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August 14, 2009 **Via E-Mail: rule-comments@sec.gov**

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Ms. Murphy and Commissioners:

Re: File Number S7-10-09; Facilitating Shareholder Director Nominations

The California Public Employees' Retirement System (CalPERS) welcomes the opportunity to provide comments to the Securities and Exchange Commission (Commission) on proposed amendments to the federal proxy rules governing the exercise of shareowner rights to nominate and elect company directors.

CalPERS is the largest state public pension system in the United States with approximately $190 billion under management. CalPERS provides retirement benefits to over 1.5 million public workers, retirees, and their families and beneficiaries. Acting as fiduciaries to the members of the system, the CalPERS Board of Administration and its staff invest the pension funds of its members over the long term throughout the global capital markets. CalPERS holds equity shares in more than 7,000 publicly traded companies and views the regulation of director elections as an issue of vital importance to all investors. We would like to thank the Commission for the opportunity to provide public comment.

CalPERS Supports Proposed Rule 14a-11

The proposed rule is a historically significant reform that will enable investors to hold corporate boards accountable and restore investor confidence in the capital markets. CalPERS recognizes the leadership of the Commission and offers its full support for the proposed rule.

We note that "The right of a shareholder to vote for directors who are to manage the corporate affairs is a 'valuable and vested property right' representing one of the most

important rights incident to stock ownership...."[1] The proposed rule changes will give effect to this right.

The financial crisis has revealed fundamental flaws in corporate governance in the US system. The point has been made by the Investors' Working Group in US Financial Regulatory Reform:

> *Shareowners should have the right to place director nominees on the company's proxy. In the United States, unlike most of Europe, the only way that shareowners can run their own candidates is by waging a full-blown election contest, printing and mailing their own proxy cards to shareowners. For most investors, that is onerous and prohibitively expensive. A measured right of access would invigorate board elections and make boards more responsive to shareowners, more thoughtful about whom they nominate to serve as directors and more vigilant in their oversight of companies.* [2]

Investors are best protected when board directors are responsive and accountable to the shareowners. Having an effective channel through which to nominate directors through access to the company's proxy card is critical to ensuring this accountability. For almost a decade, CalPERS has asked the Commission to fulfill its mission "to protect investors and maintain the integrity of the securities markets" by strengthening the rights of shareowners to participate in director elections. The proposed rule will reform the director election process, ensuring fair corporate suffrage for all shareowners.

The current financial crisis exposed a glaring lack of board oversight at many companies. Directors who are independent, competent and responsive to the interests of shareowners will be more effective in undertaking their management oversight roles. As a whole, companies will be better managed and will have enhanced risk management and potential for creating value.

<u>The Current Rules Unfairly Discourage Shareowner Nominations</u>

Under current rules, shareowners are too often locked out of the decision making process for board appointments and are unable to hold incumbent directors and company management accountable. Nominating committees can prevent shareowner-nominated, independent candidates from being fairly considered in elections. Shareowners are therefore forced to create their own "ballot" and mount a proxy

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[1] *Smith v. Orange & Rockland Utilities, Inc., 617 N.Y.S.2d 278, 279-280 (1994)*

[2] *U.S. Financial Regulatory Reform: The Investors' Perspective, A Report by the Investors' Working Group – An Independent Taskforce Sponsored by CFA Institute Centre for Financial Market Integrity and Council of Institutional Investors (July 2009)*

campaign. Because this process is prohibitively expensive, it rarely occurs outside of hostile takeover or other change in control efforts.

As an example, in 2005 CalPERS considered running a short slate at a large public company and retained a proxy solicitation firm and outside counsel. CalPERS identified and recruited two candidates to make up the short slate. The mailing and proxy solicitation costs alone were estimated at approximately $1,750,000 assuming only a campaign consisting of mailing the proxy and two short supporting letters to larger shareowners only. Outside counsel costs were estimated to be up to another $750,000, assuming no litigation. Verifying factors related to the campaign and potential litigation could have easily doubled the costs. In addition, substantial expense of internal staff time would have added to the already significant cost burden.

In lieu of undertaking this costly and time-consuming effort, CalPERS requested that the company's management nominate the two candidates and include them on the company's proxy card. Despite the excellent credentials of these candidates, the company refused. The candidates advanced by management were included on the proxy card and elected. The company is now majority-owned by the United States government. While there is no way of knowing whether two truly independent board members would have stemmed the losses that forced the government bailout of this company, we do know that the extremely expensive and time-consuming nomination and election process discouraged CalPERS from running a short slate which was intended to strengthen the board.

Proposed Rules Will Be Utilized Responsibly and Will Not Result in the Nomination of "Special Interest" Directors

We recognize that nominating directors is a significant step for owners; therefore, we fully expect that shareholders will continue to seek reform at underperforming companies primarily through direct engagement before utilizing open access. Moreover, we find it extremely unlikely that "special interest" candidates will be nominated as the proposed new rules restrict this right of access to long-term large shareowners such as CalPERS, whose investment interest lies in ensuring the company's success. We do not see an incentive for significant long term shareowners to put forward candidates that are very unlikely to receive more than a token amount of support.

In the election process shareowners will have an opportunity to review the qualifications of candidates and form a view on merit and on the needs of the company.

Share Ownership Threshold Standards

CalPERS supports the proposed approach that the rule would apply to all companies subject to the Exchange Act proxy rules, including investment companies registered under the Investment Company Act of 1940, unless applicable state law or a company's

governing documents prohibit shareholders from nominating candidates for the board of directors. CalPERS also supports the proposed tiered beneficial owner threshold approach based on company market capitalization ranging from 1% for large companies to 5% for small companies as an acceptable measure to ensure that the nominating holder is a significant investor.

Nominating Shareowner Eligibility Thresholds

In addition, we consider that loaned securities should be counted towards the eligibility threshold if those securities can be recalled and votes can be cast, as is the case with CalPERS. The proposed rule, by incorporating the beneficial ownership concepts of 13D and 13G in the proposed rule, appears to allow loaned securities to count towards the eligibility threshold. Nonetheless, we are in agreement with the Council of Institutional Investors' request that the Commission clarify and confirm that nominating shareowners or each member of the nominating group may include securities that have been loaned to a third party, provided that the participant represents that it has the legal right to recall those securities for voting purposes and will vote the securities at the shareowner meeting, accompanied by a representation that the participant will hold those securities through the date of the annual meeting.

Number of Shareowner Nominees

CalPERS agrees with the proposed rule that a company would be required to include no more than one shareowner nominee or the number of nominees that represents 25 percent of the company's board of directors, whichever is greater. However, in our experience, it is very difficult for a single director to effect change where there has been a contested election. We would advise that the minimum number of permitted number of nominees should not be less than two.

In principle, CalPERS supports the concept that shareowners should have the ability to nominate as many director candidates as necessary to focus the board's attention on optimizing the company's operating performance, profitability, and sustainable returns to shareowners. CalPERS views the proposed limitations on the number of nominees as inconsistent with the intent and spirit of this proposal, which is to remove impediments to the exercise of shareowners' rights to nominate and elect directors to company boards of directors. Conceivably, a change in control could be necessary to ensure the company is being managed to achieve long-term, sustainable shareowner returns. Nonetheless, CalPERS supports the Commission's proposal at this point in time in order to allow for a measured adoption of proxy access.

Ownership Holding Period

CalPERS supports the proposed holding period put forward in the rule. CalPERS is a long-term shareowner and we agree with the proposed approach that a nominating shareholder or group must have beneficially owned the securities that are used for

purposes of determining the ownership threshold continuously for at least one year as of the date of the shareholder notice and represents that it intends to continue to own those securities through the date of the Annual General Meeting.

Disclosure – Independence Standards

CalPERS fully supports disclosure requirements requiring nominees to disclose their holdings, qualifications and affiliation with the nominating holder. With this information, it is appropriate to let the owners decide if a nominee proposed by a significant equity owner should be elected to the board to represent shareowners. CalPERS opposes the additional disclosure rules contemplated during the 2007 rulemaking, which we found to be of little or no value to shareowners and would have increased the risk of litigation.

First-in Standard

CalPERS does not agree with the proposed 'first in standard'. We support a standard under which the largest shareowner or group of shareowners would have their nominee(s) included in the company proxy materials. While CalPERS appreciates the Commission's attention to fairness in its proposed first-in approach, the size of the economic stake held in any particular publicly traded company is a better way to prioritize who should be able to utilize the rule at any particular company. CalPERS agrees with the Council of Institutional Investors' perspective that what matters most is not who is the fastest to nominate but which investor or group has the greatest stake in the director election and ultimately, the long term performance of the company.

Proposed Amendment to Rule 14a-8(i)(8)

CalPERS supports amending Rule 14a-8(i)(8) to allow proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareowner nominations. This shareowner right – as recognized under state law – is crucial to protecting the interests of shareowners by ensuring fair director elections and director accountability to the owners of the company.[3] As discussed below, however, a national standard on proxy access is needed.

A National Standard for Proxy Access Should Be Established

CalPERS considers that the Commission has clear authority to adopt the proxy access rule proposal. We refer to the Council of Institutional Investors' comment letter for a fuller discussion of the authority of the Commission to adopt the proposed rules.

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[3] *"A shareholder's ability to participate in corporate governance through the election of directors is a fundamental part of our corporate law." Preston v. Allison, 650 A.2d 646, 649 (Del. 1994)*

Federalism issues aside, the main advantage of a national standard is to ensure that the companies that need the reform the most actually implement the rule. In CalPERS experience, recalcitrant companies may unreasonably resist shareowner proposals brought pursuant to Rule 14a-8 by:

1) Adopting supermajority vote requirements.
2) Adopting vote requirements that require a percentage of "shares outstanding" with the result that each broker non-vote is equivalent to a no-vote.
3) Failing to implement shareowner proposals that actually pass, even where they pass several years in a row.
4) Setting up their governing documents such that certain reforms require the approval of the Board of Directors by, for example, requiring a change to the Articles of Incorporation.
5) Challenging bona fide investors' use of 14a-8 by filing meritless SEC no-action requests.
6) Claiming that proposals are not properly presented by adopting burdensome and vague meeting procedures ostensibly supported by state law.
7) Adopting advance notice provisions with no purpose other than to raise the burden and costs of filing a shareowner proposal and increasing the odds that a company can rely on a technical exception to justify a refusal to put the proposal on the ballot.

In addition, requiring shareowners to proceed company-by-company to obtain the right of access to the proxy in order to nominate directors will cost shareowners and companies significant time, and unnecessary expense. The Commission reported in 1997 that the cost per company of determining whether or not a shareowner proposal should be included in the proxy statement is $37,000 and that the direct cost per company of including the proposal is $50,000.[4] CalPERS estimates that the average approximate cost for shareowners of running a proposal to be $30,000. Based on these figures it would cost $351,000,000 to attempt to adopt proxy access at Russell 3000 companies.

Relying on the shareowner proposal process to effect reform is inefficient, and the majority-vote standard for the election of directors is one example of this inefficiency. Majority voting has only been adopted by 294 companies in the S&P 500 and just 734 companies out of the 3,369 companies according to the Corporate Library Board Analyst database, even though the standard has broad-based support among shareowners. Slow adoption can be attributed to the fact that companies rarely voluntarily adopt shareowner friendly corporate governance practices without a formal request by their shareowners. Even then, many companies negotiate to modify and reduce the intended effect of a proposed corporate governance reform. Most companies have adopted majority vote provisions that allow directors to ignore majority votes in practice. An example of this can be found in the recent action by Pulte Homes

[4] http://www.sec.gov/rules/final/34-40018.htm

where the company's board of directors refused to accept the resignations of three board members receiving less than a majority of votes.

Shareowners, including CalPERS, have accepted these modest steps towards majority vote standards in order to make some progress, and also to avoid the cost and burden of proceeding with contested shareowner proposals. As noted above, submitting shareowner proposals takes significant resources and effort. CalPERS experience has shown that if shareowners are forced to implement proxy access one company at a time many of those most in need of board renewal may not adopt reform and those that do will likely impose limitations on its use.

In conclusion, CalPERS considers shareowner access to the proxy to be the most critical corporate governance reform in the United States today. CalPERS applauds the Commission in its decision to further pursue this important reform and provide shareowners with effective access to a public corporation's annual proxy statement to ensure fair corporate suffrage.

CalPERS offers its strong support to the Commission in its decision making process and will be glad to provide any assistance that you might require. Thank you for considering our comments. If you would like to discuss any of these points, please do not hesitate to contact me at (916) 795-4079, or Peter Mixon, CalPERS General Counsel, at (916) 795-3797.

Sincerely,

Joseph A. Dear
Chief Investment Officer
California Public Employees' Retirement System

cc: Eric Baggesen, Senior Investment Officer - CalPERS
Peter Mixon, General Counsel – CalPERS
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