ASSOCIATION OF CORPORTATE COUNSEL
Corporate & Securities Law Committee
1025 Connecticut Ave. NW
Washington, DC 20036

January 12, 2004

Via e-mail: rule-comment@sec.gov

Securities and Exchange Commission
450 Fifth St., N.W.
Washington, D.C. 20549
Attention: Jonathan G. Katz, Secretary

Re: Shareholder Access to Company Proxy for the Nomination and Election of Directors
(Release No. 34-48626: IC-26206; File No. S7-19-03; RIN 3235-AI93)

Ladies and Gentlemen:

On behalf of the Association of Corporate Counsel, ("ACC"), formerly known as the American Corporate Counsel Association, ACC's Corporate & Securities Law Committee is pleased to have the opportunity to comment on the Commission's shareholder access proposal. ACC 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 ACC's committees, with over 4,600 attorney members, most of whom work in public companies that are subject to the Commission's disclosure requirements.

We do not disagree with the stated objective of the proposed rule, which is to enhance the responsiveness of corporate Boards of Directors to the shareholders of the companies which they serve as directors, by providing a route for those shareholders to participate more actively in the proxy process for the election of directors, in situations where the Board has been demonstrably unresponsive to the legitimate concerns of the company's shareholders. However, we, like many others representing the corporate community, do have a concern that the Commission's current proposal will result in a more confrontational and adversarial relationship between directors and shareholders that is not sufficiently outweighed by any benefits from what some think is a more democratic process for the nomination and election of directors. At a time when attracting and retaining qualified individuals to serve as directors is increasingly difficult due to the time and liability concerns that face them in those roles, we believe that the increased likelihood that director nominations will be subject to arbitrary proxy contests launched by small groups of shareholders will only harm the effort to improve the functioning of the Board, and will deter many otherwise qualified individuals from agreeing to serve as directors.

We think that any past problems arising from a lack of responsiveness on the part of directors to legitimate shareholder concerns are likely to diminish as a result of the dramatic changes required by the Sarbanes-Oxley Act and its implementing regulations, by the revised listing standards of the NYSE and NASDAQ, and by the Commission's recently adopted rule on Disclosure Regarding Nominating Committee Functions and Communications between Security Holders and Boards of Directors (File No.S7-14-03). These rules, all of which are designed in a broad sense to more closely align the interests of corporate Boards of Directors with the interests of shareholders by increasing their independence from corporate management, and which are further designed to improve communications between Boards and shareholders, should be given time to operate before additional mechanisms such as providing shareholder access to a company's proxy for the purpose of nominating and electing directors are adopted.

While we urge the Commission to give further consideration to the substantial governance changes that have already been made, and which stand an excellent chance of significantly enhancing corporate governance generally, and Board responsiveness to specific shareholder concerns in particular, we do have comments on a number of issues raised in the proposing release.

Triggering Events

We agree that there should be triggering events that must occur before the proposed shareholder nomination procedure can be used. We also do not disagree with the two types of triggering events proposed by the Commission. We do believe, however, that the vote required to trigger shareholder access with respect to each of the triggering events should be a majority of shares outstanding, and not just a majority or percentage of votes cast. The shareholder access mechanism will be disruptive to the functioning of a Board of Directors and will be expensive and time-consuming for the companies involved. As such, it should be available only where a majority of shares outstanding have been voted in support (or withheld, in the case of voting on directors) of a matter that can trigger shareholder access.

In addition, we do not believe that shareholder access should be permitted in response to a majority withhold vote if the Board of Directors, prior to the next shareholder meeting at which directors are to be elected, takes action that is clearly responsive to the shareholder vote. For instance, if the Board determines that the director receiving the large withhold vote will not be nominated for re-election, then shareholder access would not need to be triggered, because the Board would have appropriately responded to the results of the vote. We urge the Commission to add to the withhold vote trigger a provision that would limit it to those situations where the Board has been unresponsive to the results of the withhold vote.

We are also opposed to additional triggers over and above the two outlined in the Commission's proposal. Certainly, those proposals which relate to the governance of a company, such as proposals to eliminate staggered boards or rescind shareholder rights

plans, should not act as triggers for three principal reasons. First, many such proposals are brought by shareholder groups against companies for reasons that have nothing to do with the performance of those companies, but have more to do with the specific interests of the shareholder groups themselves. Second, in many cases, the voting policies of many institutional shareholders are to vote in favor of such proposals, regardless of the performance of the affected companies, or the quality of their Boards and managements. To allow voting results that are not based on Board performance to trigger the potentially onerous consequences of the proposed shareholder access would subvert the Commission's intention in seeking shareholder access, which is to open the proxy process in those companies that have demonstrated a lack of responsiveness to shareholder interests.

Third and perhaps most important, shareholder access should not be the penalty incurred when a Board in its business judgment does not take a specific action, even if shareholders have voted in favor of such an action. The "penalty" for a Board has always been, and should remain, a judicial determination that it has breached the duty which it owes under state law to the corporation and its shareholders. If shareholder access is permitted in response to certain Board conduct or certain events within the purview of the Board, regardless of whether the Board has breached its obligations, the erosion in the law surrounding the legal duties of a Board of Directors could result in far-reaching consequences that are certainly not contemplated by the Commission's proposal. We recommend that the Commission limit the triggering events to the two that have been proposed, with the modifications outlined above.

Required Share Ownership

We are further concerned about the percentage of share ownership that is required both to bring a shareholder proposal to authorize shareholder access and to nominate a candidate to become a director. The 1% threshold for the former is simply too low. Many, if not most, public companies have a group of shareholders that are willing to use the proxy mechanism for purposes that are not relevant to the overall performance of the Company or the creation of shareholder value. Such shareholders may find it relatively easy to form a coalition to meet the low 1% threshold and place a proposal on the ballot to permit shareholder access. Since the Commission's proposal is intended to impact those companies that have demonstrated unresponsiveness to shareholder concerns. It is more consistent with that philosophy to require more than 1% of shares for a shareholder access proposal to be placed in the Company's proxy materials.

We suggest that this number be raised to at least 5%. While even at that level, we have concerns that a very small number of shareholders can cause disruption to the Board's activities through an attempt to permit shareholder access where the circumstances would not require it, such a percentage would be more likely to insure that a shareholder access proposal had support across a somewhat broader range of the shareholder base. We recognize, of course, the argument that if a shareholder access proposal is not warranted, then it will be defeated. Unfortunately, the cost and disruption of having to defend

against one is distracting for any company and its Board, even if it is handily defeated. Such contests should not be encouraged where they are not warranted.

We have further concerns about the percentage of share ownership required to actually nominate a director pursuant to the shareholder access mechanism. The 5% number in the Commission's proposal would allow a very small number of the Company's institutional shareholders, many of which own 2 or 3% of the shares of even very large public companies, to seek Board representation for their favored candidate. It is our view that the percentage of ownership required to nominate a director should be considerably higher, perhaps 15%.

The ability to nominate a director through the Company's proxy process is a major change to the current corporate governance scheme, and we are very concerned about vesting that ability in a shareholder group that represents as little as 5% of a company's outstanding shares. A contested election will be not only time-consuming and exponentially more expensive than a shareholder access proposal, but will be confusing to shareholders, who may no longer be able to as easily vote in favor of the entire slate of Board-recommended candidates, and who will face the difficulty of discerning from a more complex proxy statement and proxy card what action they must take. At 15%, the probability is much greater that shareholders as a group are dissatisfied with overall corporate or Board performance, and that the nomination of an alternative director candidate has support among a significant portion of the shareholder group.

In addition, it is our position that those shareholders who are in the group proposing an alternative director should not only have held their shares for the period described in the proposal, but should also be required to agree that they will continue to hold them for some specified period of time after the election of their nominee. We believe that is fair to expect that their share ownership would continue until at least the meeting at which that director stands for re-election, but in no event should the period be less than one year. While this issue exposes the flaws in the concept of "ownership" of stock that have been well articulated by others opposed to the shareholder access idea, we certainly believe that it is wrong for a shareholder who has no obligation to remain a shareholder to be able to significantly influence the direction of a company by proposing an alternative director.

Effective Date

Finally, we believe that the effective date of the shareholder access proposal should be delayed until January 1, 2005. We understand the Commission's argument that under its proposal no contested election can occur until January 1, 2005, and that proposals to adopt the shareholder access procedure can be treated just as any other shareholder proposals. However, this is a year in which public companies, and to a large extent, ACC members who provide counsel to them, are working to comply with the new listing standards, with completing their compliance with the voluminous Sarbanes-Oxley requirements, and with improving or establishing the mechanisms for direct shareholder-

Board communications. Company websites and next year's annual reports and proxy statements will contain many new disclosures about Board and company governance practices that should be digested by shareholders before an independent shareholder access mechanism is added to the lengthy menu of governance changes.

There would appear to be little to gain from an immediate effective date for this proposal, especially when viewed against the disruption that could be caused during a period of significant governance change that, once completed, could alleviate a current perceived need for a shareholder access mechanism in a particular company. In addition, while a great deal has been written about the shareholder access issue from all sides of the debate, there has not been time for reflection on the part of all interested parties regarding all of the issues, both practical and theoretical, raised by all of the various parties. We see little to lose, and much to gain, from a one-year delay in the implementation of the proposal.

Town Hall Meeting Approach

In addition to all of the foregoing, we would like to express our support for further consideration of the so-called "town hall" meeting approach that has been proposed by some commenters in conjunction with the shareholder access proposal. Under such an approach, a company would be required to hold a broad-based meeting among key members of the company's Board and management and shareholders who have held their shares for a specified period of time, if requested to do so by at least a certain percentage of the company's longer-term shareholders who have articulated certain specified grievances against the company. Shareholder access would then be permitted only if the Board failed to respond appropriately to the results of the "town hall" meeting. While many details as to how this idea would work in practice need to be resolved, such an idea could provide for a Board-shareholder communication mechanism that would satisfy both those who say that Boards are not currently incentivized to meet shareholder concerns with those, including many ACC members, who fear that shareholder access could be far more complex, expensive and divisive than is contemplated by the Commission. We urge the Commission to consider it as it determines how to proceed.

Conclusion

The foregoing summarizes our principal concerns. Not addressing certain other issues in this letter should not be interpreted as agreement or belief that such provisions are less consequential. There are many practical concerns, for instance, about share voting, the design of proxy cards, the so-called "ten-day rule" of the NYSE, etc., that are significant and must be considered by the Commission as it decides how to proceed. Those are of concern to us as well.

In sum, we request that this potentially far-reaching proposal not be treated casually, that all of its ramifications be carefully thought through before it becomes effective, and that the effective date of any final rule be delayed by at least one year.

We are pleased to be able to offer our comments on the proposal and we hope that this letter will constitute a useful contribution to the debate. Should you wish to discuss it with us, please contact the undersigned at 317-488-6264.

Respectfully submitted,

/s/ Michael C. Wyatt

ASSOCIATION OF CORPORATE COUNSEL

By: Michael C. Wyatt
Chair, Corporate & Securities Law Committee

cc: Hon. William H. Donaldson
Chairman of the Securities and Exchange Commission
Hon. Paul Atkins, Commissioner
Hon. Roel Campos, Commissioner
Hon. Cynthia A. Glassman, Commissioner
Hon. Harvey Goldschmid, Commissioner
Alan L. Beller, Director Division of Corporation Finance
Annette L. Nazareth, Director, Division of Market Regulation
Paul Roye, Director, Division of Investment Management
Giovanni Prezioso, General Counsel
Martin Dunn, Deputy Director, Division of Corporation Finance