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August 24, 2011

Via Email: rule-comments@sec.gov

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

Re: File No. S7-10-09
Rel. Nos. 33-9046; 34-60089; IC-28765;33-9086
Facilitating Shareholder Director Nominations

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee" or "we") of the Business Law Section (the "Section") of the American Bar Association (the "ABA"). The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, these comments do not represent the official position of the Section.¹

We understand that the Securities and Exchange Commission (the "Commission") is evaluating the appropriate steps to take in light of the July 22, 2011 decision of the U.S. Court of Appeals for the District of Columbia invalidating Rule 14a-11² and that, among other things, the Commission will determine and announce what action it will take with respect to the Commission's order staying the effectiveness of the amendments to Rule 14a-8 that were adopted contemporaneously with Rule 14a-11.³ For the reasons set forth below, we are writing to recommend that the Commission continue to stay the

¹ In connection with the referenced rulemaking, this Committee previously has submitted three letters to the Commission, dated August 31, 2009 <http://sec.gov/comments/s7-10-09/s71009-456.pdf>; September 18, 2009 <http://sec.gov/comments/s7-10-09/s71009-535.pdf>; and January 19, 2010 <http://sec.gov/comments/s7-10-09/s71009-624.pdf>.

² *Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission* (D.C. Cir. July 22, 2011).

³ According to the Commission's notice of the October 4, 2010 Order Granting Stay (the "Stay Order"), published in the Federal Register on October 14, 2010: "The Commission will publish a document in the Federal Register announcing the effective and compliance dates following resolution of the petition for review in Business Roundtable [filed in the U.S. Court of Appeals for the District of Columbia Circuit]." SEC Rel. No. 9151, 75 FR 64641.

effectiveness of the amendments to Rule 14a-8, and that it either repropose the amendments to Rule 14a-8 or reopen the comment period relating to those amendments, in order to more fully consider the implications of the amendments in the absence of Rule 14a-11.

The amendments to Rule 14a-8 would enable shareholders, under certain circumstances, to require companies to include in their proxy materials shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding director nomination procedures or disclosures related to shareholder nominations.⁴ As stated in Part II.C. of the Adopting Release, the amendments to Rule 14a-8 were not intended to be a substitute for Rule 14a-11. The Rule 14a-8 amendments were adopted in conjunction with the adoption of Rule 14a-11, and the Commission determined to stay the effectiveness of the Rule 14a-8 amendments at the same time that it stayed Rule 14a-11. At that time, the Commission stated, "it is consistent with what justice requires to stay the effectiveness of the amendment to Rule 14a-8 adopted contemporaneously with Rule 14a-11 because the amendment to Rule 14a-8 was designed to complement Rule 14a-11 and is intertwined, and there is a potential for confusion if the amendment to Rule 14a-8 were to become effective while Rule 14a-11 is stayed." We concur with the concerns that the Commission expressed at that time and believe that the policy considerations for maintaining the stay on the Rule 14a-8 amendments are even more compelling in the wake of Rule 14a-11 being invalidated.

Neither Rule 14a-11 nor the amendments to Rule 14a-8 are self-contained provisions. Both were adopted in the context of numerous other associated amendments to the Commission's rules and forms.⁵ Many of these rules and forms refer specifically to Rule 14a-11 but do not refer specifically to Rule 14a-8, instead referencing "procedures related to including shareholder nominees for director in a registrant's proxy materials," which procedures could be imposed through a company's governing documents pursuant to the amendments to Rule 14a-8. Due to this structure, created with the expectation that both Rule 14a-11 and the amendments to Rule 14a-8 would be in effect, questions could arise over the operation of the rules and forms in the absence of Rule 14a-11. By continuing the stay on the amendments to Rule 14a-8, the Commission will be able to evaluate and if deemed appropriate clarify and/or revise how the amendments operate in the context of the associated rule and form amendments and in the absence of Rule 14a-11.

In this regard, we believe it is important to the Commission's processes and statutory mandates to assess whether, in the absence of Rule 14a-11, Rule 14a-8 would operate as intended and whether, in this very different context, the Commission's assessment of the amendments to Rule 14a-8 satisfies the standards of the Administrative Procedures Act. After careful consideration of numerous comments advocating the adoption of amendments to Rule

⁴ Facilitating Shareholder Director Nominations, Sec. Act Rel. No. 9046 (Aug. 25, 2010), appearing at <http://www.sec.gov/rules/final/2010/33-9136.pdf> (the "Adopting Release").

⁵ The "Supplementary Information" section of the Adopting Release lists the numerous forms and rules that were adopted or amended in connection with the adoption of Rule 14a-11 and amendment of Rule 14a-8. As stated in the Stay Order, the petition filed with the court and the motion filed with the Commission addressed Rule 14a-11 "and associated amendments to the Commission's rules," which "include new Schedule 14N, new Rule 14a-18, and amendments to Rule 14a-2, among others."

14a-8 without the adoption of Rule 14a-11, the Commission stated that it viewed the arguments in favor of that approach as flawed for several reasons, and that such an approach would not achieve the Commission's stated objectives. The Commission therefore described the amendments to Rule 14a-8 as supplementing Rule 14a-11.⁶ Throughout the Adopting Release, it appears that the Commission assumed the effectiveness of Rule 14a-11 when evaluating the operation of the amendments to Rule 14a-8, including in the Commission's analysis of the cost burdens resulting from the amendments to Rule 14a-8, the benefits and costs of the economic effects of the amendments, their burden on competition, and the implications of the amendments for promoting efficiency, competition and capital formation. With the invalidation of Rule 14a-11, the amendments to Rule 14a-8, if allowed to go into effect, would be operating in an entirely different context than what was contemplated at the time they were adopted. In light of the changed context, we believe that the Commission should reconsider and reevaluate the operation and implications of the Rule 14a-8 amendments.

In the adopting release, the Commission noted that the costs associated with its adoption of amendments to Rule 14a-8 "may be limited to the extent that shareholders do not submit proposals related to director nomination procedures due to the uniform applicability of Rule 14a-11 to all companies subject to the rule and availability of the rule for eligible shareholders."⁷ Similarly, the Commission stated, "We have no reason to expect that the amendment to Rule 14a-8(i)(8) will substantially increase the number of shareholder proposals to smaller companies and likely will have little impact on small entities." The Commission relied on that conclusion in determining not to change the eligibility requirements for submitting Rule 14a-8(i)(8) shareholder proposals at small companies.⁸ However, absent the opportunity to submit director nominations pursuant to Rule 14a-11, it is not unreasonable to expect that shareholders will pursue change through the Rule 14a-8 route. It is not clear to us whether, against this backdrop, the Commission's analysis and conclusions remain apposite.

We recognize that the amendments to Rule 14a-8 were not within the scope of the Circuit Court's decision. However, the statutory standards referred to by the Circuit Court would be applicable to the adoption of the amendments to Rule 14a-8(i)(viii), and we believe that, in the absence of a clear analysis of the effects of the Rule 14a-8 amendments in the absence of an effective Rule 14a-11, there exists a clear risk of a challenge to the adoption of the Rule 14a-8

⁶ Adopting Release, at part I.A. ("We believe that the amendments to Rule 14a-8(i)(8) will provide shareholders with an important mechanism for including in company proxy materials proposals that would address the inclusion of shareholder director nominees in the company's proxy materials in ways that supplement Rule 14a-11...").

⁷ Adopting Release, text at note 999.

⁸ Adopting Release, at part VI.E. ("Although this approach [a different eligibility standard for submitting proposals under the amendments to Rule 14a-8(i)(8)] could potentially reduce the number of shareholder proposals submitted to smaller entities by establishing a minimum threshold for having such proposals included in the company's proxy statement, we have not taken this approach because, as noted above, we do not expect the final rule to substantially increase the number of shareholder proposals to smaller companies. In addition, we have not relied exclusively on an amendment to Rule 14a-8(i)(8) to achieve our regulatory goals because we seek to provide shareholders with a more immediate and direct means of effecting change in the boards of directors of the companies in which they invest.").

amendments. Indeed, the Commission itself observed that 90% of companies receiving a proposal submitted under the amendments to Rule 14a-8 would seek to challenge it,⁹ and noted the previous litigation over proxy access proposals under Rule 14a-8.¹⁰

In light of the foregoing considerations, including the context and stated purpose of the Commission's adoption of the Rule 14a-8 amendments, we believe that the better course for the Commission would be to maintain the stay on the amendments to Rule 14a-8, and either to repropose the amendments to Rule 14a-8 or to reopen the comment period relating to those amendments, in order to more fully consider the implications of the amendments in the absence of Rule 14a-11. To an equal or greater extent as when the Stay Order was first issued, maintaining the stay on the Rule 14a-8 amendments avoids potentially unnecessary costs, regulatory uncertainty and disruption, while allowing the Commission to evaluate and document its consideration of the operation and implication of those (or any other) amendments to Rule 14a-8 in the absence of Rule 14a-11.

We appreciate the consideration of this request by the Commission and would be pleased to respond to any comments the Commission or the staff may have.

Very truly yours,

/s/ Jeffrey W. Rubin

Jeffrey W. Rubin

Chair, Federal Regulation of Securities Committee

cc: Mary L. Schapiro, Chairman
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Troy A. Paredes, Commissioner
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Meredith Cross, Director, Division of Corporation Finance
Eileen Rominger, Director, Division of Investment Management
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Shelley E. Parratt, Deputy Director, Division of Corporation Finance
Robert E. Plaze, Deputy Director, Division of Investment Management

⁹ Adopting Release, text at note 998.

¹⁰ *American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc.*, 462 F.3d 121 (2d Cir. 2006).