements of particularity and clarity that are required in Rules 14a-8 and 14a-9? Would companies have to resolicit on the proposal and mail revised proxy materials if the final rules are adopted after the proxy statement for the annual meeting has been sent to stockholders?

We foresee numerous practical problems for companies in dealing with such opt-in proposals before the sdoption of any new rules. How does management of a company currently receiving a Rule 14a-11 opt-in proposal sensibly assess whether to support that proposal or not? Will the company potentially be confronted with the dilemma of two different shareholder access procedures, one approved by shareholders and one mandated by the Commission? The content of a shareholder access rule ultimately adopted by the Commission will necessarily be a relevant consideration to a board of directors in determining whether or not to support a shareholder proposal to follow such procedure.

Providing adequate disclosure in the proxy statement as to the tei-ms and effects of an opt-in proposal also presents serious problems. Shareholders are entitled to all material facts as to an opt-in proposal and its consequences. How could this be accomplished where a proposal will apply on a retroactive basis? Most shareholder proposals under Rule 14a-8 are relatively straightforward, and support for the proposals can be meaningfully advocated in the 500 word statement which Rule 14a-8 allows. Indeed, most proposals are of a precatory nature, leaving the board of directors with substantial discretion as to their implementation. In contrast,

an opt-in proposal will have binding effect on the director selection process. Given the complexity of the issues surrounding access proposals and the technical aspects of any access process, providing appropriate disclosure without speculating about the rule as it may ultimately be adopted may not be possible.

We therefore believe that both policy and practical considerations render it inadvisable to use opt-in proposals as triggering events before the requirements that they would trigger are known. Further, an opt-in proposal that is submitted at this time would not conform to Rule 14a-8, and therefore, should be excludible by a company, consistent with the specific requirements of Rule 14a-8 and existing practices and interpretations.

APPLICATION OF THE "WITHHELD VOTE" TRIGGERING EVENT

Proposed Rule 14a-11(a)(2)(i) would also establish a separate triggering event if holders of 35% of the shares voted at an annual meeting of shareholders that takes place after January 1,2004 withhold their votes for a director. Because this vote would be a triggering event for procedures that likely will not yet be finalized, it should not be effective until the rule establishing those procedures is adopted and noticed. Shareholders should know the consequences of withholding their vote in relation to an adopted rule and not merely with respect to a rule that has been proposed but may be changed before adoption. They should be informed as to how an access rule will fit in with the entire package of rules governing director nominations and proxy solicitations. Furthermore, there are other issues with respect to the calculation of the 35% test, which we will address in our more detailed comment letter on the proposal. Sufficient opportunity for addressing these issues should be provided before shareholders are asked to vote on so fundamental **a** matter as the director selection process.

OTHER RULE 14a-8 PRECATORY PROPOSALS AS POSSIBLE TRIGGERING EVENTS

The Release explicitly contemplates that the Commission may include as a triggering event the failure of a board of directors to respond appropriately to a precatory shareholder proposal on any matter. The Release further indicates that such a proposal submitted and adopted at a 2004 annual meeting would constitute the first leg of such a triggering event so that, if the company failed to comply with the shareholder proposal, the proposed access rule would become applicable for the next two annual meetings.

This position can only result in more confusion and uncertainty during the 2004 proxy season and in the application of any shareholder access rule that is ultimately adopted. As with the "opt-in" proposal, there is the issue of how to explain the possible triggering effect of adoption of a precatory proposal when the terms of the final access rule are not known. For example, what vote will be required to qualify a precatory proposal as the first leg of a triggering event? Will any precatory proposal qualify as a predicate for a triggering event, or only some (such as those directly bearing on corporate governance)? The Commission suggests that only proposals made by holders of 1% or more of the outstanding shares would be given this effect, but that the other requirements for inclusion of a shareholder proposal under Rule 14a-8 must be satisfied. However, this assumes that a selective, and thus far unadopted, change from the terms of existing Rule 14a-8 would be applied retroactively.

Similar uncertainties and disclosure complexities arise with respect to the second leg of this possible additional triggering event. What board action will constitute the requisite response or lack of response? When must that board action occur? Under this regimen, who will determine whether the board's response meets the terms of the rule? How can a board assess the consequences of opposing a proposal? How can shareholders assess the consequences of adopting a proposal?

The Release recognizes these and other issues and questions about such a triggering event, but does not affirmatively propose how these issues might be addressed if this triggering event is adopted. Nevertheless, the Commission in the Release instructs companies to explain in their 2004 proxy materials the potential effect of a vote on all precatory proposals submitted by greater than 1% shareholders. We submit that such a disclosure would require a lengthy and highly speculative attempt either to guess at the ultimate nature of a rule that may never be proposed, let alone adopted, or an extraordinarily complicated attempt to explain all possible outcomes. Either approach, in our view, would raise significant issues of compliance with Rule 14a-9. We think it is wholly inappropriate as a matter of policy and administrative procedure for the Commission to put companies to this task, particularly with respect to a matter that is only under consideration and not addressed in the proposal.

RECOMMENDATION

The issues raised in this letter can be remedied and resolved. We urge the Commission to act now to revise the proposed rules such that the relevant shareholder meeting to which any new access rules may apply should be at least six months (or such other appropriate time period as the Commission determines) after

the new rules become effective. In this manner, the conclusion of the work of the Commission on these rules will determine their application, leaving sufficient time for a proponent to make a shareholder proposal on an opt-in basis or otherwise under Rule 14a-8. The company will have sufficient time to make a reasoned and informed decision as to whether to support or seek to oppose it and to provide material disclosure to its shareholders. This will also enable the procedural and other safeguards of Rule 14a-8 to be operative and effective with respect to opt-in proposals and should satisfy the other legal and practical problems which have been identified in this letter. Similarly, it will allow shareholders to understand the significance on withholding votes for the election of directors without having to speculate as to the terms and conditions of a proposed rule that is subject to comment and possibly significant revision.

CONCLUSION

We bring these matters to the attention of the Commission now only because of the immediacy of the issues raised by the implementation process proposed in the Release. We note that Rule 14a-11 has been proposed as part of a package of other rules and interpretations which seek to clarify and in some instances change existing requirements and practices relating to director selection. The proposal affects institutional and other shareholders, including proponents, companies and the investing public. We recognize and endorse the substantial study and the undertaking made by the Commission and its Staff with respect to the director selection process and shareholder access to company proxy materials. Nevertheless, we respectfully request that the Commission consider a change in the implementation process it has proposed in order to avoid the stated difficulties.

We hope that these comments will be helpful to the Commission and its Staff. We would be pleased to discuss with the Commission or its Staff any aspect of this letter. Questions may be directed to Robert Todd Lang (212) 310-8200, Charles Nathan (212) 906-1730 or Dixie Johnson (202) 639-7269.

Respectfully submitted,

/s/ Dixie Johnson

Dixie Johnson, Chair,
Committee on Federal Regulation of Securities

/s/ Robert Todd Lang

Robert Todd Lang, Co-Chair,
Task Force on Shareholder Proposals

/s/ Charles Nathan

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