

August 18, 2015

# Proxy Access Bylaw Developments and Trends

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## Including List of Considerations, Analysis of Terms Adopted to Date, and Sample Bylaw

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### A. INTRODUCTION

The significant success of shareholder proxy access proposals this year is likely to result in even more shareholder proposals for proxy access in the 2016 proxy season. As of August 13, 2015, 82 shareholder proxy access proposals have come to a vote in 2015, and 48 have passed. In many cases, shareholder proposals were approved despite a pre-existing bylaw (most often adopted after the receipt of the shareholder proposal) or a conflicting proposal by the company with modestly more restrictive terms. The average vote in favor of all proposals was 54.4%, and ISS recommended for all shareholder proxy access proposals.

This memorandum summarizes developments in the area of proxy access, including an analysis of the record of company responses to shareholder proxy access proposals received during 2015 (with further detail set forth in Annex A). Those companies that receive a proxy access shareholder proposal or that are evaluating preemptive adoption of a proxy access provision will want to consider the appropriate terms and requirements. In all cases, as a matter of preparedness, companies should be aware of options to respond to potential shareholder proxy access proposals. For more information regarding shareholder proposals generally, our [2015 Proxy Season Review](#), which we distributed on July 20, details the results of these proposals during the 2015 proxy seasons.

As a threshold matter, we emphasize that the practical consequences of adopting proxy access remain unclear. Although a small number of proxy access bylaws have been in existence for a couple of years (four provisions predated 2011), we are not aware of any proxy access nominees to date. More

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importantly, in the area of activist campaigns for board seats, we do not believe proxy access is likely to play a significant role. Activist investors are unlikely to use proxy access for several reasons. First, like now-vacated Rule 14a-11, proxy access bylaws require that the nominating shareholders be passive investors without the intent to influence the control of the company. Many activist investors will not meet this passivity requirement. Second, proxy access bylaws require the nominating shareholders to meet a three-year holding period. Such a holding period is inconsistent with some activist investors' historical investment periods. Proxy access bylaws restrict the number of nominations generally to 20-25% of the board, and activist proxy contests are often for more seats. Finally, activists who threaten or wage proxy contests are unlikely to use proxy access (even if they could meet the passivity requirement) because the solicitation efforts that can be undertaken as part of a traditional proxy contest provide substantially greater flexibility and a greater likelihood of success and the cost is generally not substantial compared to the investment made in the issuer.<sup>1</sup> Other potential nominating shareholders may be deterred as well. Depending on the market value of the issuer and the concentration of holdings, it may be difficult to accumulate sufficient shares in a "group" to nominate an individual without requiring compliance with the proxy rules—Rule 14a-2(b)(7), which exempts solicitations to form a nominating group, only applies to Rule 14a-11 nominations.<sup>2</sup> Potential nominating shareholders also may be concerned about the possible loss of 13G eligibility, or the potential formation of a 13D group.<sup>3</sup> Individuals may be reluctant to serve as proxy access nominees—in the typical activist situation, the nominated individual can rely on the activist undertaking substantial effort and expense to win the proxy contest, whereas efforts for a proxy access

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<sup>1</sup> Most proxy access bylaws do not prohibit additional solicitation efforts for that nominee, other than requiring the use of the issuer's proxy card and in some cases the filing of all soliciting material with the SEC, whether or not required by the proxy rules. However, there are a number of restrictions that limit shareholder solicitation efforts in connection with using proxy access. First, virtually all proxy access bylaws have a 500-word limitation on proponent statements to be included in the proxy statement, as did Rule 14a-11 (which provided for 500 words for each nominee). Second, the exemption for solicitation efforts by a nominating stockholder or group for its nominee contained in Rule 14a-2(b)(8) is limited to nominations under now-vacated Rule 14a-11 (and in response to comments the SEC declined to expand it to nominations pursuant to a corporation's governing documents). Third, many proxy access bylaws prohibit proceeding under both proxy access and the advance notice provisions in the bylaws. Finally, the exemption under Rule 14a-2(b)(1) (where no authorization or revocation is furnished or requested) is unavailable unless the nominating stockholder takes the improbable position that it is not acting on behalf of its nominee.

<sup>2</sup> The SEC rejected comments that the exemption under Rule 14a-2(b)(7) also cover formation of a group under a company's governing documents, because "[g]iven the range of possible criteria companies and/or shareholders could establish for nominations, we continue to believe it would not be appropriate to extend the exemption to those circumstances." The adopting release noted that in forming a nominating group, shareholders would also have the option to structure their solicitations under the exemptions for solicitations of no more than 10 shareholders (Rule 14a-2(b)(2)) and for certain communications that take place in an electronic shareholder forum (Rule 14a-2(b)(6)).

<sup>3</sup> The exception for director nominations to the passive investor requirements of Rule 13d-1(b)(1)(i) applies only to nominations under Rule 14a-11. Here again the SEC declined to extend the exception to nominations under a company's governing documents because of the differing criteria that could be adopted, noting instead that Schedule 13G eligibility would be a fact-specific inquiry. In the adopting release, the SEC noted "nominating shareholders will need to consider whether they have formed a group under Exchange Act Section 13(d)(3) and Rule 13d-5(b)(1)...."

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nominee would by their very nature likely be more limited. In addition, activist nominees generally receive indemnification agreements from the activist, which may or may not be provided to proxy access nominees in the future. We do expect, over time, that shareholders will make some use of proxy access, but we see no evidence that its use will become routine or widespread. It is also possible that the SEC may revise some of the ancillary rules adopted together with Rule 14a-11, to provide comparable exemptions for nominations and solicitation activities pursuant to proxy access bylaws, or consider no-action relief, eliminating some impediments to proxy access utilization.

### B. KEY PROXY ACCESS TERMS AND THE EMERGENCE OF MARKET TRENDS

The appropriate terms of a proxy access bylaw will differ from company to company and proxy access bylaws as a whole are still relatively new. However, trends are beginning to develop for certain key terms. To assist companies in the process of considering their own proxy access provisions, we analyze below a summary of key terms that have been adopted by public companies thus far. Attached as Annex B is a sample form of proxy access bylaw that companies can use as a starting point in crafting their own bylaw, whether to be adopted proactively, as a competing or substantially implementing proposal, in negotiations with a proponent, or following a successful shareholder proposal.

- 1. Ownership threshold and holding period for making a nomination.** All shareholder proposals in 2015 have proposed a 3% ownership threshold, which was the threshold in Rule 14a-11.<sup>4</sup> Of the 35 proxy access bylaws adopted after 2010, 25 have had a 3% ownership threshold, and ten have had a 5% ownership threshold. Of the 15 most recent adoptions (only one of which was in response to a successful shareholder proposal), 14 have been at the 3% threshold. The only exception is SBA Communications Corporation, which adopted a 5% bylaw after its non-binding management proposal at that level defeated a 3% shareholder proposal. All proxy access proposals and almost all bylaws have a continuous three-year holding period requirement, which was also the holding requirement in Rule 14a-11 (a limited number of earlier bylaws contain a shorter period).
- 2. Formation of shareholder groups.** Only four bylaws (three of which were adopted before 2014) do not address the use of shareholder groups to reach the ownership threshold. Of the remaining 35, 21 permit a group of 20 holders, one permits a group of 15, seven permit a group of 10, one permits a group of five and five have no limit on the number of group participants. Of the 15 most recent adoptions, eleven were at 20, one each at 15 and 10, one did not permit groups, and one had no limit. A subset of bylaws provides that funds or companies under common management constitute one person. In its policy survey disseminated August 4, 2015, ISS asked whether a group limit of less than 20 adopted after a successful shareholder proposal should be considered non-responsive and potentially warrant withheld or against votes for directors.<sup>5</sup> In its Proxy Access: Best Practices publication, the Council of Institutional Investors (“CII”) noted it does not endorse a limit on the number of shareholders in the nominating group. Generally, proxy access bylaws provide that shareholders cannot be in more than one nominating group.
- 3. Maximum number of nominees.** Companies should consider the maximum number of access nominees eligible for nomination to the board. Ignoring pre-2011 bylaws, 25 issuers

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<sup>4</sup> Data throughout this publication is based on information from ISS and FactSet Shark Repellent, as well as our own selective review of public filings.

<sup>5</sup> The 2016 ISS policy survey can be accessed at: <http://www.issgovernance.com/iss-releases-annual-policy-survey>.

have a 20% maximum, nine have a 25% maximum, and one bylaw provides for only one proxy access director. Of the most recent 15 adoptions, eleven were at 20% and four at 25%. CII opposes a limitation that would prevent shareholders from nominating at least two candidates. Most shareholder proposals provide for a 25% maximum.

4. **Definition of ownership.** All post-2010 bylaws require that the ownership position has full economic and voting rights, as did Rule 14a-11, and excludes borrowed shares and shares subject to options, derivative or similar agreements. Although the instructions to Rule 14a-11 specifically provided that loaned stock would be considered continuously owned if the nominating stockholder had the right to recall the loaned stock and did so upon notification that its nominees would be included in the proxy statement, most bylaws do not address loaned stock. Ten issuers, including GE, Microsoft, Prudential, Bank of America, Broadridge and Merck, however, do provide that loaned stock is considered owned as long as it is callable, and, in some cases, recalled. If stock loans are not addressed, the lending of stock may cause a break in “ownership” because in a typical stock loan both voting and dispositive rights pass to the borrower. CII has publicly stated that loaned securities should be counted towards the ownership threshold if the participant has the right to recall those securities for voting purposes and will vote the securities at the meeting, as well as representing it will hold those securities through the date of the annual meeting.
5. **Deadline for notice.** Proxy access bylaws vary widely on this point. Most advance notice (as opposed to proxy access) bylaws require notice to be delivered 90-120 days prior to the anniversary of the prior year’s annual meeting date. The deadline for shareholder proposals under Rule 14a-8 is 120 days prior to the anniversary of the date of the issuer’s proxy statement for the prior year, and the window provided in vacated Rule 14a-11 was 120-150 days prior to the anniversary of the date the registrant mailed its proxy statement in the prior year. Rule 14a-18 provides that a shareholder nominating a proxy access nominee under the issuer’s governing documents must provide notice on a Schedule 14N by the date specified in the registrant’s advance notice provision, or if no such date is in place, no later than 120 days before the anniversary of the mailing of the issuer’s proxy materials in the prior year.

Of the 35 bylaws adopted after 2010, 17 have the same window provided by Rule 14a-11—120-150 days prior to the anniversary of the mailing of the prior year’s proxy statement. Five issuers have the 14a-8 deadline, which is effectively the same deadline as the prior 17, but with no window. Another seven issuers have a window of 120-150 days prior to the anniversary of the prior year’s annual meeting. Only ten issuers have the same deadline for proxy access as they do for nominations under their advance notice bylaw.

In considering a required notice period, there are at least four issues that should be considered. First, issuers typically need more time than the advance notice deadline of 90-120 days prior to mailing because of the time required for reviewing and confirming the information provided (because material inaccuracies are generally a ground for exclusion in proxy access bylaws) and potentially engaging in discussions with the nominating stockholder or nominee. Second, a window ensures that the issuer is not receiving proposals throughout the year. Third, extending the general advance notice deadline to the proxy access deadline or window could result in a determination by ISS that this is a unilateral bylaw amendment resulting in a negative board recommendation—ISS specifically referred to increasing advance notice requirements in its 2016 policy survey. Fourth, if the general advance notice deadline is different from the proxy access deadline, it may be desirable to avoid any ambiguity of what constitutes an “advance notice provision” under Rule 14a-18 and to amend the advance notice bylaw to reflect the separate deadline (or window) applicable to proxy access nominations.<sup>6</sup>

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<sup>6</sup> Because Rule 14a-18 provides that Schedule 14N is to be provided to the registrant by the date specified in the registrant’s advance notice provision, absent including a proxy access deadline in the

6. **Treatment of incumbent access directors.** Companies should consider whether incumbent directors who were access nominees should count against the maximum number of nominees for a number of years after their election, to prevent the board from having an incentive not to renominate them. This type of provision has been adopted by about slightly more than one-third of public companies who provide for proxy access. Similarly, five companies have restricted shareholders from nominating further nominees for a period of two years if that shareholder has a prior successful access nominee currently serving on the board.
7. **Nominee eligibility.** Proxy access bylaws include a number of eligibility standards for access nominees, including independence under relevant stock exchange standards, lack of affiliation with competitors, no criminal convictions, no violation of law or stock exchange requirements caused by the nomination and not providing materially inaccurate information. Fourteen companies permit the exclusion of nominees who have compensation arrangements with third parties for serving as a director of the issuer—although ISS has specifically questioned in its 2016 policy survey whether this provision should be considered nonresponsive. CII believes “limiting the pool of eligible board candidates by excluding those who receive candidacy fees would be an unduly onerous requirement”—it is unclear whether a “candidacy fee” would include all forms of third party director compensation.
8. **Required information with respect to nominating shareholders and nominees.** A company’s bylaws may require submission of reasonable information about the candidate and the nominating party, similar to what is called for by typical advance notice provisions. In this regard, it should be noted that the SEC’s Schedule 14N, which was adopted in conjunction with Rule 14a-11, remains in effect and would apply in the case of a nomination under a company proxy access bylaw. The company bylaw should be drafted to work in conjunction with Schedule 14N. Careful attention should be given to what information, in addition to existing advance notice provisions and Schedule 14N is really necessary, given ISS’s question in its current policy survey as to whether such additional disclosure requirements may be “nonresponsive.”
9. **Repeat nominee eligibility restrictions.** Although the exclusion of candidates who received below a specified threshold of support (usually 25%) of votes cast in a previous annual meeting appears to be a universal provision, ISS has queried in its policy survey if this should be considered “nonresponsive” and CII opposes restrictions on renominations as a result of receiving a prior low vote.
10. **Other limitations.** A company may determine to place reasonable limitations on the use of proxy access, including making it unavailable where a shareholder has provided a notice of a nomination under the advance notice bylaw—28 bylaws have such a provision (although in six instances proxy access is disallowed only if the number of non-proxy access candidates exceeds a certain number). Most companies have explicitly prevented a nominating shareholder from distributing a separate proxy card or from participating in solicitations for other candidates.

These and other considerations are addressed in the form of proxy access bylaw attached as Annex B.

### C. COMPANY RESPONSES TO PROXY ACCESS PROPOSALS

During the 2015 proxy season, companies employed a variety of strategies in response to shareholder proxy access proposals. To assist companies in evaluating the appropriate strategy, we have outlined

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advance notice provision, there could be an ambiguity as to which deadline prevails for purposes of filing Schedule 14N. Existing advance notice provisions should generally be carefully reviewed to ensure there are not inconsistencies with proxy access bylaws.

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below the most frequent forms of response and included as Annex A a more detailed summary of the results for companies which have adopted each respective response.

- **No Company Action.** For companies that allowed the shareholder proposal to come to a vote, but simply suggested shareholders vote against it, the shareholder proposal passed (> 50% support) 57% of the time.
- **Company Offered Competing Proposal.** Some companies have allowed the shareholder proposal (typically a 3% ownership threshold) to come to a vote while also offering their own company proposal (typically a 5% ownership threshold). These proposals often varied in other key terms as well. This response had mixed results and the company proposals passed approximately half of the time (in one instance, both the company and the shareholder proposal failed). In most instances, these company proposals were non-binding and covered the same provisions as the competing shareholder proposal did. This appears to be a superior approach to putting the full bylaw up for a vote. Presenting a detailed bylaw could engender a negative reaction from some shareholders in contrast to the simpler shareholder proposal and, should the company proposal lose, it would be very difficult for the company to determine exactly which provisions shareholders were voting against.
- **Preemptive Adoption.** Nine companies chose to adopt their own proxy access bylaw prior to the annual meeting and saw mixed results. At these companies, four shareholder proposals were passed and five failed.
- **Intent Announcement.** Four companies announced an intent to adopt their own proxy access proposal. In three of these cases, the shareholder proposal passed despite the intent announcement from the company, and in the fourth case the vote in favor was 49.4%.
- **Management Supported Shareholder Proposal.** At two companies, the company supported the shareholder proposal and in a third instance, the board took no position (although it detailed a number of governance factors for shareholders to consider), and in those three cases, the shareholder proposal passed with overwhelming support.
- **No Action Sought for Substantial Implementation.** General Electric was able to exclude a proxy access proposal on the basis of substantial implementation.<sup>7</sup>

### D. NEXT STEPS

The advisability of proactively adopting a proxy access provision will vary from company to company. Relatively few companies have done so to date, and trends are still evolving. In addition, as of today, most of the issuers who saw successful shareholder proposals have not yet implemented a proxy access bylaw. Accordingly, as of today there seems to be no compelling reason to adopt a proxy access bylaw proactively, although that could change, depending on a number of factors, including market practice, the development of more detailed, and restrictive, shareholder proposals, or the adoption of a particularly narrow view by ISS of which provisions would be considered “responsive.” There are, however, a number of concrete steps that are advisable to take now.

- **Review Shareholder Profile.** Issuers should review their shareholder profile with their proxy solicitor to determine the likelihood of success if a shareholder proxy access proposal is made. It should be assumed, however, consistent with most governance trends, that the support of institutional shareholders for proxy access will grow over time.

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<sup>7</sup> The General Electric no-action letter and related correspondence is available at: <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/kevinmaharrecon030315-14a8.pdf>

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- **Consideration of Potential Terms.** Consideration of what terms would be appropriate, and preparing potential bylaws, is advisable at this stage. Proxy access bylaws are complicated and should be tailored to fit with existing bylaw provisions as well as a company's particular situation. Becoming familiar with the mechanics and evaluating terms will allow companies to respond quickly as trends become clearer or if a proposal is received. Although shareholder proposals were not excluded on the basis of conflicting with management proposals this year,<sup>8</sup> GE was able to exclude a proposal on the basis of substantial implementation. Depending, in particular, on what limitations ISS determines to impose on "responsiveness" following its policy survey, which should be announced in November, it may be preferable to adopt a proxy access provision and seek to exclude the shareholder proposal as substantially implemented, or to structure a competing non-binding proposal, in order to have greater flexibility in crafting the other provisions in the proxy access bylaw. Depending on who proposes proxy access provisions next year, it may also be possible to successfully negotiate an acceptable outcome as well. All these actions are more easily undertaken with a bylaw considered in advance.
- **Board Preparation.** As a part of an issuer's general review with its Board of proxy season developments, the Board should be informed about developing proxy access trends, and the potential advantages and disadvantages of the various strategies relating to proxy access. Again, a prepared Board will allow companies to respond quickly.

Please contact any of the lawyers listed at the end of this memo or your contact person at the firm if you wish to discuss any of these matters.

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<sup>8</sup> For a discussion of the SEC staff's decision, and the announcement by SEC Chair White that spurred it, see our publication, dated January 16, 2015, entitled "SEC Staff Suspends No-Action Relief on Conflicting Shareholder Proposals." Chair White has indicated that the goal with respect to this issue "is to provid[e] clarity for next year's proxy season." See SEC Chair White Speech, available at: <http://www.sec.gov/news/speech/building-meaningful-communication-and-engagement-with-shareholde.html>.

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## ANNEX A

### COMPANY RESPONSES TO SHAREHOLDER PROXY ACCESS PROPOSALS AND CORRESPONDING ANNUAL MEETING VOTING RESULTS

<b>Opposition Statement</b> (59 companies)
For companies that allowed the shareholder proposal to come to a vote and recommended against adoption, the shareholder proxy access proposal passed (> 50% support) 57% of the time. All proposals were at the 3% / 3-year level.
<b>Competing Proposal</b> (7 companies)
For companies that offered a competing management proposal, the shareholder proxy access proposal passed 43% of the time and the average vote in support was 44%. Additional detail on these proposals is in the following table.
<b>Preemptive Adoption</b> (9 companies)
For companies that preemptively adopted a proxy access bylaw, the shareholder proxy access proposal passed 44% of the time and the average vote in support was 49%. Additional detail on these proposals is in the following table.
<b>Announced Intent</b> (4 companies)
For companies that announced intent to adopt a proxy access bylaw, the shareholder proxy access proposal passed 75% of the time. Additional detail on these proposals is in the following table.
<b>No Board Recommendation</b> (1 company)
Republic Services, Inc. took no position and 89% of the shares approved the proposal.
<b>Management Supported Shareholder Proposal</b> (2 companies)
Apache Corporation and Citigroup supported shareholder proxy access proposals and both passed with an average vote in support of 90%.

Company	Date	% of votes cast
<b>Competing Proposal – Additional Detail:</b>		
AES Corp (5% management proposal failed with 36%)	4/23/2015	66%
Chipotle Mexican Grill, Inc. (5% management proposal failed with 35%)	5/13/2015	49.9%
Cloud Peak Energy Inc. (5% management proposal failed with 26%)	5/13/2015	71%
Exelon Corp (5% management proposal passed with 52%)	4/28/2015	44%
Expeditors Int'l of Washington, Inc. (3% mgt. proposal passed with 70%)	5/21/2015	35%

Company	Date	% of votes cast
<b>Competing Proposal – Additional Detail:</b>		
SBA Communications Corporation (5% mgt. proposal passed with 52%)	5/21/2015	46%
Visteon Corporation (5% management proposal failed with 20%)	6/11/2015	74%
<b>Preemptive Adoption – Additional Detail</b>		
Arch Coal (adopted at 5%)	4/23/2015	36%
Boston Properties, Inc. (adopted at 3%, but groups limited to 5)	5/19/2015	46%
Cabot Oil & Gas (adopted at 5%)	4/23/2015	45%
CF Industries Holdings, Inc. (adopted at 5%)	5/15/2015	57%
HCP, Inc. (adopted at 5%)	4/30/2015	56%
Marathon Oil (adopted at 5%)	4/29/2015	63%
New York Community Bancorp, Inc. (adopted at 5%)	6/3/2015	44%
Rite Aid Corporation (adopted at 3%)	6/25/2015	37%
The Priceline Group Inc. (adopted at 5%)	6/4/2015	54%
<b>Announced Intent – Additional Detail</b>		
Cimarex Energy Co. (announced intent to adopt at 4%, group of 15, 20% of board)	5/14/2015	56%
eBay Inc. (announced intent to adopt proxy access, terms TBD)	5/1/2015	59%
Freeport-McMoRan Inc. (announced intent to adopt proxy access, terms TBD)	6/10/2015	64%
Pioneer Natural Resources Company (announced intent to adopt at 5%, 20% of board)	5/20/2015	49.4%

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## ANNEX B

### SAMPLE FORM OF PROXY ACCESS BYLAW

Section \_\_\_\_\_. Stockholder Nominations Included in the Corporation's Proxy Materials.

(a) Inclusion of Nominee in Proxy Statement. Subject to the provisions of this Section \_\_\_\_, if expressly requested in the relevant Nomination Notice (as defined below), the Corporation shall include in its proxy statement for any annual meeting of stockholders:

(i) the name of any person nominated for election (the "Nominee"), which shall also be included on the Corporation's form of proxy and ballot, by any Eligible Holder (as defined below) or group of up to 20 Eligible Holders that has (individually and collectively, in the case of a group) satisfied, as determined by the Board of Directors or its designee, acting in good faith, all applicable conditions and complied with all applicable procedures set forth in this Section \_\_\_\_ (such Eligible Holder or group of Eligible Holders being a "Nominating Stockholder");

(ii) disclosure about the Nominee and the Nominating Stockholder required under the rules of the SEC or other applicable law to be included in the proxy statement;

(iii) any statement included by the Nominating Stockholder in the Nomination Notice for inclusion in the proxy statement in support of the Nominee's election to the Board of Directors (subject, without limitation, to Section \_\_\_\_ (e)(ii)), if such statement does not exceed 500 words; and

(iv) any other information that the Corporation or the Board of Directors determines, in their discretion, to include in the proxy statement relating to the nomination of the Nominee, including, without limitation, any statement in opposition to the nomination and any of the information provided pursuant to this Section.

(b) Maximum Number of Nominees.

(i) The Corporation shall not be required to include in the proxy statement for an annual meeting of stockholders more Nominees than that number of directors constituting 20% of the total number of directors of the Corporation on the last day on which a Nomination Notice may be submitted pursuant to this Section \_\_\_\_ (rounded down to the nearest whole number, but not less than two) (the "Maximum Number"). The Maximum Number for a particular annual meeting shall be reduced by: (1) Nominees who are subsequently withdrawn or that the Board of Directors itself decides to nominate for election at such annual meeting and (2) the number of incumbent directors who had been Nominees with respect to any of the preceding three annual meetings of stockholders and whose reelection at the upcoming annual meeting is being recommended by the Board of Directors. In the event that one or more vacancies for any reason occurs on the Board of Directors after the deadline set forth in Section \_\_\_\_ (d) below but before the date of the annual meeting, and the Board of Directors resolves to reduce the size of the board in connection therewith, the Maximum Number shall be calculated based on the number of directors in office as so reduced.

(ii) If the number of Nominees pursuant to this Section \_\_\_\_ for any annual meeting of stockholders exceeds the Maximum Number then, promptly upon notice from the Corporation, each Nominating Stockholder will select one Nominee for inclusion in the proxy statement until the Maximum Number is reached, going in order of the amount (largest to smallest) of the ownership position as disclosed in each Nominating Stockholder's Nomination Notice, with the process repeated if the Maximum Number is not reached after each Nominating Stockholder has selected one Nominee. If, after the deadline for submitting a Nomination Notice as set forth in Section \_\_\_\_ (d), a Nominating Stockholder becomes ineligible or withdraws its nomination or a Nominee becomes unwilling to serve on the Board of Directors, whether before or after the mailing of the definitive proxy statement, then the nomination shall be disregarded, and the Corporation: (1) shall not be required to include in its proxy statement or on any ballot or form of proxy the disregarded Nominee or any

successor or replacement nominee proposed by the Nominating Stockholder or by any other Nominating Stockholder and (2) may otherwise communicate to its stockholders, including without limitation by amending or supplementing its proxy statement or ballot or form of proxy, that the Nominee will not be included as a Nominee in the proxy statement or on any ballot or form of proxy and will not be voted on at the annual meeting.

(c) Eligibility of Nominating Stockholder.

(i) An “Eligible Holder” is a person who has either (1) been a record holder of the shares of common stock used to satisfy the eligibility requirements in this Section \_\_\_(c) continuously for the three-year period specified in Subsection (ii) below or (2) provides to the Secretary of the Corporation, within the time period referred to in Section \_\_\_(d), evidence of continuous ownership of such shares for such three-year period from one or more securities intermediaries in a form that the Board of Directors or its designee, acting in good faith, determines would be deemed acceptable for purposes of a shareholder proposal under Rule 14a-8(b)(2) under the Securities Exchange Act of 1934 (the “Exchange Act”) (or any successor rule).

(ii) An Eligible Holder or group of up to 20 Eligible Holders may submit a nomination in accordance with this Section \_\_\_ only if the person or group (in the aggregate) has continuously owned at least the Minimum Number (as defined below) of shares of the Corporation’s common stock throughout the three-year period preceding and including the date of submission of the Nomination Notice, and continues to own at least the Minimum Number through the date of the annual meeting. A group of funds under common management and investment control shall be treated as one Eligible Holder if such Eligible Holder shall provide together with the Nomination Notice documentation reasonably satisfactory to the Corporation that demonstrates that the funds are under common management and investment control. For the avoidance of doubt, in the event of a nomination by a group of Eligible Holders, any and all requirements and obligations for an individual Eligible Holder that are set forth in this Section \_\_\_, including the minimum holding period, shall apply to each member of such group; provided, however, that the Minimum Number shall apply to the ownership of the group in the aggregate. Should any stockholder withdraw from a group of Eligible Holders at any time prior to the annual meeting of stockholders, the group of Eligible Stockholders shall only be deemed to own the shares held by the remaining members of the group.

(iii) The “Minimum Number” of shares of the Corporation’s common stock means [3%] of the number of outstanding shares of common stock as of the most recent date for which such amount is given in any filing by the Corporation with the SEC prior to the submission of the Nomination Notice.

(iv) For purposes of this Section \_\_\_, an Eligible Holder “owns” only those outstanding shares of the Corporation as to which the Eligible Holder possesses both:

- (A) the full voting and investment rights pertaining to the shares; and
- (B) the full economic interest in (including the opportunity for profit and risk of loss on) such shares;

provided that the number of shares calculated in accordance with clauses (A) and (B) shall not include any shares: (1) sold by such Eligible Holder or any of its affiliates in any transaction that has not been settled or closed, (2) borrowed by such Eligible Holder or any of its affiliates for any purpose or purchased by such Eligible Holder or any of its affiliates pursuant to an agreement to resell, or (3) subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such Eligible Holder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of outstanding shares of the Corporation, in any such case which instrument or agreement has, or is intended to have, the purpose or effect of: (x) reducing in any manner, to any extent or at any time in the future, such Eligible Holder’s or any of its affiliates’ full right to vote or direct the voting of any such

shares, and/or (y) hedging, offsetting, or altering to any degree, gain or loss arising from the full economic ownership of such shares by such Eligible Holder or any of its affiliates.

An Eligible Holder “owns” shares held in the name of a nominee or other intermediary so long as the Eligible Holder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. An Eligible Holder’s ownership of shares shall be deemed to continue during any period in which the Eligible Holder has delegated any voting power by means of a proxy, power of attorney, or other similar instrument or arrangement that is revocable at any time by the Eligible Holder. An Eligible Holder’s ownership of shares shall be deemed to continue during any period in which the Eligible Holder has loaned such shares provided that the Eligible Holder has the power to recall such loaned shares on three business days’ notice and has recalled such loaned shares as of the date of the Nomination Notice and holds such shares through the date of the annual meeting. The terms “owned,” “owning” and other variations of the word “own” shall have correlative meanings. Whether outstanding shares of the Corporation are “owned” for these purposes shall be determined by the Board.

(v) No person shall be permitted to be in more than one group constituting a Nominating Stockholder, and if any person appears as a member of more than one group, it shall be deemed to be a member of the group that has the largest ownership position as reflected in the Nomination Notice.

(d) Nomination Notice. To nominate a Nominee, the Nominating Stockholder must, no earlier than 150 calendar days and no later than 120 calendar days before the anniversary of the date that the Corporation mailed its proxy statement for the prior year’s annual meeting of stockholders, submit to the Secretary of the Corporation at the principal executive office of the Corporation all of the following information and documents (collectively, the “Nomination Notice”); provided, however, that if (and only if) the annual meeting is not scheduled to be held within a period that commences 30 days before such anniversary date and ends 30 days after such anniversary date (an annual meeting date outside such period being referred to herein as an “Other Meeting Date”), the Nomination Notice shall be given in the manner provided herein by the later of the close of business on the date that is 180 days prior to such Other Meeting Date or the tenth day following the date such Other Meeting Date is first publicly announced or disclosed:

(i) A Schedule 14N (or any successor form) relating to the Nominee, completed and filed with the SEC by the Nominating Stockholder as applicable, in accordance with SEC rules;

(ii) A written notice of the nomination of such Nominee that includes the following additional information, agreements, representations and warranties by the Nominating Stockholder (including each group member):

(A) the information required with respect to the nomination of directors pursuant to Section \_\_\_\_ of these Bylaws [*reference advance notice information requirements*];

(B) the details of any relationship that existed within the past three years and that would have been described pursuant to Item 6(e) of Schedule 14N (or any successor item) if it existed on the date of submission of the Schedule 14N;

(C) a representation and warranty that the Nominating Stockholder did not acquire, and is not holding, securities of the Corporation for the purpose or with the effect of influencing or changing control of the Corporation;

(D) a representation and warranty that the Nominee’s candidacy or, if elected, Board membership would not violate applicable state or federal law or the rules of any stock exchange on which the Corporation’s securities are traded;

(E) a representation and warranty that the Nominee:

(1) does not have any direct or indirect relationship with the Corporation other than those relationships that have been deemed categorically immaterial pursuant to the Corporation's Policy on Director Independence as most recently published on its website] and otherwise qualifies as independent under the rules of the primary stock exchange on which the Corporation's securities are traded;

(2) meets the audit committee independence requirements under the rules of any stock exchange on which the Corporation's securities are traded;

(3) is a "non-employee director" for the purposes of Rule 16b-3 under the Exchange Act (or any successor rule);

(4) is an "outside director" for the purposes of Section 162(m) of the Internal Revenue Code (or any successor provision);

(5) [meets the director qualifications set forth in Section \_\_\_ of these Bylaws;] and

(6) is not and has not been subject to any event specified in Rule 506(d)(1) of Regulation D (or any successor rule) under the Securities Act of 1933 or Item 401(f) of Regulation S-K (or any successor rule) under the Exchange Act, without reference to whether the event is material to an evaluation of the ability or integrity of the Nominee;

(F) a representation and warranty that the Nominating Stockholder satisfies the eligibility requirements set forth in Section \_\_\_(c) and has provided evidence of ownership to the extent required by Section \_\_\_(c)(i);

(G) a representation and warranty that the Nominating Stockholder intends to continue to satisfy the eligibility requirements described in Section \_\_\_(c) through the date of the annual meeting and intends to continue to hold the Minimum Number of shares for at least one year following the annual meeting;

(H) details of any position of the Nominee as an officer or director of any competitor (that is, any entity that produces products or provides services that compete with or are alternatives to the [principal] products produced or services provided by the Corporation or its affiliates) of the Corporation, within the [three] years preceding the submission of the Nomination Notice;

(I) a representation and warranty that the Nominating Stockholder will not engage in a "solicitation" within the meaning of Rule 14a-1(l) (without reference to the exception in Section 14a-1(l)(2)(iv)) (or any successor rules) with respect to the annual meeting, other than with respect to the Nominee or any nominee of the Board;

(J) a representation and warranty that the Nominating Stockholder will not use any proxy card other than the Corporation's proxy card in soliciting stockholders in connection with the election of a Nominee at the annual meeting;

(K) if desired, a statement for inclusion in the proxy statement in support of the Nominee's election to the Board of Directors, provided that such statement shall not exceed 500 words and shall fully comply with Section 14 of the Exchange Act and the rules and regulations thereunder, including Rule 14a-9; and

(L) in the case of a nomination by a group, the designation by all group members of one group member that is authorized to act on behalf of all group members with respect to matters relating to the nomination, including withdrawal of the nomination;

(iii) An executed agreement, in a form deemed satisfactory by the Board of Directors or its designee, acting in good faith, pursuant to which the Nominating Stockholder (including each group member) agrees:

(A) to comply with all applicable laws, rules and regulations in connection with the nomination, solicitation and election;

(B) to file any written solicitation or other communication with the Corporation's stockholders relating to one or more of the Corporation's directors or director nominees or any Nominee with the Securities and Exchange Commission, regardless of whether any such filing is required under rule or regulation or whether any exemption from filing is available for such materials under any rule or regulation;

(C) to assume all liability stemming from an action, suit or proceeding concerning any actual or alleged legal or regulatory violation arising out of any communication by the Nominating Stockholder with the Corporation, its stockholders or any other person in connection with the nomination or election of directors, including, without limitation, the Nomination Notice;

(D) to indemnify and hold harmless (jointly with all other group members, in the case of a group member) the Corporation and each of its directors, officers and employees individually against any liability, loss, damages, expenses or other costs (including attorneys' fees) incurred in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against the Corporation or any of its directors, officers or employees arising out of or relating to a failure or alleged failure of the Nominating Stockholder to comply with, or any breach or alleged breach of, its obligations, agreements or representations under this Section \_\_\_\_\_;

(E) in the event that any information included in the Nomination Notice, or any other communication by the Nominating Stockholder (including with respect to any group member), with the Corporation, its stockholders or any other person in connection with the nomination or election ceases to be true and accurate in all material respects (or due to a subsequent development omits a material fact necessary to make the statements made not misleading), or that the Nominating Stockholder (including any group member) has failed to continue to satisfy the eligibility requirements described in Section \_\_\_(c), to promptly (and in any event within 48 hours of discovering such misstatement or omission) notify the Corporation and any other recipient of such communication of the misstatement or omission in such previously provided information and of the information that is required to correct the misstatement or omission; and

(iv) An executed agreement, in a form deemed satisfactory by the Board of Directors or its designee, acting in good faith, by the Nominee:

(A) to provide to the Corporation such other information, including completion of the Corporation's director questionnaire, as it may reasonably request;

(B) that the Nominee has read and agrees, if elected, to serve as a member of the Board of Directors, to adhere to the Corporation's [Corporate Governance Guidelines] and [Code of Business Conduct] and any other Corporation policies and guidelines applicable to directors; and

(C) that the Nominee is not and will not become a party to (i) any compensatory, payment or other financial agreement, arrangement or understanding with any person or entity in connection with service or action as a director of the Corporation that has not been disclosed to the Corporation, (ii) any agreement, arrangement or understanding with any person or entity as to how the Nominee would vote or act on any issue or question as a director (a "Voting

Commitment”) that has not been disclosed to the Corporation or (iii) any Voting Commitment that could limit or interfere with the Nominee’s ability to comply, if elected as a director of the Corporation, with its fiduciary duties under applicable law.

The information and documents required by this Section \_\_\_(d) shall be: (i) provided with respect to and executed by each group member, in the case of information applicable to group members; and (ii) provided with respect to the persons specified in Instruction 1 to Items 6(c) and (d) of Schedule 14N (or any successor item) in the case of a Nominating Stockholder or group member that is an entity. The Nomination Notice shall be deemed submitted on the date on which all the information and documents referred to in this Section \_\_\_(d) (other than such information and documents contemplated to be provided after the date the Nomination Notice is provided) have been delivered to or, if sent by mail, received by the Secretary of the Corporation.

(e) Exceptions.

(i) Notwithstanding anything to the contrary contained in this Section \_\_\_, the Corporation may omit from its proxy statement any Nominee and any information concerning such Nominee (including a Nominating Stockholder’s statement in support) and no vote on such Nominee will occur (notwithstanding that proxies in respect of such vote may have been received by the Corporation), and the Nominating Stockholder may not, after the last day on which a Nomination Notice would be timely, cure in any way any defect preventing the nomination of the Nominee, if:

(A) the Corporation receives a notice pursuant to [*cite advance notice provision*] of these Bylaws that a stockholder intends to nominate a candidate for director at the annual meeting;

(B) the Nominating Stockholder or the designated lead group member, as applicable, or any qualified representative thereof, does not appear at the meeting of stockholders to present the nomination submitted pursuant to this Section \_\_\_ or the Nominating Stockholder withdraws its nomination;

(C) the Board of Directors, acting in good faith, determines that such Nominee’s nomination or election to the Board of Directors would result in the Corporation violating or failing to be in compliance with the Corporation’s bylaws or certificate of incorporation or any applicable law, rule or regulation to which the Corporation is subject, including any rules or regulations of any stock exchange on which the Corporation’s securities are traded;

(D) the Nominee was nominated for election to the Board of Directors pursuant to this Section \_\_\_ at one of the Corporation’s two preceding annual meetings of stockholders and either withdrew or became ineligible or received a vote of less than 25% of the shares of common stock entitled to vote for such Nominee;

(E) the Nominee [(1)] has been, within the past three years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914, as amended[, or (2) is a director, trustee, officer or employee with management functions for any depository institution, depository institution holding company or entity that has been designated as a Systemically Important Financial Institution, each as defined in the Depository Institution Management Interlocks Act, provided, however, that this clause (2) shall apply only so long as the Corporation is subject to compliance with Section 164 of the Dodd-Frank Wall Street Reform and Consumer Protection Act]; or

(F) the Corporation is notified, or the Board of Directors acting in good faith determines, that a Nominating Stockholder has failed to continue to satisfy the eligibility requirements described in Section \_\_\_(c), any of the representations and warranties made in the Nomination Notice ceases to be true and accurate in all material respects (or omits a material fact necessary to make the statement not misleading), the Nominee becomes unwilling or unable to serve on the Board of Directors or any material violation or breach occurs of the obligations,

agreements, representations or warranties of the Nominating Stockholder or the Nominee under this Section \_\_\_\_;

(ii) Notwithstanding anything to the contrary contained in this Section \_\_\_\_\_, the Corporation may omit from its proxy statement, or may supplement or correct, any information, including all or any portion of the statement in support of the Nominee included in the Nomination Notice, if the Board of Directors in good faith determines that:

(A) such information is not true in all material respects or omits a material statement necessary to make the statements made not misleading;

(B) such information directly or indirectly impugns character, integrity or personal reputation of, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation, with respect to, any person; or

(C) the inclusion of such information in the proxy statement would otherwise violate the SEC proxy rules or any other applicable law, rule or regulation.

The Company may solicit against, and include in the proxy statement its own statement relating to, any Nominee.