

May 7, 2009

Strategies for the New Reality of Shareholder Proxy Access

Access to company proxy materials for board candidates nominated by shareholders is now an imminent reality. Since the SEC first proposed a shareholder proxy access regime in 2003, the wisdom of such a fundamental departure from traditional practice has been hotly debated. We have long been of the view that shareholder proxy access is a serious mistake, likely to impair the ability of public companies to attract and retain quality directors and lead to a further politicization and balkanization of the boardroom, with attendant negative consequences for American capitalism and competitiveness. (See our comment letters to the SEC in response to the SEC's [2003](#) and [2007](#) proxy access rulemaking proposals.)

Political developments have turned the tide strongly in the other direction. SEC Chairman Schapiro has said that the SEC will consider a shareholder access rule later this month, and Senator Schumer has said that shareholder access will be an element of his so-called "Shareholder Bill of Rights Act of 2009." In an effort to forestall these attempts to further federalize corporate law, Delaware last month enacted legislation which expressly enables the adoption by Delaware companies of bylaws permitting shareholder access to company proxy materials. Crucially, such bylaws can be adopted not only by a company's board of directors, but also by shareholder action on shareholder initiative.

Due to the negative impact of shareholder proxy access, we expect that many companies will understandably resist the adoption of shareholder access bylaws of any sort. Others will favor a wait-and-see attitude, particularly since federal legislation or regulation may change the ground rules further. Some companies, however, may wish to consider the preemptive adoption of a reasonable and carefully tailored bylaw, in part to deter, or discourage adoption of, more extreme versions of shareholder access that may be proposed by short-term activist or special-interest shareholders. We have prepared a model shareholder access bylaw (attached) for consideration.

Our model permits shareholders holding at least 5% of a company's common stock for at least a year to nominate a limited number of independent director candidates using the company's proxy statement and card. Our model bylaw also contains features designed to prevent the use of shareholder access as a "Trojan Horse" for takeover activity. For shareholders seeking to effect a takeover via director election, the SEC's existing proxy contest process, containing essential disclosure and procedural safeguards, remains the appropriate mechanism.

The potential variations on the model access bylaw are many, and a board's decision whether to adopt a shareholder access bylaw at all and, if so, what features it should have, must be carefully considered in the context of each company's particular situation. For that reason, we believe that if shareholder access is to be a part of our public company landscape, the private-ordering approach through company specific bylaws contemplated by the Delaware legislation is preferable to a federally mandated one-size-fits-all proxy access rule. We expect that significant, long-term shareholders that do not desire the companies in which they invest to be subject to director election free-for-alls – and the risks likely to result – should find that the attached model shareholder access bylaw offers a reasonable framework.

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Model Proxy Access Board Resolution and By-Law

WHEREAS, the Board of Directors has determined that it would be appropriate to the Corporation to provide a reasonable mechanism for stockholders with substantial investments in the Corporation to be able to directly nominate candidates for election to the Corporation's Board of Directors utilizing the Corporation's proxy materials, provided that appropriate safeguards are included to ensure that such mechanism is not used to facilitate a takeover of the Corporation or otherwise abused;

NOW THEREFORE the Board of Directors hereby amends the By-laws of the Corporation to add the following Section •:

Section •. Stockholder Access to Corporation's Proxy Statement.

(a) Whenever the Corporation solicits proxies with respect to an election of directors at an annual meeting (an "Election"), it shall include in its proxy statement and on its proxy card, in addition to individuals nominated by the Board of Directors, up to the Permitted Number of individuals nominated in compliance with these By-laws by one or more Eligible Stockholders. Any Eligible Stockholder seeking to have its nominee included in the Corporation's proxy statement and on the Corporation's proxy card shall comply with all provisions of these By-laws otherwise applicable to shareholder nominations and furnish to the Secretary of the Corporation, no later than the last day on which stockholder nominations for consideration in the Election may be made under Section • of these By-laws (the "Advance Notice Date"), (i) the information set forth in Sections • and • of these By-laws¹, (ii) the written undertakings described in subsections (d) and (e) below and (iii) any accompanying statement from the Eligible Stockholder to be included in the Corporation's proxy statement, which statement in order to be so included shall not exceed 500 words and must fully comply with Section 14 of the Exchange Act and the rules and regulations promulgated thereunder, including without limitation Rule 14a-9.

(b) For purposes of this Section:

(i) The "Permitted Number" means one-third of the number of seats on the Board of Directors to be filled in the Election (rounded down to the nearest whole number but not less than one); *provided, however*, that if the Corporation shall have received by the Advance Notice Date one or more valid stockholder notices nominating director candidates (other than any nominations submitted in accordance with this Section for inclusion in the Corporation's proxy statement and on the Corporation's proxy card), then the Permitted Number shall be reduced by the number of such director candidates so nominated.

(ii) An "Eligible Stockholder" means a stockholder of the Corporation that, together with its Affiliates, has continuously held Beneficial Ownership and Economic Interest of not less than the Required Interest for at least one year

¹ Insert applicable references to the advance notice and qualification provisions of the issuer's By-laws. See our [Memorandum of April 18, 2008](#) for a suggested model of such provisions.

preceding the Advance Notice Date, and that complies with all applicable provisions of these By-laws.

(iii) “Beneficial Ownership” means the power to vote or direct the voting of, or to dispose or direct the disposition of, the securities in question.

(iv) An “Economic Interest” in a security means having or sharing the opportunity, directly or indirectly, to profit or share in any profit (or loss) derived from a transaction in the security, including through options, swaps or other derivative securities or synthetic arrangements.

(v) The “Required Interest” means five percent (5%) of the voting power of the outstanding voting securities of the Corporation entitled to vote in the Election, based upon the number of outstanding voting securities of the Corporation most recently disclosed prior to the Advance Notice Date by the Corporation in a filing with the Securities and Exchange Commission.

(vi) “Affiliate” of a specified person means a person that, directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with, the specified person, and, with respect to any investment company (as defined in the Investment Company Act of 1940, whether or not exempt from registration thereunder), shall also include all other investment companies managed by the same investment adviser or any of its Affiliates.

(c) Subject to the following sentence and any undertaking previously provided by an Eligible Stockholder pursuant to subsection (d) below, each Eligible Stockholder, together with its Affiliates, may nominate one, and not more than one, individual under this Section for inclusion in the Corporation’s proxy statement and on its proxy card. If the Corporation shall receive more than the Permitted Number of proposed nominations from Eligible Stockholders in compliance with these By-laws, then the nominees shall be included in the order of the size (from largest to smallest) of the Beneficial Ownership of the nominating Eligible Stockholders of voting securities of the Corporation as of the Advance Notice Date, up to the Permitted Number.

(d) Any Eligible Stockholder nominating an individual for director in accordance with this Section shall execute and deliver to the Corporation no later than the Advance Notice Date an undertaking, in a form to be provided by the Secretary of the Corporation, that it will, and will cause its Affiliates to, (i) not sell or otherwise dispose of its Beneficial Ownership and Economic Interest of voting securities of the Corporation so as to reduce the Beneficial Ownership and Economic Interest held by such Eligible Stockholder, together with its Affiliates, below the Required Interest on or prior to the date of the Election (and representing that they have no present intention of reducing, within one year following the Election, their aggregate Beneficial Ownership and Economic Interest below the greater of (x) the Required Interest and (y) seventy-five percent (75%) of their aggregate Beneficial and Economic Interest as of the Advance Notice Date), (ii) comply with the provisions of the Corporation’s Certificate of Incorporation and By-laws and all laws and regulations relating to the accompanying statement submitted by the Eligible Stockholder and any solicitation or communications with stockholders

of the Corporation in connection with such nomination, (iii) indemnify the Corporation and its agents and representatives in respect of any and all liabilities that may arise out of the accompanying statement submitted by the Eligible Stockholder or any solicitation or communications with stockholders of the Corporation by such Eligible Stockholder, its Affiliates or their respective agents or representatives in connection with such nomination, including as a result of any violation of law or regulation by such Eligible Stockholder, its Affiliates or their respective agents or representatives in connection therewith, (iv) not use any proxy card other than the Corporation's proxy card in soliciting stockholders in connection with the matters to be voted on at the meeting at which the Election is held, (v) file all solicitation materials used by it or on its behalf with the Securities and Exchange Commission under cover of Schedule 14A promulgated under the Exchange Act, and (vi) for a period of one year from the date of the Election, not (x) nominate any individual to be a director of the Corporation or conduct any solicitation with respect to an election for directors of the Corporation other than with respect to the Election and in accordance with this Section, or (y) acquire or propose to acquire Beneficial Ownership of or an Economic Interest in any voting securities of the Corporation such that such Eligible Stockholder, together with its Affiliates, would have aggregate Beneficial Ownership of, and/or an Economic Interest in, more than the greater of (I) fifteen percent (15%) of the voting power of the outstanding voting securities of the Corporation or (II) an additional five percent (5%) of the voting power of the Corporation's outstanding voting securities in excess of the aggregate Beneficial Ownership and Economic Interest held by such Eligible Stockholder, together with its Affiliates, as of the Advance Notice Date.

(e) Any Eligible Stockholder nominating an individual for director in accordance with this Section shall also deliver to the Corporation no later than the Advance Notice Date a signed undertaking of its nominee agreeing that he or she will tender his or her resignation from the Board of Directors if (i) any of the information provided to the Corporation by the Eligible Stockholder or the nominee pursuant to this By-law is determined to be inaccurate in any material respect, or (ii) the Eligible Stockholder or any of its Affiliates shall breach their obligations under the undertakings described in subsection (d) above in any material respect.

(f) This Section shall provide the exclusive method for stockholders to include nominees for director in the Corporation's proxy statement and on the Corporation's proxy card.