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at&t

Wayne Watts
Senior Executive VP & General Counsel
Legal Department

AT&T Inc.
One AT&T Plaza
208 South Akard Street
Dallas, TX 75202

T: 214.757.3300
F: 214.746.2103
wayne.watts@att.com

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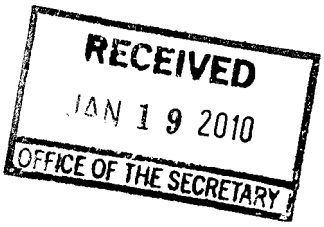

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-10-09 – *Facilitating Shareholder Director Nominations*

Dear Ms. Murphy:

I am writing on behalf of AT&T Inc. ("AT&T") in response to the Commission's invitation for supplemental comment on the Commission's proposed proxy access rule, Exchange Act Rule 14a-11 ("Rule 14a-11").[1] AT&T appreciates the opportunity to provide its views on the proxy access provisions set forth in proposed Rule 14a-11 and on the additional "data and analyses in the public comment file" identified by the Commission in its call for supplemental comment.[2] The data and analyses identified by the Commission – while doing nothing to undermine the arguments made by AT&T and others in opposition to the proposed proxy access rule – provide powerful evidence against the adoption of that rule.[3] In considering these data and analyses, however, the Commission should not lose sight of the fact that a necessary condition for any agency rule is the statutory authority to promulgate it. And, as AT&T has explained, the Commission lacks such authority.[4]

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[1] *See* Facilitating Shareholder Director Nominations, SEC Release Nos. 33-9086, 34-61161, 74 Fed. Reg. 67,144 (Dec. 18, 2009); Facilitating Shareholder Director Nominations, SEC Release Nos. 33-9046, 34-60089, 74 Fed. Reg. 29,024 (proposed June 18, 2009).

[2] 74 Fed. Reg. at 67,145.

[3] *See* Letter from Wayne Watts, Senior Executive VP & General Counsel, AT&T Inc., to Elizabeth M. Murphy, Secretary SEC, File No. S7-10-09, Release Nos. 33-9046, 34-60089 (filed Aug. 17, 2009) ("AT&T August Comments").

[4] *See id.* at 2-6.

1. **The Corporate Library, *The Limits of Private Ordering: Restrictions on Shareholders' Ability to Initiate Governance Change and Distortions of the Shareholder Voting Process* (Nov. 2009) ("Corporate Library Paper")**

The Corporate Library Paper takes the position that private ordering with respect to proxy access is insufficient because, the paper asserts, many companies maintain multiple classes of stock with disparate voting rights, place limitations on shareholders' ability to amend company bylaws, and/or have supermajority voting provisions governing bylaw amendments.[5] There are multiple reasons this analysis provides unreliable support for the proposed rule, however.

First, although the Corporate Library Paper aggregates companies that ban shareholder bylaw amendments altogether and those that impose supermajority voting requirements,[6] the paper acknowledges that only "4% of companies in the Russell 3000 and Russell 1000 indices do not allow shareholders to amend the bylaws" and that, "[a]mong S&P 500 companies, about 3% prohibit shareholder bylaw amendments altogether."[7] The number of companies with bans on bylaw amendment therefore is exceptionally small, and cannot provide a basis for a sweeping proxy access rule.[8] And non-binding shareholder proposals give shareholders the ability to influence corporate governance even at companies where shareholders cannot amend bylaws.[9]

The real focus of the Corporate Library Paper, therefore, is supermajority voting requirements. But conflating a ban on bylaw amendment with supermajority requirements is unfounded. To begin with, such requirements do not foreclose shareholders from amending bylaws, and, in fact, they can serve legitimate ends – such as contributing to stability and predictability by ensuring that a bare majority cannot effect structural changes to a corporation's foundational documents.

Furthermore, shareholders may avoid bans on bylaw amendments and supermajority voting requirements by going directly to a board of directors and requesting that the board implement a bylaw change on its own. Indeed, AT&T's own experiences demonstrate the influence shareholders wield over corporate governance. At the 2005 annual shareholder meeting, AT&T's shareholders voted to approve a proposal requesting that the board take necessary

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[5] *See* Corporate Library Paper at 1-2.

[6] *See id.* at 3.

[7] *Id.* at 6.

[8] The number of companies with disparate voting rights also is small, as the Corporate Library Paper admits, *see id.* at 8, and could provide no basis for a mandatory proxy access rule. Indeed, the substantial variation among corporations with respect to proxy access, voting, and bylaw amendment suggests why the Commission should reject a one-size-fits-all approach to proxy access in favor of rules that reflect the diversity of shareholder democracy.

[9] *See, e.g.*, Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 Yale J. on Reg. 174, 178 (2001) ("Management often responds to precatory proposals, even those receiving less than a majority of the shares.").

action to ensure that a majority-vote rule applies to all matters voted on by shareholders. The next year, AT&T submitted a proposal to shareholders to amend its certificate of incorporation to remove supermajority voting provisions, which was approved by shareholders.[10] In addition, at the 2007 annual meeting, AT&T's shareholders voted to approve a proposal requesting that the board amend the bylaws to reduce the number of shares required to call a special shareholder meeting. As a result, AT&T's board complied with the request and amended the bylaws to permit shareholders with 25% of outstanding shares to call such a special meeting.[11] Finally, at the 2009 annual meeting, a proposal was submitted to reduce the shares required to call a special meeting to 10% of outstanding shares.[12] Although that proposal did not pass (receiving 49.9% of votes cast), AT&T's board has reduced the shares necessary to call a special meeting to 15%. These examples demonstrate that, contrary to the central premise of the Corporate Library Paper, shareholders have a variety of means to influence corporate governance and that corporations are responsive to non-binding shareholder requests.[13]

Second, although the Corporate Library Paper acknowledges that Delaware "recently enacted changes to its corporate law clarifying that bylaws establishing a proxy access regime are permissible,"[14] it does not give any weight to the likelihood that, to the extent the Delaware model is successful in promoting shareholders' interests, other states will follow suit. Indeed, as the Corporate Library Paper notes, consideration already is being given "to amending the Model Business Corporation Act to follow Delaware's lead."[15] In fact, since the Corporate Library Paper was submitted to the Commission, such amendments have been approved to the Model Business Corporation Act.[16] In this way, state corporate law can be expected to serve as a

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[10] *See* AT&T News Release, *AT&T Inc. Announces Preliminary Results of 2006 Annual Meeting* (Apr. 28, 2006), *available at* http://www.att.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22249.

[11] *See* AT&T News Release, *AT&T Inc. Announces Targeted Ad Hoc Pension Increase; Preliminary Results of 2007 Annual Meeting Released* (Apr. 27, 2007), *available at* http://www.att.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=23739.

[12] *See* AT&T News Release, *AT&T Announces Preliminary Results of 2009 Annual Meeting* (Apr. 24, 2009), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26772.

[13] The Corporate Library Paper also ignores that shareholders can "vote" with their feet: the public market for buying and selling shares empowers shareholders to decide for themselves whether a corporation's ban on bylaw amendment or a supermajority requirement ultimately is in their best economic interest. The paper offers no theoretical or empirical case for believing shareholders cannot be trusted to make such decisions.

[14] Corporate Library Paper at 1.

[15] *Id.* at 5.

[16] *See* American Bar Ass'n Press Release, *Corporate Laws Committee Adopts New Model Business Corporation Act Amendments To Provide for Proxy Access and Expense*

laboratory for experimentation with different approaches to shareholder proxy access, leaving shareholders free to choose those models they believe will best protect their interests and state legislators free to choose those approaches to corporate governance that they believe best serve the public good. Such innovation and experimentation would be foreclosed, of course, by a one-size-fits-all federal mandate such as the Commission's proposed proxy access rule.

Third, even were the Commission concerned about bans on bylaw amendment and supermajority voting requirements, that would provide no support for a mandatory, across-the-board proxy access rule. Instead, the Commission could set a default or mandatory rule of proxy access for those companies – and only those companies – that substantially restrict bylaw amendment or that impose supermajority requirements. These approaches would best advance shareholder democracy by respecting the ability of shareholders to make decisions about what type and level of proxy access best serve their interests. Indeed, for that reason, this approach would avoid the deep contradiction regarding shareholders' capacity to make reasoned, informed decisions that lies at the heart of the proposed rule.[17] The Commission has a statutory obligation to consider these alternatives – which maximize shareholder choice – and to provide a reasoned explanation for rejecting them before moving forward with a proxy access rule.[18]

2. Division of Risk, Strategy, and Financial Innovation, Memorandum Regarding Supplemental Analysis of Share Ownership and Holding-Period Patterns from Form 13F Data (Nov. 24, 2009) ("Staff Memorandum")

Using data culled exclusively from Form 13F filings for the quarter ending December 31, 2008, the Staff Memorandum offers an analysis of the percentage of public companies that would satisfy various holding-period and ownership thresholds. The Staff Memorandum confirms how and why Rule 14a-11 will impose substantial costs on public companies. According to these data, the proposed rule would result in broad shareholder eligibility for proxy access: 74% of all public companies, and 94% of all public companies with a market capitalization greater than $50 billion, would have one or more shareholders eligible for proxy access under a one-year holding period and a 1% ownership threshold.[19] Furthermore, 64% of all public companies, and 91% of all public companies with a market capitalization greater than $50 billion, would have one or more shareholders eligible for proxy access under a one-year holding period and a 3% ownership

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Reimbursement (Dec. 17, 2009) *available at* http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=848.

[17] *See* AT&T August Comments at 6-8.

[18] *See, e.g.*, *Public Citizen v. Steed*, 733 F.2d 93, 103 (D.C. Cir. 1984) ("NHTSA's action was also arbitrary and capricious because the agency failed to pursue available alternatives that might have corrected the deficiencies in the program which the agency relied upon to justify the suspension. At the very least, NHTSA was required to explain why those alternatives would not correct the variability problems it had identified.").

[19] *See* Staff Memorandum, Tables 1A & 1B.

threshold.[20] In view of the substantial costs associated with expanded shareholder proxy access – as described in AT&T's previous comments and in other comments submitted – these data are significant.[21]

In all events, the ultimate number of shareholders with a potential to nominate directors – and thereby to give rise to costly and distracting proxy contests – under the proposed rule is not relevant. The aim of any regulatory policy should be to empower those shareholders – and only those shareholders – who are committed to the long-term fortunes of the company and who have a reasonable prospect of success to nominate directors. As AT&T has explained, if the Commission is inclined to move in this direction, meaningful threshold and duration requirements are vital to achieve that objective.[22]

3. NERA Economic Consulting, *Report on Effects of Proposed SEC Rule 14a-11 on Efficiency, Competitiveness and Capital Formation* (Aug. 17, 2009) ("NERA Report")

The NERA Report provides strong support for AT&T's position that proposed Rule 14a-11 is unnecessary and that it would impose substantial costs on public companies. The overall conclusion of the NERA Report is straightforward: "the proposed rules risk undermining, rather than improving, board quality and composition and are likely to undermine the ability of boards of directors to serve the interests of shareholders."[23] The NERA Report sets forth several important points in support of that conclusion.

First, the NERA Report collects compelling empirical evidence establishing that shareholders already possess a variety of means to address any problems with management and boards. The NERA Report explains, for example, that "[i]nvestors can and do express dissatisfaction with boards by selling shares or taking short positions," that institutional investors can influence boards by reducing holdings in "poorly performing companies," and that the "[e]mpirical research bears out the theoretical insight that managers are replaced when a company's stock performance is poor."[24] And, as explained above, AT&T's own experiences provide concrete evidence that corporations are responsive to shareholders' requests.[25] Absent concrete evidence

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[20] *See id.*

[21] *See, e.g.*, AT&T August Comments at 8-10.

[22] *See id.* at 10-12.

[23] NERA Report at 1.

[24] *Id.* at 2.

[25] *See supra* pp. 2-3.

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