

# Weil Briefing:

## SEC Disclosure and Corporate Governance

August 27, 2010

### SEC Adopts New Rule Mandating Proxy Access

#### Introduction

This week, the U.S. Securities and Exchange Commission approved measures that substantially change the nomination and election process for directors of public companies. Under a new Exchange Act Rule 14a-11, a company will be required to, at its own expense, include, on the company's proxy card, director nominees selected by a shareholder or a group of shareholders that meet certain eligibility requirements and to include information about such nominees in the company's proxy statement (*i.e.*, provide "access" to company proxy materials).

The principal eligibility standards are continuous ownership, for at least 3 years, of at least 3% of the total voting power of a company's securities entitled to vote in the election of directors. Access will be available for nominees for 25% of the board positions.

Amendments to the proxy rules to facilitate the formation of nominating groups and solicitations by nominating shareholders for their candidates were also adopted, as well as an amendment to the beneficial ownership reporting rules (under Regulation 13D-G) to permit otherwise qualifying institutional and other nominating shareholders to continue to file short-form reports (Schedule 13G).

The SEC also approved an amendment to Rule 14a-8(i)(8) requiring a company to include in its proxy materials proposals that seek to establish procedures for the inclusion in the company's proxy materials of director nominees of a shareholder or group of shareholders (unless such proposal seeks to limit the availability of Rule 14a-11).

A copy of the adopting release is available at <http://www.sec.gov/rules/final/2010/33-9136.pdf>. The adopting release contains hundreds of pages of technical instructions and commentary about the new rules. This briefing is intended, among other things, to explain in shorter form the key aspects of the new rules and the SEC's commentary.

#### Timing

The new rules will go into effect 60 days after publication in the Federal Register (which is expected shortly). For smaller reporting companies (generally, those with market capitalization of less than \$75 million) the effectiveness of Rule 14a-11 is deferred for three years. For other companies, the access rules will apply to their 2011 annual meetings. Under the rules, a nominating shareholder is required to give advance notice to the company and the SEC of its intent to access the company's proxy statement, in most circumstances not earlier than 150 days and not later than 120 days before the anniversary date of the mailing of the company's proxy materials for the prior year's annual meeting. Consequently, for companies that usually hold their annual meetings in May or June, the deadline for access nominations will be in December

or January. Like Rule 14a-8, Rule 14a-11's submission deadlines trump any company advance notice bylaw.

## **Things to Consider Now**

***Governance Structure*** The new rules create a "one size fits all" access regime. Companies should consider how their individual governance structures and processes, capitalization and other arrangements may be affected by the new access requirements and whether any adjustments are necessary. In particular, advance notice bylaws warrant a re-examination, to see how they will interact with the new rule's notice requirements.

***Nominating Committee Processes*** Nominating committees, in particular, should be briefed on the key aspects of the new requirements and consider how they would react to an access nomination. Before finalizing their nomination decisions, nominating committees may wish to see if there will be any access nominees, which may affect the slate the committee will endorse. Procedures for vetting shareholder nominees should be considered, as well as for determining whether and how to negotiate with a nominating shareholder in an effort to avoid a contested election.

***Annual Meeting Timeline*** The preparation schedule for annual meetings may also require modification to account for a potential election contest. If there is an access nomination, issues may arise as to the eligibility of the nominating shareholder and the company may need to go through the process established by the SEC for disputed nominations. In these circumstances, the company should become prepared for a contested election, ready to draw in its solicitation activities on the assistance of a proxy solicitation advisor. In addition, companies will need to revise their proxy statements to include applicable dates for the submission of director nominations by a shareholder or group of shareholders for the 2012 proxy season as required by revised Rule 14a-4.

***Shareholder Relations*** Most importantly, companies should use the advent of access as a reason to re-examine their shareholder relations processes. It has never been more important for companies to be aware of the concerns of their shareholders and to maintain good communications with them, particularly their largest shareholders. Constructive engagement, not only on traditional matters such as financial performance and corporate strategy, but also on executive compensation and governance practices, may head off access efforts and build support for the board's nominees. Shareholder relations efforts undertaken before the access deadline may be especially important.

Although it seems likely that the volume of access activity in the upcoming proxy season will be limited pending the development of experience with the access process, it is nevertheless the prudent course for companies and particularly their boards to take steps to prepare themselves for the possibility of an access initiative.

## **Background**

Whether and under what circumstances shareholders should be able to use company proxy materials to solicit votes for shareholder nominees has been a matter of significant debate.<sup>1</sup>

Historically, shareholders have been able to recommend director candidates for nomination by a company's board, nominate candidates and solicit votes in support of their nominees. In order to solicit other shareholders on a widespread basis for support for its nominee, however, a shareholder was required to prepare and disseminate to shareholders a proxy statement and proxy card at its own expense. The SEC's creation of a new right of access permits a shareholder to sponsor candidates at the company's expense and without making this effort.

The SEC received over 600 comments on its proxy access proposal. These comments were sharply divided between supporters and opponents. The Commission itself voted 3 to 2 to adopt the new rules, with Commissioners expressing strongly divergent views. The Commission's action followed Congress addressing the subject of access in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, signed into law on July 21, 2010. Section 971 of the Dodd-Frank Act provided the SEC with authority to adopt rules that require inclusion of director nominees submitted by a shareholder or group of shareholders in a company's proxy solicitation materials and that establish related procedures. The Dodd-Frank Act permits the SEC to provide access on terms and conditions that the SEC determines to be in the interests of shareholders and for the protection of investors. This week's action was the Commission's first exercise of this authority. In most respects the new rules were adopted as proposed by the SEC in May 2009.<sup>2</sup>

## **Summary of the New Proxy Rules**

### **Applicability**

The new rules apply to all companies subject to the SEC's proxy rules (including investment companies), other than companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Securities Exchange Act of 1934, as amended.<sup>3</sup> A company is required to provide access under the new rules despite any contrary state law or charter or bylaw provision that seeks to regulate or limit shareholder access to company proxy materials.<sup>4</sup> Companies are not permitted to opt-out of the access rules' applicability. The access requirements are applicable even if the company is also subject to a traditional proxy contest.

### **Eligibility to Nominate**

New Rule 14a-11 provides a process for an eligible shareholder (or group of eligible shareholders) to nominate one or more directors for up to 25% of the company's board seats (or a minimum of one director) and have those nominees included in a company's proxy statement and form of proxy. A nominating shareholder will be required to provide the company and the SEC notice on a new Schedule 14N of its intent to require the company to include its nominees in the company's proxy materials (generally no earlier than 150 days or later than 120 days before the anniversary of the mailing of the proxy materials for the last year's annual meeting) and to have information concerning such nominees included in the company's proxy materials.

To be eligible to obtain access, a nominating shareholder, individually or together with other shareholders making a nomination as a group, must:

- Beneficially own (as of the date it filed its Schedule 14N) at least 3% of the total voting power of the company's securities that are entitled to vote on the election of directors at the annual meeting (the "voting securities").
- Have beneficially owned the voting securities for at least 3 years (as of the date of the Schedule 14N) and must continue to hold such amount through the date of the election.
  - The rule as adopted represents a material change in the eligibility standards from the SEC's original proposal in June 2009, which included eligibility standards that were tiered according to company size as follows: ownership, for at least one year, of 1% of voting securities of large accelerated filers; 3% of voting securities of accelerated filers; or 5% of voting securities of nonaccelerated filers.
- Provide proof of ownership of the voting securities used for the purposes of satisfying the minimum ownership requirements.
- State in its Schedule 14N that it intends to continue to hold securities satisfying the minimum ownership requirement through the date of the annual meeting.
- State in its Schedule 14N its intent with respect to continued ownership of the company's securities after the election.

The nominating shareholder loses its eligibility if it participates in a nomination outside of Rule 14a-11 or in more than one nominating group. In addition, the nominating shareholder (including each member of a group) may not be holding any of the company's securities with the purpose, or with the effect, of changing control of the company or gaining seats on the board in excess of the maximum number of nominees it is permitted to nominate under Rule 14a-11 (and must so certify in its Schedule 14N).<sup>5</sup>

### **Determining Ownership Threshold**

Rule 14a-11 includes instructions for calculating ownership in order to meet the 3% voting power threshold, including the following:

- The nominating shareholder must hold a class of securities subject to the proxy rules (thereby excluding privately held classes of voting securities).
- The nominating shareholder must hold *both* voting *and* investment power (thereby excluding securities underlying options that are exercisable but have not been exercised).
- Shareholders are permitted to aggregate holdings in order to meet the 3% threshold.
- Shareholders are permitted to include securities loaned to a third party but only if they can be recalled and will in fact be recalled if the nominee is included.
- All short positions are netted out and borrowed shares are excluded.

In determining the total voting power of the company's securities, nominating shareholders are entitled to rely on information provided in the company's most recent annual, quarterly or current report, unless the shareholders know or have reason to know that this information is inaccurate.

### **Shareholder Nominee Requirements**

A company is not required to include a shareholder nominee in its proxy materials if the nominee's candidacy or, if elected, his or her board membership would violate state or federal law or stock exchange rules (other than the rules regarding director independence). The nominee(s) must also satisfy the *objective* director independence standards set forth in the national securities exchange listing standards that apply to the company, if any (as opposed to those standards requiring a subjective board determination of independence). There is no requirement that the director be independent from or unaffiliated with the shareholder making the nomination. Each nominating shareholder will be required to represent that neither the nominee nor the nominating shareholder has a direct or indirect agreement with the company regarding the nomination of the nominee prior to filing the Schedule 14N.

### **Maximum Number of Shareholder Nominees**

A company is required to include no more than the greater of one shareholder nominee or the number of nominees that represent no more than 25% of the company's board (or the closest whole number below 25% where 25% does not result in a whole number). Where a company has a staggered board the 25% calculation is based on the total number of board seats, not the number of board seats being voted on at the upcoming meeting. Where a nominating shareholder owns shares of a class that has the right to elect a subset of the full board, the maximum number of nominees of such a shareholder that a company is required to include may not exceed the number of director seats that the class of shares is entitled to elect.

Incumbent directors elected as a result of being nominated by a shareholder pursuant to Rule 14a-11 and whose term will continue after the election to which proxy materials relate count toward the maximum permitted number of shareholder nominees. However, where the company decides to nominate a director that was nominated by a shareholder during a previous year's election, such director will not count toward the maximum.

In order to encourage dialogue between companies and nominating shareholders, Rule 14a-11 provides that, if a company has negotiated with a shareholder who has filed a Schedule 14N before the beginning of any discussions with the company about the nomination, then, if the company agrees to include the shareholder's nominees as company nominees, those nominees count toward the 25% maximum. This allows a company's board to negotiate with a nominating shareholder and reach a consensus on the board's nominees without thereby creating a position for another shareholder nominee (but only after the nominating shareholder has filed a Schedule 14N). Thus, a privately negotiated arrangement with a shareholder regarding board composition will not affect the availability of access unless it occurs after the shareholder has "gone public" in a Schedule 14N.

### **Multiple Nominations**

In cases where the company receives more access nominations than it is required to include in its proxy statement and in cases of withdrawn or disqualified nominations, the shareholder or group with the highest qualifying voting power percentage – not the "first-in time" shareholder or group as the SEC originally proposed – has priority. Thus, in the event that the company receives more shareholder nominees than it is required to include in its proxy materials, the

company is only required to include in its proxy materials the nominees of the shareholder or group which has the highest qualifying voting power percentage disclosed in the Schedule 14Ns.

### **Notice and Disclosure Requirements**

The Schedule 14N must be submitted to the company on the same day that it is filed with the Commission, which must be no earlier than 150 calendar days nor later than 120 calendar days before the anniversary date of the company's mailing of its proxy materials for the prior year's meeting. Companies will need to revise their proxy statements to include applicable dates for the submission of director nominations by a shareholder or group of shareholders for the 2012 proxy season as required by revised Rule 14a-4. If, however, the date of the meeting has changed by more than 30 calendar days from the prior year (or if the company is holding a special meeting or conducting an election by written consent), then the notice must be transmitted a "reasonable time" before the company mails its proxy materials. This date must be specified and disclosed in a Form 8-K filed pursuant to a new Item 5.08 within four business days after the company determines the date of the meeting.<sup>6</sup> This timing requirement may differ from the date provided for the company's advance notice bylaw.

A nominating shareholder must provide the company with a notice, on Schedule 14N, of the intent to require the company to include its nominees in the company's proxy materials.<sup>7</sup> Schedule 14N may include a statement of support for the nominee, and the company is required to include this statement with its proxy materials so long as it is no more than 500 words in length.<sup>8</sup> The Schedule 14N must include the same information regarding the nominee and nominating shareholder (and all members of a nominating shareholder group) required to be provided in a traditional proxy contest plus certain additional information and representations relating to Rule 14a-11's access eligibility requirements and certifications regarding the shareholders' ownership and intentions.

### **Procedures Upon Receipt of Notice**

Upon receipt of a shareholder or group's notice of intent to seek the inclusion of shareholder nominees in the company's proxy materials, the company must determine whether any of the circumstances permitting exclusion of the shareholder nominees apply. If it determines to object, the company must advise the SEC no later than 80 days before the company wishes to file its definitive proxy statement. Should the company determine not to challenge eligibility and thus include a shareholder's (or group's) nominees, it must notify the nominating shareholder (or group) not later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company would then include in the company's proxy statement the required disclosure regarding the shareholder nominees, the nominating shareholder or group and the statement of support. The company would also include the name of the shareholder nominees on the company's form of proxy.<sup>9</sup>

The new rule establishes a procedure, modeled after the staff no-action process used in connection with shareholder proposals under Rule 14a-8, that must be followed when a company intends to exclude from its proxy materials a shareholder nomination received pursuant to Rule 14a-11.

The following chart, included in the adopting release, summarizes the procedure:

<b>Due Date</b>	<b>Action Required</b>
No earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting	Nominating shareholder or group must provide notice on Schedule 14N to the company and file the Schedule 14N with the Commission
No later than 14 calendar days after the close of the window period for submission of nominations	Company must notify the nominating shareholder or group (or its authorized representative) of any determination not to include the nominee or nominees
No later than 14 calendar days after the nominating shareholder's or group's receipt of the company's deficiency notice	Nominating shareholder or group must respond to the company's deficiency notice and, where applicable, cure any defects in the nomination
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the Commission	Company must provide notice of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the Commission and, if desired, seek a no-action letter from the staff with regard to its determination
No later than 14 calendar days after the nominating shareholder's or group's receipt of the company's notice to the Commission	Nominating shareholder or group may submit a response to the company's notice to the Commission staff
As soon as practicable	If requested by the company, Commission staff would, at its discretion, provide an informal statement of its views to the company and the nominating shareholder or group
Promptly following receipt of the staff's informal statement of its views	Company must provide notice to the nominating shareholder or group stating whether it will include or exclude the nominee

An instruction to the rule states that the company bears the burden of demonstrating that it may exclude a nominee submitted under Rule 14a-11.

### **Amendments to Rule 14a-8(i)(8)**

The amendment to Rule 14a-8(i)(8) substantially narrows the categories of shareholder proposals concerning director elections that a company may exclude from its proxy materials.<sup>10</sup>

Previously, Rule 14a-8(i)(8) permitted companies to exclude shareholder proposals that “relate to an election.” Rule 14a-8(i)(8) as amended, eliminates this broad exclusion. A company, generally speaking, will now be required to include in its proxy materials shareholder proposals concerning nomination procedures or disclosures to be made regarding shareholder nominations, including access proposals, as long as the proposed action would not conflict with Rule 14a-11 and is otherwise not excludable under Rule 14a-8 (e.g., because it is violative of state law).<sup>11</sup>

The normal qualification requirements to make such a proposal under Rule 14a-8 apply. Thus, a shareholder could propose provisions with more liberal access requirements (e.g., 2% ownership) but not more stringent requirements (e.g., 5% ownership).

The amendments to Rule 14a-8 are intended to facilitate the presentation of proposals by shareholders to adopt company-specific procedures for including shareholder nominees for director in company proxy materials.

### **Other Rule Amendments**

The Commission also adopted rule amendments intended to facilitate the formation of a group of shareholders having collectively the ownership level required for eligibility to make an access nomination and the conduct of a solicitation by a nominating shareholder in support of its candidates, and to clarify the beneficial ownership reporting obligations of a nominating shareholder.

### **New Solicitation Exemptions**

Under new Rule 14a-2(b)(7), a proxy statement need not be furnished to a person solicited (and related requirements need not be complied with) where the solicitation is made in connection with forming a shareholder group to seek access under Rule 14a-11 for a director candidate.<sup>12</sup>

Under new Rule 14a-2(b)(8), a solicitation by the nominating shareholder in support of a nominee for whom access was provided, or urging a vote against a nominee of the company, outside the proxy statement (for example, on a designated website) is exempted from the proxy statement delivery (and related) requirements, provided that the soliciting party does not seek the power to act as a proxy for a shareholder and does not furnish or request any form of proxy, revocation, abstention, consent or authorization.<sup>13</sup>

These exemptions (and Rule 14a-11) are not be available to a person who subsequently engages in other solicitation or nomination activities in connection with the same election of directors or who becomes a member of a group (as determined for beneficial ownership reporting purposes under Section 13(d)) with any person (other than another member of the nominating group) engaged in soliciting or nominating activities for the same election.

### **Beneficial Ownership Reporting Requirements**

Under the new rules, a nominating shareholder or group will not lose eligibility to file abbreviated beneficial ownership reports as a passive investor pursuant to Schedule 13G solely as a result of making a nomination pursuant to Rule 14a-11, soliciting in connection with such



nomination (including soliciting in opposition to a company's nominees) or having a nominee elected to the board.<sup>14</sup> Further disclosures will be required in the group's Schedule 14N. This Schedule 13G eligibility provision will not be available to the group after the election of directors.

Beneficial ownership reporting requirements under Section 16 of the Securities Exchange Act are unaltered. Accordingly, shareholders who come together as a nominating group must determine whether their collective ownership of shares exceeds the 10% level at which a report is required under the existing Section 16 rule provisions, which also triggers concomitant trading restrictions. Whether this reporting requirement will apply will depend on the nature of the group members and the capacity in which they hold shares.<sup>15</sup> A shareholder must continue to consider the possibility that having a nominee successfully elected to the company's board pursuant to Rule 14a-11 may result in the nominating person being deemed a director subject to Section 16.

### **Application of Liability Provisions**

An amendment to Rule 14a-9 confirms that it is unlawful for a nominating shareholder to cause any false or misleading statement to be included in the company's proxy materials, subjecting the nominating shareholder to enforcement penalties under the Securities Exchange Act and, under applicable case law, an implied private right of action to remedy such a violation. However, consistent with the existing approach in Rule 14a-8, under Rule 14a-11(f), a company will not be responsible for the accuracy or completeness of any information provided by a nominating shareholder, despite the inclusion of the information in its proxy materials.

### **New Item 5.08 of Form 8-K**

A new Item 5.08 of Form 8-K requires the company to disclose the date (which must be a reasonable time before the company mails its proxy materials) by which a nominating shareholder must submit the Schedule 14N if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting. The Item 5.08 Form 8-K must be filed within four business days after the company determines the date of the meeting.

### **New Rule 14a-18**

A new Rule 14a-18 has also been adopted and will apply to shareholder nominations for inclusion in the company's proxy materials made pursuant to procedures established by state law or by a company's governing documents. The rule requires a nominating shareholder or group utilizing such provisions to file a Schedule 14N and include in it certain disclosures concerning the nominating shareholder or group and the nominee, which are similar to what would be required under the proxy rules in an election contest.

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If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or to any member of the Firm's Public Company Advisory Group:

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<sup>1</sup> The SEC's current action, based on its May 2009 proposal, represents the third time in recent years that the Commission has taken up proxy access. In 2003, the SEC proposed a rule providing shareholder access to company proxy material under certain limit conditions. See Release No. 34-48626, *Security Holder Director Nominations* (October 14, 2003). After receiving extensive comment on the proposal, the Commission declined to adopt the proposed rule. In 2007, the SEC proposed amending Rule 14a-8 to permit shareholder proposals establishing a right of access, but eventually decided not to do so and instead clarified that under the rule such proposals were not permitted. See Release No. 34-56914, *Shareholder Proposals Relating to Election of Directors* (December 6, 2007).

<sup>2</sup> See SEC Proposing Release, *Facilitating Shareholder Director Nominations* (Release No. 33-9046, 74 Fed. Reg. 29024) (June 18, 2009), available at [www.sec.gov/rules/proposed/2009/33-9046.pdf](http://www.sec.gov/rules/proposed/2009/33-9046.pdf).

<sup>3</sup> The rules do not apply to foreign private issuers, as Securities Exchange Act Rule 3a12-3 exempts foreign private issuers from the Commission's proxy rules.

<sup>4</sup> As a formal matter, an exception is provided where applicable state or foreign law or a company's governing documents prohibit shareholders from nominating candidates for the board. No such provisions are known to exist, at least among domestic companies.

<sup>5</sup> The Commission has acknowledged the possibility that, after a company has distributed proxy materials that include information about the nominee of a shareholder, the nominating shareholder's intent may change to include a change in control of the company. The rules require the nominating shareholder to disclose this change in its intent in an amendment to Schedule 14N. The adopting release also clarifies that the Commission could take enforcement action with respect to a shareholder that provides false certifications in connection with its Schedule 14N and that such person could be liable under Rule 14a-9 for materially false or misleading certifications.

<sup>6</sup> This is similar to the requirement currently in Rule 14a-5(f), which specifies that, where the date of the next annual meeting is advanced or delayed by more than 30 calendar days from the date of the annual meeting to which the proxy statement relates, the company must disclose the new meeting date in the company's earliest possible quarterly report on Form 10-Q.

<sup>7</sup> The nominating shareholder or group will be required to file promptly an amendment to Schedule 14N for any material change in the facts set forth in the original Schedule 14N. The nominating shareholder or group will also be required to file a final amendment to the Schedule 14N disclosing within 10 days of the final election results the nominating shareholder's or group's intention with regard to continued ownership of their shares. The adopting release expresses that requiring such amendment will provide shareholders with information as to whether the outcome of the election may have altered the intent of a nominating shareholder and what further plans the nominating shareholder may have with regard to the company.

<sup>8</sup> It should be noted that the shareholder or group could also post additional supporting statements on a designated website. Such website must be disclosed on Schedule 14N.

<sup>9</sup> The rules clarify that inclusion of a shareholder nominee in the company's proxy materials will not be deemed a "solicitation in opposition," requiring the company to file a preliminary proxy statement. Thus, the company can still file its proxy statement only in definitive form, provided that it is otherwise qualified to do so.

- <sup>10</sup> The amendment to Rule 14a-8(i)(8) specifies the types of proposals that will be excludable under Rule 14a-8(i)(8), largely codifying prior staff interpretations of the director election exclusion. A company would be permitted to exclude a proposal under Rule 14a-8(i)(8) only if it: (1) would disqualify a nominee who is standing for election; (2) would remove a director from office before his or her term expired; (3) questions the competence, business judgment, or character of one or more nominees or directors; (4) nominates a specific individual for election to the board of directors, other than pursuant to Rule 14a-11, an applicable state law provision, or a company's governing documents; or (5) otherwise could affect the outcome of the upcoming election of directors. With the broader "otherwise could affect the outcome of the upcoming election" language, the Commission is seeking to address new proposals that may be developed over time that are comparable to the four specified categories and would undermine the purpose of the exclusion.
- <sup>11</sup> The amendment of Rule 14a-8 takes into account recent corporate law developments confirming the validity of bylaws providing a right of access to corporate proxy materials. On April 10, 2009, the Governor of Delaware signed into law new legislation permitting, but not requiring, Delaware companies to adopt bylaws that would provide for shareholder access to company proxy materials for the purpose of proposing director nominees pursuant to the procedures and conditions set forth in such bylaws (Section 112 of the Delaware General Corporation Law), and for the reimbursement of expenses incurred by the nominating shareholder in soliciting proxies (Section 113). Such bylaws can be adopted either by the company's board of directors or nominating shareholders. Bylaws adopted under new Section 112 (which became effective August 1, 2009) may include procedures and conditions under which a company soliciting proxies for the election of director nominees would also be required to include in its proxy materials nominees submitted by shareholders. For a detailed discussion of these amendments, see <http://www.weil.com/news/pubdetail.aspx?pub=9434>.
- <sup>12</sup> In order to qualify for the exemption, any written communications used must be limited to a statement of intent to form a group to seek access, a brief statement regarding the potential candidate (or, if none has been identified, the characteristics of a candidate), the percentage of securities beneficially owned by the soliciting shareholder and the means by which shareholders may contact the soliciting shareholder. A copy of this material must be filed with the Commission.
- <sup>13</sup> Any written communication used as part of such solicitation must identify each nominating shareholder and describe its direct or indirect interests in the matter, by security holdings or otherwise, and contain a prominent legend that refers shareholders to the company's proxy statement for important information. Any such materials must be filed with the Commission when first given to any shareholder.
- <sup>14</sup> Shareholders who come together as a nominating group and as such a group collectively have, but otherwise would not have had, beneficial ownership of 5% or more of a company's shares may as a result be required to file a beneficial ownership report, applying traditional "acting in concert" standards for determining if the shareholders constitute a "group" for beneficial ownership reporting purposes. Under the new rules, such a group will be eligible to report using the abbreviated Schedule 13G, assuming they otherwise satisfy the requirements for use of Schedule 13G.
- <sup>15</sup> Under Rule 16a-1(a)(1), shares held by certain regulated entities for third-party accounts are not considered beneficially owned for purposes of determining if the 10% beneficial ownership threshold is satisfied (even though the shares are considered beneficially owned for Section 13(d) reporting purposes). The adopting release indicates that a comparable exception for nominating group activity was not provided for Section 16 purposes as the proposed ownership thresholds for exercising access rights are substantially below 10% and the possible application of the Section 16 reporting requirement is not expected to discourage use of access.

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