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January 19, 2010

Via email: rule-comments@sec.gov

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

Re: Proposed Rules Relating to Facilitating Shareholder
Director Nominations (File No. S7-10-09)

Dear Ms. Murphy:

We respectfully submit our comments on Release Nos. 33-9046; 34-60089; IC-28765 (June 10, 2009) (the "Proposing Release")¹ in which the Securities and Exchange Commission (the "Commission") has proposed rules to facilitate shareholder nominations of candidates for directors of public companies. Our comments focus on the single issue of whether the proposed rules are structured to give the appropriate and necessary consideration to the internal corporate laws of foreign jurisdictions which may be the jurisdiction of organization of numerous public companies which are not foreign private issuers exempt from the proxy rules under Rule 3a12-3.²

The Commission's underlying basis for mandating proxy access for U.S.-domiciled companies will not always apply to non-U.S. domiciled companies

¹ Proposing Release, 74 Fed. Reg. at 29,024.

² 17 CFR § 240.3a12-3 (2009). While Rule 3a12-3 exempts foreign private issuers from the proxy rules, there are a number of foreign issuers that either do not qualify as foreign private issuers or that voluntarily comply with the reporting requirements applicable to U.S.-domiciled public companies. We estimate that there are over 50 such companies, with the following domiciles: Alberta, Canada; Bahamas; Bermuda; British Columbia, Canada; Cayman Islands; Ireland; Israel; Netherlands; Netherlands Antilles; Ontario, Canada; Panama; Singapore; Switzerland; Virgin Islands, British.

As clearly articulated in the Proposing Release, the proxy process is designed to function "... as nearly as possible, as a replacement for an actual in-person meeting of shareholders."³ The Commission's underlying basis for providing public company shareholders with the proposed proxy access rights is that shareholders have the substantive right under state corporate law to nominate directors at shareholders meetings, and that the proxy process should not impede the exercise of such rights.⁴ The corollary to this predicate must therefore be that, where as a matter of substantive corporate law, shareholders do not have the right to nominate directors or where such rights are subject to specific eligibility and other requirements, the proxy rules should not provide a substantive right (or greater substantive right) to include nominees in company proxy statements. Where a foreign jurisdiction's substantive corporate laws specifically address a shareholder's right to nominate directors at a shareholders meeting, it would be inappropriate for the proxy rules to alter the shareholders' substantive rights that otherwise prevail under such jurisdiction's laws. A number of foreign jurisdictions may have different corporate governance regimes as compared with the United States.⁵ These governance regimes may limit shareholder rights to nominate directors at shareholders meetings, but may mandate other rights such as allowing shareholders to call extraordinary shareholders meetings and giving shareholders the right to remove directors. These corporate governance regimes reflect a balance between promoting effective corporate stewardship and providing shareholders' rights that the foreign jurisdiction determined when devising its corporate laws. This balance should be respected by the proxy rules.⁶

³ Proposing Release, 74 Fed. Reg. at 29,025.

⁴ See Proposing Release, 74 Fed. Reg. at 29,027: "To the extent shareholders have the right to nominate directors at meetings of shareholders, the federal proxy rules should not impose unnecessary barriers to the exercise of this right."

⁵ We understand that the laws of certain foreign jurisdictions do limit the rights of shareholders to propose business or nominate directors at companies' annual general meetings of shareholders. For example, under Section 183 of the Singapore Companies Act, only shareholders representing at least 5% of the outstanding voting rights or not fewer than 100 registered shareholders having an average paid up sum of at least S\$500 each may, at their expense, requisition a company to include and give notice of their proposal for an annual general meeting. Section 177 of the Singapore Companies Act provides an additional right on the part of shareholders holding at least 10% of the company's outstanding shares to call a shareholders meeting, and Section 176 of the Singapore Companies Act entitles shareholders holding at least 10% of the outstanding voting rights to requisition the directors of a company to convene an extraordinary general meeting of shareholders, at the company's expense. Apart from utilizing the rights under these provisions, we understand that shareholders of Singapore companies may not nominate directors or propose business at shareholders meetings. Sections 176 and 183 also effectively provide proxy access rights, as the company is required to circulate notice and, at least in the case of Section 183, include supporting statements of the shareholders. In addition to the laws of Singapore, we understand that the laws of China, Hong Kong, Israel and the Netherlands, among others, may limit the rights of shareholders to propose business or nominate directors at shareholders meetings.

⁶ We only are addressing cases where the foreign jurisdiction's laws limit the substantive right of shareholders to nominate directors at shareholders meetings, as opposed to foreign laws that may provide some form of proxy access rights. Where the laws of the foreign jurisdiction limit the substantive rights of shareholders to nominate directors, we believe that it would be inappropriate for the proxy rules to interfere with the foreign jurisdiction's substantive corporate laws. On the other hand, where the foreign jurisdiction does not limit the ability of shareholders to attend an in-person shareholders meeting and nominate directors, but provides a more limited proxy access rule than proposed Rule 14a-11, we believe that the Commission may determine that the rights provided under Rule 14a-11 should govern.

Accordingly, we urge the Commission to include specific language in final Rule 14a-11 providing that the rule will not apply to foreign issuers (as defined in Rule 3b-4(b)⁷) in cases where inclusion of shareholder nominees under Rule 14a-11 would result in the shareholder proponent having greater rights to nominate directors than otherwise would be the case under the laws of the jurisdiction of organization of the foreign issuer. In this regard, we note that the language in proposed Rule 14a-11, specifically paragraphs (a)(1) and (2), even if broadened to refer to foreign law, would not be sufficient. These provisions condition the use of proposed Rule 14a-11 on (i) applicable state [foreign] law not prohibiting the nomination and (ii) the nominee's candidacy or election not violating state [foreign] law. In cases where the laws of a foreign jurisdiction provide specific limitations on shareholder rights to nominate candidates for directors at shareholders meetings, we believe that the proposed standard of "not prohibiting" likely would result in unnecessary disputes and confusion. Although a foreign jurisdiction may impose specific eligibility and other requirements (or otherwise not provide an affirmative right to nominate), the foreign laws may not explicitly "prohibit" shareholder nominations that are non-compliant.⁸ We therefore believe that the final rule should be clear and provide that a foreign issuer will not be required to include a shareholder nominee in its proxy statement and proxy where inclusion of shareholder nominees under Rule 14a-11 would result in the shareholder proponent having greater rights to nominate directors than otherwise would be the case under the laws of the jurisdiction of organization of the foreign issuer.

The Commission should not interfere with a foreign jurisdiction's substantive corporate laws; the Commission has long recognized the need to accommodate differences in foreign laws and practices

As discussed above, where a foreign jurisdiction's laws do not permit shareholders to nominate directors at shareholders meetings without complying with explicit eligibility and other requirements, the underlying predicate for providing proxy access is missing.⁹ In addition, in these circumstances, imposing proxy access would be an unwarranted interference with the foreign jurisdiction's substantive corporate laws.

The Commission has long recognized the need to accommodate differences in foreign laws and practices. For example, when the Commission adopted Form 20-F in 1979, the Commission stated that "... the Commission recognizes that there are differences in various national laws and businesses and accounting customs which the Commission should take into account when assessing disclosure requirements for foreign issuers."¹⁰ Similarly, in 1990, the Commission adopted Regulation S to clarify the extraterritorial application of the registration requirements of the Securities Act of 1933. In its release proposing certain amendments to Regulation S in 2008, the Commission stated: "In the interests of both comity and the

⁷ 17 CFR § 240.3b-4(b)

⁸ One reason why a foreign companies act may not prohibit shareholder nominations would be to allow for companies to provide additional rights in a company's governing documents.

⁹ In those cases where shareholder nominations are included in company proxy statements pursuant to the applicable foreign law, we believe that proposed Rule 14a-19 should govern.

¹⁰ Rules, Registration and Annual Report Form for Foreign Private Issuers, Release No. 34-16371, 44 Fed. Reg. 70132, 70133 (Dec. 6, 1979).

internationalization of the world's securities markets, the Commission believed that the registration provisions under U.S. law should not apply where the offshore placements were truly offshore. Instead, the laws of the foreign jurisdiction regulating the public offerings of securities would serve to protect investors in that market."¹¹

After the enactment of the Sarbanes-Oxley Act of 2002,¹² the Commission adopted rules governing listed company audit committees. Here again, the Commission addressed areas where foreign corporate governance arrangements differed significantly from general practices of U.S. companies.¹³ Among the accommodations adopted by the Commission were to clarify that certain provisions in Rule 10A-3¹⁴ "... do not conflict with, and do not affect the application of, any requirement or ability under a listed issuer's governing law or documents or other home country legal or listing provisions that requires or permits shareholders to ultimately vote on, approve or ratify..." auditor selection, compensation or termination.¹⁵ Other instructions to Rule 10A-3 similarly defer to the home country laws and practices with regard to delegation by a board to its audit committee and in cases where certain powers are vested with a government entity.¹⁶ In the adopting release, the Commission stated that it has "...long recognized the importance of the globalization of the securities markets both for investors who desire increased diversification and international companies that seek capital in new markets."¹⁷

Finally, more recently, in its release announcing amendments to rules governing foreign issuer reporting, the Commission reaffirmed its practice of improving the accessibility of the U.S. capital markets to foreign issuers and accommodating differences in the laws and corporate governance practices applicable to foreign issuers.¹⁸ Significantly, the Commission specifically stated that the rules "... do not imply a preference for any particular type of corporate governance regime."¹⁹

Consistent with the Commission's accommodations for different corporate governance laws and practices of foreign issuers and adherence to principles of comity, we respectfully submit that the proposed proxy access rules should not apply to foreign issuers where to do so would interfere with a foreign jurisdiction's substantive corporate laws.

Proposed Rule 14a-19 should apply to shareholder nominations submitted for inclusion pursuant to the laws of foreign jurisdictions

Proposed Rule 14a-19 provides disclosure and notice requirements in cases where shareholder nominees are included in company proxy statements pursuant to applicable state law

¹¹ Offshore Offers and Sales, Release Nos. 33-7392, 34-38315, 62 Fed. Reg. 9258 (Feb. 28, 1997).

¹² Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302, 116 Stat. 745 (2002).

¹³ See Standards Relating to Listed Company Audit Committees, Release Nos. 33-8220, 34-47654, IC-26001, 68 Fed. Reg. 18788 (Apr. 9, 2003) (hereinafter, the "Audit Committee Release").

¹⁴ 17 CFR § 240.10A-3

¹⁵ Instruction 1 to 17 CFR § 240.10A-3

¹⁶ Instructions 2 and 3 to 17 CFR § 240.10A-3

¹⁷ Audit Committee Release, 68 Fed. Reg. at 18,802

¹⁸ Foreign Issuer Reporting Enhancements, Release Nos. 33-8959, 34-58620, 73 Fed. Reg. 58,300 (Oct. 6, 2008).

¹⁹ Id at 58,310

or a registrant's governing documents. We believe that Rule 14a-19 should equally apply in cases where shareholder nominees are included in company proxy statements pursuant to applicable laws of a foreign jurisdiction.

The Commission should provide guidance on the inclusion of shareholder proposals under Rule 14a-8 in cases where the laws of a foreign jurisdiction limit the ability of shareholders to propose business at shareholders meetings

As discussed above, the laws of certain foreign jurisdictions may limit the ability of shareholders to propose business to be acted upon at shareholders meetings. Just as the predicate for proxy access is the underlying right of shareholders to nominate directors at an in-person shareholders meeting, the predicate of Rule 14a-8 is the underlying right of shareholders to propose business to be acted upon at an in-person shareholders meeting. Rule 14a-8 was designed to promote the same objective of replicating, in the proxy process, an in-person shareholders meeting. As noted in the Proposing Release, in drafting the substantive bases for excluding shareholder proposals under Rule 14a-8, "the Commission has been mindful of the traditional role of the states in regulating corporate governance."²⁰ Accordingly, where the laws of a foreign jurisdiction limit a shareholder's rights to propose business at shareholders meetings, Rule 14a-8 should not enable shareholders to propose a matter for inclusion in company proxy statements that they otherwise would not be entitled to propose at an actual in-person meeting. We believe that it would be appropriate for the Commission to provide guidance on this issue. This is particularly important given the proposed amendment to the election exclusion under Rule 14a-8(i)(8). Currently, under Rule 14a-8, a company is permitted to exclude a shareholder proposal if it "is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization"²¹ The Commission should clarify that this basis for exclusion is available where a shareholder proponent would not have the right to propose the matter for shareholder action under the laws of the jurisdiction of the company's organization.

Thank you for this opportunity to provide our comments on the Proposing Release. Any questions about this letter may be directed to Jeffrey N. Ostrager at (212) 696-6918.

Very truly yours,

/s/ CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

²⁰ See Proposing Release, 74 Fed. Reg. at 29,025

²¹ 17 CFR § 240.14a-8(i)(1)