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January 19, 2010 **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

Thank you for the opportunity to provide our views on the additional data and analysis published in the public comment file regarding the SEC's proposed rules to facilitate shareholder director nominations.

CalPERS is the largest state public pension system in the United States with approximately $200 billion under management and long term equity ownership in more than 7,000 publicly-traded companies. We regard the process for facilitating shareholder director nominations as an issue of vital importance. The financial crisis reflected significant governance failure. Facilitating the nomination of directors by shareowners provides a critical market solution to ensuring the effective board performance which underpins economic stability and growth.

We would like to make the following specific comments on the reports and data sources cited in the SEC's consultation.

(1) Reports on efficiency, competitiveness and capital formation, filed by the Business Roundtable:

We consider that the proposed SEC rules facilitating shareowner director nominations will improve efficiency, competitiveness and capital formation.

The current arrangements regarding shareowner nominations to the board are highly inefficient. Shareowners are prevented from putting forward nominations for the board in many companies, and the costs elsewhere are prohibitive. As you know, we have calculated the cost of introducing proposals at the Russell 3,000 to be several hundreds of millions of dollars. Companies also can and do frustrate efforts to nominate directors. CalPERS has faced situations where companies have been able to prevent change through measures such as: maintaining super majority voting thresholds; ignoring the results of shareowner proposals even when supported by majority vote; directors not standing down even when they do not receive a majority of shareowner votes, in favor of their election; companies filing meritless no action requests with the SEC presenting byzantine meeting procedures or requiring lengthy notice provisions which impose a deadline for filing proposals which restricts timely intervention.

As the proposed rules will bring US capital markets into line with international practice, we see the potential for an improvement in competitiveness. As shareowners are able to use the proxy process to more effectively hold boards accountable, the improvements in performance will undoubtedly contribute to improved capital formation. Evidence on these points is set out below.

(2) Article entitled “Why did some banks perform better during the financial crisis?” filed by the Business Roundtable

We question the relevance of this article to the SEC’s deliberations, as the article does not address the ability of shareowners to nominate directors nor is the main focus on the US.

The paper studies 98 international banks, 19 of which are based in the United States. The authors use the term ‘shareholder friendly’ to describe boards with particular governance features in the study, but the underlying data points do not include proxy access or other shareowner rights to appoint directors. The study therefore does not actually examine the issue which the SEC is seeking comment upon.

The data used in the study are drawn from a commercial product, The Corporate Governance Quotient (CGI) provided by the company Risk Metrics. This absence of data on the process for shareowner nominations to boards in the study fatally undermines its conclusions.

The limitations of the data set provided by Risk Metrics’ Corporate Governance Quotient for the purpose of academic research in an international setting have been recognized by the United States’ leading scholar in the field, Professor Lucien Bebchuk, Director of Corporate Governance at Harvard University. He has concluded that the data set is ”inadequate” and “irrelevant” and “even harmful” for the assessment of governance arrangements internationally as it does not include a number of critical elements for markets without dispersed ownership.

We consider this study does not have relevance to the question of proxy access in the United States, and furthermore, the conclusions are flawed even for international purposes. Instead, we would encourage the SEC to consider research which addresses the impact of shareowner nominated directors on corporate performance. Two studies on the subject are particularly illuminating and reflect CalPERS experience in the field.

We refer the SEC to a study commissioned by the IRRC Institute which tracks the performance of 120 US companies from 2005-2008 where shareowners had successfully nominated candidates to sit alongside management nominated board members, much as would be the effect of the proposed SEC rules on proxy access. The results of the study show both relative and absolute improvements in performance at companies where shareowners nominated directors to boards. [1]

"On average the study found that total shareowner returns at ongoing companies with hybrid boards (i.e. a mix of management and shareowner nominated directors) were 19.1 – 16.6% better than peers – from the beginning of the contest period through the hybrid board's one year anniversary. More than half of these gains came during a three-month period leading up to the formation of the hybrid board, providing strong evidence for a sizeable contest effect increase in share prices, as the market priced in its expectations of changes a hybrid board might bring."

We would also draw the SEC's attention to a comparative analysis of shareowner rights in the US and UK commissioned by the Yale School of Management and Oxford University's SAID school of business which shows that the appointment of shareowner candidates to the boards of underperforming companies in the UK (a country which has had proxy access for over 100 years) was followed by a significant improvement in financial returns.[2]

These research results support CalPERS extensive experience in the field, through its Focus List which has used shareowner engagement to tackle underperforming boards via governance reform over a 20 year period. CalPERS external pension consultant, Wilshire Associates, has tracked the progress of companies in the Focus List program since its inception. Their conclusion in a 2009 report to the CalPERS Board of Administration stated that after the first five years of engagement by CalPERS, the companies concerned averaged excess returns of 15 percent above their benchmark return on a cumulative basis. This result is all the more striking as the universe of companies on average came onto the Focus List with a collective underperformance relative to their benchmark of some negative 84 percent.[3]

Likewise, over this last decade CalPERS has allocated significant capital to specialist funds which tackle corporate performance through engagement with failing boards, and

[1] "Effectiveness of Hybrid Boards", By Chris Cernich, Scott Fenn, Michael Anderson and Shirley Westcott, Prepared by Proxy Governance, Inc. under contract for the IRRC Institute for Corporate Responsibility May 2009.

[2] "Shareholders and Corporate Governance: A Research Agenda and Conference", Yale University – Yale School of Management, Oxford University – Said University, Conference Summary: By Jonathan GS Koppel, 2007. http://millstein.som.yale.edu/oxfordsummary.shtml

[3] The "CalPERS Effect" on Targeted Company Share Prices, Wilshire Associates Incorporated, July 31, 2009

via proxy contexts or negotiation have introduced shareowner candidates. These corporate governance funds overall have outperformed their benchmark since inception.

We therefore see great potential for improving corporate performance through facilitating shareowner nominated directors through a simple and efficient process, namely proxy access.

(3) Limits of Private Ordering, research paper filed by the Shareowner Education Network and the Council of Institutional Investors.

CalPERS experience supports the conclusions of this paper, which are that private ordering, or a state law solution, will not be efficient or effective. We also agree with the paper's analysis that any form of opt out from federal securities legislation is to be avoided at all costs. We would consider an opt out from securities legislation as a dangerous precedent. The thrust of regulatory reform should be to ensure comprehensive and clearly enforced standards of transparency and accountability across capital markets and to close loopholes or gaps. To allow an opt out in the wake of the financial crisis would be viewed as an abject failure by regulators whose first duty is to investors who suffered extensive losses and have been badly hurt by the economic down turn which followed. An opt out from federal securities law would be considered wholly unacceptable in other areas, for example on filing of accounts or other disclosures vital to market integrity. Furthermore, the concern regarding the SEC's authority on this issue is entirely misplaced. The SEC has had responsibility for regulation of the content of proxy disclosures since its inception in the 1930s. That authority was specifically confirmed in the House Financial Services Bill as recently as December 2009.

(4) Supplemental analysis of holding periods and patterns.

We note that the supplemental analysis carried out by the SEC staff supports the proposed thresholds and holding periods contained within the proposed rules. These thresholds are to ensure that significant, long term shareowners are able to gain access to the proxy for the purposes of nominating directors for consideration by their fellow investors. They will also have the pragmatic effect of limiting proxy access to all but exceptional cases, where proposal of new directors is a last resort for investors seeking to improve performance. The data illustrates that these thresholds have been drawn in a reasonable way.

Having carefully reviewed the supplemental reports and analysis, CalPERS continues to strongly support the Commission's rules and applauds the considered process for assessing comment.

We would be glad to provide any further details required or 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 either me directly or Peter Mixon, CalPERS General Counsel, at (916) 795-3797 or Anne Simpson, Senior Portfolio Manager, Global Equities, who leads our governance program, at (916) 795-9672.

Sincerely,

JOSEPH A. DEAR
Chief Investment Officer

cc: Peter Mixon, General Counsel – CalPERS
Eric Baggesen, Senior Investment Officer - CalPERS
Anne Simpson, Senior Portfolio Manager, Global Equity - CalPERS