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Monday, December 22, 2003

Mr. Jonathan G. Katz

Secretary

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

450 Fifth Street, NW

Washington, D.C. 20549-0609

RE: File No. S7-19-03

Dear Mr. Katz:

I am writing concerning newly proposed "rules that would, under certain circumstances, require companies to include in their proxy materials security holder nominees for election as director." We understand that "the proposed rules are intended to improve disclosure to security holders to enhance their ability to participate meaningfully in the proxy process for the nomination and election of directors."

The rule and rule amendments "are intended to create a mechanism for nominees of long-term security holders, or groups of long-term security holders, with significant holdings to be included in company proxy materials where there are indications that security holders need such access to further an effective proxy process. This mechanism would apply in those instances where evidence suggests that the company has been unresponsive to security holder concerns as they relate to the proxy process."

Background

William Michael Cunningham registered with the U.S. Securities and Exchange Commission as an Investment Advisor on February 2, 1990. He registered with the D.C. Public Service Commission as an Investment

Advisor on January 28, 1994. Mr. Cunningham manages an investment advisory and research firm, Creative Investment Research, Inc. The firm researches and creates socially responsible investments and provides socially responsible investment advisory services.

Mr. Cunningham's understanding of capital markets is based on first hand knowledge obtained in a number of positions at a diverse set of major financial institutions. He served as Senior Investment Analyst for an insurance company. Mr. Cunningham was an Institutional Sales Representative in the Fixed Income and Futures and Options Group for a leading Wall Street firm. Mr. Cunningham also served as Director of Investor Relations for a New York Stock Exchange-traded firm. On November 16, 1995, his firm launched one of the first investment advisor websites.

The firm and Mr. Cunningham have long been concerned with the Commission's ability to carry out its primary mission: "to protect investors and maintain the integrity of the securities markets." We base this apprehension on the following:

- On July 9, 1993, Mr. Cunningham wrote an SEC Commissioner to notify the Commission about a certain specific investing "scam." A timely warning was not issued to the investing public.¹
- In April 1995, following a thorough and objective study, Mr. Cunningham recommended investors not purchase municipal bonds issued by the District of Columbia. In retaliation, Mr. Cunningham was subject to certain "unfair regulatory practices" by the Government of the District of Columbia. He requested the Commission review this action. No review was ever conducted.
- On June 18, 1998, Creative Investment Research opposed the application, approved by the Federal Reserve Board on September 23, 1998 and endorsed by the Commission, of Travelers Group Inc. to

¹ We note that at least one U.S. citizen was murdered as a result of this scam. Certainly, the SEC failed, in the most direct and critical sense, to protect this investor.

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become a bank holding company by acquiring Citicorp. One Travelers subsidiary, Salomon Smith Barney Inc., (created when Salomon, Inc. merged with Smith Barney) had a history of defrauding investors and operating schemes in restraint of trade.² This single fact should have rendered the proposed merger potentially injurious to the public welfare and, therefore, prohibited. *It did not.* On April 28, 2003, the merged firm, Citigroup Global Markets Inc., paid fines totaling \$400 million. The firm was found, again, to be defrauding investors and operating schemes in restraint of trade.

- In an October 1998 petition to the United States Court of Appeals³, Mr. Cunningham cited evidence that growing financial market malfeasance greatly exacerbated risks in financial markets, reducing the safety and soundness of large financial institutions. He went on to note that:

“The nature of financial market activities is such that significant dislocations can and do occur quickly, with great force. These dislocations strike across institutional lines. That is, they affect both banks and securities firms. The financial institution regulatory structure is not in place to effectively evaluate these risks, however. Given this, public safety is at risk.”

- From October 1999 to March 2002, Mr. Cunningham served as Manager, Social Purpose Investing for a pension fund. In that role, he was responsible for proxy voting activity. In 2001, he voted on 1395 issues impacting 401 companies. In 2000, he voted on 1903 issues impacting 422 companies. On Thursday, February 14, 2002, Mr. Cunningham wrote to Ms. Linda Snyder in the Office of the General Council to inquire about his responsibility under the duty of care standard to monitor corporate events and to vote proxies, as an SEC and State-registered investment adviser who also worked for a pension fund. Mr. Cunningham noted several incidents at work that led him to be concerned about his ability to carry out his duty to exercise proper care. As a result, he questioned Ms. Snyder about his liability

² According to published reports, “the integrity of the entire U.S. Treasury securities auction market was called into question when Salomon Inc., admitted in August 1991 to serious violations of the auction rules during 1990 and 1991.” In essence, the firm attempted to “monopolize” or “corner the market” in a particular U.S. Treasury security.

³ Case Number 98-1459.

for negligence on the part of his employer. The Commission responded in a timely manner. In Appendix B, attached, we have provided background memorandum concerning this matter.

There have been several other incidents.⁴ These concerns led Mr. Cunningham to write to the House Committee on Financial Services to suggest that the SEC create a hotline to field calls about corporate accounting practices from insiders who have concerns.

Summary Comments

The Commission is proposing "new rules that would, under certain circumstances, require companies to include in their proxy materials security holder nominees for election as director."

We appreciate this effort, but note the following:

Repeatedly over the past twenty years, signal market participants abandoned ethical principles in the pursuit of material well being.⁵ This occurred in both bull and in bear markets and has taken place in the most materially advantaged country that has ever existed.

By 2003, marketplace ethics reached a new low. The following are the simple, uncontestable facts:

- On September 4, 2003, a major investment bank, Goldman Sachs,

⁴ From 12/5/2002 to 11/24/2003, Mr. Cunningham forwarded 118 financial market "scam" email messages to the Division of Enforcement of the SEC. It is not clear that the Division took action in any of these cases. Again, the public interest has not been served by this lack of action.

⁵ We refer to the following, abbreviated list of market related ethical lapses:

- The National Association of Security Dealers was found by the U.S. Securities and Exchange Commission to be "failing to police wrongdoing the NASDAQ Stock market, the second largest stock market in the world." The Washington Post (August 8, 1996. Page A1.)
- The failure of Long-Term Capital, an investment partnership started in 1994, was "laid on the kind of capitalism .. where a closed, secretive and incestuous elite held absolute sway over politics, the economy and finance, where banks lent to cronies and crooks, and the state miraculously came to the rescue when the time came to balance (or cook) the books." From "LTCM, a Hedge Fund Above Suspicion," by Ibrahim Warde, *Le Monde Diplomatique*, November 1998.

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admitted that it had violated anti-fraud laws. Specifically, the firm misused material, nonpublic information that the US Treasury would suspend issuance of the 30-year bond. The firm agreed to "pay over \$9.3 million in penalties." On April 28, 2003, the same firm was found to have "issued research reports that were not based on principles of fair dealing and good faith .. contained exaggerated or unwarranted claims.. and/or contained opinions for which there were no reasonable bases." The firm was fined \$110 million dollars, for a total of \$119.3 million dollars in fines in six months.

- On September 3, 2003, the New York State Attorney General announced he has "obtained evidence of widespread illegal trading schemes, 'late trading' and 'market timing,' that potentially cost mutual fund shareholders billions of dollars annually. 'Late trading' involves purchasing mutual fund shares at the 4:00 p.m. price after the market closes." This, according to the Attorney General, "is like allowing betting on a horse race after the horses have crossed the finish line."
- In May, 2003, the SEC disclosed that several "brokerage firms paid rivals that agreed to publish positive reports on companies whose shares..they issued to the public. This practice made it appear that a throng of believers were recommending these companies' shares." This was false. "From 1999 through 2001, for example, one firm paid about \$2.7 million to approximately 25 other investment banks for these so-called research guarantees, regulators said. Nevertheless, the same firm boasted in its annual report to shareholders that it had come through investigations of analyst conflicts of interest with its 'reputation for integrity' maintained."
- On April 28, 2003, every major US investment bank, including Merrill Lynch, the aforementioned Goldman Sachs, Morgan Stanley, Citigroup, Credit Suisse First Boston, Lehman Brothers Holdings, J.P. Morgan Chase, UBS Warburg, and U.S. Bancorp Piper Jaffray, were found to have aided and abetted efforts to defraud investors. The firms were fined a total of \$1.4 billion dollars by the SEC.

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Envy, hatred, and greed have flourished in certain capital market institutions, propelling ethical standards of behavior downward. Without meaningful reform, there is a small (but significant and growing) risk that our economic system will simply cease functioning.

Courts have found that, "Section 10(b) of the Securities Exchange Act makes it 'unlawful for any person ... [t]o use or employ, in connection with the purchase or sale of any security ..., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.'" Yet, investment analyst "buy and sell" recommendations became "manipulative or deceptive device(s)," part of "a (successful) scheme to defraud" the investing public.

Fully identifiable entities and individuals (investment banks, mutual fund managers, and investment analysts) engaged in criminal activities. They have, for the most part, evaded civil and criminal prosecution by paying fines of no real consequence, representing an insignificant percentage of annual earnings. We note that the aforementioned Goldman Sachs, ostensibly fined \$119.3 million by the Commission for various efforts to defraud investors, subsequently received \$75 million in Federal Government tax credits.⁶

This prosecution strategy appears contrary to both common sense and to principles of fairness. This strategy is also contrary to basic principles of justice, since remuneration for crimes committed is divorced from any realistic measure of damage caused.

The lack of rational, effective and efficient regulation may actually encourage future illicit behavior. We understand that, given any proposed rule, crimes will continue to be committed.⁷

⁶ The tax credits were awarded under the U.S. Department of the Treasury New Markets Tax Credit (NMTC) Program. (See: <http://www.cdfifund.gov/programs/nmtc/>).

⁷ We assume that "employees are 'rational cheaters,' who anticipate the consequences of their actions and (engage in illegal behavior) when the marginal benefits exceed costs." See Nagin, Daniel, James Rebitzer, Seth Sanders and Lowell Taylor, "Monitoring, Motivation, and Management: The Determinants of Opportunistic Behavior in a Field Experiment, *The American Economic Review*, vol. 92 (September, 2002), pp 850-873.

These facts lead some to suggest that regulatory authorities have been “captured” by the entities they regulate.⁸ We note that under the “regulatory capture” market structure regime, the public interest is not protected.

Summary Comments on the Proposed Rules

We appreciate the time and effort the Commission has devoted to this task. The proposal is the second part of a two-part process. Nominating committee disclosure and board communication revisions were examined first. The SEC then released a proposed revision to ballot access rules. We believe the current proposal goes a long way toward enhancing the ability of board members to act on behalf of all shareholders. We support the Commission’s efforts to make changes in this area.

We are, however, concerned that the proposal will allow those opposed to changes in corporate governance practices an opportunity to claim that corporate governance reform efforts are, in their entirety, unreasonably time consuming, burdensome and costly.

For example, some have suggested that “One of the responsibilities of directors under state law is the nomination of director candidates.” According to this theory, allowing shareholders access to the ballot would be illegal, contrary to state law. We agree with those who believe that “state laws do not assign to directors the responsibility to nominate director candidates.” Further, some have claimed that “board accountability to shareholders would be diminished by allowing the shareholders to select directors themselves.” We disagree. The proposal strengthens Board accountability to shareholders, since “meaningful shareholder involvement is” not “otherwise provided under existing proxy rules” or under new laws, like Sarbanes-Oxley.⁹

⁸ See George J. Stigler, “The Theory of Economic Regulation,” in *The Bell Journal of Economics and Management Science*, vol. II (Spring 1971), pp. 3-21.

⁹ Shareholders currently have limited impact on Board composition. According to Dow Jones Newswires, “dissidents managed to unseat directors in only seven of the 37 proxy contests waged in 2003.” See: *Angry Investors Still On Losing End In Proxy Fights*. Wednesday December 3, 2003. By Phyllis Plitch, Dow Jones Newswires.

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We also agree with those who indicate that “direct shareholder access to company proxy statements is NOT inconsistent with exchange standards, which define ‘independence’ in terms of a lack of financial conflicts of interest- an issue that should always have been covered by the overall fiduciary standard.”

The claim that special interests will use the newly proposed rules to pursue an agenda harmful to other shareholders also rings hollow. Special interests are already well represented on every board. (For example, members of one special interest group, white males, currently occupy 85% of all Board seats.) In any event, Board members are almost always self-interested. Most have an agenda of some sort. Once formed, boards become very political, very quickly. Such is the nature of business.

Suggestions that any election contests that may occur as a result of the proposed rules would be a distraction to management and a waste of company resources are, likewise, spurious. There is no reason to assume contested elections will increase. They may, in fact, decrease. Such events occur naturally over the life of a corporation, anyway. Even if an increase is observed, these elections need not drain economic or management resources. We suggest using on-line tools to significantly reduce the cost of board elections.

Prior to the creation and adoption of high speed, massively networked public computer systems, allowing shareholders to place nominees on a companies' proxy statement was a costly proposition, unfair to public companies and corporate management, since this would mean having to incur substantial costs (time and monetary) to insure shareholder access. This is, however, no longer the case.

Public companies should be required to conduct Board elections on-line, via the Internet. Candidates could be nominated by shareholders on-line and a fair, efficient candidate screening procedure could be established.

Board elections could be conducted using a secure, tamper resistant, management-independent website. Votes would be tabulated in real time.

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The proposed Board member nomination and vote tabulation system could be tied to a shareholder accounting system to determine the number of shares held by the person or group nominating a candidate. Once nominated, information on the candidate and the shareholders or groups of shareholders nominating that person could be easily incorporated into on-line proxy material. Many shareholders currently use websites like www.proxyvote.com to vote proxies. Internet technology was specifically designed for this type of problem.

Finally, we note that, according to James McRitchie, Editor of CorpGov.Net, the United Kingdom Companies Act allows:

“10% of shareholders at any time (by value) to call a meeting, within 21 days at which the whole board can be removed. For an Annual General Meeting all that is needed is 5% of shareholders (by value) or 200 by number, to put any resolution forward, including the appointment and removal of directors. Furthermore each year 1/3 of the board is up for re-election, if the vote goes against by a simple majority, the director is off the board. The UK law has been in place for over 100 years.”

The UK law has not had a major negative impact.

We agree with one commenter¹⁰ who noted:

“The governance of a public company is a balance, developed over time, that is designed to contribute to the successful business operation and economic performance of the company.”

To be fully productive, a Board Chair or CEO must manage competing interests and, quite often, competing egos. Managing a NYSE or NASDAQ company-level Board requires significant skill. The proposed rules do not change this fact.

The new rules do have the potential to be disruptive. Certain groups, including labor and related narrowly focused interests, corporate raiders, mutual funds, hedge funds, pension funds, investment banks and others may seek to use these new rules unfairly, to create new harassment and

¹⁰ Comments of Wachtell, Lipton, Rosen & Katz, November 14, 2003 (File name: wachtell111403.htm).

takeover techniques.¹¹ To minimize this possibility, we suggest the Commission require full disclosure of all director nominee interests, including any interests that could conflict with those of other shareholders.

In addition, should shareholders discover that these new rules have been used as a takeover device we suggest the Commission put into place a series of strict monetary and criminal penalties. This set of penalties would include forfeiture of board membership and corporate control.

We believe these new rules have the potential to be especially disruptive to small publicly traded companies. Requiring a small company to abide by the proposed rules would be counterproductive to capital formation and injurious to the long term health of the economy. We therefore believe the rule should incorporate a market value or size trigger: we suggest the proposed rule only apply to companies traded on a major exchange, like the NYSE or the NASDAQ.

In the alternative, we suggest that the “triggers” giving rise to the ability of shareholders to nominate directors be market capitalization-based.

In Appendix A, attached, we respond to the Commission’s specific questions concerning this proposal. Below, however, we suggest a policy evaluation framework that we believe can be used to evaluate proposals designed to “enhance the transparency of the operation of boards of directors.”

Policy Evaluation Rationale and Framework

We start by assuming there are only two types of shareholders: *smart money* and *dumb money* shareholders. *Smart money* shareholders are part of corporate management. They have more and better information than *dumb money* shareholders on the exact nature of corporate activities. Thus, they are better informed about the true value of the shares they own.

¹¹ Given their critical role in the capital formation process, we suggest that, if an investment bank or mutual fund is found to have used these new rules unfairly or unethically, their SEC registration be lifted immediately. This is a “death penalty” for the misuse of these new rules.

All other shareholders are *dumb money*: if you are not "*smart money*" you are "*dumb money*". Most investors are "*dumb money* investors" - outsiders, without access to market-relevant, non-public information concerning corporate operations.

Assume that, prior to investing, shareholders do not know whether they will be *smart* or *dumb money*. Further, assume they have an equal chance of being placed in either group. A fair policy is one which both *smart* and *dumb money* shareholders would be happy with or, at least indifferent to, prior to investing and prior to knowing which group they belong to.

A just policy treats *smart* and *dumb money* shareholders equally. Equal treatment is defined as follows: the proposed policies do not, from a monetary standpoint, favor either group.

An efficient policy does not interfere with profit maximization.

Recently, we have observed several cases where corporate management unfairly transferred value from *dumb* to *smart* money shareholders.¹² Abuses have been linked to faulty corporate governance safeguards and to the capture of regulatory authorities by those acting on behalf of *smart money* interests. This implies that faulty corporate governance practices mask a company's true value.¹³ This misallocates capital by moving investment dollars from deserving companies to unworthy companies.

Faulty corporate governance practices are also inefficient. They significantly increase the risk of corporate economic failure. Economic failure is not usually consistent with profit maximization.

¹² Including, but not limited to, Adlephia Communications, Alliance Capital Management, Enron, Gateway, Inc., Global Crossing, Homestore, Inc., ImClone, Invesco Funds Group Inc., Janus Capital Group Inc., PBHG Funds, Putnam Investment Management LLC, Security Trust Company, N.A., Strong Mutual Funds, Tyco, and WorldCom. We believe there are hundreds of other cases.

¹³ Accounting firms, including Arthur Andersen and Ernst & Young aided and abetted efforts to do so.

The proposed changes to director nomination and election rules are intended to make it more difficult for corporate management to unfairly transfer value from shareholders to management. Economic models created by the firm suggest that the appropriate way for the Commission to do so is by crafting policies that are fair, just and efficient.¹⁴

The proposed rules fit these criteria. Since they are efficient, the rules are fair to both *smart and dumb money* shareholders. They do not interfere with profit maximization, since they reduce the risk of economic failure induced by faulty corporate governance. In addition, they can be structured so that they do not require a great deal of time, money and other corporate resources.

They are specifically fair to *dumb money* shareholders: by increasing the ability of *dumb money* shareholders to participate in the director nomination and election process, the proposed rules enhance their property rights.

Since the ability of smart and dumb money shareholders to participate in the director nomination and election process is now more evenly balanced, the proposed rules are just.

The proposal raises the cost of investing by increasing the amount of time investors spend monitoring and managing corporate activities, specifically, board director nomination and election processes. Given recent events, this is entirely appropriate.

Conclusion

We continue to believe it is the responsibility of the SEC to collect, review, summarize and grade companies based on their disclosure, communication and board election policies. We suggest the SEC do this by issuing an opinion on the fairness of the board election process at a given company.

¹⁴ These models also suggest that fairness, justice and efficiency are not inconsistent, but, rather, self reinforcing. In other words, profit maximization subject to fairness and justice constraints leads to the same solution as if one were to maximize justice and fairness, subject to a profit maximization guideline. These models are proprietary and beyond the scope of this comment. If Commission is interested in getting more information, they can contact us.

Investors could then use this opinion to determine the chances they have of being treated fairly by corporate management and the probability that corporate management will unfairly transfer value from *dumb* to *smart money* shareholders. They can also use this rating to guide their efforts with respect to board director nomination and election, using these newly proposed rules. We believe the SEC has the responsibility to facilitate the ability of shareholders to participate in Board election contests by sponsoring a board election website.

We agree with Robert A.G. Monks when he states that:

“We need a language with which owners can communicate with Chief Executive Officers in a mutually supportive dialogue. The kind of corporate leadership necessary for legitimate legal standards will only be manifest to the extent that corporate officers are fully participants.”¹⁵

This proposal is the first step in the creation of the new language cited above, required given shareholder disappointment with American corporate management. This disappointment has less to do with an expectation of perfection than with a betrayal of trust: shareholders have a right to expect ethical behavior from corporate managers and officers.

We know “One cannot force corporate leadership.” One should not have to. Apparently, certain corporate managers learned little from the S&L, junk bond and treasury market scandals of the 1980’s and 1990’s. These incidents were precursors to the systematic looting of shareholder value by people who really didn’t need the money and who really should have known better. They did so because they could do so, without fear of punishment.

We believe any changes to rules regarding the ability of shareholders to “participate meaningfully in the proxy process for the nomination and election of directors” should be fair, just and efficient, designed to “protect investors and maintain the integrity of the securities markets.”

¹⁵ *SHAREHOLDER SOCIAL ACTIVISM: Learn from our mistakes.* Robert A.G. Monks. Speech given at SRI in the Rockies, October 19-21, 2003, Lake Tahoe, Squaw Valley, CA.

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We cite the following:

"Above all, we must bear in mind that the critical issue should be how to strengthen the legal base of free market capitalism: the property rights of shareholders and other owners of capital. Fraud and deception are thefts of property. In my judgment, more generally, unless the laws governing how markets and corporations function are perceived as fair, our economic system cannot achieve its full potential. "

Testimony of Chairman Alan Greenspan, Chairman of the Federal Reserve Board, Federal Reserve Board's semiannual monetary policy report to the Congress. Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate. July 16, 2002

We agree.

We favor efforts to strengthen the property rights of shareholders and to increase fairness in our capital markets, in general, while opposing reform for reform's sake. Efforts to enhance the ability of shareholders to "participate meaningfully in the proxy process for the nomination and election of directors" should also boost the ability of investors and the public to efficiently make informed investment decisions. The current proposal moves in that direction.

We believe efforts surrounding the Commission's review of shareholder's ability to "participate meaningfully in the proxy process for the nomination and election of directors" economically significant and positive.

We appreciate the time and effort the Commission has devoted to this task. Thank you for your leadership. Please contact me with any questions or comments.

Sincerely,

William Michael Cunningham
Social Investment Adviser
for William Michael Cunningham and Creative Investment Research, Inc.

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cc:

Chairman William H. Donaldson

Commissioner Paul S. Atkins

Commissioner Roel C. Campos

Commissioner Cynthia A. Glassman

Commissioner Harvey J. Goldschmid

Subcommittee on Capital Markets, Insurance, and Government Sponsored
Enterprises of the House Committee on Financial Services, 2129 Rayburn
H.O.B., Washington, D.C. 20515

Chief, Bureau of Legislative and Intergovernmental Affairs,

New York State Attorney General, 120 Broadway, New York City, NY 10271

APPENDIX A

1. General questions

A.1. Should the Commission adopt revisions to the proxy rules to require companies to place security holder nominees in the company's proxy materials?

Yes.

Are the means that currently are available to security holders to address a company's perceived unresponsiveness to security holder concerns adequate?

We agree with CALPERS when it says it "believes that a lack of accountability is at the heart of significant concerns with corporate boards in the U.S. The proposed rules on open access certainly provide some ability for shareowners to improve the responsiveness and accountability of corporate boards to owners, however we also feel that several improvements to the proposed rule could greatly enhance this ability without negatively impacting areas of the proposal where the Commission has obvious concerns over how the rule may impact companies."

A.2. What would be the cost to companies if the Commission adopted proxy rules requiring companies to include security holder nominees in company proxy materials?

As currently structured, this proposal will result in significant compliance costs. First year costs are likely to be higher than subsequent year costs. These costs include legal fees associated with structuring and reviewing policies, management time cost related to structuring policies, fees paid to accountants for

managerial and financial statement creation and review, opportunity costs related to missed business opportunities, and many other costs. Social costs relate to the capture of regulatory authorities by those acting on behalf of smart money interests. Should staff wish to more fully discuss these and associated costs, they should contact us.

To facilitate this effort, we suggest the Commission carefully review the experience of the Federal Financial Institution Examination Council (FFIEC) with respect to the implementation of the Home Mortgage Disclosure Act. HMDA requires banks and other financial institutions to report statistics on every home mortgage loan application received. The law requires the FFIEC collect millions of records¹⁶, and has resulted in no appreciable damage to banking operations. In fact, the law, by encouraging financial institutions to make loans to previously underserved but credit worthy borrowers, opened a new market, resulted in increased profitability.¹⁷

A.3. What direct or indirect effect would this procedure have on companies' corporate governance policies relating to the election of directors? For example, will companies be more or less likely to adopt cumulative voting policies and/or elect directors annually?

¹⁶ According to the FFIEC, "In 2002, there were approximately 28 million loan records for calendar year (CY) 2001 reported by 7,631 financial institutions. In 2001, 7,713 financial institutions reported approximately 19 million loan records for CY 2000. In 2000, 7,829 financial institutions reported approximately 23 million loan records for CY 1999. In 1999, 7,836 financial institutions reported approximately 24.7 million loan records for CY 1998. In 1998, 7,925 financial institutions reported approximately 16.4 million loan records for CY 1997." See: <http://www.ffiec.gov/hmda/history.htm>.

¹⁷ This is our view. For a detailed review of the law's impact, see: "The Impact of the Community Reinvestment Act on Bank and Thrift Home Mortgage Lending." March, 2001. Eric Belsky, Gary Fauth, Michael Schill, Anthony Yezer, presented at **Changing Financial Markets and Community Development: The Federal Reserve System's Second Community Affairs Research Conference**. Available on-line at: <http://www.chicagofed.org/cedric/2001/Aprilconference.cfm>.

We agree with CALPERS when it states that “one of the most significant benefits from the proposed rule will be increased accountability of boards to the interests of owners.”

B.1. As proposed, the security holder nomination procedure in Exchange Act Rule 14a-11 would apply to all companies subject to the proxy rules. Would this broad application have a disproportionate impact on smaller operating companies?

Yes.

Are there modifications that would accommodate the needs of small entities while accomplishing the goals of the proposal?

Yes.

Would it instead be more appropriate to apply the procedure only to "accelerated filers" and funds?

Yes.

Would it be more appropriate to apply the procedure only to "accelerated filers" and funds as an initial step?

Yes.

If so, are there any special provisions that would be necessary for companies transitioning to "accelerated filer" status with respect to the nomination procedure in proposed Exchange Act Rule 14a-11, such as the timing of nomination procedure triggering events or the proposed disclosure requirements?

Yes.

Would other limitations be more appropriate, such as applying the proposed rules to all companies other than small business issuers or all companies other than those that have been subject to the proxy rules for less than a specified period of time (e.g., 3 years)?

See our comments above. Requiring a small company to abide by the proposed rules would be counterproductive to capital formation and injurious to the long term health of the economy. We therefore believe the rule should incorporate a market value or size trigger. We therefore suggest the proposed rule only apply to companies traded on the NYSE or the NASDAQ.

In the alternative, we suggest that the “triggers” giving rise to the ability of shareholders to nominate directors be market capitalization-based.

B.2. Should companies be able to take specified steps or actions that would prevent application of the proposed nomination procedure where such procedure would otherwise apply?

There should be room for specific hardship exceptions, as long as these exceptions are not abused.

If so, what such steps or actions would be appropriate? For example, should companies that agree not to exclude any security holder proposal submitted by an eligible security holder pursuant to Exchange Act Rule 14a-8 be exempted from application of the proposed nomination procedure for a specified period of time?

Yes.

Should a company that implements all security holder proposals that receive passing votes in a given year be exempted?

Yes.

Conversely, should companies subject to Exchange Act Rule 14a-11 be permitted to exclude certain security holder proposals that they would otherwise be required to include? If so, what categories of proposals? For example, should the company be able to exclude proposals that are precatory, proposals that relate to corporate governance matters generally, proposals that relate to the structure or composition of boards of directors, or other proposals?

No.

B.3. Would adoption of this procedure conflict with any state law, federal law, or rule of a national securities exchange or national securities association? To the extent you indicate that the procedure would conflict with any of these provisions, please be specific in your discussion of those provisions that you believe would be violated.

We are “not aware of any significant conflict though we are concerned that state laws may in the future be amended to limit the application of the proposed rule.”

B.4. Is it appropriate to limit the availability of the proposed nomination procedure to those situations where state law permits security holders to nominate candidates for director? Is it

appropriate to permit companies to limit the availability of the proposed procedure by limiting the right to nominate directors, when allowed by state law? Will the proposed procedure's reliance on the pre-existence of a state law right, combined with the possibility that companies may limit security holders' rights in this regard, adversely affect the effectiveness of the procedure? Is the proposed procedure's reliance on the pre-existence of a state law right of nomination a proper balance between federal law and state law? Regardless of the existence of a state law right to nominate candidates for director, should companies be subject to the proposed procedure?

We agree with CALPERS: It is appropriate for the SEC to be sensitive to situations where the proposed rule is in direct conflict with state law. However, it is not appropriate to require permissive state law for the application of the proposed procedure.

B.5. Most companies currently use plurality voting in the election of directors; accordingly, proposed Exchange Act Rule 14a-11 is drafted assuming that in most cases plurality voting would apply to an election of directors in which the inclusion of a security holder nominee resulted in more nominees than available seats on the board of directors. What specific issues would arise in an election where state law or the company's governing instruments provided for other than plurality voting, (e.g., majority voting)? Would these issues need to be addressed in revisions to the proposed rule text? If so, how?

We agree with CALPERS: "It appears that plurality voting would be the most reasonable means of electing directors under the proposed rules, especially since companies tend to use plurality voting anyway."

C.1. As proposed, the new procedure would require a triggering event for security holders to be able to use the security holder nomination procedure. Is this appropriate? If so, are the proposed nomination procedure triggering events appropriate? Are there other events that should trigger the procedure? For example, should the following trigger the procedure: lagging a peer index for a specified number of consecutive years; being delisted by a market; being sanctioned by the Commission; being indicted on criminal charges; or having to restate earnings once or restate earnings more than once in a specified period? Should the election of a security holder nominee as a member of a company's board of directors be deemed a triggering event in itself that would extend the process by another year or longer period of time?

We agree with CALPERS and are “generally supportive of the Commission’s goal of providing a mechanism for long-term owners to influence companies where there are indications that the proxy process has been ineffective or shareowners are dissatisfied with that process. The triggers in the proposed rule do identify companies where the proxy process is broken. However, there is no better evidence of a corporate governance breakdown than a company ignoring a shareholder proposal voted for by more than 50% of the “votes cast”. CalPERS, as a matter of policy, votes against all directors of a company that has failed to take such action. While we understand there are implementation issues, these issues are not insurmountable. Moreover, to allow this trigger to be excluded from the final rule will severely weaken this proposal.

As a major institutional investor and a long time governance advocate, we are also supportive of provisions in the rule that could address poor performance as well as generally poor governance as evidenced by a broken proxy process. We feel that there are

significant benefits to this slightly broader interpretation of the goals of the rule.

Therefore, CalPERS suggests the following additional triggers:

- 1) CalPERS supports a trigger based upon non-response to a shareowner proposal that passes by majority of "votes cast" (see above and question C.11);**
- 2) Material restatements. Rather than approach this trigger by requiring multiple restatements we feel that it is more appropriate to identify a level of significance in the restatement that would correspond with a "significant level of concern" by owners. While any restatement may qualify as a significant concern for the owners, this must be balanced with a desire to permit more routine restatements without the impact of triggering the procedure. CalPERS suggests that the threshold be established at any restatement that affects greater than 1/3 of income for the applicable accounting period;**
- 3) SEC enforcement actions including a negotiated settlement in which the company agrees to any substantial monetary payments;**
- 4) Significant underperformance relative to an applicable peer group for an extended period, such as three years. CalPERS suggests two alternative means of implementing this trigger: a) any company with a total stock return (TSR) of less than a set amount of the pertinent peer index for any consecutive three year period; and b) any company with a TSR of less than 25% of the pertinent peer index per year for any consecutive three year period. (CalPERS estimates that approximately 12 % of companies would be subject to open access rules under this suggestion using the 25% number above.**
- 5) CalPERS would also support triggers based upon indictment on criminal charges of any executive officer or director of the company directly relating to his or her duties as an officer or director.**
- 6) Delisting by a market.**

As long as the rule is adopted to include a more significant time period for its application (see C.2 below), it does not appear necessary to deem the election of a shareowner nominee (under the proposed rule) a triggering event in itself thus extending the process by another year or more.

However, if the time period is not extended, the election of a holder nominee as a member of a company's board of directors should be deemed a triggering event that would extend the process by another year or longer period of time."

C.2. How long after a nomination procedure triggering event should security holders be able to use the nomination procedure, if not two years, as is proposed (e.g., one year, three years, or longer)?

Three to five years.

Should there be other ways for the operation of the procedure to terminate at a company?

No.

If so, what other means would be appropriate?

N/A.

For example, should companies be able to take specified actions that would terminate operation of the nomination procedure?

No.

If so, what such actions would be appropriate?

N/A

C.3. As proposed, the nomination procedure could be triggered by withhold votes for one or more directors of more than 35% of the votes cast. Is 35% the correct percentage? If not, what would be a more appropriate percentage and why? Is it appropriate to base this trigger on votes cast rather than votes outstanding? If not, please provide a basis for the recommendation, including numeric data, where available. Is the percentage of withhold votes the appropriate standard in all cases? For example, what standard is appropriate for companies that do not use plurality voting? If your comments are based upon data with regard to withhold votes for individual directors, please provide such data in your response.

We agree with CALPERS: "CalPERS is strongly supportive of the concept that significant withhold votes represent a sign of investor dissatisfaction with the proxy process and should be one of the trigger events for access to the proxy. However, a threshold of 35% is too high to provide a meaningful trigger. CalPERS believes that a threshold of 20% would be more appropriate and would maintain the balance between demonstrating significant shareowner dissatisfaction on one hand and yet still ensuring that the process would provide a reasonable opportunity for shareowners to trigger the nominating procedure.

It is appropriate to use the percentage of votes cast vs. votes outstanding. If the Commission adopts another standard other than votes cast, the rule will encourage issuers to adopt higher voting standards to the detriment of all shareowners. This unintended result must be avoided.

In regards to the threshold for triggering the procedure, there does not appear to be any reason to differentiate if a company uses plurality voting or majority voting.”

C.4. Should the nomination procedure triggering event related to direct access security holder proposals trigger the procedure only where a more than 1% holder or group submits the proposal? If not, what would be a more appropriate threshold, if any? For example, should the standards otherwise applicable for inclusion of a proposal under Exchange Act Rule 14a-8 apply? Should the required holding period for the securities used to calculate the security holder's ownership be longer than one year? If so, what is the appropriate holding period? Should that holding period be shorter than one year? If so, what is the appropriate holding period?

We agree with CALPERS: “No, there should be no limitations placed upon the application of the proposal for the nomination procedure other than standard thresholds that apply to all shareowner proposals. It is more appropriate to recognize that the proposal must pass by a majority vote to be implemented. In this case it is irrelevant who sponsored the proposal as long as the typical shareowner proposal requirements are met.

The thresholds under Exchange Act Rule 14a-8 are appropriate since a company’s response to this type of shareowner will pose no greater burden to a Company than a proposal brought under Exchange Act Rule 14a-8.

If the Commission insists on a threshold different from Exchange Act Rule 14a-8, CalPERS respectfully requests a threshold of .25% of a company if the .25% consists of a passive long-term strategy. CalPERS finds it difficult to understand why an investor with 1% of a company who may sell the stock in as little as one year could bring a proposal but a shareholder of CalPERS size could not, even though

we do not plan on selling the stock at all. To require CalPERS to get the cooperation of fellow shareholders may be possible, but will jeopardize the confidential nature of our communications with many companies that we focus on in our Corporate Governance Program.

A one year holding period is appropriate.”

C.5. Are the existing methods under Exchange Act Rule 14a-8 sufficient to demonstrate that a proposal was submitted by a more than 1% security holder? If not, what other methods would be appropriate?

We agree with CALPERS: “In the event the Commission adopts the 1% hurdle, which CalPERS believes is inappropriate, the methods demonstrate ownership should not be more stringent than under Exchange Act Rule 14a-8. In fact, this rule and Exchange Act Rule 14a-8 should be written to allow a custodian bank to confirm ownership. The Commission should be aware that issuers often use the “record” owner test to the confusion and ultimate frustration of shareowner proposal proponents by claiming that Cede & Co. is the only ‘record’ owner they know. ”

C.6. As proposed, a direct access security holder proposal could result in a nomination procedure triggering event if it receives more than 50% of the votes cast with regard to that proposal. Is this the proper standard? Should the standard be higher (e.g., 55%, 60%, or 65%)? Should the standard be based on votes cast for the proposal as a percentage of the outstanding securities that are eligible to vote on the proposal (e.g., 50% of the outstanding securities)?

We agree with CALPERS: “Yes, this is the proper standard. It should not be higher.

It is appropriate to use the percentage of votes cast on the particular proposal to demonstrate a majority vote. CalPERS does not support any other methodology of calculating a majority vote. If the Commission adopts a standard based on 'votes outstanding' vs. 'votes cast' the rule will no doubt cause issuers to adopt higher voting standards to the detriment of all shareowners. This unintended result must be avoided."

C.7. Should direct access security holder proposals be subject to a higher resubmission standard than other Exchange Act Rule 14a-8 proposals? If so, what standard would be appropriate?

No.

C.8. We have proposed that nomination procedure triggering events could occur after January 1, 2004. Is this the proper date? Should it be an earlier date? Should it be a later date?

We agree with CALPERS: "CalPERS suggests that any triggering event in the preceding three year period be applicable to the extent that such a position is allowed by law, and that any resulting nominating procedure be effective no later than January 1, 2004 (or such period that would permit the proper notifications and disclosures under the rule). Companies that have satisfied the trigger events in previous years are no less in need of greater shareowner involvement as companies that have a trigger event occur after 2004."

C.9. What are the possible consequences of the use of nomination procedure triggering events? Will there be more expense and effort related to votes on direct access security holder proposals? Will there be more campaigns seeking "withhold" votes? How will any such consequences affect the operation and governance of companies?

We agree with CALPERS: “CalPERS does not feel that adoption of the nominating procedures will result in a significant difference in regards to resources dedicated to shareowner proposals. It is likely that directors will face an increased level of scrutiny and more frequent withhold campaigns, which CalPERS considers an ancillary benefit of the proposed rule. CalPERS believes it is healthy to bring more attention to the director election process by raising the stakes on director elections. (CalPERS maintains that a 20% threshold is appropriate for the withhold trigger as this level will still require significant dissatisfaction on behalf of shareowners to reach).

CalPERS believes that the proposed rules will have a significant benefit in relation to the governance of public companies. Not only will companies be much more inclined to adopt rigorous nominating and re-nominating standards, they will also be highly inclined to adopt majority vote shareowner proposals and generally be more accountable to owners.”

C.10. Should companies be exempted from the security holder nomination procedure for any election of directors in which another party commences or evidences its intent to commence a solicitation in opposition subject to Exchange Act Rule 14a-12(c) prior to the company mailing its proxy materials? If so, should the period in which security holders in such companies may use the nomination procedure be extended to the next year (assuming that a nomination procedure triggering event is required)? What should be the effect if another party commences a solicitation in opposition after the company had mailed its proxy materials?

No.

C.11. We have discussed our consideration of and requested public comment on the appropriateness of a triggering event premised upon the company's non-implementation of a security holder proposal that receives more than 50% of the votes cast on that proposal. Should such a triggering event be included in the nomination procedure?

We agree with CALPERS: "Yes, CalPERS strongly supports a trigger based on non-implementation of a proposal that passes by majority vote. We believe there is no more direct link than the one between the non-implementation of a shareowner proposal and the Commission's rationale for the proposed rule – providing a mechanism for long-term shareowners to influence companies where there are indications that the proxy process has been ineffective or where there is dissatisfaction with the proxy process. If a shareowner's proposal passes but is not implemented – often times year after year – obviously the proxy process is ineffective."

In responding to this question, please also consider the following questions:

a. Should a security holder proposal that receives more than 50% of votes cast operate as a nomination procedure triggering event regardless of the topic of the proposal, or would it be appropriate to instead require that the proposal relate to a specified category of topics (e.g., corporate governance matters)? If so, how should that specific category of topics (e.g., corporate governance matters) be defined?

We agree with CALPERS: "Any shareowner proposal that passes by greater than 50% but is not implemented should qualify as a triggering event. The topic of the proposal is not relevant in this regard because the focus of this trigger is on the ineffectiveness of

the proxy process. The fact that the proposal must pass by greater than 50% is a more than adequate guarantee that the topic of the proposal is sufficiently important to the owners to merit implementation by the company.”

b. Should a security holder proposal result in a nomination procedure triggering event if it receives more than 50% of the votes cast with regard to that proposal? Should the standard be higher (e.g., 55%, 60%, 65%)? Should the standard be based on votes cast for the proposal as a percentage of the outstanding securities that are eligible to vote on the proposal (e.g., 50% of the outstanding securities)? Would the described means of determining whether a security holder proposal has been implemented be sufficient? Should there be a different means for determining implementation? Are there other or additional criteria that would be appropriate? Should the determination be made by the entire board of directors? Should the determination be made by the independent members of the board of directors? Should the board be given broader flexibility (e.g., should it be able to represent its intention to implement a proposal)? Should the Commission or its staff (for example, the Division of Corporation Finance) play a role in this process (e.g., similar to that for security holder proposals under Exchange Act Rule 14a-8)? Alternatively, what role should the courts play? What is the best record for a judicial determination?

We agree with CALPERS: “The only appropriate measure is 50% of votes cast. It is not appropriate to require a majority of shares outstanding as this would presume that shares not voted are opposed to the proposal.

In regards to determining implementation, it is acceptable to require that board represent in Exchange Act Form 8-K whether it has

implemented a proposal that has passed by greater than 50% of votes cast.

However, it is imperative that some form of appeal be provided in cases where owners are not satisfied with the representation by the board that it has satisfactorily implemented the proposal. The SEC seems to be the most appropriate means for arbitrating a dispute over implementation of shareowner proposals. We feel that the number of events where boards will improperly represent their response to majority vote proposals will be limited; however, some additional incentive may serve to keep the number of cases to a minimum. CalPERS suggests that in cases where a company represents that it has satisfactorily implemented a proposal and a shareowner seeks correction through the SEC and is successful, the shareowner nomination procedure would apply to that company for twice the normal period.

It is appropriate to require that the independent members of the board provide the determination that the proposal has been implemented. The certification should provide adequate disclosure to determine how the board members came to their conclusion.

It may be easier to provide for a set period of time from the annual meeting where the proposal was passed for the board to act upon the proposal. This period should be sufficient to provide adequate time for the board to act (or provide its commitment to act), but should also provide enough time for security owners to prepare for the nominating procedure at the following meeting should it be triggered. CalPERS suggests a period of 6 months from the meeting date for the board to act upon the proposal. In cases where the proposal would take additional time to implement, such as a proposal asking the board to seek shareowner approval at the next annual meeting to declassify, the board should be permitted to simply commit within the six month time period to taking the necessary action to satisfy the proposal in the appropriate time frame."

c. Should security holders that do not agree with a company's conclusion that a proposal had been implemented have the right to contest that conclusion through a judicial proceeding? Should they have a private right of action to do so? Is there any reason to believe that security holders would not have a private right of action to contest a company's determination that a proposal has been implemented? If so, what recourse, if any, should a security holder have with regard to a company's determination?

We agree with CALPERS: "Yes, shareowners should have the ability to challenge the company's actions or lack thereof in court where the SEC has heard and decided against a shareowner. To the extent current law is ambiguous on this point, the proposed rule should address the issue."

d. Should a company be required to file an Exchange Act Form 8-K stating whether or not it implemented a security holder proposal that is eligible to trigger the rule? Is it appropriate to require that companies make such a statement on Exchange Act Form 8-K? Would this impose unnecessary liability on companies that make a determination regarding implementation of a security holder proposal with which security holders may disagree?

Yes.

D.1. Will the proposed disclosure requirements in Exchange Act Forms 10-Q, 10-QSB, 10-K and 10-KSB provide adequate notice to security holders? Should additional notices be required? If so, what form should that notice take and at what time should it be made public?

Yes.

D.2. Should the company's notice be filed and/or made public in some other manner? If so, what manner would be appropriate?

Yes. We suggest the notice be filed on the company's website.

E.1. Are the proposed thresholds for use of the proposed procedure appropriate? If not, should there be any restrictions regarding which security holder nominees for director would be required to be disclosed in the company proxy materials under the proposed procedure? If so, should those restrictions be consistent with the ownership requirements of Exchange Act Rule 14a-8? Should those restrictions be more extensive than the minimum requirements in Exchange Act Rule 14a-8?

See our comments on a market-value based trigger. Requiring a small company to abide by the proposed rules would be counterproductive to capital formation and injurious to the long term health of the economy. We therefore believe the rule should incorporate a market value or size trigger. We therefore suggest the proposed rule only apply to companies traded on the NYSE or the NASDAQ.

In the alternative, we suggest that the "triggers" giving rise to the ability of shareholders to nominate directors be market capitalization-based.

E.2. Is it appropriate to include a restriction on security holder eligibility that is based on percentage of securities owned? If so, is the more than 5% standard that we have proposed appropriate? Should the standard be lower (e.g., 2%, 3%, or 4%) or higher (e.g. 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)?

We suggest 3%.

E.3. Should there be a restriction on security holder eligibility that is based on the length of time securities have been held? If so, is two years the proper standard? Should the standard be shorter (e.g., 1 year) or longer (e.g., 3 years, 4 years, or 5 years)? Should the standard be measured by a different date (e.g., 2 years as of the date of the meeting, rather than the date of nomination)?

We suggest one year.

E.4. As proposed, a nominating security holder would be required to represent its intent to hold the securities until the date of the election of directors. Is it appropriate to include such a requirement?

Yes.

Would it be appropriate to require the security holder to intend to hold the securities beyond the election of directors (e.g., for six months after the election, one year after the election, or two years after the election) and to so represent?

Yes.

E.5. Is the eligibility requirement that a security holder or security holder group must file an Exchange Act Schedule 13G appropriate? Should there be a different mechanism for putting companies and other security holders on notice that a security

holder or security holder group has ownership of more than 5% of the company's securities and intends to nominate a security holder? Is it appropriate to permit the filing to be on Exchange Act Schedule 13G rather than Exchange Act Schedule 13D? If not, why not?

Yes, it is appropriate to permit the filing to be on Exchange Act Schedule 13G rather than Exchange Act Schedule 13D.

E.6. Should the procedure include a provision that would deny eligibility for any nominating security holder or nominating security holder group that has had a nominee included in the company materials where that nominee did not receive a sufficient number of votes (e.g., 5%, 15%, 25%, or 35%) within a specified period of time in the past?

Yes. 5%.

If there should be such an eligibility standard, how long should the prohibition last?

1 year.

E.7. Should security holders be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors?

Yes.

If so, is it appropriate to require that all members of a nominating security holder group individually meet the minimum holding period?

No.

Is it appropriate to require that all members of the group be eligible to file on Exchange Act Schedule 13G?

No.

E.8. As proposed, the beneficial ownership level of a nominating security holder or nominating security holder group would be established by the Exchange Act Schedule 13G filed by that security holder or security holder group, for companies other than open-end management investment companies ("mutual funds"). Is the filing of the Exchange Act Schedule 13G sufficient evidence of ownership? If not, what additional evidence would be appropriate? Should there be an additional procedure by which disputes regarding ownership levels are resolved?

We agree with CALPERS: "CalPERS feels that the 13G filings, and the accompanying certifications of ownership should the Commission take CalPERS' suggestions above, would provide adequate proof of ownership.

Procedures for settling a dispute over ownership should be created by the SEC. The procedures should provide for adequate means of cure, and should specify that as long as the group identified maintains the required thresholds, it will not be a violation of the rule resulting in the disqualification of the group or shareowner nominated candidate(s) if one or more members is found to have

less shares than originally represented or a holding period that is different than originally represented.”

F.1. Should there be any other or additional limitations regarding nominee eligibility? Would any such limitations undercut the stated purposes of the proposed process? Are any such limitations necessary? If so, why?

As we noted above, certain groups, including labor and related narrowly focused interests, disgruntled employees, corporate raiders and others may seek to use these new rules unfairly, to create new takeover techniques. To minimize this possibility, we suggest the Commission require full disclosure of all director nominee interests, including any interests that could conflict with those of other shareholders.

In addition, should shareholders discover that these new rules have been used as a takeover device, we suggest the Commission put into place a series of strict monetary and criminal penalties. This set of penalties would include forfeiture of board membership and corporate control.

F.2. Is it appropriate to use compliance with state law, federal law, and listing standards as a condition for eligibility?

No.

F.3. Should there be requirements regarding independence from the company? Should the fact that the nominee is being nominated by a security holder or security holder group, combined with the absence of any direct or indirect agreement with the company, be a sufficient independence requirement?

See our comments, F1, above.

F.4. How should any independence standards be applied? Should the nominee and the nominating security holder or nominating security holder group have the full burden of determining the effect of the nominee's election on the company's compliance with any independence requirements, even though those consequences may depend on the outcome of any election and may relate to the outcome of the election with regard to nominees other than security holder nominees?

Yes.

F.5. Are the proposed standards with regard to independence appropriate?

Yes.

If not, what standards would be appropriate?

N/A

If these limitations generally are appropriate, are there instances where they should not apply?

N/A

F.6. Where a company is subject to an independence standard of a national securities exchange or national securities association that includes a subjective component (e.g., subjective determinations by a board of directors or a group or committee of

the board of directors), should the security holder nominee be subject to those same requirements as a condition to nomination?

No.

F.7. As proposed, a nominating security holder or nominating security holder group would be required to represent that the security holder nominee satisfies applicable standards of a national securities exchange or national securities association regarding director independence, except where a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board. What independence requirements should be used if the company is listed on more than one market with such independence requirements?

The tightest one

Should the nominating security holder or nominating security holder group have the discretion to choose the applicable standards?

No. This should be set by rule.

Should the company have discretion to choose the applicable standards?

No. This should be set by rule.

Should all the standards of all markets on which shares are traded apply?

No. This should be set by rule.

Should the more stringent standards apply?

Yes.

F.8. Should there be requirements regarding independence of the nominee from the nominating security holder, nominating security holder group, or the company?

Yes.

If so, are the proposed limitations appropriate? What other or additional limitations would be appropriate?

As we noted above, certain groups, including labor and related narrowly focused interests, disgruntled employees, corporate raiders and others may seek to use these new rules unfairly, to create new takeover techniques. To minimize this possibility, we suggest the Commission require full disclosure of all director nominee interests, including any interests that could conflict with those of other shareholders.

In addition, should shareholders discover that these new rules have been used as a takeover device, we suggest the Commission put into place a series of strict monetary and criminal penalties. This set of penalties would include forfeiture of board membership and corporate control.

If these limitations generally are appropriate, are there instances where they should not apply?

Yes.

F.9. Should there be any standards regarding separateness of the nominee and the nominating security holder or nominating security holder group?

Yes.

Would such a limitation unnecessarily restrict access by security holders to the proxy process?

No.

If such standards are appropriate, are the proposed standards the proper standards?

Yes.

Should other standards be included?

See our comments above.

Should any of the proposed standards be eliminated?

No.

F.10. Should there be a prohibition, as is proposed, on any affiliation between nominees and nominating security holders or nominating security holder groups? If so, are the proposed rules appropriate? For example, we have proposed a definition of "immediate family" that is consistent with the existing disclosure

requirement under Item 401(d) of Regulation S-K. Is this the appropriate definition for purposes of addressing relationships between the nominee and the nominating security holder or nominating security holder group? If not, what definition would be more appropriate?

See above.

F.11. Should there be exceptions to the prohibition on any affiliation between nominees and nominating security holders or nominating security holder groups? If so, what exceptions would be appropriate?

See above.

F.12. Is the two-year prohibition on payments from nominating security holders to nominees appropriate? Should it be longer (e.g., 3 years, 4 years, or 5 years) or shorter (e.g., 1 year)? Should there be exceptions to this prohibition? If so, what exceptions would be appropriate?

See above.

F.13. Is the prohibition on direct or indirect agreements between companies and nominating security holders appropriate?

Yes.

Would such a prohibition inhibit desirable negotiations between security holders and boards or nominating committees regarding nominees for directors?

No.

Should the prohibition provide an exception to permit such negotiations?

Yes.

If so, what should the relevant limitations be?

See comments above. Exceptions should not be abused or used to delay or derail legitimate shareholder efforts.

F.14. Should there be a nominee eligibility criterion that would exclude an otherwise eligible nominee or nominating security holder or nominating security holder group where that nominee (or a nominee of that security holder or security holder group) has been included in the company's proxy materials as a candidate for election as director but received a minimal percentage of the vote?

No.

If so, what would be the appropriate standard (e.g., 5%, 15%, 25%, or 35%)?

N/A

F.15. As proposed, the rule includes a safe harbor providing that nominating security holders will not be deemed "affiliates" solely as a result of using the security holder nomination procedure. This safe harbor would apply not only to the nomination of a candidate, but also where that candidate is elected, provided that the nominating security holder or nominating security holder group does not have an agreement or relationship with that director otherwise than relating to the nomination. Is it appropriate to provide such a safe harbor for security holder nominations?

Yes.

Should the safe harbor continue to apply where the nominee is elected?

No.

G.1. Is it appropriate to include such a limitation on the number of security holder nominees? If not, how would the proposed rules be consistent with our intention not to allow the proposed procedure to become a vehicle for changes in control?

We agree with CALPERS: "CalPERS believes the proposed rule should not be utilized as a substitute for contested elections or to facilitate a takeover of a company. However, does not the Schedule 13G eligibility requirement already address this concern? For this reason, CalPERS does not understand the intellectual underpinning for limiting the number of nominees."

G.2. If there should be a limitation, is the proposed limitation appropriate? Should the number of security holder nominees be

higher or lower? Should the limitation instead be based on the total percentage of the board that the security holder nominees would comprise? Should the limitation be the greater or lesser of the number or a specified percentage, rather than a set number, as proposed? Is it appropriate to permit more than one security holder nominee regardless of the size of the company's board of directors?

We agree with CALPERS: "Assuming a limitation is otherwise appropriate, CalPERS believes a higher limit is appropriate. One director is too low for any company. CalPERS has heard first-hand from directors who were lone representatives elected in a contested election. At a company where the triggering events have occurred it would not be surprising if a single director elected under this rule was treated materially differently than management endorsed directors, e.g., executive committees may be formed and information may be withheld,. While there is no guarantee that two candidates would not be similarly treated, allowing multiple candidates to serve at any company would minimize that risk and, at a minimum, make it more likely that candidates would serve, and continue to serve, in a hostile environment. While two directors should be the minimum allowed a higher percentage, e.g., 35%, should otherwise be the floor. In other words, the ceiling should be 2 directors or 35% of the board, whichever is larger."

G.3. Should the number increase during the second year of the proposed procedure?

No.

Should the number decrease during the second year of the proposed procedure?

No.

G.4. The proposal contemplates taking into account incumbent directors in the case of classified or "staggered" boards for purposes of determining the maximum number of security holder nominees. Is that appropriate? Should there be a different procedure to account for such incumbent directors? Also with regard to staggered boards, should the procedure address situations in which, due to a staggered board, fewer director positions are up for election than the maximum permitted number of security holder nominees? If so, how?

We defer to CALPERS: "While CalPERS is concerned that the policy should not encourage classified boards, it does seem appropriate to consider incumbent directors in the case of classified boards for purposes of determining the maximum number of holder nominees.

Notwithstanding the above, CalPERS believes that it should be able to run the maximum number of seats allowed by the rule in any one year even if the number of seats up for election is less, unless the addition of the maximum number of additional seats would violate a company's articles of incorporation or state law. In effect, shareowners could expand the size of the board by virtue of this rule unless such an action violates a company's articles of incorporation or state law."

G.5. We have proposed a limitation that permits the security holder or security holder group with the largest beneficial ownership to include its nominee(s) where there is more than one eligible nominating security holder or nominating security holder group. Is this proposed procedure appropriate? If not, should there be different criteria for selecting the security holder nominees (e.g., length of security ownership, date of the nomination, random drawing, allocation among eligible

nominating security holders or security holder groups, etc.)? Rather than using criteria such as that proposed, should the company's nominating committee have the ability to select among eligible nominating security holders or security holder groups?

We agree with CALPERS: "At this time, CalPERS believes this is appropriate, though the Commission may want to specifically reexamine this portion of the proposed rule in a few years.

CalPERS does not believe that the company's nominating committee should not be permitted to select among nominating holders or groups. This would be inconsistent with the stated goal of the SEC, to provide owners with greater ability to address non-responsive companies."

G.6. Rather than a limitation on the maximum number of security holder nominees, should there be only a limitation on the number of security holder nominees that may be elected?

No.

H.1. Are the proposed content requirements of the notice appropriate?

No.

Are there matters included in the notice that should be eliminated? Are there additional matters that should be included?

Yes.

For example, is there additional information that should be included with regard to the nominating security holder or nominating security holder group (e.g., disclosure similar to that required from participants in solicitations in opposition with regard to contracts, arrangements or understandings relating to the company's securities), or with regard to the security holder nominee?

We suggest the Commission require full disclosure of all director nominee interests, including any interests that could conflict with those of other shareholders.

H.2. Are the required representations appropriate?

Yes.

Should there be additional representations?

Only to the extent needed to meet the requirements of our suggestion above.

Should any of the proposed representations be eliminated?

No.

H.3. Is it appropriate to require that the notice (other than the copy of the Exchange Act Schedule 13G included in that notice) be filed with the Commission?

Yes.

Should additional or lesser information be filed with the Commission and be made publicly available?

Summary data may be made available, via the web, to the public.

Is the proposed filing requirement appropriate?

Yes.

For example, should the notice be filed as an exhibit to an amendment to the nominating security holder or nominating security holder group's Exchange Act Schedule 13G?

No.

H.4. When should the notice be required to be filed with the Commission?

Two business days.

Should it be required to be filed at the time it is provided to the company?

Yes.

Should it be required to be filed within a specified period of time, such as two business days, after it is provided to the company, as is proposed?

Yes.

Should the information in the notice that is included in the company's proxy statement instead be filed on or about the date

that the company releases its proxy statement to security holders?

No.

H.5. What should be the consequence to the nominating security holder or nominating security holder group of submitting the notice to the company after the deadline? Should such a late submission render the nominating security holder or nominating security holder group ineligible to use the nomination procedure, as is currently proposed under the rule? What should be the consequence to the nominating security holder or nominating security holder group of filing the notice with the Commission late? Should such late filing be viewed exclusively as a violation of Exchange Act Rule 14a-6 or should it affect eligibility to use the nomination procedure? Should the failure of a nominating security holder or nominating security holder group to file the notice with the Commission be viewed exclusively as a violation of Exchange Act Rule 14a-6 or should it affect eligibility to use the nomination procedure?

We agree with CALPERS: A late submission to the Company should result in the ineligibility of the nominating shareowner or group.

Failing to file timely or at all with the Commission should be viewed exclusively as a violation of Exchange Act Rule 14a-6 and should not affect eligibility.

The nominating shareowner or group should be able to cure any defects of a timely filed notice with the Company or Commission.

H.6. The proposed notice requirements address both regularly scheduled annual meetings and circumstances where a company

may not have held an annual meeting in the prior year or has moved the date of the meeting more than 30 days from the prior year. Under these circumstances, what is the appropriate date by which a nominating security holder must submit their notice to the company? We have proposed a standard similar to that currently used in connection with the Exchange Act Rule 14a-8 security holder proposal process. Is such a standard appropriate?

Yes.

If not, what standard would be more appropriate?

N/A

H.7. As proposed, Exchange Act Rule 14a-11 includes a number of notice and other timing requirements. Should these timing requirements incorporate or otherwise address any advance notice provisions under state law or a company's governing instruments? If so, should any advance notice provisions govern? Should they instead be provided as an alternative to the timing provisions set out in the rule?

We agree with CALPERS: "Like Exchange Act Rule 14a-8, state law should not allow a company to insist on additional procedural or notice requirements."

I.1. Is it appropriate to require that the company include in its proxy statement a supporting statement by the nominating security holder or nominating security holder group? If so, is it appropriate to limit this requirement to instances where the company wishes to make a statement opposing the nominating security holder's nominee or nominees and/or supporting

company nominees? Is it appropriate to limit the supporting statement to 500 words? If not, what limit, if any, is more appropriate? Is it appropriate to require filing of the statement on the date that the company releases its proxy statement to security holders? If not, what filing requirement would be appropriate?

We agree with CALPERS: "The rule should permit a supporting statement of 500 words per candidate irrespective of whether the Company includes its own supporting statement(s) or statement(s) of opposition. To allow a company to prevent a supporting statement by a nominating shareowner or group from appearing on the proxy would result in an uneven playing field since the Company could use the Company's resources to solicit votes in other ways, e.g., hiring a proxy solicitor and running advertisements.

In instances where the Company does provide an opposition statement or a statement in support of its own candidate, the nominating shareowner or group should be provided with at least 500 words per candidate or equal space per candidate, whichever is greater."

Again we believe using the internet to manage the voting process will eliminate many of these concerns.

I.2. Is it appropriate for the company to make the specified determinations regarding the basis on which a nominee would not be included? By what means should a company's determination be subject to review? By the courts? Should there be an explicit statement by the Commission regarding this review? Should any determination by the company be subject to review by the Commission or its staff? Should there be an explicit provision for such review, as, for example, with security holder proposals under Exchange Act Rule 14a-8?

We agree with CALPERS: “There should be a similar process for review and litigation as is available under Exchange Act Rule 14a-8.”

I.3. Proposed Exchange Act Rule 14a-11(a)(3) provides that a company is not required to include a security holder nominee where either: (a) the nominee's candidacy or, if elected, board membership, would violate controlling state law, federal law or rules of a national securities exchange or national securities association, (b) the nominating security holder's notice is not adequate, (c) any representation in the nominating security holder's notice is false in any material respect, or (d) the nominee is not required to be included in the company's proxy materials due to the proposed limitation on the number of nominees required to be included. Instruction 4 to proposed Exchange Act Rule 14a-11(a)(3) provides that the company shall determine whether any of these events have occurred. Should the nomination procedure include a procedure for a company to gather information additional to that included in the notice that is reasonably necessary for the company to make its determination in this regard? If so, please respond to the following additional questions.

We agree, in part, with CALPERS: “The company’s ability to request additional information and facts should be severely limited. A company where a triggering event has occurred may be inclined to spend unlimited resources harassing a shareholder group. If the company is allowed to, in effect, litigate a nominee’s adequacy, this will add significant costs and hurdles to the process. For example, would companies have unfettered access to CalPERS’ trading history of the company and the managers trading on its behalf to conclusively decide that CalPERS was obtaining the company’s shares in the normal course of business? It is CalPERS’ experience

that companies where a triggering event has occurred will likely take such aggressive action because of a fear of conspiracy or unfairness against existing management.

Also, analogous rights to information may not be so readily available to shareowners regarding the Company's candidates.

In conclusion, all the information necessary to evaluate these issues should be in the required disclosures, which CalPERS believes, is already required."

We disagree with the last sentence. We believe as noted above, that certain groups, including labor and related narrowly focused interests, disgruntled employees, corporate raiders, investment banks and others may seek to use these new rules unfairly, to create new takeover techniques. To minimize this possibility, we suggest the Commission require full disclosure of all director nominee interests, including any interests that could conflict with those of other shareholders.

a. Should the company be provided with a maximum amount of time to request specific information (e.g., three days, five days, one week, two weeks, or one month)?

Three days.

b. Should nominating security holders and/or nominees be provided with a maximum amount of time to respond to such a request (e.g., three days, five days, one week, two weeks, or one month)?

Two weeks. Again, we suggest they be specifically allowed to use the internet to provide responses to inquiries.

c. Should the procedure prescribe the type of information that a company may request from a nominating security holder or nominee?

Yes.

Should the procedure specify those representations in the nominating security holder's notice to the company with regard to which the company may request information?

Yes.

d. Should the procedure include a method for a company to obtain follow-up information after a nominating security holder or nominee submits an initial response?

Yes, since the initial submission may be unresponsive or unclear. But, the right of a company to request additional data should be subject to finite time requirements. In addition, there should be severe penalties (including the loss of the right to challenge or question nominees) should a company be found to have used this right as a delaying or harassment tactic.

If so, should that follow-up method have similar time frames and informational standards to those related to the initial request and response?

Yes.

e. Should the rule explicitly state that a nominee may be excluded from a company's proxy materials if the nominating security holder or nominee does not provide the requested

information in the required timeframe, or if the information does not confirm the representations included in the notice to the company, or is it sufficient to rely on the proposed provision that permits the exclusion of nominees when a representation is false in any material respect? In order to facilitate reliance on this proposed provision if a nominating security holder or nominee fails to provide requested information, would it be appropriate to require that a nominating security holder represent that the nominating security holder or nominee will respond to a request by the company for information that is reasonably necessary to confirm the accuracy of representations of the nominating security holder?

We agree with CALPERS: "A no-action letter process should be followed. There should be notice and cure opportunities for shareholder nominees. Like any new rule there will be unforeseen issues and problems and the companies should not use these problems to exclude nominees from the proxy who were intended to be included. Therefore, a notice and cure period is necessary. Also, because of the occurrence of the triggering events it is likely that some companies will look for every loophole to exclude qualified nominees. If the rule is not simple and easy to follow and does not have a cheap and easy dispute resolution mechanism, it will not work as efficiently as it could."

f. Should this procedure be the same for operating companies, registered investment companies, and business development companies?

No.

Should there be unique procedures for different types of entities?
If so, what is unique to a particular type of entity that would
require a unique procedure?

We do not know. Procedures should be targeted to and made relevant for each of the types of entities listed above.

I.4. As proposed, the company must provide the nominating security holder or nominating security holder group with notice of its determination whether to include in its proxy statement the security holder nominee by a date that will generally fall approximately 30 days prior to the date the company will mail its proxy statement. Does this requirement allow the nominating security holder or nominating security holder group adequate time to contest a company's determination with regard to a potential security holder nominee?

No.

If not, what timing would be more appropriate?

45 days.

Is the timing requirement with regard to the nominating security holder's submission of its statement of support to the company appropriate?

Yes.

If not, what timing would be appropriate?

N/A

I.5. As proposed, the rule would not provide a mechanism by which a nominating security holder or nominating security holder group could "cure" a defective notice. Would such a "cure" period, similar to that currently provided under Exchange Act Rule 14a-8, be appropriate?

Yes.

If so, how and by what date should a company be required to notify a nominating security holder or nominating security holder group of a defect in the notice?

No comment. We defer to the Commission's judgment.

How long should the nominating security holder or nominating security holder group have to cure any defects? Are there any defects that would not require notice by the company, for example, where a defect could not be remedied?

No. Notice should always be required. To lower costs, notice should be delivered electronically, at a web site specifically created to facilitate the security holder nomination process.

I.6. As proposed, inclusion of a security holder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the proposed rules make clear that inclusion of a security holder nominee would not be deemed a "solicitation in opposition." Is it appropriate to view the inclusion of a nominee in

this manner or should the inclusion of a nominee instead be viewed as a solicitation in opposition that would require a company to file its proxy statement in preliminary form? Should we view inclusion of a security holder nominee as a solicitation in opposition for other purposes (e.g., expanded disclosure obligations)?

We agree with the rule as proposed.

I.7. As proposed, the rule would prohibit companies from providing security holders the option of voting for the company's slate of nominees as a whole. Should we allow companies to provide that option to security holders? Are any other revisions to the form of proxy appropriate?

We agree with CALPERS: "The rule should prohibit companies from providing holders the option of voting for the company's slate and provide a level-playing field between candidates. Allowing a shareholder to vote for an entire slate will have the potential effect of discouraging voters from taking the time and effort to identify whether any candidates are contested and to evaluate the qualifications of the competing nominees. Most importantly, many voters might mistakenly believe that the election is not contested."

J.1. Is it appropriate to characterize the statements in the nominating security holder's notice as the nominating security holder's representations and not the company's?

Yes.

Does the proposal make clear that the nominating security holder would be responsible for the information submitted to the company?

Yes.

Should the proposal characterize these statements differently?

No.

If so, please explain in what manner.

N/A.

J.2. Does the proposal make clear the company's responsibilities when it includes such information in its proxy materials?

Yes.

Should the proposal include language otherwise addressing a company's responsibility for repeating statements that it knows are not accurate?

Yes.

J.3. Should information provided by nominating security holders or nominating security holder groups be deemed incorporated by reference into Securities Act or Exchange Act filings?

No.

Why?

K.1. What requirements should apply to soliciting activities conducted by a nominating security holder?

None, except that they be fair, just and consistent with the law. We again suggest these activities be carried out on line, at a web site specifically designed to facilitate this type of activity.

In particular, what filing requirements and specific parameters should apply to any such solicitations?

All security holder nominee interest fully disclosed.

For example, we have proposed that certain solicitations by security holders seeking to form a nominating security holder group be limited to no more than 30 security holders. Is this limitation appropriate?

No.

If not, what limitation would be appropriate, if any (e.g., fewer than 10 security holders, 10 security holders, 20 security holders, 40 security holders, more than 40 security holders)?

None. Limitations, if any, should be based on technological constraints, (i.e. the number of people you can squeeze into a chatroom or on a website facility.)

In addition, is the alternate, content-based limitation appropriate?

Yes.

If not, what limitations would be more appropriate?

N/A

K.2. Should communications in connection with a direct access security holder proposal, for example by security holders seeking to form a more than 1% group to submit a security holder proposal, be included in the exemption provided for communications between security holders seeking to form a nominating security holder group? Would such an exemption be necessary and/or appropriate? If so, what parameters should apply?

We agree with CALPERS: "CaLPERS thinks such communications are likely already exempted, but if they are not, they should be included in the exemption.

CaLPERS is not supportive of the proposed requirement that a group of at least 1% must submit a proposal for it to be applicable under this rule."

K.3. Should all soliciting materials be filed with the Commission on the date of first use?

Yes. It is vitally important that the Commission be fully informed from the start. We again suggest these activities be carried out on line, at a web site specifically designed to facilitate this type of activity.

For example, as proposed, security holder communications that are limited to no more than 30 security holders would be filed with the Commission. Would such filing render the limitation

unworkable in that the communication would be readily accessible to security holders on EDGAR?

See comments above. We believe the requirement that security holders use a specifically designed web site would eliminate this concern.

K.4. We contemplate that solicitations in connection with elections involving Exchange Act Rule 14a-11 could involve electronic means. We have provided that, where requested, the company would include in its proxy materials the website address where solicitation materials related to a security holder nominee may be found. Are there other steps that we should take to provide for or encourage the use of electronic means for these elections?

Yes. See our comments above. We suggest the Commission create a web site specifically designed to facilitate this type of activity.

To facilitate this effort, we suggest the Commission carefully review the experience of the Federal Financial Institution Examination Council (FFIEC) with respect to the implementation of the Home Mortgage Disclosure Act. HMDA requires banks and other financial institutions to report statistics on every home mortgage loan application received.

We also suggest the Commission capture data related to the company's nominating committee, nominating committee policies, track record of responding to shareholder concerns, number and type of contested elections, number of nominees proposed and elected and criteria for considering nominees. The SEC would have to maintain this database that it would then process and make available to the public.

Having the SEC maintain a database would clearly serve the public interest. A database would lower information search costs by making it easier for the public to review policies and actions across companies.

We also suggest the Commission describe policies and procedures it believes are best practices in a separate set of documents.

L.1. Should the proposed security holder nomination procedure apply to funds?

Yes.

If so, to which funds should it apply?

All. The Commission may want to consider a market capitalization limit.

Are there any aspects of the proposed nomination procedure that should be modified in the case of funds?

In general, we favor the extension of this rule to funds.

L.2. Should we apply the "interested person" standard of Section 2(a)(19) of the Investment Company Act with respect to the representation that a security holder nominee be independent from a company that is a fund?

We don't know.

Should the "interested person" standard also apply to security holder nominees for election to the board of directors of a business development company?

We don't know.

Should we instead apply a different independence standard to funds or business development companies, such as the definition of independence in Exchange Act Rule 10A-3?

We don't know.

L.3. Is it appropriate to require a nominating security holder or group of security holders of a mutual fund to provide disclosure of its 5% beneficial ownership of the fund's securities in its notice to the fund of its intent to require its nominee on the fund's proxy card?

We don't know.

If so, what requirements from Exchange Act Schedule 13G (or other information) should be required to be included in the notice?

We don't know.

Should such a security holder or group instead be required to file on Exchange Act Schedule 13G upon reaching the 5% beneficial ownership threshold, in order to provide the fund with notice in advance that the security holder or group has reached this threshold?

We don't know.

If so, are there any requirements of Exchange Act Schedule 13G that should be modified for this purpose?

We don't know.

L.4. Are the triggering events proposed for use of the security holder nomination procedure appropriate for funds?

In general, yes.

Are there other nomination procedure triggering events that should be used?

Yes. Fraud or other corporate actions that threaten the continued operation of the fund.

L.5. Should a fund be required to provide disclosure on Form N-CSR of whether it would be subject to the security holder nomination procedure as a result of a security holder vote with regard to any of the nomination procedure triggering events, and the required disclosure regarding such a nomination procedure triggering event?

Yes.

Will this disclosure allow sufficient time for a security holder to effectively exercise the nomination procedure?

Perhaps. Again, we suggest these procedures be conducted on line.

Should this disclosure instead be required on a different form?

No.

L.6. We are proposing to delete as duplicative Item 77C of Form N-SAR, which currently requires disclosure regarding matters submitted to a vote of security holders similar to that required by Item 4 of Part II of Exchange Act Form 10-Q, and move this disclosure to Form N-CSR. Should this disclosure remain in Form N-SAR?

We defer to the Commission's judgment.

L.7. Should a fund be required to disclose on Exchange Act Form 8-K the date by which a security holder or security holder group must submit the notice to the fund of its intent to require its nominees on the fund's proxy card? Should funds instead be permitted to provide this disclosure in a different manner?

Yes. We suggest the Commission create a web site specifically designed to facilitate this type of disclosure activity.

M.1. The proposal would provide that a security holder or security holder group would not, solely by virtue of nominating a director under proposed Exchange Act Rule 14a-11, soliciting on behalf of that candidate, or having that candidate elected, be viewed as having acquired securities for the purpose or effect of changing or influencing the control of the company. This provision would then permit those holders or groups of holders to report their ownership on Exchange Act Schedule 13G, rather than Exchange Act Schedule 13D. Is this approach appropriate?

Yes.

Should other conditions be required to be satisfied? If so, what other conditions?

Full disclosure of all security holder group interests, including those that might conflict with other shareholders.

M.2. Should nominating security holders, including groups, be deemed to have a "control" purpose that would create additional filing and disclosure requirements under the Exchange Act beneficial ownership reporting standards?

No.

M.3. As proposed, security holders that intend to nominate a director pursuant to Exchange Act Rule 14a-11 would be required to disclose this intent on Exchange Act Schedule 13G. Those filers who originally filed an Exchange Act Schedule 13G without an Exchange Act Rule 14a-11 intent would be required to amend their Exchange Act Schedule 13G to disclose such intent if it exists. Is it appropriate to require such an amendment by existing filers? If not, how should such filers indicate their intent to make a nomination pursuant to Exchange Act Rule 14a-11? Are the security holder notice requirements of Exchange Act Rule 14a-11(c) sufficient for this purpose? Intent to use the nomination procedure would be evidenced in both new filings and amendments to already-filed Schedules by the beneficial owner checking the box on the cover page of the Schedule to identify the filing as having been made in connection with a nomination under the procedure and by making the proposed new

certification regarding ownership of the required amount of company securities. Is this sufficient notice of the beneficial owner's intent to use the nomination procedure? Should we also require new disclosure related to such intent in a new item requirement to the Schedule? Would this be appropriate in light of the fact that Exchange Act Schedule 13G currently does not require such "purpose" disclosure?

We agree with CALPERS: "Yes, such an amendment is appropriate where the intent of the shareowner is not specified. The Commission should facilitate the ease of compliance by amending all forms where helpful.

The holder notice requirements of Exchange Act Rule 14a-11(c) are sufficient for this purpose."

M.4. As proposed, nominating security holders and nominating security holder groups would be required to amend their Exchange Act Schedule 13G filings in accordance with the existing timing requirements for qualified institutional investors and passive investors. Should we instead require that such filers amend on a more expedited basis? For example, should such filers be required to report changes in the information reported previously promptly after such change or within another, specified period of time? Should amendments be limited to material changes in the information reported if such an expedited requirement is used? Should the election as director of a nominating security holder group's nominee be deemed the termination of that group (provided that the group does not have an agreement to act together for some other purpose)? Should such an election require an amendment to the nominating

security holder or nominating security holder group's Exchange Act Schedule 13G?

We agree with CALPERS: "The 13G requirements are adequate."

M.5. Are there any qualified institutional investors under Exchange Act Rule 13d-1(b) that would be qualified to file on Exchange Act Schedule 13G but should not be included in the category of filers who may nominate a director using the proposed procedure? If so, please explain why.

We don't know.

M.6. A related issue with regard to beneficial ownership reporting is whether the withhold votes nomination procedure trigger may result in increased numbers of "vote no" campaigns by security holders who are attempting to trigger the nomination procedure. The possibility of triggering Exchange Act Schedule 13D reporting requirements currently may have a chilling effect on security holders who otherwise would organize such an effort. With regard to this concern, do the current rules under Exchange Act Regulation 13D have such a chilling effect? Are the current rules sufficient to determine when such activities should require additional security holder filings? Should security holders who organize such a campaign be deemed to have a control purpose or effect that would necessitate filing on Exchange Act Schedule 13D rather than Exchange Act Schedule 13G? Should we issue specific guidance with regard to these "vote no" campaigns and the beneficial ownership reporting requirements generally? Should any such guidance be limited to circumstances where the

security holder engaging in the "vote no" campaign does so solely to trigger the security holder nomination procedure?

We defer to CALPERS: "Yes, the current rules are a deterrent to pursuing vote no campaigns. For example, CalPERS' policy is to withhold votes where a company has not implemented a majority-vote shareholder proposal. CalPERS would like to pursue more vigorous vote no campaigns against these companies presently and regardless of this proposed rule. The 13D rules, we have been advised, limit our ability to pursue such initiatives without regulatory requirements meant to apply to shareholders attempting to take over a company. We "vote no" on hundreds of directors per year, not because we want to control a Company, but because the directors are not following what CalPERS considers best practices in the board room, and because often the directors and Company are unresponsive to the proxy process. The Commission should address this issue to allow "vote no" campaigns by investors such as CalPERS where directors are perceived by shareowners to be performing poorly or are otherwise not responsive to shareowners."

N.1. Would the proposed Exchange Act Rule 16a-1(a)(1) amendments address nominating security holders and nominating security holder groups appropriately?

Yes.

Should the proposed exclusion be based on any additional or different conditions?

No.

N.2. If the Commission adopts a security holder nomination rule with an eligibility threshold of 10% or greater, would Exchange

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Act Section 16 reporting and short swing profit liability deter the formation of nominating security holder groups?

Yes.

III. Paperwork Reduction Act Responses

Below, our estimate of the PRA Reporting and Cost Burdens.

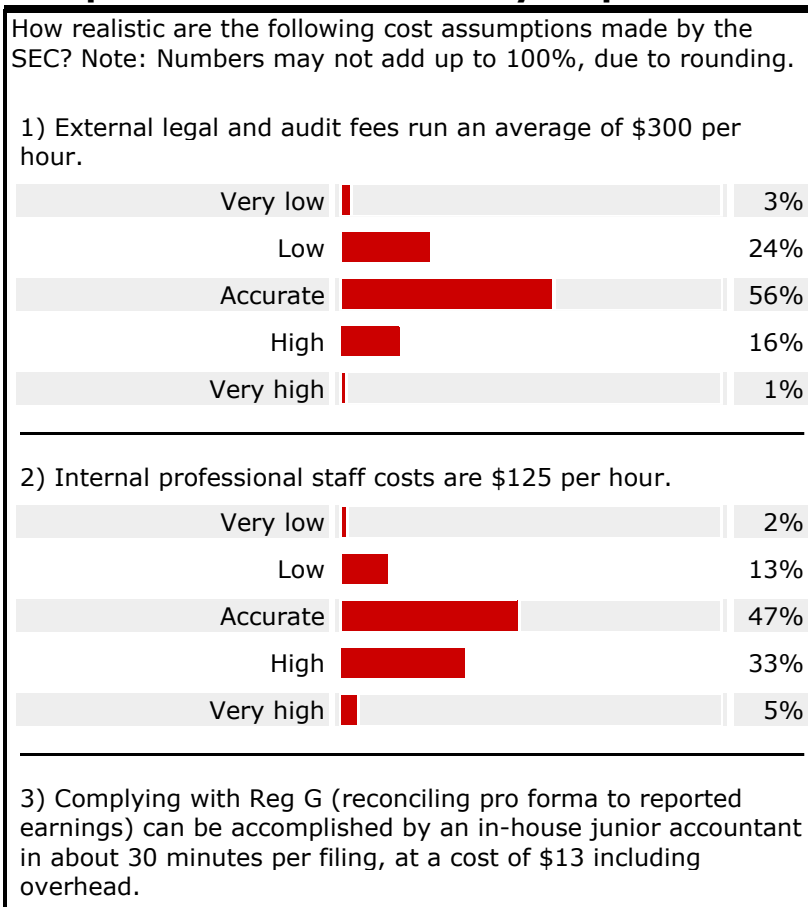
Table 1: Calculation of Incremental PRA Burden Estimates							
	Annual Responses	Annual Responses Affected	Incremental Hours/ Form	Incremental Burden	75% Company	25% Professional	\$500 Prof. Cost
		(A)	(B)	(C)=(A) × (B)	(D)=(C) × 0.75	(E)=(C) × 0.25	(F)=(E) × \$500
SCH 14A* **	7,188	104	20	2,080	1560	520	\$260,000
SCH 14C* **	446	7	20	140	105	35	\$17,500
FORM 10-K*	8,484	28	5	140	105	35	\$17,500
FORM 10-Q*	23,743 (7,914 respondents)	83	5	415	311.25	103.75	\$51,875
FORM 8-K	333,915 (13,200 respondents)	3	20	60	45	15	\$7,500
FORM N-CSR	6,658 (3829 respondents)	281	5	1,405	1053.75	351.25	\$175,625
Rule 20a-1* **	1,058	24	40	960	720	240	\$120,000
	Annual Responses	Annual Responses Affected	Incremental Hours/ Form	Incremental Burden	25% Company	75% Professional	\$500 Prof. Cost
SCH 13G	9,500	90	20	1,800	1350	1350	\$675,000
	Annual Responses	Annual Responses Affected	Incremental Hours/ Form	Incremental Burden	100% Company and Security Holders	0% Professional	\$500 Prof. Cost
FORM N-SAR	9306 (4653 respondents)	281	-0.5	-140.5	-140.5	0	0
Total				6,860	5,110	2,650	\$ 1,325,000

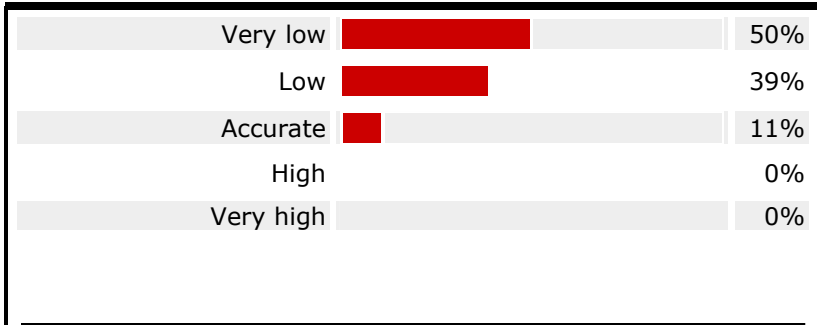
We understand the Commission is seeking to “solicit comments to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

We believe the proposed collection of information is necessary for the proper performance of the functions of the agency. We think the information will have practical utility.

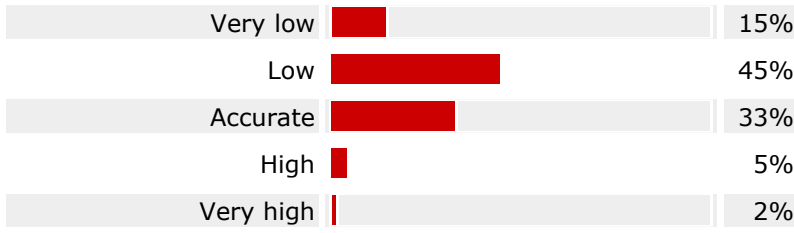
(ii) evaluate the accuracy of our estimate of the burden of the proposed collection of information;

See Table 1 above. We refer the Commission to the cost of compliance with the Sarbanes-Oxley Act of 2002. "In August, CFO Magazine E-mailed a questionnaire on Sarbanes-Oxley compliance to senior financial executives drawn randomly from our circulation list. We received 220 responses; 139 from executives at publicly traded companies." Relevant survey responses are reproduced below.

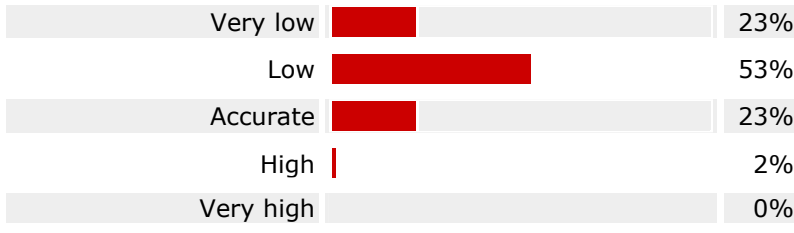




4) Disclosure associated with off-balance sheet arrangements costs \$10,000, including in-house staff time and outside professional fees.



5) Additional disclosure associated with nonaudit fees and changes in practices to promote auditor independence takes about two hours, half a page of a proxy and/or 10-K, and costs about \$418 per filing, including internal and external staff fees.



6) The average annual cost of implementing Section 404 is around \$91,000 per company.



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Source: CFO Magazine.

(iii) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected;

We believe there are several ways to enhance the quality, utility and clarity of the information to be collected. As suggested above, public companies should be required to conduct Board elections on-line, via the Internet. Candidates could be nominated by shareholders on-line and a fair, efficient candidate screening procedure could be established.

Board elections could be conducted using an SEC managed, secure, tamper resistant, management-independent website.

and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology."

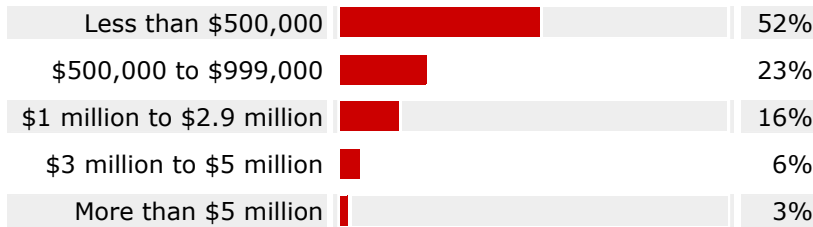
See our comments about using the Internet, above. To the extent that the Commission can implement the suggestions noted above, we believe a web site specifically designed to facilitate this type of activity will also result in a lower burden of the collection of information.

O.1. We solicit quantitative data to assist our assessment of the benefits and costs of enhanced security holder access to company proxy materials when there has been a demonstrated failure in the proxy process. Will proposed Exchange Act Rule 14a-11 increase director accountability and responsiveness?

Yes.

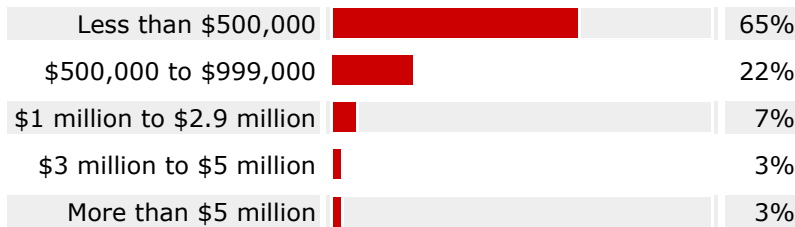
If so, what costs would be incurred in instituting responsive policies and procedures?

See our comments on costs above. We believe costs can be minimized by using on-line resources and services. Companies will incur time and monetary costs. While we cannot be certain of the full costs, we refer the Commission to the CFO Magazine Survey on the cost of compliance with the Sarbanes-Oxley Act of 2002. According to the survey, the total costs to implement all portions of the Act are described below:



Source: CFO Magazine.

Survey participants indicated that compliance costs going forward would be as noted below:



Source: CFO Magazine.

Will more accountability and responsiveness lead to better managed boards?

Yes.

What effects, if any, would increased accountability and responsiveness have on the board's time spent in its duties overseeing management?

It is difficult to determine at this point, but we expect that board time spent in duties overseeing management will increase. We believe this is appropriate.

O.2. We solicit quantitative data on the potential increases, if any, of security holder proposals under Exchange Act Rule 14a-8 as a result of these proposed rules. We also solicit quantitative data on how often the two triggering events that would activate proposed Exchange Act Rule 14a-11 would occur.

It is difficult to determine at this point, but we expect the two triggering events would occur no more than 15% of the time. We suggest the Commission review information

O.3. We solicit quantitative data on the time and cost spent in preparing a no-action request to exclude a proposal under Exchange Act Rule 14a-8, the incremental cost spent to print and mail such a security holder proposal and to include a security holder nominee and his/her background information in the proxy materials, and the cost borne by both companies and security holders to solicit security holders regarding a direct access security holder proposal and election of a nominee or nominees to the board.

See our comments on costs above. We believe costs can be minimized by using on-line resources and services.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

The Commission has requested “comment regarding the degree to which our proposed disclosure requirements would create competitively harmful effects upon public companies, and how to minimize those effects. We also request comment on any disproportionate cross-sectional burdens among the firms affected by our proposals that could have anti-competitive effects.”

We do not believe the rules will have an “adverse impact on efficiency, competition and capital formation” due to the fact “that boards may devote less time to overseeing the management of companies because they are spending more time on security holder relations.”

We refer the Commission to the cost of compliance with the Sarbanes-Oxley Act of 2002 and the CFO Magazine questionnaire. According to the survey, the percentage of respondents indicating that projects or initiatives have been delayed or canceled as a result of Sarbanes-Oxley compliance totaled 54%. We believe a similar percentage of “boards may devote less time to overseeing the management of companies because they are spending more time on security holder relations.”

Have projects or initiatives been delayed or canceled as a result of Sarbanes-Oxley compliance?



Source: CFO Magazine.

VI. Initial Regulatory Flexibility Act Analysis

D. Small Entities Subject to the Proposed Rules

The Commission requested “comment on the number of small entities that would be impacted by our proposals, including any available empirical data.”

We concur with the Commission’s estimate concerning the number of small entities impacted by the proposal. We do not agree with the Commission’s estimate concerning the hourly burden number of small entities impacted by the proposal.

We believe these estimates are too low. We suggest the Commission review information on the cost of compliance with the Sarbanes-Oxley Act of 2002.

The Commission assumed outside legal fees would be \$300. We believe these rules will require initial consultations with senior partners, “whose rates run from \$400 to \$700 per hour in most big cities.”

Likewise, we believe the estimate of hours too low. Since “the proposed nomination procedure would be triggered at only” a limited number of companies, those companies impacted will have serious corporate governance problems. These problems will require

management to spend significant time resolving these issues. This will result in increased costs.

F. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or completely duplicate the proposed rules.

G. Significant Alternatives

We understand that the Regulatory Flexibility Act directs the Commission “to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities.” Our comments on this matter are outlined below. The Commission considered the following amendments:

1. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
2. The clarification, consolidation or simplification of disclosure for small entities; and
3. An exemption for small entities from coverage under the proposals.

We prefer the Commission consider an exemption for small entities from coverage under the proposals. While we agree that “an exemption or separate requirements for small entities may not address issues of corporate accountability and security holder rights that may affect small entities as much as they would affect large companies” we believe this consideration irrelevant. Boards are

especially important for small companies. Managers should be allowed some leeway and flexibility in forming Boards at small companies. These companies have limited market influence and impact. It is more important not to inhibit the ability of these companies to reach significant size.

H. Solicitation of Comment

We understand the Commission is seeking “comments with respect to any aspect of this Initial Regulatory Flexibility Analysis.” The Commission “request comments regarding: (i) the number of small entities that may be affected by the proposals;”

We defer to the Commissions estimate of the number of small business entities impacted.

“(ii) the existence or nature of the potential impact of the proposals on small entities discussed in the analysis;”

See our comments above. We believe small entities should be exempted.

and “(iii) how to quantify the impact of the proposed rules.”

We suggest the Commission review the CFO Magazine Survey, cited above. The Commission may want to conduct a survey to determine the impact of the proposed rules.

VII. Small Business Regulatory Enforcement Fairness Act

We understand the Commission seeks “comment on whether our proposals would be a ‘major rule’ for purposes of SBREFA.” The Commission seeks “comment and empirical data on:”

(a) the potential effect on the U.S. economy on an annual basis;

We believe the proposal would have a major positive long term impact on the economy.

A growing number of major corporations conducted deceptive and fraudulent activities. These activities were carried out by corporate officers, accountants, investment banks, investment analysts, mutual funds and brokerage firms. Greed and other unethical behavior is, like a virus, quick to spread. Accountants, CFO's, CEO's, investment banks and investment analysts, have all been contaminated. Even mutual funds. Unless inoculated, all sectors of the economy will be infected.

Just as a virus may bring about a general decline in the health of an organism, this type of unethical behavior will result in a general decline in the health of the economy. Societal fairness and justice will fall, as will market efficiency.

(b) any potential increase in costs or prices for consumers or individual industries; and

Unless checked, the illegal behavior that gave rise to the Commission's proposal will result in higher prices and fewer jobs. The proposal will actually result in lower costs.

(c) any potential effect on competition, investment or innovation.

Unless checked, the illegal behavior that gave rise to the Commission's proposal will result in lower competition, investment and innovation. The proposal will actually result in higher levels of competition, investment and innovation.

APPENDIX B

Inquiry concerning responsibility under the duty of care standard to monitor corporate events and to vote proxies, as an SEC and State-registered investment adviser who also worked for a pension fund.

Mr. Cunningham noted several incidents at prior job that led him to be concerned about his ability to carry out his duty to exercise proper care. As a result, he questioned the Commission about his liability for negligence on the part of his employer. Background memorandum are included below.



BOARD OF PENSIONS
EVANGELICAL LUTHERAN CHURCH IN AMERICA
800 Marquette Avenue, Suite 1050 □ Minneapolis, Minnesota 55402 □ 612-333-7651

MEMORANDUM

DATE: Thursday, February 14, 2002

TO: Mike Troutman, Dave Lecander, Janet Sergot, Beverly Riegel

FROM: BILL CUNNINGHAM

RE: 2001 Proxy Voting Activity

This memorandum summarizes 2001 proxy voting activity for the ELCA Board of Pensions.

In 2001, the Board voted on 1395 issues impacting 401 companies. These votes conformed to proxy voting guidelines. In 1041 matters, we voted in favor of shareholder resolutions. We voted against 349 items. We abstained from voting on 5 matters. We voted against management 261 times. A complete report on proxy voting activities in 2001 is available.

Proxies from 86 companies were not voted in 2001. In 2000, proxies from 30 companies were not voted. In 1999, The Board did not vote 43 proxies.

For 2001, in some cases, vendor systems failure prevented staff from determining the economic impact of the subject proxy proposal. In other cases, changes in corporate annual meetings following events related to September 11, 2001 prohibited staff from filing timely votes.

More importantly, certain factors related to administrative staff, including staff turnover, have negatively impacted our proxy voting activities. After attempting to solve the problem with currently assigned administrative staff, I notified Dave Lecander (my supervisor) and Beverly Riegel (administrative staff supervisor) of the problem. Attached are several email messages sent in 2001 concerning this issue. The first email is dated May 11, 2001. The final email is dated July 29, 2001.¹⁸ In addition, to protect the Board and to help insure that administrative tasks relating to proxy voting be carried out professionally, I suggested another administrative staff person (Jeanne Hammerly) be assigned to assist or replace the person currently handling this task (Julie Kaplan).¹⁹

¹⁸ After this date, it became apparent that further efforts to correct the problem by replacing administrative personnel would be futile.

¹⁹ In my experience, Julie has opinions that prevent her from working professionally with managers who happen to be people of color. Incidents reflecting these opinions have made it

-----Original Message-----

From: Bill Cunningham
Sent: Friday, May 11, 2001 10:29 AM
To: Julie Kaplin
Cc: Bev Riegel; Dave Lecander
Subject: Missed proxy votes

We missed the following international proxy votes:

Taiwan Semiconductor Mfc.
Koninklijke Nederlandsche Petroleum Maatschappij

Julie, you've been posting the domestic proxy voting date on the international proxy materials. This is incorrect. International proxies have specific cut off dates that are listed on the bottom of each ballot. Please post this cut off date on international proxy forms forwarded to me. Thanks.

William Michael Cunningham
Manager, Social Purpose Investing & Customer Education
Board of Pensions
ELCA
800 Marquette Ave.
Suite 1050
Minneapolis, MN 55402
612-752-4268 phone

difficult for me to work with Julie. In a meeting with Janet Sergot, Manager, Human Resources, held on Tuesday, October 30, 2001, I described specific nonproductive incidents and specific language Julie has used that I found objectionable.

-----Original Message-----

From: Bill Cunningham
Sent: Tuesday, June 05, 2001 6:53 PM
To: Julie Kaplin
Cc: Bev Riegel
Subject: Missed Proxy Vote

I discovered the proxy for Nabors Industries today stuck inside the proxy documentation for Converse Technology. The Nabors meeting took place today, so we missed voting. Julie, you'll want to make sure to separate the proxies documents in the future.

Thanks.

William Michael Cunningham
Manager, Social Purpose Investing & Customer Education
Board of Pensions
ELCA
800 Marquette Ave.
Suite 1050
Minneapolis, MN 55402
612-752-4268 phone

-----Original Message-----

From: Bill Cunningham
Sent: Thursday, June 07, 2001 11:11 AM
To: Bev Riegel
Subject: RE: Missed Proxy Vote
Sensitivity: Private

As I have indicated, the administrative support for proxy voting has gone thru a number of iterations. We have had at least four admins involved in the process over the past year: Julie, Tina, Myhang, and LJ. This one of the key issues here. In addition, as I have mentioned several times, Julie seems to have an issue working in a diverse environment. This does not help matters and may now be impacting her (and my) work. Placing a proxy ballot box in my office is fine, if you think this will help.

The short term solution is to carefully monitor the situation, as I have, noting every problem as it occurs. Perhaps we want to do a trial run of the proxy voting report out of IRRC to determine how many proxies have been voted to date and the number of missed votes.

A further issue concerns Julies' creation of ballots in the IRRC program. In certain cases, ballots are missing from the IRRC database. Julie then creates a ballot, selecting the issues to place on the ballot. This is fine, as long as the created ballot matches the real ballot. We need to check. I will check with IRRC to determine why these ballots are missing in the first place.

Thanks.

William Michael Cunningham
Manager, Social Purpose Investing & Customer Education
Board of Pensions
ELCA
800 Marquette Ave.
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Minneapolis, MN 55402
612-752-4268 phone

-----Original Message-----

From: Bill Cunningham
Sent: Sunday, July 29, 2001 8:02 PM
To: Bev Riegel
Cc: Dave Lecander
Subject: Missed proxy votes

FYI...There are several (5 or 6) proxies that I am, I believe, just getting that we missed voting on. I will provide more detail later.

William Michael Cunningham



BOARD OF PENSIONS
EVANGELICAL LUTHERAN CHURCH IN AMERICA

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MEMORANDUM

DATE: Wednesday, January 09, 2002
TO: Janet Sergot
FROM: Bill Cunningham
SUBJECT: Workplace environment issues

There have been several workplace incidents I think need to be reviewed by the Board. I have noted (racially) offensive language incidents with Tim Kaspar, Mark Haney, Diane Brehmer, Julie Kaplan and several others. My operating policy has been to report these incidents to my supervisor, Dave Lecander. While I have reported incidents before, I have refrained from, until now, formally cataloging these incidents. (Note that this is not a complete catalog.) I have sought, instead, to work with the individuals. Unfortunately, this approach has met with limited success.

While the Board has made some progress in addressing the diversity issue, by starting a diversity team, for example, these incidents have continued. Together, these incidents may breach Board policy and values, and well as certain basic employment guidelines. In addition, these incidents and the resulting may have negatively impacted performance here at the Board by making collaboration more difficult.

ELCA, as a Church, has committed itself to: hir(ing) without discriminating on the basis of race, ethnicity, gender, age, disabilities, sexual orientation, or genetic factors; compensat(ing) all people we call or employ at an amount sufficient for them to live in dignity; provid(ing) adequate pension and health benefits, safe and healthy work conditions, sufficient periods of rest, vacation, and sabbatical, and family-friendly work schedules; cultivat(ing) workplaces of participatory decision-making;

The Board has committed itself to upholding certain core values, including: Respect: We value every individual and their diverse contributions and styles; We treat everyone with dignity and respect; We strive to create a work environment of openness and trust.

I believe these statements help to define ELCA and ELCA BOP employment policy. I believe the Church clearly favors a non-discriminatory workplace. As a branch of the Church, ELCA

BOP may, also, support nondiscriminatory workplaces. The behavior noted below stands in contrast to the Board's values, since I find offensive language threatening.

Let me discuss several incidents specifically.

Most disturbingly, on April 17, 2001, at an off site gathering at the 8th Street Grill, Tim Kasper, after viewing photographs I took of Stuttgart, Germany the following exchange took place:

WMC: "Well, the grass looks greener than it should be this time of year."

Tim Kasper: "It's probably because of all the Jewish fertilizer."

WMC: No reply.

I immediately noted the comment in an email dated 4/17/01 to my supervisor, Dave Lecander. That email exchange is included. No other action that I know of concerning this incident was taken.

I was stunned by the offensive nature of this comment. This was not the first time or the last time Tim has made comments I found offensive. I have included an email message from 10/25/01.

In an email I sent to Diane Brehmer on December 6, 2001, I requested a meeting with her to discuss communication issues, before going to supervisors. This request followed the model suggested in an ELCA BOP document stating "All (ELCA BOP) employees owe each other:

- A commitment to deal directly with each other first and to go to superiors only as a last resort."

I have attempted to communicate with Diane after this incident, even offering to apologize, but she indicated that she "is not speaking to me". This makes communicating with her problematic. This is not the first time I have had an issue with Diane's speech or behavior. There have been at least three, prior to 12/6/01. I have dealt with these other incidents informally. Information on one incident, occurring on June 4, 2001, is attached. Diane's attitude has been, in my opinion, intolerant. In discussing these incidents with her in 2000 and 2001, she indicated her conservative upbringing, as a member of the Wisconsin Synod was a factor. After earlier incidents, I worked with her on these issues, but now find her lack of progress and lack of willingness to speak about these matters problematic, since this interferes with my ability to answer questions related to my work. I have had a confidential conversation with Janet Sergot mentioning these incidents.

Often, in these matters, a party will overreact to collaborative and corrective attempts as a way of trying to "shield" themselves from scrutiny.

-----Original Message-----

From: Bill Cunningham
Sent: Tuesday, April 17, 2001 10:21 PM
To: Dave Lecander
Subject:

I take strong exception to Tim's comment about the grass in Germany. I found the comment very offensive....

William Michael Cunningham
Manager, Social Purpose Investing & Customer Education
Board of Pensions
ELCA
800 Marquette Ave.
Suite 1050
Minneapolis, MN 55402
612-752-4268 phone

-----Original Message-----

From: Dave Lecander
Sent: Wednesday, April 18, 2001 10:11 AM
To: Bill Cunningham
Subject: RE:

Well, my hunch is Tim regretted saying it just as he was saying it. A very atypical comment from TK. Any proposed follow-ups (e.g., mentioning it directly to Tim)?

-Dave