

April 8, 2016

Proxy Access: Developments in Market Practice

Market-Standard Terms and Conditions Emerge for Company Bylaws; SEC Staff No-Action Letters Provide Additional Support

SUMMARY

Looking back at the proxy access provisions adopted by U.S. companies over the past year, it is clear that there is convergence around most key terms and conditions, including exceptions and details that are not contemplated by most shareholder proposals. While this convergence does not mean that market practice will stop developing or that governance advocates will cease fighting terms that they find objectionable, companies considering whether to adopt a proxy access provision now have the benefit of significant precedents.

In addition, no-action letters issued by the staff of the Securities and Exchange Commission in February have confirmed that a company that receives a typical 3%/3-year shareholder proposal should be able to adopt a proxy access bylaw with market-standard terms and conditions and then exclude the shareholder proposal as “substantially implemented.” While governance activists have submitted, and will likely continue to submit, shareholder proposals requesting that companies modify their bylaws to remove some of these terms and conditions, the only proposal that has come to a vote to date has failed, receiving 40% of votes cast at Whole Foods.

We have attached as an annex a sample form of proxy access bylaw that companies can use as a starting point in crafting their own. This has been updated to reflect developments in market practice and ongoing discussions with clients.

KEY TERMS OF ADOPTED PROXY ACCESS BYLAWS

Since the 2015 proxy season, 200 public companies have adopted some form of proxy access, compared to a total of only 15 companies before 2015.¹ At this point, consistency has emerged in most of the key terms of these proxy access provisions. In particular, of the proxy access bylaws adopted by U.S. companies from April 2015 through March 2016:

- **97%** have a 3% ownership threshold
- **100%** have a 3-year holding period
- **100%** require full voting and economic ownership
- **91%** allow aggregation by groups of up to 20 holders
- **92%** count funds under common management as a single holder for aggregation purposes
- **87%** limit the number of access nominees to 20% of the board, most of which (71%) provide a minimum of two access nominees
- **79%** count incumbent access nominees against the current-year maximum
- **73%** provide a nomination window of 120 to 150 days before the prior year's proxy mailing date
- **93%** prohibit or limit the availability of proxy access in the event of a concurrent proxy contest
- **82%** prevent resubmission of a failed candidate who received less than a specified vote percentage (usually 25%) in the past few years

Many companies considering proxy access may, of course, determine that provisions that differ from the above make the most sense for their situation – this may particularly be the case for smaller and regulated companies – and market practice will likely continue to develop in these and other regards.

For some ancillary terms and conditions, practice continues to vary from company to company, and these will likely be the subject of ongoing discussion and focus. For example:

- **Loaned Stock.** Bylaws vary in their treatment of stock that the nominating shareholder has loaned out. A slight majority of companies (54%) require that the shareholder actually recall the stock at some specified time, such as the annual meeting date, or the period from the record date or the nomination date through the meeting date. A significant number of companies (34%) do not require that the stock actually be recalled, but require that it can be recalled within five days (21%) or three days (13%). The latter provision is intended to exclude term stock loans, which can be viewed as more akin to a disposition of the loaned shares rather than a short-term loan.

¹ For a more detailed discussion of proxy access proposals during the 2015 proxy season, see our publication, dated August 18, 2015, entitled "[Proxy Access Bylaw Developments and Trends](#)". Any client that would like to receive a copy of the updated sample form marked to show changes from our prior sample form should contact any of the lawyers listed at the end of this publication or any other Sullivan & Cromwell lawyer you have dealt with.

For a comprehensive discussion of proxy access and other shareholder proposals, as well as public company governance, compensation and disclosure more generally, see the *Public Company Deskbook: Complying with Federal Governance and Disclosure Requirements* (Practising Law Institute) by our partners Bob Buckholz, Marc Trevino and Glen Schleyer, available at 1-800-260-4754 (1-212-824-5700 from outside the United States) or www.pli.edu.

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- **Statement of Post-Meeting Intent to Hold Stock.** Another developing area is whether the nominating shareholder must provide a statement of its intent to hold stock after the annual meeting. Most bylaws (69%) do not have any particular requirement in this regard. However, a significant number require either a representation that the shareholder intends to hold the stock for one year after the meeting (13%) or, consistent with the requirement of vacated SEC Rule 14a-11, a statement that describes the shareholders' intent to hold stock after the meeting (19%).

The attached sample form of proxy access bylaw contains language that could be used to implement each of the key provisions and alternatives discussed above. We will continue to monitor developments in market practice, and are happy to discuss with clients any particular terms or conditions in more detail, or to discuss the tailoring of the attached sample proxy access bylaw to a particular client's circumstances.

SEC STAFF "SUBSTANTIAL IMPLEMENTATION" LETTERS

One question that has arisen in the proxy access context is whether a company's adoption of a proxy access bylaw would permit the company to exclude the typical form of shareholder proposal on the basis that the proposal has been "substantially implemented" under Rule 14a-8(i)(10). The application of this exclusion became more important after the SEC staff narrowed the scope of Rule 14a-8(i)(9) such that a company may no longer exclude a shareholder proposal by putting forward a "conflicting" management proposal providing for similar rights but with different terms.²

On February 12, 2016, the SEC staff answered this question through the issuance of a number of no-action letters applying the "substantial implementation" exclusion in the proxy access context. In particular, with respect to the typical shareholder proposal (that is, 3%/3-years, nominee cap of 25% of the board or two nominees), the SEC staff permitted exclusion where the issuer's bylaws had the same 3%/3-year threshold, but contained other conditions and limitations contrary to, or not contemplated by, the shareholder proposal.³ Most notably, this included bylaw provisions that capped the number of nominees at 20% of the board (or two nominees, if greater), rather than 25%, and that limited the shareholder group size to 20 holders, even where the shareholder proposal specifically called for no limit on group size. In addition, the companies' bylaw provisions contained a number of the other terms and conditions described in the prior section, including a "net long" definition of ownership, various qualification requirements for nominees, counting of incumbent access nominees against the nominee cap, restrictions on repeat nominees, and requirements to provide additional information along with the nomination notice. The staff did not permit exclusion in the case of a company that had adopted a 5%

² For a further discussion of this SEC staff position, which was announced in October 2015 through Staff Legal Bulletin No. 14H, see our publication, dated October 23, 2015, entitled "[SEC Staff Issues Guidance on Excluding Shareholder Proposals](#)".

³ See, e.g., Alaska Air Group, Inc. (Feb. 12, 2016); Baxter Int'l Inc. (Feb. 12, 2016); Capital One Financial Corp. (Feb. 12, 2016); Cognizant Tech. Solutions Corp. (Feb. 12, 2016), The Dun & Bradstreet Corp. (Feb. 12, 2016).

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threshold, which suggests that the ownership threshold is viewed by the staff as one of the most important elements of the “essential objective” of these proposals.⁴

To some extent, this takes pressure off companies to adopt a proxy access bylaw prior to the Rule 14a-8 deadline for the 2017 annual meeting, rather than waiting to see if the company receives a 3%/3-year proxy access proposal. If the company does receive such a proposal, the company should be able to adopt a 3%/3-year bylaw that has terms and conditions consistent with market practice, and thereby exclude the shareholder proposal as substantially implemented. Of course, the application of the “substantial implementation” exclusion depends on the specifics of the shareholder proposal and the company bylaw, and the outcome may be different if shareholder proponents revise the form of their proposals in an attempt to give companies less flexibility in how they can “substantially implement” the proposal.

If a company decides not to wait and instead adopts a proxy access bylaw proactively during 2016, there is a risk that it will receive a shareholder proposal to *amend* the proxy access bylaw rather than a proposal to adopt one. For at least the next year or two, we expect that at least some companies with a proxy access bylaw with market-standard terms and conditions will receive a shareholder proposal to amend the bylaw to remove or modify some of those terms and conditions. Two of the more active submitters of proxy access proposals – the New York State Comptroller and James McRitchie – have in fact submitted proposals for 2016 meetings that seek such modifications, including removing the limit on shareholder groups, modifying the calculation of ownership and raising the 20% cap on nominees. So far in 2016, this shareholder proposal failed at Whole Foods, receiving the support of 40% of votes cast. The outcome of these votes in the 2016 proxy season will provide insight into whether the terms and conditions that have developed as market-standard may need to be re-examined in the future.

We expect that some companies that receive a proposal to amend an existing proxy access bylaw to modify terms other than the percent ownership threshold will seek to exclude the proposal under Rule 14a-8(i)(10) or, if the company’s bylaw is up for a shareholder vote, Rule 14a-8(i)(9). It is unclear at this point how the SEC staff may view such exclusion requests, as none of the handful of issuers who have received such proposals have sought such relief to date.⁵

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⁴ See SBA Communications Corp. (Feb. 12, 2016).

⁵ The SEC staff has allowed a company to exclude a shareholder proposal seeking to modify the company’s proxy access bylaw to (i) lower the threshold from 5% to 3%, (ii) lengthen the stock loan recall provision from 3 days to 5 days, (iii) remove the 20-holder group limit, and (iv) remove the requirement for an intent to own the stock for one year post-meeting, on the basis that it was substantially implemented by the company’s amendments to its bylaw that implemented only the modifications in clauses (i) and (ii) above. See NVR, Inc. (*reconsideration*, Mar. 25, 2016).

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ANNEX A

SAMPLE FORM OF PROXY ACCESS BYLAW

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

(a) Inclusion of Nominees 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 names of any person or persons nominated for election (each, a "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, 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 each 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 each Nominee's election to the Board of Directors (subject, without limitation, to Section ____ (e)(ii)), if such statement does not exceed 500 words and fully complies with Section 14 of the Securities Exchange Act of 1934 (the "Exchange Act") and the rules and regulations thereunder, including Rule 14a-9 (the "Supporting Statement"); 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 each Nominee, including, without limitation, any statement in opposition to the nomination, any of the information provided pursuant to this Section and any solicitation materials or related information with respect to a Nominee.

For purposes of this Section ____, any determination to be made by the Board of Directors may be made by the Board of Directors, a committee of the Board of Directors or any officer of the Corporation designated by the Board of Directors or a committee of the Board of Directors, and any such determination shall be final and binding on the Corporation, any Eligible Holder, any Nominating Stockholder, any Nominee and any other person so long as made in good faith (without any further requirements). The chairman of any annual meeting of stockholders, in addition to making any other determinations that may be appropriate to the conduct of the meeting, shall have the power and duty to determine whether a Nominee has been nominated in accordance with the requirements of this Section ____ and, if not so nominated, shall direct and declare at the meeting that such Nominee shall not be considered.

(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 the greater of (i) two or (ii) 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) (the "Maximum Number"). The Maximum Number for a particular annual meeting shall be reduced by: (1) Nominees who the Board of Directors itself decides to nominate for election at such annual meeting; (2) Nominees who cease to satisfy, or Nominees of Nominating Stockholders that cease to satisfy, the eligibility requirements in this Section ____, as determined by the Board of Directors; (3) Nominees whose nomination is withdrawn by the Nominating Stockholder or who become unwilling to serve on the Board of Directors; and (4) the number of incumbent directors who had been Nominees with respect to any of the preceding [two] [three] annual meetings of stockholders and whose reelection at the upcoming annual meeting is being recommended by the

Board of Directors.¹ In the event that one or more vacancies for any reason occurs on the Board of Directors after the deadline for submitting a Nomination Notice as 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 or a Nominee ceases to satisfy the eligibility requirements in this Section ____, as determined by the Board of Directors, a Nominating Stockholder withdraws its nomination or a Nominee becomes unwilling to serve on the Board of Directors, whether before or after the mailing or other distribution 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 a 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 determines would be deemed acceptable for purposes of a shareholder proposal under Rule 14a-8(b)(2) under 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. Two or more funds that are (x) under common management and investment control, (y) under common management and funded primarily by a single employer or (z) a "group of investment companies," as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended, 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 meet the criteria set forth in (x), (y) or (z) hereof. 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 cease to satisfy the eligibility requirements in this Section ____, as determined by the Board of Directors, or withdraw from a group of Eligible Holders at any time prior to the annual meeting of

¹ *Drafting Note: Some companies also reduce the Maximum Number by the number of shareholder nominees made outside the proxy access system under the advance notice bylaws. That provision is generally unnecessary, however, if the bylaw makes proxy access unavailable once the company has received such an advance notice nomination as per Section ____ (e)(1)(A) of these sample bylaws.*

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) purchased or sold by such Eligible Holder or any of its affiliates in any transaction that has not been settled or closed, (2) sold short by such Eligible Holder, (3) 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 subject to any other obligation to resell to another person, or (4) 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] [five] business days’ notice[, has recalled such loaned shares as of the date of the Nomination Notice] and continues to hold 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 Eligible Holder shall be permitted to be in more than one group constituting a Nominating Stockholder, and if any Eligible Holder 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 each Nominee, completed and filed with the SEC by the Nominating Stockholder as applicable, in accordance with SEC rules;

(ii) A written notice, in a form deemed satisfactory by the Board of Directors, of the nomination of each 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 acquired the securities of the Corporation in the ordinary course of business and 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 each 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 each Nominee:

(1) does not have any direct or indirect relationship with the Corporation [other than those that have been deemed categorically immaterial under] [that would cause the Nominee to be considered not independent pursuant to] the Corporation's [Policy on Director Independence/Corporate Governance Guidelines] 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 shares of common stock are traded;

(2) meets the audit committee and compensation committee independence requirements under the rules of the primary stock exchange on which the Corporation's shares of common stock are traded;²

(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 such Nominee;

² *Drafting Note: Banking organizations that are subject to the Dodd-Frank risk committee requirements should consider also requiring a statement detailing whether the Nominee is experienced in matters of risk management for purposes of applicable regulations (e.g., Regulation YY of the Federal Reserve Board).*

(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 a statement regarding the Nominating Stockholder's intent with respect to continued ownership of the Minimum Number of shares for at least one year following the annual meeting] [and intends to continue to hold the Minimum Number of shares for at least one year following the annual meeting³];

(H) details of any position of a 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 a 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 Supporting Statement; 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, 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 or any of its Nominees 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'

³ *Drafting Note: To address any concerns as to the ability of index funds to provide this commitment or statement of intent, some companies have added language such as: "; provided, however, that any Eligible Holder that is a registered open-end mutual fund under the Investment Company Act of 1940, and that seeks to replicate an index, will not violate this requirement as a result of changes to its common stock holdings in response to changes in the index or weightings of the securities in the index."*

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 or any of its Nominees to comply with, or any breach or alleged breach of, its or their 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 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, omission or failure) notify the Corporation and any other recipient of such communication of (A) the misstatement or omission in such previously provided information and of the information that is required to correct the misstatement or omission or (B) such failure; and

(iv) An executed agreement, in a form deemed satisfactory by the Board of Directors, by each Nominee:

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

(B) at the reasonable request of the [Nominating and Corporate Governance Committee], to meet with the [Nominating and Corporate Governance Committee] to discuss matters relating to the nomination of such Nominee to the Board of Directors, including the information provided by such Nominee to the Corporation in connection with his or her nomination and such Nominee's eligibility to serve as a member of the Board of Directors;

(C) that such 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], [Code of Business Conduct], [Related Party Transaction Policy] and any other Corporation policies and guidelines applicable to directors; and

(D) that such 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 his or her nomination, 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 such 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 such 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) to be provided by the Nominating Stockholder 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 Supporting Statement) 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 such 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, whether or not such notice is subsequently withdrawn or made the subject of a settlement with the Corporation;

(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 ____, the Nominating Stockholder withdraws its nomination or the chairman of the annual meeting declares that such nomination was not made in accordance with the procedures prescribed by this Section ____ and shall therefore be disregarded;

(C) the Board of Directors 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 the primary stock exchange on which the Corporation's common stock is traded;

(D) such Nominee was nominated for election to the Board of Directors pursuant to this Section ____ at one of the Corporation's [two] [three] 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;⁴

(E) such Nominee 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] [*add any applicable industry-specific regulatory references*]⁵

(F) the Corporation is notified, or the Board of Directors determines, that the Nominating Stockholder or the Nominee 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 statements made not misleading), such 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 such 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,

⁴ *Drafting Note: Some companies also provide that if a Nominee receives less than 25% of the vote, then the Nominating Stockholder (including all group members) is ineligible to use proxy access for a specified number of years. On the other hand, some companies provide that a Nominating Stockholder (including all group members) whose Nominee gets elected is ineligible to use proxy access so long as its Nominee remains on the Board. The concern underlying such a provision is, to a large extent, addressed by the provision included in Section ____ (b)(i) that reduces the Maximum Number by incumbent access Nominees for a specified period.*

⁵ *Drafting Note: Companies in regulated industries should consider adding any director qualifications or approval processes necessary under applicable law or regulation. For example, banking organizations could consider adding a requirement that "(2) the Nominee's election as a member of the Board of Directors would cause the Corporation to seek, or assist in the seeking of, advance approval or to obtain, or assist in the obtaining of, an interlock waiver pursuant to the rules or regulations of the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency or the Federal Energy Regulatory Commission or (3) the Nominee 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 (3) 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.]*

including all or any portion of the Supporting Statement or any other statement in support of a Nominee included in the Nomination Notice, if the Board of Directors 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 the 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 Corporation may solicit against, and include in the proxy statement its own statement relating to, any Nominee.