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## Shareholder Nomination of 25 Percent of Your Directors Coming Soon?

As reported in our [April 2009 Corporate Alert](#), effective August 1, 2009, the Delaware General Corporate Law was amended to give shareholders greater access to Delaware corporations' proxy materials with respect to nomination of directors. On May 20, 2009, the Securities and Exchange Commission (SEC) announced proposed rule amendments that, if adopted, would provide shareholders with director nomination rights similar to those allowed under the amended Delaware law.

### Background

The renewed focus on shareholders' rights has recently led to a variety of proposals for changes in corporate governance, both in Congress and at the SEC. For example, on May 19, 2009, Senator Charles E. Schumer (D-NY) introduced the Shareholder Bill of Rights Act of 2009, which focuses on governance issues and related reforms. While Senator Schumer's bill is fairly broad and is not expected to gain much momentum, the SEC has taken a more pointed action that is expected to lead to changes in shareholder proxy access.

On May 20, 2009, the SEC held an open meeting focusing on the federal proxy rules and shareholders' access to company proxy materials. Chairman Mary L. Schapiro stated that the SEC had considered the question of amending the proxy rules "[n]o less than three times in recent memory" and that "[t]he time has come to resolve this debate." The SEC then voted 3-2 in favor of proposing the rule amendments described below.

### Summary of Proposed Amendments

If adopted, the amended proxy rules would apply to all Exchange Act reporting companies. The rules would allow

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### Contacts:

[Thomas R. McGuigan](#)  
+1.561.650.7278

[Frank M. Placenti](#)  
+1.602.528.4004

[Joseph P. Richardson](#)  
+1.602.528.4801

[Nicholas Unkovic](#)  
+1.650.843.3238  
+1.415.954.0275

[Ryan J. Kretschmer](#)  
+1.602.528.4823

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qualifying shareholders and shareholder groups to nominate a number of director nominees totaling up to 25 percent of the board seats in competition with the board's own nominees, with the company required to include the shareholder nominees in its proxy materials. Importantly, if more than one shareholder or group nominates directors, the first to do so will have its nominees included – this may create pressure on those considering nominations to make their nominations early and without consulting the company.

In order to be eligible to have its nominee(s) included in the company's proxy materials, the nominating shareholder or shareholder group would have to meet the following requirements:

- Voting stock ownership of 1 percent if the company is a "large accelerated filer," 3 percent if the company is an "accelerated filer" and 5 percent for all other companies. The thresholds can be met by aggregating shares with shares held by others;
- Ownership of the required percentage of stock for a minimum of one year prior to the nomination and delivery of a signed statement declaring each nominating shareholder's intent to continue to own the shares through the annual meeting at which directors are elected;
- Delivery of a certification that the nominating shareholder or group is not holding the stock for the purpose of changing control of the company or to gain more than minority representation on the board of directors;
- Absence of any direct or indirect agreement with the company regarding the nomination; and
- Filing with the SEC and submitting to the company a new form, Schedule 14N, disclosing information relating to the nominating shareholder's satisfaction of the above requirements, including amount and duration of voting stock ownership, and statements of intent to maintain ownership and to certify that the shareholder is not seeking to change the control of the company or gain more than a minority representation.

At each shareholder meeting, the applicable requirements will allow for nomination of the greater of one nominee for director or the number of nominees that, if elected, would represent not greater than 25 percent of the board of directors. Note that in companies with staggered boards, this could comprise an entire class of directors every year. In addition, each nominee must satisfy the objective independence standards of the applicable national securities exchange or national securities association, **but** each nominee may be a nominating shareholder himself or herself or have a relationship with the nominating shareholder(s).

The SEC's proposed rule amendments would also expand shareholders' rights to include proposals in the

company's proxy materials relating to the election of directors. Exchange Act Rule 14a-8(i)(8) currently permits companies to exclude shareholder proposals relating to the election of directors, but if the proposed rule amendments are adopted, such exclusion would be narrowed, effectively expanding shareholder access to proxy materials for shareholder proposals.

### **Next Steps**

The SEC will post the full text of the proposed rule amendments on its website and publish the proposed rule amendments in the *Federal Register*. There will be a 60-day public comment period following the *Federal Register* publication. After the comment period, the SEC will determine whether to adopt the proposed rule amendments, either in their current form or in a modified form. Supporters of the proposed rule amendments have indicated early backing for adoption of the amendments while also stating that they want to see further reforms to expand shareholder access to the director nomination process including company reimbursement of election campaign expenses for successful shareholder nominees and the elimination of staggered boards. If the SEC maintains its focus on shareholder rights, additional proposals to amend the proxy rules can be expected in the future.

### **Conclusion**

The intensified focus on shareholders' rights and the recent actions by Congress and the SEC are likely to lead to significant changes to shareholders' rights, especially with respect to access to company proxy materials. It will be important for companies to keep abreast of such changes in the coming months and to consult with counsel regarding the effects of any such changes. For further information relating to the status or content of the proposed rule amendments, or for advice on preparing for any amended rules or laws that are ultimately adopted, please contact your principal Squire Sanders lawyer or any of the individuals listed in this Alert.

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Two Renaissance Square, 40 North Central Avenue, Suite 2700, Phoenix, Arizona 85004 USA

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