IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW YORK

LUCIAN BEBCHUK,	:	
	:	
Plaintiff.	:	
	:	
-v.-	:	CV 08-3716
	:	Electronically Filed
ELECTRONIC ARTS, INCORPORATED	:	
	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF *AMICI CURIAE'S*
UNOPPOSED MOTION FOR LEAVE TO FILE

DATED: September 8, 2008

Professor Jeffrey N. Gordon, Esq.
435 West 116th Street
New York, NY 10027
Tel. (212)-854-2316
Fax (212)-854-7946

Counsel for Amicus Curiae

INTRODUCTION

Amici[1] are professors at various law schools around the country. They file their brief in their individual, not institutional capacities. The teaching and research interests of the *amici* lie in the areas of corporate and securities law. *Amici* therefore have expertise on state and federal securities law governing Professor Bebchuk's proposal (the "Proposal"), which recommends a bylaw or certificate of incorporation amendment to be adopted by Electronic Arts, Inc. ("EA") specifying how EA will exercise its discretion under Rule 14a-8 to exclude shareholder proposals from its proxy statement.

ARGUMENT

"Federal courts have discretion to permit participation of amici where such participation will not prejudice any party and may be of assistance to the court." *Strougo v. Scudder, Stevens & Clark, Inc.*, 1997 WL 473566 (S.D.N.Y. Aug. 18, 1997) (internal citations omitted). The purpose of an *amicus* briefs is to "insur[e] a complete and plenary presentation of [potentially] difficult issues so that the court may reach a proper decision[.]" *Onondaga Indian Nation v. State*, 1997 WL 369389, at * 2 (N.D.N.Y. 997).

This Court should grant the *Amici*'s request to file a brief. In this case, neither party is prejudiced by submission of the *Amici* brief as both parties have consented to its submission. Further, EA's motion to dismiss raises, *inter alia*, the novel argument that federal securities law limits a corporation's ability to organize its internal affairs under state law by adopting bylaw or certificate amendments. Plaintiff has consented to and the Chamber of Commerce of the United States has submitted an *amicus curiae* brief to

[1] *Amici* are named in Exhibit 2 to the Unopposed Motion For Leave To File.

address the important issues in the instant case. *Amici* are 46 professors from 28 top-ranked universities from across the nation. As such, *Amici* believe that they are uniquely situated and qualified to evaluate the merits of Professor Bebchuk's argument that EA must include the Proposal in its proxy statement, and believe that that their academic qualifications and experience would provide assistance to the Court in evaluating the issues in this case.

The Second Circuit Court of Appeals has recognized that professors serving as *amici* can be "extremely helpful" in analyzing the issues of a case. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.* 153 F.3d 82, 88 (2d Cir. 1998). Because the *Amici* have experience researching and teaching issues of corporate and securities law, they believe that their submission will aid the Court in deciding the case.

While the *Amici* here do not share a common belief as to the merits of the bylaw or certificate amendment in the Proposal, they do share the opinion that the federal proxy rules require EA to place the Proposal in its proxy statement. Therefore, the *Amici* are not necessarily aligned with either a management-centric model of corporate governance, nor a model that favors shareholders. Rather, *Amici* are concerned with the structure of the law in general and the specific relationship of federal regulation to state laws as applied in this case. This unique perspective, *Amici* respectfully submit, should be of assistance to the Court in deciding the issues presented in the pending motion to dismiss.

CONCLUSION

For the forgoing reasons, we respectfully request that this Court grant leave to file the *amici* brief.

Dated: New York, New York
September 8, 2008

s/ Jeffrey N. Gordon
Professor Jeffrey N. Gordon, Esq.
435 West 116th Street
New York, NY 10027
Tel. (212)-854-2316
Fax (212)-854-7946

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW YORK

LUCIAN BEBCHUK,	:	
	:	
Plaintiff.	:	
	:	
-v.-	:	CV 08-3716
	:	Electronically Filed
ELECTRONIC ARTS, INCORPORATED	:	
	:	
Defendant.	:	

BRIEF FOR CORPORATE AND SECURITIES LAW PROFESSORS
AS *AMICI CURIAE* SUPPORTING PLAINTIFF

DATED: September 8, 2008

Professor Jeffrey N. Gordon, Esq.
435 West 116th Street
New York, NY 10027
Tel. (212)-854-2316
Fax (212)-854-7946
jgordon@law.columbia.edu

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

LIST OF THE *AMICI CURIAE*

The corporate and securities law professors joining this brief as *amici*, listed alphabetically, are:

Robert Ashford
Professor of Law
Syracuse University College of Law

Ian Ayres
William K. Townsend Professor
Yale Law School

Laura N. Beny
Assistant Professor of Law
University of Michigan Law School

Lisa E. Bernstein
Wilson-Dickinson Professor of Law and
Co-Director, Institute for Civil Justice
University of Chicago Law School

Bernard S. Black
Professor of Law
University of Texas Law School
Professor of Finance
McCombs School of Business

Stephen Choi
Murray and Kathleen Bring Professor of Law
New York University School of Law

John C. Coffee
Adolf A. Berle Professor of Law
Columbia Law School

James D. Cox
Brainerd Currie Professor of Law
Duke University School of Law

George W. Dent, Jr.
Schott-van den Eynden Professor of Business Organizations Law
Case Western Reserve University School of Law

John J. Donohue
Leighton Homer Surbeck Professor of Law
Yale Law School

Melvin A. Eisenberg
Koret Professor of Law
Boalt Hall
University of California at Berkeley

Charles M. Elson
Edgar S. Woolard, Jr., Chair
Professor of Law
Director of the John L. Weinberg Center for Corporate Governance
Lerner College of Business & Economics
University of Delaware

Lisa M. Fairfax
Professor of Law and Director, Business Law Program
University of Maryland School of Law

James A. Fanto
Professor of Law
Brooklyn Law School

Allen Ferrell
Greenfield Professor of Securities Law
Harvard Law School

Jill E. Fisch
Professor of Law
University of Pennsylvania Law School

Merritt B. Fox
Michael E. Patterson Professor of Law
NASDAQ Professor for the Law and Economics of Capital Markets
Columbia Law School

Tamar Frankel
Professor of Law
Michaels Faculty Research Scholar
Boston University School of Law

Jesse M. Fried
Professor of Law and Co-Director
of the Berkeley Center for Law, Business and the Economy
Boalt Hall
University of California at Berkeley

Jon D. Hanson
Alfred Smart Professor in Law
Harvard Law School

Claire Hill
Professor and Director, Institute for Law and Rationality
Associate Director, Institute for Law and Economics
Vance K. Opperman Research Scholar
University of Minnesota Law School

Peter H. Huang
Harold E. Kohn Chair Professor of Law
Temple University James Beasley School of Law

Marcel Kahan
George T. Lowy Professor of Law
New York University School of Law

Ehud Kamar
Professor of Law
University of Southern California - Gould School of Law

Vikramaditya S. Khanna
Professor of Law
University of Michigan Law School

Reinier H. Kraakman
Ezra Ripley Thayer Professor of Law
Harvard Law School

Donald C. Langevoort
Thomas Aquinas Reynolds Professor of Law
Georgetown University Law Center

Louis Lowenstein
Simon H. Rifkind Professor Emeritus of Finance & Law
Columbia Law School

Stephen Marks
Professor of Law
Boston University School of Law

Brett McDonnell
Professor of Law
Associate Dean for Academic Affairs
University of Minnesota Law School

Richard W. Painter
S. Walter Richey Professor of Corporate Law
University of Minnesota Law School

Frank Partnoy
Professor of Law
University of San Diego School of Law

Arthur R. Pinto
Professor of Law and Co-Director of the Dennis J. Block Center
for the Study of International Business Law
Brooklyn School of Law

Robert A. Ragazzo
University of Houston Law Foundation Professor of Law
University of Houston Law Center

Mark J. Roe
David Berg Professor of Law
Harvard Law School

Kenneth E. Scott
Ralph M. Parsons Professor of Law and Business, Emeritus
Stanford Law School

David Arthur Skeel
S. Samuel Arsht Professor of Corporate Law
University of Pennsylvania Law School

D. Gordon Smith
Glen L. Farr Professor of Law
J. Reuben Clark Law School
Brigham Young University

James C. Spindler
Associate Professor of Law and Business

University of Southern California - Gould School of Law

Marc I. Steinberg
Rupert and Lillian Radford Professor of Law and
Senior Associate Dean for Research
Dedman School of Law
Southern Methodist University

Guhan Subramanian
Joseph Flom Professor of Law and Business
Harvard Law School
Douglas Weaver Professor of Business Law
Harvard Business School

Eric Talley
Professor of Law and Faculty Co-Director of the
Berkeley Center for Law, Business and the Economy
Boalt Hall
University of California at Berkeley

Randall S. Thomas
John S. Beasley II Professor of Law and Business
Vanderbilt University Law School

Frederick Tung
Professor of Law
Emory University School of Law

David I. Walker
Professor of Law
Boston University School of Law

Elliott J. Weiss
Charles E. Ares Professor Emeritus
Rogers College of Law
University of Arizona

INTEREST OF THE *AMICI CURIAE*

Amici are forty-six professors from twenty-eight law schools around the country. They file this brief in their individual, not institutional capacities; their institutional affiliations are listed above for identification purposes only. The teaching and research interests of the *amici* lie in the areas of corporate and securities law. *Amici* have devoted significant parts of their professional careers to teaching and writing about the country's corporate and securities laws.

Amici do not generally hold the same views as to whether EA and its shareholders would benefit from the passage of the proposal submitted by Professor Lucian Bebchuk ("the Proposal") to Electronic Arts ("EA"). *Amici* also differ on many issues concerning corporate governance and corporate law policy. *Amici* all share, however, the view that EA may not exclude the Proposal from its proxy materials and deny EA's shareholders the opportunity to vote on it. While the brief reflects this consensus view of the *amici*, all of whom believe that EA may not exclude the Proposal, each individual *amicus* may not endorse each and every statement in this brief.

Amici focus in their brief on the two far-reaching arguments that are made by EA and the Chamber of Commerce of the United States of America (the " Chamber"), which filed an *amicus curiae* brief in support of EA. An acceptance of these arguments by the court will have implications that go far beyond the current case. Such an acceptance will lead to considerable limits on state law arrangements, and to considerable expansion in the freedom of companies to exclude shareholder proposals, that are unwarranted in light of the clear language and design of Rule 14a-8.

Because our interest is in the general questions of law presented in this case, we do not analyze below the claims made by EA and the Chamber that the particular

proposal in the current case includes language that is so "vague and indefinite" as to warrant exclusion. We should note, however, that our not analyzing these claims does not reflect an acceptance of these arguments. On the contrary, we believe that, as drafted, the Proposal would provide stockholders voting on it, and the company in considering whether to implement the Recommended Amendment if the Proposal is approved, with a very good and clear picture as to what the Proposal advocates. Indeed, the Proposal provides a more precise and detailed blueprint for implementation of an amendment to the company's governing documents than many precatory proposals, which often propose a general, open-ended approach that would require the company to fill in significant details in the event it decides to follow it.

ARGUMENT

I. The Proposal

The Proposal recommends that EA's board submit to a shareholder vote a charter or a by-law amendment ("the Recommended Amendment") that would require the company, to the extent permitted by law, to include in the company's proxy materials proposals for by-law amendments that meet certain requirements (including, among other things, submission by a shareholder(s) owning more than 5% of the company's stock). Specifically, the Proposal reads as follows:

> RESOLVED that stockholders of Electronic Arts, Incorporated recommend that the Board of Directors, to the extent consistent with its fiduciary duties, submit to a stockholder vote an amendment to the Corporation's Certificate of Incorporation or the Corporation's Bylaws that states that the Corporation (1) shall, to the extent permitted by law, submit to a vote of the stockholders at an annual meeting any Qualified Proposal to amend the Corporation's Bylaws; (2) shall, to the extent permitted by law, include any such Qualified Proposal in the Corporation's notice of an annual meeting of the stockholders delivered to

stockholders; and (3) shall, to the extent permitted by law, allow stockholders to vote with respect to any such Qualified Proposal on the Corporation's proxy card for an annual meeting of stockholders. "Qualified Proposals" refer in this resolution to proposals satisfying the following requirements:

(a) The proposal was submitted to the Corporation no later than 120 days following the Corporation's preceding annual meeting by one or more stockholders (the "Initiator(s)") that (i) singly or together beneficially owned at the time of submission no less than 5% of the Corporation's outstanding common shares, (ii) represented in writing an intention to hold such shares through the date of the Corporation's annual meeting, and (iii) each beneficially owned continuously for at least one year prior to the submission common shares of the Corporation worth at least $2,000.00;

(b) If adopted, the proposal would effect only an amendment to the Corporation's Bylaws, and would be valid under applicable law;

(c) The proposal is a proper action for stockholders under state law and does not deal with a matter relating to the Corporation's ordinary business operations;

(d) The proposal does not exceed 500 words; and

(e) The Initiator(s) furnished the Corporation within 21 days of the Corporation's request any information that was reasonably requested by the Corporation for determining eligibility of the Initiator(s) to submit a Qualified Proposal or to enable the Corporation to comply with applicable law.

Two aspects of the Proposal are worth noting. First, the Proposal is precatory. Thus, if the Proposal passes and the board decides to move in the direction urged by the Proposal, the board may design and bring to a shareholder vote an amendment that differs from the Recommended Amendment in some minor or major ways.

Second, the Recommended Amendment would require the taking of any corporate actions only to the extent permitted by law. Accordingly, the Recommended Amendment could not lead to the inclusion of false and misleading statements in proxy materials or to outcomes that would otherwise violate the proxy rules.

II. The Far-Reaching Consequences of the Preemption Argument

According to EA and the Chamber, Rule 14a-8 "has essentially 'occupied' the field of proxy regulation," and as a result any state law arrangements that attempts to regulate what is included by the company in proxy materials is "contrary to the proxy rules" and "a nullity."[1] Thus, on this view, state law arrangements, including charter and by-law provisions adopted under state law such as the Recommended Amendment, cannot in any way regulate what companies do with the freedom left to them by Rule 14a-8 to make their own choice whether to include or exclude proposals that Rule 14a-8 does not mandate including.

Acceptance of this argument would have important consequences that go far beyond the current case. To begin, while EA and the Chamber make these arguments in this case to prevent Professor Bebchuk's proposal from being included in EA's proxy materials and coming to a vote, their arguments imply that charter and by-law provisions like the Recommended Amendment would be contrary to the proxy rules and a nullity no matter how they were adopted – even if they were adopted at the initiative of a company's board or as a result of a shareholder conducting a proxy solicitation to amend the by-laws. This argument would introduce substantial and unwarranted limits on state law, and the Court should not accept EA's and the Chamber's invitation to do so.

Furthermore, acceptance of EA's and the Chamber's preemption arguments would imply the invalidity under federal law not only of charter and by-law provisions that require the company to include proposals for by-law amendments in proxy materials but also charter and by-law provisions that apply to the inclusion of other proposals initiated in company proxy materials. In particular, this argument implies the invalidity

[1] Def. Br. at 11.

under federal law of any charter or by-law provisions that require companies to include the names of director candidates proposed by shareholders in proxy materials. While Rule 14a-8(i)(8) prevents shareholders from using Rule 14a-8 to place proposals relating to such provisions in proxy materials, it has long been accepted that the adoption of such provisions, as Comverse Technology, Inc., did recently,[2] would not be itself contrary to federal law. Indeed, just last year, the Chamber stated the following in comments filed with the SEC:

> "States that want to permit shareholder access to proxy statements can do so, and in fact have done so."[3]
>
> "[S]tate law defines the rights of shareholders, including the extent to which shareholders can propose by-law amendments and nominate directors, and the extent to which they have access to the company's proxy to do so."[4]

Acceptance of EA's and the Chamber's argument in this case would imply that, contrary to the long-standing understanding of Rule 14a-8 and to the Chamber's position stated earlier, charter and by-law provisions relating to inclusion of shareholder-nominated candidates in proxy materials are invalid, no matter how adopted.

In addition, well beyond implications for provisions related to inclusion in proxy materials, acceptance of EA's and the Chamber's preemption argument would go against the long-standing acceptance of the role of state law in governing the internal affairs of companies. Courts have long protected this long-standing role of state law alongside and

---

[2] *See* Comverse Bylaws, Art IV. Sec. 3(b), filed as Exhibit 3.1 to the Comverse Form 8-K, filed April 23, 2007, *available at* http://sec.gov/Archives/edgar/data/803014/000090951807000351/0000909518-07-000351.txt.

[3] Letter of David T. Hirschmann, Senior Vice President, Chamber of Commerce, to Ms. Nancy M. Morris, Secretary, US. Securities and Exchange Commission, Oct. 2, 2007, File No. S7-16-07 and S7-17-07 (Proposed Rules Relating to Shareholder Access), page 7.

[4] Letter of David T. Hirschmann, *supra*, page 11.

in co-existence with the requirements of federal law.[5] Consistent with the long-term role of state law, the Recommended Amendment would govern EA's actions within the zone of freedom left to it by Rule 14a-8 to include or exclude certain proposals, and it would do so without weakening in any way EA's obligations under Rule 14a-8 to include certain proposals in proxy materials.

The Chamber, a long-standing champion and defender of the role of state law arrangements, described the importance of guarding its role as follows:

> "State law is the traditional and appropriate forum for defining the rights of shareholders with regard to director elections, by-law amendments and other fundamental corporate matters... The laws of the various states provide flexible environment in which new corporate governance ideas can be tested, refined and applied."[6]

Professor Bebchuk's proposal seeks to use this flexible environment in which additional corporate governance requirements can be adopted in addition to the one-size-fit all mandatory minimum requirements imposed by some federal rules such as Rule 14a-8. Acceptance of EA's and the Chamber's preemption argument would eliminate this environment for an important area of corporate affairs and would undermine the long-standing and established system of co-existence of state law and federal law requirements.

---

[5] *See, e.g., Santa Fe Industries v. Green*, 430 U.S. 462 (1977) (no expansion of reach of federal antifraud rule to address matters of fiduciary duty under state law); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) (no preemption by Williams Act of state shareholder voting rules that affect making of tender offers). As the U.S. Supreme Court said in rejecting a claim that the Williams Act preempted state corporate governance rules that could affect the making of tender offers, "if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly." CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).

[6] Letter of David T. Hirschmann, *supra*, page 12.

III. Additional Problems with the Preemption Arguments

EA and the Chamber of Commerce fail to take into account or do not give due consideration to the following aspects of Rule 14a-8 and its relationship with state law and the Recommended Amendment.

1. *Rule 14a-8 sets a floor, not a cap, with respect to the inclusion of proposals in proxy materials:* Rule 14a-8 requires the inclusion of some materials but does not prohibit the inclusion of any proposals. Rule 14a-8 does not stand in the way of a company that *chooses* "through the procedures of corporate democracy," *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978), to give its shareholders greater access to the company's proxy statement than the Rule *requires* for all public companies. Thus, to the extent that the adoption of the Recommended Amendment would lead to the inclusion of a proposal that Rule 14a-8 permitted the company to exclude or include, such an outcome would not violate Rule 14a-8 and would not be contrary to it.

This floor/cap distinction on the operation of Rule 14a-8 is clear from the earliest cases that construed the SEC's shareholder initiative rule through today's cases. The grant of authority to the SEC under section 14(a) of the 1934 Securities Exchange Act was prompted by concerns about the freedom of corporate managers "to engage in abusive solicitation practices by virtue of their domination of the proxy voting machinery." Aranow & Einhorn on Proxy Contests for Corporate Control (Randall S. Thomas & Catherine T. Dixon, eds. (3d ed., 2001 Supp.) at 1-5. In an early seminal case on Rule 14a-8's precursor, *SEC v. Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948), the Court rejected an assertion of management prerogative to exclude a shareholder proposal whose inclusion was required by the rule

but contravened a company by-law. Allowing such exclusion, the Court held, "will serve to circumvent the intent of Congress in enacting the [statute]. It was the intent of Congress to require fair opportunity for the operation of corporate suffrage. The control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a)." 163 F.2d at 518 (footnote omitted). Thus, the claim that a corporate by-law that *expands* shareholder rights to present proposals to fellow shareholders would in some way offend the regulatory scheme is inconsistent with the received view of the scheme's intention.

The permissibility of by-law provisions providing access beyond the minimum requirements of Rule 14a-8, which follows from the floor/cap distinction, is clearly stated in the Second Circuit's most recent opinion addressing Rule 14a-8, *Am. Fed'n of State, County & Mun. Employees v. Am. Int'l Group, Inc.*, 462 F.3d 121 (2d Cir. 2006). The case focused on whether American International Group could use the election exclusion of Rule 14a-8(i)(8) to exclude from its proxy materials a proposal submitted by AFSCME to adopt a by-law provision providing shareholders with the right to place director candidates on the company's proxy. In the course of its analysis, the Court took as settled law that a bylaw expanding shareholder access to the company's proxy beyond Rule 14a-8's minimum requirements is permissible and consistent with the securities laws, stating as follows:

> *"The question, however, is not really whether proposals like AFSCME's are allowed – they are certainly allowed, at least under the federal securities laws* -- the question is whether corporations can exclude such proposals if they wish to do so. Even if proxy access bylaw proposals were excludable under Rule 14a-8(i)(8), a company could nevertheless decide to include the proposal in its proxy statement; if the proposal were subsequently adopted by the requisite number of shareholder votes, then, subject to the specifics of the adopted proxy access bylaw, shareholders

would be able to wage election contests without conducting a separate proxy solicitation and without providing the disclosures required by the rules governing such solicitations." 462 F.3d at 130 n.9 (emphasis added).

In other words, says the Court, putting aside the question whether Rule 14a-8 permits management to exclude a proposal to adopt a certain by-law provision providing shareholders with access to the company's proxy, nothing in the Rule or in the securities laws forbids the company adopting such a by-law provision and such a provision would be valid and consistent with the securities laws if adopted. This is obviously because the Rule is meant to establish minimum rights of shareholder access to the company's proxy, a floor, and not to set a cap forbidding broader rights.[7]

To be sure, while the inclusion of an additional shareholder proposal would not be inconsistent with Rule 14a-8, such inclusion could be inconsistent with other proxy rules to the extent that the proposal includes false and misleading statements. However, the Recommended Amendment would not produce such an outcome because it would require that any inclusion of proposals be done only to the extent permitted by law.

2. *Rule 14a-8 does not mandate that directors and managers have discretion:* The Chamber asserts that the proposed Arrangements would upset the federal

[7] The Chamber's brief asserts that the exclusions of Rule 14a(8)(i) are the result of a cost-benefit analysis by the SEC "as necessary or appropriate in the public interest or for the protection of investors." Chamber Brief at 11-14. Nothing in our analysis – or the analysis of the Second Circuit in *Am. Fed'n of State, County & Mun. Employees v. Am. Int'l Group, Inc.*, is inconsistent with that view. The SEC was deciding what shareholder access rule would be appropriate to impose as a mandatory matter across all public firms in the United States – what minimum level of protecting shareholder access rights was necessary. Nothing about the SEC's rule or the administrative deliberation underneath it would forbid a particular firm from expanding shareholder rights. The "customization" that the SEC allegedly rejected in (see Chamber Brief at 20) related to whether companies should be able to opt out from or alter the Rule's minimum requirement. The SEC was unwilling to accept companies' claims that the SEC should provide a way for companies to exempt themselves from the costs of complying with the Rule's minimum requirements. See SEC Rel. No. 34-20091, 48 Fed. Reg. 32218 (Aug. 16, 1983).

design of Rule 14a-8 under which directors and managers are supposed to have discretion whether to exclude or include proposals whose inclusion is not mandated by the Rule. The Chamber claims that, while Rule 14a-8 leaves companies with discretion whether to exclude or include some proposals, "(t)he discretionary nature of the rule simply recognizes that managers and directors must be afforded some flexibility in evaluating whether certain shareholders proposals should be included..."[8] But the distribution of power over the actions a company may take within the discretion left to it by applicable law is clearly a state law issue on which the SEC rules do not, and possibly even may not, take a position.[9]

3. *The Proposal would not deprive EA of discretion afforded the Company under Rule 14a-8:* Because EA and the Chamber erroneously conflate issuer discretion with directors' discretion, they also erroneously believe that the adoption of proposal would deprive EA of rights it has under federal law. The Chamber states that "[t]his case presents the question whether [the company is required to include a] proposal that, if approved, would deprive the company of the ability it currently has under the law to exclude from its proxy materials shareholder proposal that fail to satisfy certain clearly-delineated legal criteria."[10] This argument ignores the difference between arrangements outside the company that restricts its freedom to act, no matter what its internal decision-making process produces, and internal arrangements that the company puts in place to govern how it will operate within the zone of freedom it has under the law.

---

[8] Chamber Br. at 13.

[9] *See Business Roundtable v. SEC*, 905 F. 2d 406 (D.C. Cir. 1990) (holding that the distribution of power among the various players in the process of corporate governance is part of corporate governance traditionally left to the states).

[10] Chamber Br. at 1.

If EA adopts the Recommended Amendment, then the Recommended Amendment would not be depriving EA of its rights to act within the zone of freedom set by Rule 14a-8 but rather would represent the way in which EA itself, under the state law rules governing its internal affairs, chose to operate within this zone. Furthermore, EA would always be free to replace the Recommended Amendment (following the process set by state law) with another arrangement that would regulate differently EA's actions within this zone of freedom.

4. *Rule 14a-8 necessarily depends on the existence of state law to govern issuer discretion:* Not only does Rule 14a-8 not preempt state law, but Rule 14a-8 fully presumes, accepts, and relies on state law to govern the discretion the Rule leaves to issuer. Indeed, it would be difficult to apply the Rule if that were not the case. The Rule provides issuers with certain discretion but does not speak to the internal decision-making that would produce the corporate action or inaction within the zone of discretion. Companies are legal entities whose decision-making is necessarily defined by legal rules -- and in our system by the rules of state law. Who has an authority to take an action on behalf of a company and when is not a question Rule 14a-8 in any way speaks to but rather leaves to state law.

5. *State Law establishes and can alter the authority of Boards of Directors upon which EA and the Chamber rely in arguing that the Recommended Amendment would be Contrary to the Proxy Rules*: While EA and the Chamber take it for granted that EA's board now has the power to decide how EA would act within the zone of discretion left by Rule 14a-8, they fail to take into account that this state of affairs is a product of state law. In particular, it is Section 141(a) of the Delaware code that established that the

"business and affairs of every corporation … shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." This provision explicitly subjects the authority of directors to the provisions of the company's charter, and the charter may prohibit the board from taking certain types of actions that it would be otherwise permitted to take under Section 141(a).

6. *The Recommended Amendment would complement Rule 14a-8, not replace or amend it:* Contrary to EA's and the Chamber's assertions, the Recommended Amendment, if adopted, would not opt out of Rule 14a-8 or replace it with a different regime. Rule 14a-8 sets some mandatory minimum requirements for the inclusion of certain proposals, and EA would fully remain subject to these requirements; the Recommended Amendment would not allow EA to exclude any proposal that Rule 14a-8 would require including. The Recommended Amendment would only govern how EA would act within the zone of discretion left by Rule 14a-8. In this connection, the Recommended Arrangement would merely replace the prevailing set of state law arrangements that now govern how EA acts within this zone of discretion with a set of state law arrangements that includes the Recommended Amendment.

IV. EA's Far-Reaching Indirect Consequences Argument

In later parts of its brief, EA argues (the Chamber does not join this argument) that Professor Bebchuk's proposal may be excluded because the adoption of the Recommended Amendment might one day, after a long sequences of steps, lead to the inclusion of proposals that, but for the Recommended Amendment, EA would be free to include or exclude under eight provisions of Rule 14a-8 – Rule 14a-8(i)(4), Rule 14a-

8(i)(5), Rule 14a-8(i)(8), Rule 14a-8(i)(9), Rule 14a-8(i)(10), Rule 14a-8(i)(11), Rule 14a-8(i)(12), and Rule 14a-8(i)(13).[11]

EA is asking the Court to read these provisions as allowing (or indeed to rewrite these provisions to allow) not only the exclusion of the proposals specified in these sections but also all proposals whose adoption may in some circumstances down the road lead to the inclusion of proposals specified in these provisions. Clearly, acceptance of this argument would lead to a very large and unwarranted increase in the power of companies to exclude shareholder proposals. Using EA's logic, companies would be able to exclude various proposals for a governance reform on grounds that their passage might make directors more responsive to shareholders and therefore, following some sequence of events over time, lead directors to include a proposal which under one or more of the six provisions of Rule 14a-8 the company would be free to include or exclude. To illustrate, acceptance of EA's and the Chamber's arguments would enable companies to exclude proposals to de-stagger the board, adopt majority voting, reimburse the expenses of shareholders initiating a change in the company's by-laws, or require a super-majority of directors to approve the exclusion of certain types of shareholder proposals – all proposals that might increase the likelihood that the board will down the road decide to include in the company's proxy materials a proposal that the company has discretion to include or exclude.

The problems with EA's indirect consequences argument may be illustrated by examining its application to the provision to which EA devoted most attention in its brief -- Rule 14a-8(i)(8), which allows exclusion of proposals that relate to "an election for

[11] Def. Br. at 15-20.

membership on the company's board of directors" or "a procedure for such nomination or election." Although Professor Bebchuk's proposal does not relate to a procedure for director nomination or election but to a procedure for by-law amendments, EA argues that the proposal may still be excluded because it might lead one day to, and thus might make more likely, the inclusion of a proposal relating to a procedure for director nomination or election in EA's proxy materials. Note that, as was stressed earlier, such inclusion would not be a violation of Rule 14a-8 and EA could choose to include such a proposal even without the Recommended Amendment.

Essentially, EA is asking the Court to hold that Rule 14a-8(i) (8) allows exclusion not only of proposals that relate to "an election for membership on the company's board of directors" or "a procedure for such nomination or election" but also of any proposals that relate to "a procedure for by-law amendments." This is a considerable and unjustified expansion. Procedures for by-law amendments are a significant and distinct subject from procedures for the election and nomination of directors. The SEC could have adopted such a rule (and perhaps relabeled the provision "the Election and By-laws Exclusion" rather than the "Election Exclusion" as it was referred to in the SEC's Release) when it adopted Rule 14a-8)(i)(8) last year, but it did not. Indeed, the SEC did not even consider or invite comments about expanding the election exclusion to make it the election and by-laws exclusion as EA now proposes. EA's argument which asks for a different and much broader exclusion, ignoring the language of the election exclusion and its history, should not be accepted.

CONCLUSION

For the reasons explained above, the Court should deny Defendant's motion to dismiss.

Dated: New York, New York
September 8, 2008

s/Jeffrey N. Gordon
Professor Jeffrey N. Gordon, Esq.

435 West 116th Street
New York, NY 10027
Tel. (212)-854-2316
Fax (212)-854-7946
jgordon@law.columbia.edu