

**Legal Office**

P.O. Box 942707

Sacramento, CA 94229-2707

Telecommunications Device for the Deaf - (916) 795-3240

(916) 795-3675 FAX (916) 795-3659

September 27, 2007

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F St., N.E.
Washington, D.C. 20549

Re: File No. S7-16-07: Shareholder Proposals

Dear Ms. Morris:

I am writing on behalf of the California Public Employees' Retirement System regarding the SEC's recent rule proposal, *Shareholder Proposals*, SEC Rel. No. 34-56160 (Jul. 27, 2007) (the "Shareholder Bylaw Release").

CalPERS is the largest public pension plan in the country with nearly \$250 billion in assets under management. CalPERS provides retirement benefits to over 1.5 million members who work in state and local government. CalPERS, which holds shares in more than 7,500 publicly-traded domestic companies, views the regulation of director elections as an issue of vital importance to investors and thanks the Commission for the opportunity to provide public comment.

The Shareholder Bylaw Release was published on the same day that the SEC proposed *Shareholder Proposals Relating to the Election of Directors*, SEC Rel. No. 34-56161 (Jul. 27, 2007) (the "Elections Release"). The Elections Release includes proposed amendments to paragraph (i)(8) of Rule 14a-8, the elections exclusion, and interpretive guidance regarding the application of Rule 14a-8(i)(8) to shareowner proposals that seek to allow shareowners to make nominations to a company's board of directors. Under the interpretive guidance included in the Elections Release, a company may exclude from its proxy materials any proposal that would result in an immediate election contest (by nominating persons for the board for the upcoming election of directors) or that would set up a process for shareowners to conduct an election contest in the future by requiring the company to include shareowners' director nominees in the company's proxy materials for subsequent meetings. CalPERS is submitting a separate comment letter regarding the Elections Release, in which we urge the SEC not to adopt the proposed changes covered by the Elections Release and to reconsider its interpretive guidance.

The Shareholder Bylaw Release proposes to exempt shareowner proposals that seek to create nomination procedures through bylaw amendments from the application of Rule 14a-8(i)(8) and the interpretive guidance included in the Elections Release.¹ This exemption would be limited

¹ For the purpose of this letter, shareowner proposals that seek to create nomination procedures through bylaw amendments are referred to as shareowner access bylaw proposals.



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to shareowners who own at least 5% of a company's securities for one year as of the date of submitting the proposal. The proposed amendments require that any shareowner who submits a shareowner proposal under this procedure, as well as any shareowner who makes a nomination under a bylaw adopted pursuant to this procedure, disclose information about itself on a Schedule 13G. To complement these amendments, the Shareholder Bylaw Release proposes to require certain disclosures of companies that receive shareowner access bylaw proposals or nominations under such bylaws. The Shareholder Bylaw Release also proposes a safe harbor for communications made through electronic shareowner forums and requests comment on how the SEC should handle non-binding shareowner proposals.

As a general matter, CalPERS supports the goals of the proposed amendments. A shareowner's right to make nominations to the board of directors is one of the most important rights given to shareowners. "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"² This right – as recognized under state law – is crucial to ensuring fair director elections and director accountability to the owners of the company. CalPERS believes that it is important that the proxy rules give effect to this right. However, the proposed 5% threshold is too high – it would effectively stifle the ability of shareowners to enact director election procedures. In addition, the proposed disclosure requirements are too onerous and one-sided to be workable. CalPERS therefore asks the Commission to reject these proposals.

Minimum Ownership Requirements

The proposed amendments require that a shareowner own at least 5% of a company's securities for at least one year as of the date that the shareowner submits a shareowner access bylaw proposal. This threshold is simply too high. For example, in 2003, an analysis of the holdings of three of the largest public pension funds – CalPERS, the California State Teachers' Retirement System and the New York State Common Retirement Fund – show that their combined ownership exceeded 2% in only one instance, and exceeded 1.5% in only 12 instances. Since these investors are three of the largest public pension funds, it would be necessary to assemble a very large number of investors to achieve 5% ownership for most public companies. Accordingly, CalPERS urges the SEC to lower the minimum ownership requirements of the proposed rule. A lower threshold would still require that a shareowner own a significant percentage of a company's securities to be able to submit a shareowner access bylaw proposal but also would be at a level that would contemplate meaningful availability for shareowners.

Schedule 13G Filing Obligation

The proposed amendments require that a shareowner who submits a shareowner access bylaw proposal file a beneficial ownership report on Schedule 13G. CalPERS expects that this requirement will raise significant practical and interpretative questions, none of which are adequately addressed by the Shareholder Bylaw Release. The following are some of the questions raised by this requirement:

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



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- When will a shareowner (or group of shareowners) who intends to submit a shareowner access bylaw proposal first be required to file a Schedule 13G? If a group of shareowners is submitting the shareowner access bylaw proposal, should the filing be made when the first member of the group forms a plan to submit the proposal or when the group achieves 5% collective ownership of the company's securities?
- Will shareowners that form a group for the purposes of submitting a shareowner access bylaw proposal be treated as a group for the purposes of Regulation 13D and 13G?
- Will group members be expected to file amendments to the beneficial ownership report on Schedule 13G? If so, when?
- If members of such a group buy or sell the company's securities, how is that to be reported in the beneficial ownership reports of the other members of the group?
- Can shareowners join the group after the submission of the shareowner access bylaw proposal?
- Will members of a group for the purposes of a shareowner access bylaw proposal be liable for the statements of other members of the group?

The Commission should provide answers to these and related questions before adopting any of the amendments proposed in the Shareholder Bylaw Release. The answers to some of these questions likely will determine whether shareowners rely on the proposed amendments. Further, CalPERS expects that companies will contest whether shareowners who submit shareowner access bylaw proposals and nominations under shareowner access bylaws have complied with the requirements of Regulation 13D and 13G. These arguments likely will become part of the shareowner proposal process, making it even more important that the Commission provide guidance regarding these and related questions.

Disclosure Requirements Applicable to Shareowners Who Submit Shareowner Access Bylaw Proposals

Under the proposed amendments, Schedule 13G will require that a shareowner who submits a shareowner access bylaw proposal disclose information about itself and about the circumstances in which the shareowner has submitted the shareowner access bylaw. While some of these disclosure obligations may be of value to a shareowner voting on a shareowner access bylaw proposal, many of these disclosure obligations provide little obvious benefit, yet impose significant burdens on shareowners. If the Commission adopts the proposed amendments, CalPERS believes that the following disclosure requirements should be substantially revised or eliminated for the reasons discussed below:

- Any discussion regarding the proposal between the shareowner and a proxy advisory firm during the 12-month period preceding the submission of the proposal.

It is not clear why discussions between a shareowner and a proxy advisory firm are material to a shareowner's vote regarding a shareowner access bylaw proposal.



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Some shareowners routinely communicate with proxy advisory firms in the ordinary course of business about a variety of shareowner proposals. Such communications, even if regarding a shareowner access bylaw proposal, would appear to be immaterial in all cases. The Commission should eliminate this proposed requirement.

- The shareowner's holdings of more than 5% of the securities of any competitor of the company.

This disclosure requirement appears unnecessary for two reasons. First, this disclosure requirement proposes that a shareowner use a company's Standard Industrial Classification, or SIC Code, to identify the company's competitors. A SIC Code is an inadequate means of identifying a company's competitors. Companies often select their own SIC Code and rarely identify their competitors by use of their SIC Code. Instead, companies often identify their competitors based on market and industry practices and internal judgments.

Second, it is doubtful that in most cases shareowners voting on a shareowner access bylaw proposal would be interested in the shareowner's ownership interest in the company's competitors as a per se matter. If the purpose of this disclosure requirement is to elicit information regarding the shareowner's economic interests that may be adverse to the company, the proposed rules should require such information explicitly.

- Any material relationship with any competitor of the company other than as a security holder of such competitor.

As with the disclosure regarding a shareowner's ownership interest in a company's competitors, disclosure of a shareowner's relationship with a company's competitors other than as a security holder appears unnecessary. Unless the competitor or the shareowner stands to benefit directly from the submission of the shareowner access bylaw proposal, CalPERS can see little reason why this information would be material to a shareowner's decision to vote for or against a shareowner access bylaw proposal. In addition to the questionable usefulness of this information, this disclosure requirement could require considerable efforts to gather the information necessary to respond to the requirement. This disclosure requirement appears to require that a shareowner disclose material relationships with *any* company that shares the same SIC Code as the company to which the shareowner has submitted a shareowner access bylaw proposal - not just companies in which the shareowner is a 5% shareowner. For large institutional investors, this could be a particularly onerous requirement.

- Any meetings or contacts between the shareowner and the company that occurred during the 12-month period prior to submission of the shareowner access bylaw proposal.

CalPERS doubts that a shareowner voting on a shareowner access bylaw proposal would find information about all contacts between the shareowner and the company to be material to the shareowner's decision to vote for or against the proposal. We note in particular that this requirement is neither limited to material communications



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nor to communications that relate to the submission of the shareowner access bylaw proposal. As a result, this would appear to call for detailed disclosure of all communications, no matter their subject matter or significance.

In addition, compliance with this disclosure obligation would impose significant obligations on institutional shareowners that are considering submitting shareowner access bylaw proposals. To comply with this requirement, an institutional shareowner would have to institute rigorous record-keeping practices for all communications with companies in which it invests. In light of the marginal value of this proposed disclosure requirement, particularly as compared to the costs that it could impose on shareowners, CalPERS urges the Commission to delete this requirement or modify it to be consistent with the existing proxy disclosure rules.

Finally, CalPERS is concerned that this disclosure requirement will chill communications between companies and shareowners. Under this disclosure requirement, a shareowner who communicates with a company would have to disclose information about the meeting if it chooses to join or co-sponsor a shareowner access proposal within the following 12 months. As a result, shareowners and companies likely will be more concerned about discussing important issues, even if such issues relate to other matters, if it is possible that the substance of those conversations will be disclosed publicly as a result of the new rules.

- If the shareowner is not a natural person, the natural persons responsible for the submission of the shareowner access bylaw proposal.

As with the disclosure requirements discussed above, it is not apparent why this disclosure would generally be material to an investor voting on a shareowner access bylaw proposal. Moreover, the disclosure requirement is quite vague. It is not clear, for instance, how this disclosure requirement would apply to shareowners that are organizations, where a shareowner access bylaw proposal might be the product of the efforts of an entire department. In such an instance, who should be identified in response to this disclosure requirement? The head of the department? All of the members of the department? The head of the institutional investor? Because it would be difficult to implement and would not result in meaningful disclosure, CalPERS recommends that the SEC delete this requirement.

- The role of equity holders or other beneficiaries of the shareowner in the selection of the person responsible for the submission of the shareowner access bylaw proposal.

This too appears to be a disclosure requirement for which there is no clear benefit. It is difficult to imagine what information could be elicited in response to this requirement that would be meaningful to investors. Further, there would be few instances in which a shareowner's equity holders or beneficiaries would have played a direct role in the selection of the person responsible for the submission of a shareowner access bylaw proposal. Accordingly, CalPERS recommends that the Commission delete this requirement.

- The qualifications and background of the person responsible for the submission of the shareowner access bylaw proposal.



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Just as the identity of the natural person responsible for the submission of a shareowner access bylaw is likely to be immaterial in nearly every conceivable scenario, so too would be the qualifications of such person. In addition, it is unclear what constitutes "qualifications". Does this seek information regarding the person's educational or business experience or experience with corporate governance matters? Due to the lack of any apparent benefit from this disclosure, CalPERS recommends that the Commission delete this requirement.

Proposed Disclosure Requirements Regarding Shareowners Who Make Nominations Under Shareowner Access Bylaws

Among other disclosures, the Shareholder Bylaw Release also proposes to require that a nominating shareowner provide the same disclosures required of a shareowner who submits a shareowner access bylaw proposal. These disclosures would be provided to a company's shareowners through the proxy statement and the company's website. CalPERS has the same objections to these disclosure requirements as it has for disclosure requirements that apply to shareowners who submit shareowner access bylaw proposals. Again, these rules elicit information that is unlikely generally to be material to investors. Accordingly, CalPERS recommends that the Commission substantially revise or delete these requirements as discussed above.

Electronic Shareowner Forums

The Shareholder Bylaw Release also proposes Rule 14a-18, which would provide a safe harbor for a shareowner or a company to establish an electronic shareowner forum. Rule 14a-18 exempts from the definition of the term "solicitation" communications made on an electronic shareowner forum by any person who does not seek a proxy. This exemption only applies to communications made more than 60 days prior to the date announced by the company for its annual or special meeting of shareowners. Under Rule 14a-18, no shareowner or company will be liable under federal securities law for any statement made by another person on an electronic shareowner forum. CalPERS supports efforts by the SEC to use technology to provide greater opportunities for shareowners to communicate with each other and with companies. The electronic shareowner forum is a step in the right direction.

Proposals Regarding Non-Binding Shareowner Proposals

The Shareholder Bylaw Release solicits comment regarding whether the SEC should adopt rules that would permit companies and shareowners to adopt their own procedures for treating non-binding shareowner proposals. CalPERS does not support this proposal. The current shareowner proposal process is the product of over 50 years of rulemaking, judicial guidance and industry practices. Shareowners and companies alike benefit from the predictability and relative consistency of the staff's interpretive positions under Rule 14a-8, as well as the experience that the federal courts have with the rule. While there is always room for improvement, CalPERS is concerned that the body of Rule 14a-8 precedent would be lost if companies and shareowners were left completely to their own devices. Instead of adopting such rules, CalPERS recommends that the SEC continue its current practice of periodically re-examining and adjusting Rule 14a-8 and other proxy rules.

The Shareholder Bylaw Release also solicits comment regarding whether the SEC should adopt a rule that would enable companies to follow an "electronic petition model" for non-binding



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proposals in lieu of Rule 14a-8. Under this procedure, a company would be excused from the application of Rule 14a-8 with regard to non-binding shareowner proposals if it creates an electronic forum where shareowners could submit, consider and sign electronic petitions. As CalPERS noted in its letter to the SEC dated May 25, 2007, CalPERS believes that it is worth considering whether technology can be utilized to improve Rule 14a-8 or better effectuate the public policy purposes that led to the adoption Rule 14a-8.

At the same time, CalPERS believes that non-binding shareowner proposals are too important to the corporate and shareowner community to be replaced it with an unproven chat-room concept. Non-binding shareowner proposals help shareowners identify issues that are important to other shareowners and give companies the flexibility to determine how to address such issues. These benefits would be lost if the Commission adopted an electronic petition model for non-binding proposals. First, because many shareowners that otherwise would have submitted non-binding shareowner proposals likely will submit proposals in the form of bylaw amendments that could bind a company if approved. Second, because an electronic petition is unlikely to garner the same level of support as a proposal that is voted upon at an annual meeting and thus would serve as a poor proxy for shareowner interest. Accordingly, CalPERS does not support the proposed electronic petition model discussed in the Shareholder Bylaw Release.

The SEC Should Not Adopt the Proposed Amendments If any Commission Seats Are Unfilled

With the imminent departure of one of the Commissioners, CalPERS is concerned that the Commission may act on the Shareholder Bylaw Release while one or more seats on the Commission are unfilled. CalPERS believes that shareowner access to the proxy is critical to the ongoing corporate governance dialogue at public companies. In light of the importance of the topic, CalPERS believes that only a full Commission should pass judgment on the topic. Accordingly, CalPERS urges the Commission to act on this rulemaking only when all vacancies on the Commission have been filled.

Conclusion

We again thank the Commission for the opportunity to express our viewpoint and look forward to continuing public discussion on these important issues.

Sincerely,

PETER H. MIXON
General Counsel