LETTER OF FORTY-EIGHT CORPORATE AND SECURITIES LAW PROFESSORS
IN SUPPORT OF INCLUDING PROPOSED BYLAW AMEDNMENTS
IN THE COMPANY'S PROXY MATERIALS

February 2, 2006

BY MAIL, FACSIMILE, AND EMAIL

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100 F Street NE
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RE: Inclusion of Proposed Bylaw Amendments in Company Proxy Statements

We, the undersigned, are forty-eight law professors from thirty universities around the country.[1] We all teach and/or write about corporate law and securities law. We are writing (in our individual rather than institutional capacities) to urge the Securities and Exchange Commission to express its opposition to company exclusion from proxy statements of shareholder-initiated bylaws concerning corporate elections.

We are writing in connection with a case now pending at the Second Circuit, *American Federation of State, County & Municipal Employees Pension Plan v. American International Group, Docket No. 05-2825-cv*. The case concerns whether a company may exclude under SEC Rule 14 a-8 ("the Rule") a shareholder proposal that, if adopted, would amend the company's bylaws to require the company to place candidates nominated by shareholders on the company's ballot in certain circumstances. We understand that the Court recently requested that the Securities and Exchange Commission submit an *amicus curiae* expressing the Commission's position on this question.

In our view, allowing companies to exclude the considered bylaw amendment and other similar bylaw amendments would greatly undermine the Rule's policy goals and would

[1] The universities with which one or more of us are associated are Berkeley, Boston University, Brooklyn, Case Western Reserve, Chicago, Columbia, Duke, Emory, Fordham, George Washington, Georgetown, Hastings, Harvard, Indiana, Maryland, Michigan, Minnesota, NYU, Ohio State, Penn, San Diego, Stanford, Temple, Texas, UCLA, USC, University of Arizona, Virginia, Wisconsin, and Yale. Our university affiliations are listed below for identification purposes; we do not represent or speak for our institutions.

adversely affect our corporate governance system. We also believe that a reasonable interpretation of the Rule should not allow the exclusion of such proposals. We therefore urge the Commission to communicate to the Second Circuit its opposition to excluding the considered shareholder proposal.

There is substantial disagreement among us concerning the substantive merits of the considered bylaw amendment and shareholder access to the proxy in general. We are unanimous, however, in our strong belief that shareholders should be allowed to make a decision on this subject by themselves, and that companies should not be allowed to make the decision for them by excluding proposed bylaw amendments.

One of the basic elements of the corporate structure created by state law is shareholders' power to adopt bylaw amendments including amendments concerning director elections. Forcing shareholders who consider initiating such a bylaw amendment to bear the costs of obtaining proxies from other shareholders would greatly impede the initiation of such proposals. Thus, if companies would be permitted to exclude bylaw amendments concerning election procedures that are valid under state law, shareholders' power under state law to initiate such amendments would become largely irrelevant. Permitting such exclusion thus would undermine the Rule's goal of ensuring that shareholders are able to communicate with other shareholders on matters of significant importance.

Furthermore, there is a widely held view that "one size does not fit all" and that companies should be allowed to tailor some governance arrangements to their particular needs and circumstances. Blocking shareholder-initiated bylaw amendments concerning election procedures would greatly undermine private ordering in this important area.

Exclusion of the considered proposal is not required by a reasonable interpretation of the provision that permits exclusion of a proposal that "relates to an election" for board membership. This provision should be understood as permitting the exclusion of proposals that relate to a particular election over particular candidates, which are proposals for which it might be necessary to have detailed disclosures in a separate proxy statement. This provision should not be understood as permitting the exclusion of governance provisions that do not relate to any particular election but rather to the procedural rules to which all future elections would be subject. Such proposals do not require a different type of disclosure from those accompanying proposed bylaw amendments that relate to other aspects of the company's governance.

Interpreting the Rule to allow exclusion of proposals that "may result in contested elections," as was suggested in some no-action letters, would impose an outside preference against some governance arrangements permitted under state law. Such an interpretation also

would be inconsistent with the long-standing practice of allowing shareholders to include in companies' proxy materials various proposals that may make contested elections more likely. For example, shareholders have long been permitted to include proposals to de-stagger the board or introduce cumulative voting. There is no reason to exclude proposals that make contested elections more likely by providing proxy access while permitting proposals that make such elections more likely by introducing annual elections or cumulative voting.

Indeed, an interpretation that would exclude proposals that would make contested elections more likely would have the following problematic consequence. While such interpretation would not permit shareholders to include in companies' proxy materials a proposal to provide proxy access, it would permit shareholders to include a proposal to eliminate proxy access in the event a company already has a bylaw providing proxy access; the latter would make contested elections less, rather than more, likely. This consequence highlights that excluding the considered bylaw amendment would not advance the goals of the proxy rules; instead, it would serve a policy, which the proxy rules are not intended to advance, of preventing governance structures that facilitate contested elections.[2]

In case we could be useful in any way to the deliberations of the staff or the Commission on this question, please contact Lucian Bebchuk at (617)-876-6071 or by writing to bebchuk@law.harvard.edu or 1545 Mass. Ave., Cambridge, MA 02138.

Sincerely yours,


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[2] Further elaboration of some of the points discussed in this letter can be found in the Harvard Law School Professors' brief, submitted by several of us, which was attached to the Second Circuit's letter.

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