NYSBA

# New York State Bar Association

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March 31, 2004



Securities and Exchange Commission
450 Fifth Street, N.W.
Washington D.C. 20549
E-mail address: rule-comments@sec.gov



Attention: Jonathan G. Katz, Secretary

Re: File No. S7-19-03
Proposed Rule: Security Holder Director Nominations
Release Nos. 34-48626 and IC-26206

Ladies and Gentlemen:

The Committee on Securities Regulation (the "Committee") of the Business Law Section of the New York State Bar Association appreciates the Commission's initiative in organizing the Roundtable Discussion on Security Holder Director Nominations that was held on March 10, 2004 (the "Roundtable") and welcomes the opportunity to provide additional comments on the proposed rule (the "Proposed Rule") contained in Release No. 34-48626 (the "Release") that would require companies, under certain circumstances, to include in their proxy material security holder director nominations.

The Committee is composed of members of the New York Bar, a principal part of whose practice is in securities regulation. The Committee includes lawyers in private practice and in corporation law departments. A draft of this letter was reviewed by certain members of the Committee, and the views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

## A. Summary Of Comments

The Committee supports the Commission's goal that security holders participate meaningfully in the proxy process. We believe that the

approach and suggestions set forth in this letter will best serve the public interest in accomplishing that goal.

We suggest that the Commission put out for public comment alternative approaches to the Proposed Rule such as the alternatives proposed at the Roundtable. Putting these alternatives and others out for public comment would allow issuers, investors and other market participants to analyze these alternatives and hopefully identify and discuss consequences that may not have been apparent when such proposals were initially presented. Given the importance and potential impact of the Proposed Rule, we believe that this further study is critically needed.

Should the Commission determine to adopt a final rule on security holder nominations, we believe that no such rule should be effective any earlier than the 2005 proxy season and that no such rule should have triggers that are retroactive to votes taken at any annual meetings before the effective date of such new rule.

In addition, we believe that there are potential problems in implementing the Proposed Rule under the current proxy system, such as the inability of the current technology to track the votes necessary to determine whether triggers will be met, that should be addressed prior to the effectiveness of any such rule.

Finally, we urge the Commission to analyze the impact of recent initiatives on corporate governance and security holder communications over a reasonable period of time before adopting a final rule on direct security holder nomination. It is our belief that the quality of communications between issuers and their security holders will continue to improve as a result of the recently adopted governance rules of the Self Regulatory Organizations. Because many of the concerns expressed by the Commission which gave rise to the Proposed Rule may not exist in the future, we believe that the Commission should defer adoption of any new initiatives until such governance rules have been in effect for a reasonable period of time and the Commission has had an opportunity to assess the degree to which the governance rules have adequately addressed the issue of security holder enfranchisement.

**B. The Commission Should Put Out For Public Comment Specific Alternatives to the Proposed Rule**

As we stated in our previous letter to the Commission dated December 22, 2003, the Committee supports the Commission's goal that security holders participate meaningfully in the proxy process. The Committee has generally supported the changes resulting from the Sarbanes-Oxley Act of 2002 ("Sarbanes Oxley"), recent Commission rule changes and recently approved listing standards of Self Regulatory Organizations, which have gone a long way to create effective corporate governance structures and mechanisms that promote shareholder participation.

The initiatives already in place have resulted in improved communications between companies and their security holders and will have a profound impact on the proxy process and

corporate governance in the future. The Proposed Rule could work fundamental changes in the governance landscape. The number and intensity of the comments, both for and against the Proposed Rule, confirm that many issuers, investors and other market participants share that assessment of the Proposed Rule's consequences. Many are legitimately concerned about these impacts. In addition, there were alternatives to the Proposed Rule suggested at the Roundtable -- for example, by Ira Millstein and Professor Joseph Grundfest -- and there may well be other alternatives that deserve consideration by the Commission. Given the importance of the issues at stake, we feel strongly that the appropriate course at this time is the careful consideration of the proposed alternatives against the backdrop of the changes already occurring as a result of the current reforms.

While the discussion of proposed alternatives to the Proposed Rule at the Roundtable was helpful, such alternatives (as well as any other alternatives suggested by the Commission) deserve more substantial analysis and an exploration of the fundamentals underlying such alternatives, including an assessment of their expected impacts and ramifications. Although these alternatives are interesting, they are almost certain to have consequences and impacts that have not yet been fully articulated or reviewed. Our Committee is unable at this time to endorse any of the alternatives suggested so far, and believes that the genesis of each, as well as its potential impact on such issues as state law preemption, deserves further study and comment.

At the same time, we believe that the public interest would best be served by specifically focusing any further rulemaking proceeding on an intensified examination of the benefits and shortcomings of the various alternatives. Putting these alternatives out for public comment would allow the public to more fully analyze these alternatives and hopefully identify and discuss consequences that may not have been fully apparent from the discussion of such proposals at the Roundtable. In addition, we believe that notice requesting public comment on specific alternatives would be required under the Administrative Procedures Act for consideration of adopting such alternatives by the Commission.

### C. Should The Commission Determine To Adopt A Final Rule Now, The Effective Date Of Any Final Rule Should Be No Earlier Than The 2005 Proxy Season; Issues Relating to The Implementation Of The Final Rule Should Be Addressed And Certain Changes Should Be Included

As we discussed in our December 22, 2003 comment letter, we believe that numerous practical and legal issues arise as a result of the triggers in the Proposed Rule relating to votes taken at the 2004 annual meetings. In addition, we firmly believe that no triggering event should become effective until a reasonable period following the adoption of a final rule. As to this issue, we agree with the analyses and conclusions set forth in the comment letter of the American Bar Association dated November 3, 2003.

The final Panel at the Roundtable presented a number of implementation problems that would need to be resolved before the Proposed Rule or other alternatives could effectively be

implemented. These include identification of the ultimate beneficial owner and related issues of voting verification, over-voting, and proxy card design. The schedule of effectiveness of any final rule should provide for adequate lead time for programming and other efforts required by the proxy solicitation professionals in order to implement any such rule. The amount of time required and the specific programming and other changes in turn will depend on the precise rule adopted.

**D. Recently Adopted Corporate Governance Initiatives Should Be Given Time To Work Before the Commission Adopts a Final Rule on Security Holder Nominations**

Recent corporate governance initiatives such as Sarbanes Oxley, rules adopted by the Commission and the newly revised listing standards of the Self Regulatory Organizations are beginning to work and have resulted in better communications between companies and their shareholders. We believe that these initiatives will have an even more profound impact on corporate governance and the proxy process in the future. We suggest that the Commission take this opportunity to analyze the impact of the current series of initiatives on corporate governance and shareholder communications prior to adopting a final rule on direct security holder nomination. The result of such a review may suggest different solutions from those being presented under the current rulemaking proposals, and the experience of public companies and their security holders with the current governance requirements may assist the Commission in refining both the concepts and the mechanics underlying security holder input into the director nomination process. Especially with enhanced director independence requirements, and the involvement of a nominating committee composed entirely of independent directors, we believe that the current rules will have a profound effect on the degree to which non-affiliated security holders may understand that a company's board of directors is responsive to their interests. We believe that a longer period is necessary to assess the effect of these remarkable changes before any further requirements are imposed.

In the past year alone public companies have placed an increased emphasis on improving shareholder communication. Examples of this increased emphasis include: (1) the nomination by the management of Marsh & McLennan Companies, Inc. of a director suggested by four pension plans; (2) Apria Healthcare Group Inc.'s adoption of a policy on security holder nomination of directors; and (3) the National Association of Corporate Directors survey report for 2003-2004 indicating that one half of public companies now have independent nominating committees and that most of these committees are using executive search firms to find directors and are looking for numerous qualities in their candidates to foster independence and security holder communication.

It is our view that after the new rules and regulations aimed at improving corporate governance practices have been in effect for a reasonable period of time the reasons giving rise to the Commission's proposal for the direct security holder nomination of directors may not exist.

Adopting a final rule at this time would therefore be at best unnecessary and at worst disruptive and costly.

If after a detailed analysis of the impact of the recent corporate governance initiatives, the Commission believes that the security holder communications process has not progressed sufficiently, the Commission will have an opportunity to revisit the issue of adopting a final rule on direct security holder nominations, against a backdrop of the experience it has gained as a result of the initiatives only now being implemented.

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We hope the Commission and the Staff find these views and suggestions helpful. We would be happy to meet with the Staff to discuss these matters further.

Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

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