No. 05-2825

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,
EMPLOYEES PENSION PLAN,
Appellant,

-against-

AMERICAN INTERNATIONAL GROUP, INC.
Appellee

On Appeal from an Order of the
United States District Court for the Southern District of New York

REPLY OF APPELLANT TO THE RESPONSE TO INQUIRYOF THE COURT SUBMITTED BY THE SECURITIES AND EXCHANGE COMMISSION

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PRELIMINARY STATEMENT

The Response to Inquiry of the Court Concerning *American Federation of State, County & Municipal Employees, Employees Pension Plan v American International Group* (2d Cir., No. 05-2825-cv) (the "SEC's Resp."), and the accompanying staff opinion: (1) confirm that the Securities and Exchange Commission (the "SEC" or the "Commission") itself has not taken an official position on whether SEC Rule 14a-8(i)(8) bars shareholder proposals that advocate the amendment of corporate bylaws that would install a "proxy access" policy at a specific company, and (2) fail to answer many of the questions directed to the Commission by this Court. The "legal analysis," provided in the form of a letter dated March 24, 2006, from Brian G. Cartwright, Esq., General Counsel, and John W. White, Director of the Division of Corporation Finance (the "Letter Br."), actually "represents the view" of the Division of Corporation Finance (the "Division") and the General Counsel's office (SEC's Resp. at 1), notably, not of the Commission itself. Thus, the Commission specifically declined to express its own position in response to the Court's invitation that it do so.

The Letter Brief defends the Division's decision to bar "proxy access" proposals under Rule 14a-8(i)(8), and attempts to explain its reasons for doing so. Importantly, however, because the Letter Brief does not purport to be the official position of the Commission itself, the Letter Brief, like any "no-action" letter, is entitled to no legal deference beyond its persuasive value. And in this regard, the

Letter Brief's ultimate conclusion is unpersuasive. But the Division does make one critical concession: it agrees with the position advanced by Appellant American Federation of State, County and Municipal Employees, Employees Pension Plan ("AFSCME") that the phrase "an election" in Rule 14a-8(i)(8) should not be interpreted "inappropriately broad[ly]" so as to bar shareholder proposals merely because they relate to the subject matter of elections. Letter Brief at 5. Despite this concession – which is contrary to the position taken by the District Court – the Division contends that the phrase "relates to an election" permits the exclusion of any shareholder proposal that somehow makes it more likely there will be a "contested election" if at least one candidate is nominated by the board and another is nominated by shareholders. Letter Br. at 2-3. This conclusion is unsupportable as a matter of law.

First, the Division's interpretation is not based on the text of the Rule, and the Division does not even pretend that it is. The plain language of Rule 14a-8(i)(8) only permits the exclusion of a shareholder proposal that "relates to *an* election" (emphasis supplied). And the only natural reading of this phrase, giving effect to the complete text, necessarily restricts the scope of this exclusion to proposals that relate to *specific* elections, and does not extend to proposals that would merely establish *procedures* governing the election process generally. The Division actually concedes that AFSCME's interpretation of the Rule is correct in this critical regard: Rule 14a-8(i)(8) does not bar any shareholder proposal merely

because it relates generally to the subject matter of elections. The Division's argument, however, that the phrase "relates to an election" actually means "relates to a contested election" *but only* a contested election where one candidate is shareholder nominated, makes no sense. And the Division does not even try to explain how its interpretation is consistent with the text of the Rule itself.

Second, the Division's position is, in fact, contrary to the central purpose of the federal securities laws and creates a legal distinction applicable to candidates for director positions that is without support. The securities laws are designed to ensure complete and accurate *disclosures* on matters requiring shareholder action; not to create distinctions among director candidates based upon who nominated the individual for election. The Division's interpretation not only adds a "contested election" gloss to Rule 14a-8(i)(8) that appears nowhere in either the Rule itself, but it also erects a distinction regarding the disclosure rules applicable to director candidates that is based on the identity of the person or persons who nominated a particular candidate for election. According to the Division, the SEC's "carefully crafted regulatory regime ... does not contemplate the presence of nominees from different vying factions in the same proxy materials" (Letter Br. at 11-12). In this regard, the Division is just plain wrong.

The SEC rules draw no distinction *whatsoever* regarding the disclosure requirements applicable to corporate elections based on the identity of who nominated a particular candidate. To the contrary, the disclosure requirements are

the same regardless of the source of a candidate's nomination. If a company is required, by its bylaws, to publish the names of director candidates nominated by shareholders, the company will still be subject to the same disclosure requirements applicable to board-nominated candidates. Thus, the Division's argument that "proxy access" bylaw proposals must be barred under Rule 14a-8(i)(8) in order to curtail "contested elections" in which the company publishes the names of candidates nominated by shareholders draws a distinction in the SEC's disclosure rules that simply does not exist.

The Division's argument that the publication of shareholder-sponsored candidates in a corporate proxy statement would be unlawful as "not contemplate[d]" by the federal securities laws is also incorrect. Several companies already voluntarily publish the names of candidates nominated by their shareholders and there has been no suggestion by the Division that these companies violated the federal securities laws by doing so. In fact, former SEC Chairman Richard Breeden specifically acknowledged the legality of a "proxy access" regime in recommending the installation of such a policy at WorldCom. And AIG itself conceded that AFSCME or any other shareholder could introduce such a bylaw proposal by launching an independent proxy solicitation. Brief of Defendant-Appellee American International Group, Inc. ("AIG Br.") at 14. The reasoning behind the Division's interpretation of the "election exclusion," therefore, is fatally inconsistent: One cannot bar "proxy access" proposals based

on the reasoning that the federal securities laws do not permit (or "contemplate") companies to publish the names of shareholder-nominated candidates in corporate proxy statements, yet acknowledge that the publication of corporate proxy statements that include shareholder-sponsored candidates is permitted under the federal securities laws.

RESPONSES TO SPECIFIC QUESTIONS

1. Does the SEC Rule 14a-8(i)(8) apply to a shareholder proposal that, if adopted, would result in a bylaw amendment requiring the corporation to include in its proxy statements the names and statements of candidates for the board of directors nominated by certain large shareholders?

The SEC declined to answer this question. In its Letter Brief, the Division answers the question in the affirmative, arguing that Rule 14a-8(i)(8) permits the exclusion of any shareholder proposal that might promote contested elections of directors in which at least one candidate is nominated by shareholders. Letter Br. at 2. In doing so, the Division concedes the central question at issue here, which is whether the *text* of Rule 14a-8(i)(8) permits the exclusion of AFSCME's proposal. The Division admits that a proposal that would change the procedures governing corporate elections does *not* fall with the exclusion of Subsection (i)(8) merely because it touches upon corporate elections. Letter Brief at 5. Indeed, the Division concedes that any interpretation of Rule 14a-8(i)(8) that would bar a shareholder proposal merely because it relates to corporate elections generally would be "inappropriately broad": "The Division has taken care not to adopt an

inappropriately broad reading of whether a proposal 'relates to an election,' as such a reading would permit the exclusion of all proposals regarding the qualifications of directors, the composition of the board, shareholder voting procedures and board nomination procedures." Letter Br. at 5.[1] Thus, the Division concedes that a shareholder proposal such as that advanced by AFSCME, may *not* be barred under Rule 14a-8(i)(8) merely because it touches upon the subject matter of elections. This is a critical point because it is a concession that the term "an election" has the meaning proffered by AFSCME (*i e*, that Rule 14a-8(i)(8) does not bar shareholder proposals that merely relate to "elections" generally, but only proposals that relate to *an* election, meaning a specific election).

Nonetheless, the Division argues that the phrase "relates to an election" in Rule 14a-8(i)(8) permits the exclusion of shareholder proposals that may result in "contested elections" in which one or more candidate is nominated by shareholders. This position would create a distinction regarding the disclosure requirements applicable to director candidates that has no support in the plain text of the Rule or anywhere else in the federal securities laws.

[1] Indeed, as discussed extensively in previous briefing, the Division consistently has refused to permit the exclusion of many shareholder proposals on election-related subjects, such as director qualifications, board composition, director classification, majority voting, and, indeed, director nomination. *See* Brief of Appellant at 37-38 notes 10-14; Reply of Appellant at 14.

2. In the SEC's view, what is the scope of the election exclusion, and how are (potentially inconsistent) staff responses to no-action requests for election related proposals since 1998 to be reconciled in light of the Commission's view as to the scope of the exclusion? . . .

The SEC declined to opine on the appropriate scope of Rule 14a-8(i)(8). The only official guidance from the SEC is Adoption of Amendments Relating to Proposals by Security Holders, SEC Exchange Act Release No. 12999, 1976 WL 160347 (Nov. 22, 1976), relating to the 1976 revisions to Rule 14a-8. The SEC's Response here states that it "has consistently let stand and declined to review the 'no action' positions of the Division taken in conformity with [its] legal interpretation of the Rule" SEC Resp. at 1. This is the same language the SEC used in declining the appeal from the Division's no-action determination in *Citigroup Inc.*, SEC No-Action Letter, 2003 WL 1900802 (April 14, 2003).

In its Letter Brief, the Division attempts to explain its prior no-action decisions regarding Rule 14a-8(i)(8). Regarding the "proxy access" issue specifically, the Division does not try to reconcile its prior decisions that declined to extend the "election exclusion" to bar "proxy access" proposals with its current view, dismissing its prior inconsistent decisions as "mistakes." Letter Br. at 7 n.3. The Division, however, (i) fails to explain how or why it reached this supposedly "mistaken" view; (ii) completely ignores the fact that the Division itself previously acknowledged the distinction between proposals that relate to specific elections (which may be excluded) and those that would merely establish procedures

governing elections generally (which may not be excluded)[2]; and (iii) fails to acknowledge that *even after* the Division adopted this "contested election" gloss it nonetheless determined that a "proxy access" proposal would *not* be barred if it tracked the language of Proposed Rule 14a-11.[3] And the Division does not try to justify its disparate treatment of "proxy access" proposals and virtually any other kind of election-related proposal based on anything in the text of Rule 14a-8(i)(8). The Division's inability to articulate any rational explanation for its historically inconsistent treatment of "proxy access" proposals under Rule 14a-8(i)(8) renders its present explanation, adopted here for the purposes of litigation, highly suspect. *See U.S. v. Mead*, 533 U.S. 218, 235 (2001) (noting that logic and consistency are among the factors to be considered in evaluating the persuasive value of an informal agency opinion); *Gonzalez v. Oregon*, 126 S.Ct. 904, 922 (2006) (same).

Instead, disregarding the text, the Division argues that "[t]he Division and the General Counsel interpret Rule 14a-8(i)(8) as permitting the exclusion of shareholder proposals that would result in contested elections." Letter Br. at 2. But here, the Division draws another distinction: "For purposes of Rule 14a-8, a proposal would result in a contested election if it means either to campaign for or against a director nominee or to require a company to include shareholder-nominated candidates in the company's proxy materials." Letter Br. at 2-3.

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[2] *See, e.g., Union Oil Co. of Calif.*, SEC No-Action Letter, 1981 WL 24701, *7 (Jan. 29, 1981).

[3] *Qwest Communications, Int'l, Inc.*, SEC No-Action Letter, 2004 WL 385734 (Feb. 23, 2004).

The Division's novel definition of "contested elections" draws a distinction that appears nowhere in the federal securities laws. The Division cannot point to any statute, or to any official statement, rule, or regulation promulgated by the SEC that distinguishes between candidates for director positions based on the identity of who nominated the individual. Indeed, such a distinction is at odds with the purpose that underlies Section 14 – which is simply to ensure that shareholders are provided with complete and accurate disclosures, *see Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970), not to set restrictions on the candidates that a corporation may identify based on the source of a candidate's nomination. There is, quite simply, no federal policy or rule that prohibits corporations from publishing the names of multiple candidates for election as directors simply because one candidate happened to have been nominated by shareholders. And the Division cannot use its purported goal of avoiding "contested elections" involving shareholder-nominated candidates as a means of justifying its interpretation of Rule 14a-8(i)(8). *See, e.g., Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 553 (1987) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances."); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'").

3. What did the SEC mean when it stated, in connection with the 1976 amendment to Rule 14a-8(i)(8), that "the principal purpose of [Rule 14a-8(i)(8)] is to make clear, with respect to corporate elections, that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature [i.e., "corporate, political or other elections to office"], *since other proxy rules, including Rule 14a-11, are applicable thereto*"? . . .

In its Response, the SEC declined to provide any further explanation for the statements made in Exchange Act Release No. 34-12598. In its Letter Brief, the Division makes two arguments. First, the Division argues that the statement quoted above confirms that "the express purpose of the election exclusion is to make clear that Rule 14a-8 is not a proper 'means' to achieve election contests, whether immediately or in subsequent years." Letter Br. at 4. Second, the Division suggests that the reference to "Rule 14a-11" (renumbered to 14a-12, relating to competing proxy solicitations in director elections[4]) provides support for the Division's argument that permitting "proxy access" proposals somehow "would allow an end-run around the express purpose of Rule 14a-8(i)(8)." Letter Br. at 7. Once again, this "contested elections" gloss appears nowhere in the text of Rule 14a-8, and the Division's reasoning that AFSCME's "proxy access" proposal "would allow an end run" around either the Rule 14a-8(i)(8), or any other SEC Rule for that matter, is simply incorrect.

[4] Rule 14a-12 applies, in pertinent part, to "[s]olicitations by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders". 17 C.F.R. § 240.14a-12(c).

The SEC's statement in Release No. 34-12598,[5] quoted above, makes three essential points: (1) the "election exclusion" does not bar shareholder proposals that simply relate to the subject matter of elections; (2) shareholders should not use their right to introduce a proposal through Rule 14a-8 as a means of "conducting a campaign"; and (3) other proxy rules, including Rule 14a-12, provide a means by which shareholders may conduct "campaigns." AFSCME does not quarrel with any of these points, and a "proxy access" proposal of the kind advocated by AFSCME does not run afoul of any one of them.

AFSCME's proposal does not advocate for or against (*i.e.*, "campaign") any particular candidate. It merely advocates an amendment to AIG's bylaws relating to general election procedures, which, by all accounts, is well within the power of AIG's shareholders under state law. And it does not permit an "end run" around anything. If AIG had a bylaw that required the company to publish the names of certain director nominees, the *company* would be subject to the disclosure requirements of the existing proxy solicitation rules. And if a shareholder wanted to solicit proxies in favor of the candidate he nominated, the shareholder would then be required to comply with all of the applicable SEC Rules governing solicitations, including the requirements set forth in Rule 14a-12(c). This is

[5] Release No. 34-12598 constituted the SEC's statements on a *proposed* version of Rule 14a-8 that was different from the final version of the Rule that was adopted. *See* Adoption of Amendments Relating to Proposals by Security Holders, SEC Exchange Act Release No. 12999, 1976 WL 160347 (Nov. 22, 1976); *see also* Brief of Appellant at 41-42.

precisely the point made by the Harvard Professors in their *amicus curiae* brief. Harvard Law School Professors' Amicus Br. 4.

The Division's statement, therefore, that the SEC's proxy rules "do[] not contemplate the presence of nominees from different vying factions in the same proxy materials" (Letter Br. at 11-12), is just plain wrong. To the contrary, the proxy rules draw no distinction *whatsoever* based on the identity of the individual who nominates a candidate for election as a corporate director. This is confirmed by the fact that several companies already have adopted policies of voluntarily publishing the names of shareholder-sponsored nominees. *See* Brief of Appellant at 18. If the mere publication of the identity of shareholder-sponsored nominees in corporate proxy statements violated Rule 14a-12 or any other rule, these companies would have run afoul of this rule even if their disclosures were voluntary. Yet there is no suggestion by AIG, the Division or anyone else that these companies' actions in this regard have been illegal. Similarly, under the Division's interpretation, a "proxy access" bylaw would be illegal regardless of how it was adopted. But the Division cannot point to any SEC rule or regulation, or *anything* in the federal securities laws, that would suggest a federal prohibition on the voluntary adoption of a "proxy access" regime by individual companies. Indeed, AIG itself does not suggest that the "proxy access" bylaw amendment proposed by AFSCME is illegal, but argues only that it must be introduced through an independent proxy solicitation. AIG Br. at 14. The Division's argument,

therefore, that it is necessary to bar "proxy access" proposals in order to prevent an "end run" around the existing proxy solicitation laws is simply incorrect. The existing proxy solicitation rules remain intact regardless of who nominates a particular director candidate.

Finally, the fact that corporate management may oppose a particular director nominee also does not render "proxy access" proposals inconsistent with the current SEC proxy solicitation rules. Under the existing regime, companies frequently solicit proxies in opposition to shareholder resolutions that are included in the company's proxy. On virtually every shareholder proposal introduced pursuant to Rule 14a-8 that does not have board support, the corporation's proxy statement simply indicates the board's recommendation that the shareholders vote *against* a particular resolution. Thus, even if a board opposes the election of a particular candidate nominated by shareholders pursuant to a "proxy access" bylaw, the company's proxy statement would simply contain the board's recommendation that the shareholders vote against that candidate's election. Again, this is perfectly consistent with the existing proxy solicitation rules and demonstrates that a "proxy access" proposal such as that advanced by AFSCME would not permit an "end run" around anything.

The bottom line is this: Nothing in the federal securities laws prevents companies from publishing the names of certain candidates based upon who nominated that individual for election. And nothing in Rule 14a-8(i)(8) permits the

exclusion of a shareholder proposal simply because it might result in corporations adopting a "proxy access" regime. The fact that the Division may *prefer* that every candidate nominated by shareholders be introduced via an independent proxy solicitation under Rule 14a-12 is irrelevant; *the existing proxy solicitation rules contain no such requirement.* Provided that corporations comply with the applicable disclosure rules, they are free to publish in corporate proxy statements the names of director candidates regardless of the source of the candidates' nomination. And by introducing a "proxy access" bylaw proposal via Rule 14a-8, a shareholder does not thereby avoid compliance with the SEC's other proxy solicitation rules, including Rule 14a-12. Rather, if the shareholder wants to solicit proxies in favor of or against any of the candidates listed in a corporation's proxy statement, the shareholder will still have to comply with every rule governing the solicitation of proxies, including Rule 14a-12(c).[6]

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[6] For this reason, the Division's suggestion that AFSCME's proposal is improper because it would not require compliance with the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A (Letter Brief at 12 n.5) is incorrect. Items 4(b) and 5(b) of Schedule 14A list certain information that must be disclosed in connection with a solicitation that is subject to Rule 14a-12(c), which only applies where there are competing solicitations for director elections. *See* 17 C.F.R. § 240.14a-12(c). A company's mere disclosure of the identity of the names of candidates nominated by shareholders for election as directors would not constitute a "solicitation" by the nominating shareholder. And if a shareholder does not engage in a competing solicitation, Rule 14a-12(c) does not apply. If, however, the shareholder takes the additional step of soliciting support for a particular candidate's election, all of the existing rules governing the solicitation of proxies, including Rule 14a-12(c), would still apply.

4. What "significant adjustments in the system of proxy regulation under Section 14(a) of the Securities Exchange Act of 1934," *Citigroup, Inc.*, 2003 SEC No-Act. LEXIS 534, at *2 (Apr. 14, 2003), would be required if Rule 14a-8(i)(8) were read to permit proxy access proposals such as the one proposed by Appellants?

As an initial matter, the Commission's statements quoted above were made in connection with denying an appeal from the Division's decision to issue a no-action letter permitting Citigroup, Inc. to exclude a "proxy access" proposal under Rule 14a-8(i)(8). As such, the statement does not reflect an official statement of the Commission amenable to judicial review. *See, e.g., Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d 416, 423 (D.C. Cir. 1992). Indeed, the fact that the Commission has not adopted a formal position on the issue of the applicability of Rule 14a-8(i)(8) to "proxy access" proposal is confirmed by the fact that the Commission declined to take an official position in response to this Court's inquiries.

Nevertheless, the answer to the Court's question here is simple: None. If the Division changed its interpretation (once again) and declined to permit companies to exclude "proxy access" proposals under Rule 14a-8(i)(8), every other SEC rule relating to the publication of proxy statements would remain intact. This is confirmed by the fact that on several occasions the Division permitted "proxy access" proposals to be included in corporate proxy statements (despite now characterizing such decisions as "mistakes"). The inclusion of these proposals did not require any wholesale revision of the federal securities laws, and no such

changes would be required if the Division reverted once again to this view. Indeed, the Division does not identify any of the SEC's existing proxy solicitation rules that would require amendment in the event that AFSCME's proxy access proposal were submitted to AIG's shareholders. The reason, of course, is because there are none.

The purpose of the SEC's proxy solicitation rules authorized by Section 14 is to ensure complete and accurate *disclosures* to shareholders on matters requiring shareholder action. The Supreme Court repeatedly has explained that "§ 14(a) of the Securities Exchange Act 'was intended to promote 'the free exercise of the voting rights of stockholders' by ensuring that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.'" *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 444 (1976). The proxy solicitation rules are neither designed nor intended to erect distinctions regarding the disclosure requirements applicable to the publication of the identities of candidates nominated for election as directors based on who nominated that individual, nor are they intended to discourage "contested elections" in which shareholders have the opportunity to choose among a variety of candidates. Thus, not only would rejecting the Division's current interpretation of Rule 14a-8(i)(8) *not* require any amendments to the existing proxy regulations, but permitting shareholders to introduce bylaw amendment proposals through the mechanism of Rule 14a-8 on the issue of "proxy access" actually would further the

underlying federal goal of promoting the free and meaningful exercise of the shareholder franchise. *Roosevelt,* 958 F.2d at 422 ("It is obvious to the point of banality to restate the proposition that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy").

5. What is the current status of the rulemaking process begun in 2003 with respect to a proposed new Rule 14a-11, which would expressly forbid the exclusion under Rule 14a-8(i)(8) of certain proxy access proposals? How, if at all, should the existence of this proposed rule affect the disposition of this case?

The SEC's Response did not provide any further guidance regarding the Commission's consideration of Proposed Rule 14a-11. Rather, the Response states merely that "[t]he Commission is currently exploring a variety of possibilities that would improve and invigorate shareholder democracy ..." SEC Response at 1. As previously stated, AFSCME looks forward to working with the Commission on appropriate amendments to the proxy rules.

As explained in AFSCME's Reply of Appellant, however, the fact that the Commission may be considering amendments to the existing proxy rules does not have any impact on whether AIG can amend its own bylaws to require the disclosure of director candidates nominated by shareholders. Reply of Appellant at 18-21. The proxy rules establish the *minimum* level of required disclosure. *See, e.g., Maldonado v. Flynn*, 597 F.2d 789, 796 n.9 (2d Cir. 1979) ("Schedule 14A sets minimum disclosure standards"). Thus, regardless of whether the Commission

ultimately determines to adopt a proxy access regime applicable to all publicly traded corporations, corporations are free to implement such policies for themselves. In its Letter Brief, the Division does not contest this point.

> 6. In the SEC's view, would a decision in Appellant's favor (*i.e.*, a ruling that Rule 14a-8(i)(8) does not permit the exclusion of proxy access proposals) preclude the SEC from further regulating proxy access proposals (*e.g.*,, by passing Rule 14a-11), without first making changes to Rule 14a-8(i)(8)'s election exclusion?

The Commission did not respond to this inquiry, and the Division's Letter Brief did not try to answer this question either. But the answer is clearly that a decision in AFSCME's favor *would not* preclude the SEC from promulgating further rules on the issue of proxy access. As explained in the Reply of Appellant (at pages 18 to 21), the mandatory disclosures required by SEC Rules establish only the *minimum* level of disclosures required. *Maldonado*, 597 F.2d at 796 n.9. There is nothing in the current SEC Rules that prohibit corporations from voluntarily publishing the names of candidates nominated by shareholders, and there is nothing in the current SEC Rules that would prohibit a corporation from amending its own bylaws to require such disclosure under certain circumstances. *See SEC v. WorldCom*, "Restoring Trust, Report to The Hon. Jed. S. Rakoff, The United States District Court For the Southern District of New York on Corporate Governance For The Future Of MCI, Inc. Prepared By Richard C. Breeden, Corporate Monitor," 2003 WL 22004827, *32 n.64 (S.D.N.Y. Aug. 26, 2003) ("The SEC has recently proposed changes in existing proxy rules that would allow

shareholders to nominate directors if certain trigger events had occurred. While any proxy rules will be binding on the Company in establishing minimum standards, the Company is free to go beyond SEC minimum requirements ").

In the event that the SEC decides one day to promulgate a rule directly addressing the issue of "proxy access," corporations will be required to comply with whatever minimum requirements the SEC may determine to adopt. But simply permitting shareholders to act consistently with state law to install a proxy access regime at their corporations now, in the absence of an SEC Rule prohibiting the practice, would not require any revisions to the existing proxy rules, and would not preclude the SEC from promulgating rules on the issue in the future.

7. In the SEC's view, what deference should this Court give to the SEC's letter brief?

Here, the Commission itself deliberately declined to provide answers to this Court's questions, and has not taken any official position on the applicability of Rule 14a-8(i)(8) to "proxy access" proposals. The only official statement from the SEC at issue here is the one page Response, in which the Commission stated that it "has consistently let stand and declined to review" the Division's fluctuating opinions on the "proxy access" issue. Importantly, therefore, the Commission has *not* formally adopted as its own the current prevailing view at the Division that "proxy access" proposals are prohibited under Rule 14a-8(i)(8). Thus, there is no official position of the Commission regarding the applicability of Rule 14a-8(i)(8) to "proxy access" proposals that may be accorded any deference by this Court.

The Letter Brief "represents the view of both the General Counsel and the Division." SEC's Resp. at 1. However, the United States Supreme Court has made clear that "we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Bowen v. Georgetown Univ Hosp*, 488 U.S. 204, 212 (1988) (internal quotation marks omitted). This is particularly true where, as here, the position advanced appears to have been adopted for purposes of litigation. *Id.* at 213 ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

CONCLUSION

The SEC specifically *declined* to take an official position regarding the application of Rule 14a-8(i)(8) to "proxy access" proposals, despite the Court's invitation that it do so. And the Letter Brief submitted by the Division and the General Counsel's office reveals that the Division's interpretation is the product of plain legal error. There is nothing in the text of Rule 14a-8(i)(8), any other SEC rule, or any other source of federal law that permits the exclusion of a shareholder proposal merely because a company *might* adopt a procedure that *might* someday result in a "contested election" that involves a candidate nominated by shareholders. The decision of the District Court should be Reversed.

Dated: May 15, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael J. Barry, hereby certify that on this 15th day of May, 2006, I caused a true and correct copy of the foregoing Reply Of Appellant To The Response To Inquiry Of The Court Submitted By The Securities And Exchange Commission to be served by first class mail, postage prepaid, upon the following:

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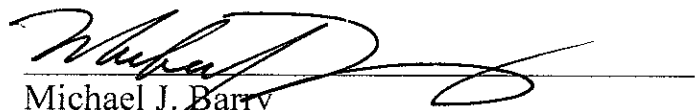

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