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The in-house bar association℠

September 15, 2003

Jonathan G. Katz, Secretary
United States Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

RE: File No. S7-14-03
Comments on Release No. 34-48301

Dear Mr. Katz:

On behalf of the American Corporate Counsel Association, ACCA's Corporate & Securities Law Committee is pleased to have the opportunity to comment on "Disclosure Regarding Nominating Committee Functions and Communications between Security Holders and Boards of Directors." ACCA has more than 14,000 individual members who act as in-house counsel to more than 6,000 business entities. The Corporate & Securities Law Committee is the largest of ACCA's committees, with over 4,600 attorney members, most of whom work in public companies that are subject to the Commission's disclosure requirements.

ACCA recognizes the importance of the Commission's request for comments. We have drawn on the practical experiences of many of our members to provide you with information that hopefully will assist the Commission in its consideration of potential changes to the proxy rules. We are aware that the Commission intends to issue a separate proposal on shareholder nominations and we note that we do plan to comment specifically on that proposal when it is issued.

In a letter dated June 13, 2003, we provided the Commission with our general comments regarding the concept of shareholder access. In that letter, we urged the Commission to move cautiously and take its time to assess the impact of Sarbanes-Oxley and its related rulemakings. We also provided some recommendations for the Commission to consider in the event that it felt that rulemaking was necessary at this time. We still believe that it is important that the Commission move cautiously in this area.

Below are specific comments on the rules and regulations proposed in this release:

A. Nominating Committee Activities

Who proposed a nominee – The Commission's proposal would require disclosure of who proposed each nominee approved by the nominating committee for inclusion on the company's proxy card, except when the nominee is an executive officer or a director standing for reelection. We believe that this proposed regulation should not be adopted. At a minimum, we recommend

that the trigger for disclosure of this nature should be limited only to when the CEO or the board's chair suggests a candidate.

If the nomination is approved by - and is the responsibility - of an independent nominating committee, who first recommended the nominee should be of limited relevance. We believe the limited value of who suggested a candidate does not outweigh the value to the company – which indirectly benefits shareholders – of the personal knowledge about potential candidates that might come from the board. Clearly, the proposed disclosures may chill a director's willingness to step forward and offer names for consideration.

In addition, this type of disclosure may cause shareholders to focus more on who first raised a person's name rather than on the nominee's qualifications. Clearly, the more important information is how a nominating committee seeks and evaluates information, rather than who first proposes a name. This disclosure would be elicited under the Commission's proposal.

Use of third party to identify and evaluate candidates - The Commission's proposal would require a company that pays a fee to third parties to identify or assist the company in identifying or evaluating potential nominees to provide disclosure of the function performed by the third party. It is unclear to us what value this disclosure would provide to investors. In fact, if the Commission does not modify the proposed requirement to identify who recommended a candidate as we suggest above, it would appear that the most important aspect of this disclosure (i.e. the fact that one or more search firms were used) would already be elicited.

Identification of shareholders who nominate - If a nominating committee (a) receives a nominee recommendation from a shareholder or group of shareholders that has beneficially owned more than 3% of the company's voting common stock for at least one year as of the date of the recommendation, and (b) the nominating committee decides not to nominate that candidate, the Commission's proposal would require a company to disclose the name or names of the stockholder(s) who recommended the candidate and the specific reasons that the nominating committee decided not to include the candidate as a nominee.

We have three comments regarding this proposed requirement. First, the Commission should add a proof of ownership requirement that would require shareholders to provide documentary support for claims of beneficial ownership. Without this requirement, a company would have to rely on the mere claim by a shareholder or group of shareholders that they beneficially owned more than 3% of the company's voting common stock for at least one year.

We suggest that the process under Rule 14a-8 be applied in this context, with some modifications. In Rule 14a-8(1), a company has 14 calendar days after receiving a shareholder proposal to request documentation. In the nomination context, we believe the period of time to request documentation should be longer as the board's nominating committee might have to convene a meeting to act on a shareholder nomination.

Besides this modification, we believe the rest of the Rule 14a-8 process should be applied in its current state, including Rule 14a-8(f) that provides that shareholders must reply within 14 calendar days of receiving a notice from the company that documentation needs to be provided. We also urge that the Commission staff be willing to play a role in handling any disputes about the sufficiency of notices and documentation, much as it does with administering Rule 14a-8.

Our second comment is that the Commission should modify its proposal to limit how many stockholders get identified if a disclosure is triggered. Under the current proposal, it is conceivable that a group of hundreds of beneficial owners could band together to submit a candidate (e.g. perhaps by the use of an online petition). The disclosure of these numerous names would be of limited value to investors and obscure more valuable disclosures. One potential solution is for only one stockholder to be identified and, at the time the candidate's name is submitted to the company, for the group to identify a "lead" stockholder in its transmittal communication. Other alternatives are for the largest shareholder in the group to be automatically considered the "lead" stockholder or for the company to disclose that the identities of the group to be available upon request.

Our third comment relates to the 3% threshold. It seems more appropriate for the Commission to adopt a 5% threshold, since that threshold historically has been considered the appropriate level to trigger disclosure and filing requirements (e.g. file a Schedule 13D).

B. Shareholder Communications with Directors

Material action taken - The Commission's proposal would require a company to disclose any material actions taken by the board of directors as a result of communications between shareholders and board members during the preceding fiscal year. Besides the potentially difficult determination of what is "material," this proposed requirement also might raise a difficult determination of what is "a result of communications."

For example, a company might be contemplating a particular action that subsequently becomes the subject of a communication with shareholders. In fact, a shareholder might ask a question about the action but the board does not respond with any information due to Regulation FD concerns. If the company then takes the action, it arguably might need to provide disclosure under this proposed regulation. It would be helpful if the Commission could provide some additional guidance if it adopts this proposal about what the Commission expects.

We offer the Commission any assistance it needs to consider this proposal. If you wish to contact us for more information, you can contact Broc Romanek at 703.237.9222.

Cordially,

/Broc Romanek/

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