

May 27, 2009

## SEC Proposes Rule Amendments Facilitating Shareholder Proxy Access to Nominate Directors

On May 20, 2009, the Securities and Exchange Commission voted to propose a series of proxy rule amendments that would facilitate the rights of shareholders to nominate directors to a company's board of directors. The proposed rule changes would allow shareholders, under certain circumstances, to include their director nominees in a company's proxy materials sent to all shareholders. The proposed rules would also allow shareholders, under certain circumstances, to include shareholder proposals in the proxy materials to modify the company's director nomination procedures or election disclosure provisions.

Currently, shareholders may generally nominate their own director candidates in two ways. Shareholders may attend the annual shareholder meeting and nominate candidates at the meeting. However, as a practical matter, such nominations are rarely effective as proxy votes for the management nominees will have already been cast by the time of the meeting and the shareholder nominee will have little chance of being elected. In most situations, the only other alternative for shareholders is to launch a costly proxy contest in which they mail out their own proxy materials relating to their director nominees to shareholders.

In a press release issued by the SEC on May 20, 2009, the SEC outlined the proposed rule changes. New Rule 14a-11 would permit a shareholder or multiple shareholders acting together (unless otherwise prohibited by state law or a company's charter/by-laws from nominating a director) to include their nominees in the company's proxy

materials if they satisfy the following requirements:

- Shareholders must meet certain ownership threshold requirements depending on the company's size:
  - 1% of the voting securities for large accelerated filers (companies with a market capitalization of \$700 million or more);
  - 3% of the voting securities for accelerated filers (companies with a market capitalization of \$75 million or more but less than \$700 million); and
  - 5% of the voting securities for non-accelerated filers (companies with a market capitalization of less than \$75 million).
- Shareholders must have held the requisite percentage of shares for at least one year.
- Shareholders would be permitted to nominate one nominee or a number of nominees that represents up to 25% of the board, whichever is greater.
- Shareholder nominee(s) must meet certain criteria, including satisfying independence standards of the applicable securities exchange and the nominee's candidacy or election not violating applicable laws and regulations.
- Shareholders must file a new Schedule 14N disclosing information such as the amount and percentage of securities they own and also certifying that they are not seeking to cause a change in control or to gain more than minority representation on the board.

If the above requirements are met, the company would include in its proxy materials information about the nominating shareholders, and the shareholder nominee(s), similar to disclosure currently required in a contested election.

Proposed amendments to existing Rule 14a-8(i)(8), which permits a company to exclude shareholder proposals that "relate to an election", would narrow the exclusion right and would permit shareholders (who are eligible under existing Rule 14a-8) to submit proposals to amend a company's governing documents concerning nomination procedures or director nomination disclosure provisions if the proposals do not

conflict with state law or SEC rules, including proposed new Rule 14a-11.

The full text of the proposed rule amendments is expected to be posted to the SEC website soon, and we will provide a follow-up alert after the proposed rules have been posted. Comments on the proposed rule changes may be submitted to the SEC within 60 days after their publication in the Federal Register. Information on submitting comments to the SEC can be found on the SEC's website at [www.sec.gov/rules/submitcomments.htm](http://www.sec.gov/rules/submitcomments.htm).

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### Corporate

New York  
Carlos T. Albarracín  
+1 (212) 408-1081  
[calbarracin@chadbourne.com](mailto:calbarracin@chadbourne.com)

Marc A. Alpert  
+1 (212) 408-5491  
[malpert@chadbourne.com](mailto:malpert@chadbourne.com)

A. Robert Colby  
+1 (212) 408-5571  
[rcolby@chadbourne.com](mailto:rcolby@chadbourne.com)

William Greason  
+1 (212) 408-5527  
[wgreason@chadbourne.com](mailto:wgreason@chadbourne.com)

Morton E. Grosz  
+1 (212) 408-5592  
[mgrosz@chadbourne.com](mailto:mgrosz@chadbourne.com)

Charles E. Hord, III  
+1 (212) 408-5353  
[chord@chadbourne.com](mailto:chord@chadbourne.com)

Peter K. Ingerman  
+1 (212) 408-5422  
[pingerman@chadbourne.com](mailto:pingerman@chadbourne.com)

Peter R. Kolyer  
+1 (212) 408-5564  
[pkolyer@chadbourne.com](mailto:pkolyer@chadbourne.com)

Sey-Hyo Lee  
+1 (212) 408-5122  
[shlee@chadbourne.com](mailto:shlee@chadbourne.com)

Jonathan M.A. Melmed  
+1 (212) 408-1002  
[jmelmed@chadbourne.com](mailto:jmelmed@chadbourne.com)

J. Allen Miller  
+1 (212) 408-5454  
[amiller@chadbourne.com](mailto:amiller@chadbourne.com)

J. Patrick Narvaez  
+1 (212) 408-1161  
[pnarvaez@chadbourne.com](mailto:pnarvaez@chadbourne.com)

Marc M. Rossell  
+1 (212) 408-1057  
[mrossell@chadbourne.com](mailto:mrossell@chadbourne.com)

Edward P. Smith  
+1 (212) 408-5371  
[esmith@chadbourne.com](mailto:esmith@chadbourne.com)

Kevin C. Smith  
+1 (212) 408-1092  
[ksmith@chadbourne.com](mailto:ksmith@chadbourne.com)

London  
Claude S. Serfilippi  
+44 (20) 7337-8030  
[cserfilippi@chadbourne.com](mailto:cserfilippi@chadbourne.com)

Washington  
Sean P. McGuinness  
+1 (202) 974-5680  
[smcguinness@chadbourne.com](mailto:smcguinness@chadbourne.com)

### Litigation

New York  
Thomas J. Hall  
+1 (212) 408-5487  
[thall@chadbourne.com](mailto:thall@chadbourne.com)

Alan I. Raylesberg  
+1 (212) 408-5198  
[araylesberg@chadbourne.com](mailto:araylesberg@chadbourne.com)