WSGR ALERT

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THE ADVENT OF PROXY ACCESS: IMPLICATIONS FOR PUBLIC COMPANIES AND BOARDS

On August 25, 2010, the Securities and Exchange Commission (SEC) issued its long-anticipated final rules giving public company shareholders the right, under certain circumstances, to require the company to include in its proxy statement, and on its proxy card, shareholder nominees for a portion of the seats on the board of directors. At the same time, the SEC amended Securities Exchange Act Rule 14a-8(i)(8) to permit shareholders to submit shareholder proposals seeking adoption of broader proxy access rights. The new rules become effective 60 days after publication in the Federal Register. The complete text of the new rules is available at http://www.sec.gov/rules/final/2010/33-9136.pdf.

The advent of "proxy access" had appeared inevitable for some time. Proposed rules were issued by the SEC in June 2009,[1] and the comment period was re-opened for an additional 30-day period in December 2009,[2] signaling the seriousness of the current Administration's efforts finally to implement a system of proxy access. The specific authorization of proxy access in the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] removed any remaining drama from the SEC's August 25 Release.

Summary of the New Rules

A summary of the new rules is included as Appendix A. We discuss below certain key differences between the final and the proposed rules, and provide our thoughts on the implications of the new rules for public companies and boards.

Key Differences between Final and Proposed Rules

The final rule contains a number of modifications to the rule proposals contained in the proposing release, but the basic structure and content of the new proxy access rule has not changed.

Among the more significant changes in the final rule are the following:

Minimum Ownership and Holding Period

To be eligible to utilize the proxy access mechanism, the nominating shareholder or group must have held not less than 3 percent of the voting power of the issuer's securities entitled to be voted at the meeting, and to have held that amount of securities continuously for at least three years (the proposing release included a sliding 1-3-5 percent scale based on market capitalization and required a one-year holding period).

Effect of Securities Lending and Short Sales

The nominating shareholder or group must hold both investment and voting power with respect to the securities used to demonstrate satisfaction of the 3 percent ownership requirement. In calculating the ownership percentage held, under certain conditions a nominating shareholder or group member would be able to include securities loaned to a third party in the calculation of ownership.

In determining the total voting power held by the nominating shareholder or any group member, securities sold short (as well as securities borrowed that are not otherwise excludable) must be deducted from the amount of securities that may be counted towards the required ownership threshold and holding period requirement.

Rule of Priority in Case of Multiple Nominations

Where there are multiple eligible nominating shareholders or groups who propose nominees and the number of nominees proposed exceeds the permissible number of shareholder nominees, the nominating shareholder or group with the highest percentage of the company's voting power will have its nominees included in the company's proxy materials, rather than the nominating shareholder or group that is first to submit a notice, as previously proposed.

Companies Will Be Able to Settle with Nominating Shareholders

The prior proposals discouraged the issuer from settling with the proponent, since any settlement did not count against the cap on shareholder nominees of the greater of one director or 25 percent of the entire board of directors. Under the final rule, any nominees of the nominating shareholder or group that a

[1] As described in this WSGR Alert: http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_schumer.htm.

[2] As described in this WSGR Alert: http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_proxy_disclosure_enhancements.htm.

[3] As described in this WSGR Alert: http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_dodd_frank2.htm.

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company agrees to include as company nominees after the filing of the notice will count toward the 25 percent.

Change to Advance Notice Requirements

The nominating shareholder or group must provide notice to the company no earlier than 150 days prior to the anniversary of the mailing of the prior year's proxy statement and no later than 120 days prior to this date. The proposed rule would have required the nominating shareholder or group to provide notice no later than 120 days prior to the anniversary of the mailing of the prior year's proxy statement or in accordance with the company's advance notice provision, if applicable.

Delayed Effectiveness for Small Reporting Companies

The new rule will not apply to small reporting companies (generally, those with a public float of less than $75 million as of the last business day of their most recent second fiscal quarter) until three years after the rule becomes effective for other issuers.

Implications of the New Rules

Heightened Sensitivity in the Board Room

Proxy access adds one more concern to the growing list of issues that impact dynamics and decision making in the board room. "Check the box" governance principles, the ever-increasing influence of proxy advisory firms with rigid proxy voting guidelines and withhold vote policies, the advent of majority voting, the elimination of broker discretionary voting in uncontested director elections, say-on-pay and other compensation issues, the decline of structural protections such as the classified board, and the ascendancy of the short-term investor, all have increased the challenges for boards of directors seeking to perform their basic function: setting and overseeing the long-term strategy of the company. The specter of Rule 14a-11 campaigns underscores the importance of cohesion and transparency in the board room, prompt action to address issues of performance or governance, regular evaluation of board composition and performance, and detailed knowledge of investors' perspectives and concerns regarding the company.

More, and Different, Election Contests

There can be no doubt that the new rules will lead to an increase in the number of election contests. The SEC's estimate that the new rules will result in an additional 45 election contests per year appears optimistic, although the revised minimum ownership and holding period requirements in the final rule impose a greater burden on investors seeking to submit nominations or to form a nominating group than the requirements in the proposed rule. As the SEC acknowledges in the release, the ability to include nominees in the company's proxy statement and on its proxy card eliminates only a small portion of the expense associated with seeking board representation; serious efforts to elect shareholder nominees will require an active solicitation campaign, involving public relations, legal and other advisory fees and costs, and a substantial time commitment by the nominating shareholder or group.

As discussed below, although significant limitations are inherent in the rule, we believe that Rule 14a-11 has substantial tactical value to financial activists, and we expect them to avail themselves of this new tool.

In addition, two types of contests that currently are infrequent likely will become more common: single-nominee campaigns targeting replacement of a specific board member, and concurrent campaigns by multiple shareholders at the same company. The increase in majority withhold votes against individual directors in recent years suggests that individual directors may in some cases be vulnerable to single-nominee campaigns, and we expect to see a number of these contests in 2011. In addition, Rule 14a-11 specifically permits multiple shareholders or groups to submit nominations, subject to the overall cap on shareholder nominees and the order of priority set forth in the rule, and the SEC acknowledges in the release that companies may be confronted with both Rule 14a-11 campaigns and a traditional proxy contest at the same annual meeting. Since nominees elected pursuant to a traditional proxy contest do not count against the Rule 14a-11 cap, the combination of a Rule 14a-11 campaign and a traditional proxy fight could result in the loss of significantly more than 25 percent of the seats on the board to dissident shareholders.

The new rule also will likely give rise to a number of campaigns designed to draw attention to specific causes or special-interest concerns, although the risk of mere "nuisance" campaigns is somewhat mitigated by the revised ownership and holding period thresholds.

Will Financial Activists Use the Proxy Access Mechanism?

We fully expect unions, state pension funds, and governance activists, which currently account for a significant majority of shareholder proposals, to form nominating groups to submit alternative nominees for director. A number of governance activists have been preparing for Rule 14a-11, with CalPERS establishing a "director database" of potential candidates. But will financial activists, such as activist hedge funds, use the Rule 14a-11 mechanism?

On the one hand, the rule seems designed to favor larger institutional and pension fund investors holding shares for the long term, rather than financial activists, who typically do not hold an investment continuously for a three-year period. Financial activists generally will need to form alliances with shareholders who satisfy the ownership and holding period requirements in order to use Rule 14a-11, will not be eligible to participate in a nominating

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group unless they can certify that they do not have a control intent,[4] will be limited to a maximum of 25 percent of the board, will be ineligible if they engage in any solicitation activity outside Rule 14a-11, and will not be able to disseminate or obtain forms of proxy. However, the rule gives financial activists a new means of agitation: the mere filing of new Schedule 14N disclosing the commencement of efforts to form a nominating group will put pressure on the target company, and activists will be able to submit nominations 150 days prior to the anniversary of the prior year's annual meeting, increasing the time period during which the board is confronted with the threat of a contest. In addition, activists will be able to test the waters through their Schedule 14N filings and discussions with potential nominating group members, and they still will retain flexibility to switch from a Rule 14a-11 campaign to a traditional proxy contest at any time before the shareholder nomination window closes pursuant to the target company's bylaws. Activists also may benefit from the split-ballot phenomenon we address below.

Furthermore, Rule 14a-11 may act as a catalyst for new activist campaigns and activist proxy contests. Activists certainly will monitor Schedule 14N filings, and as a result may determine to target companies not previously on their radar screens. Given that shareholders seeking to form a nominating group will make Schedule 14N filings in connection with their efforts prior to submitting nominations, and since the nomination period under Rule 14a-11 generally will close before the nomination period under the target company's bylaws, activists will have ample time to initiate a campaign while the window for a traditional proxy contest remains open. Financial activists also are likely to evaluate companies that experienced a Rule 14a-11 campaign the previous year as potential targets.

Which Companies Will Be Targeted?

Prominent companies that are frequent targets for the latest shareholder proposals by unions, pension funds, and governance activists likely will be at significant risk for Rule 14a-11 campaigns. So, too, are companies on the annual CalPERS list, those being monitored by the Council of Institutional Investors due to shareholders having approved a shareholder proposal at the preceding annual meeting or having received a majority withhold vote for one or more directors, and companies with low ratings under other governance group or proxy advisory ranking systems. Companies with highly publicized recent governance or performance issues, and those with hedge fund activist investors, are also at higher risk.

More Power for Proxy Advisory Firms

The proxy advisory firms, in particular RiskMetrics Group, wield enormous power in contested elections of directors, and the recommendations of RiskMetrics are strongly correlated with proxy contest outcomes. RiskMetrics has an established framework for evaluating the respective slates in a proxy contest for board representation (as opposed to control): (1) is change warranted and, if so, (2) whose nominees are most appropriate to oversee the actions needed to effect change? Proxy access creates new challenges for RiskMetrics and other advisory firms, and gives them even more power in corporate governance. Although RiskMetrics and other proxy advisory firms realistically will have limited information to evaluate the relative merits of individual board candidates, they nonetheless will make these choices. This dynamic will create yet more uncertainty for directors already concerned by the plethora of "check the box" voting guidelines and withhold vote triggers embedded in RiskMetrics' corporate governance policies.

Split Ballots

Under the traditional proxy contest system, investors face a choice between submitting the company's proxy card or the insurgent's. In a short-slate campaign (a campaign for less than all seats up for election), the insurgent can oppose specific directors, but any vote on management's proxy card is a vote solely for the management nominees and forecloses voting for any of the insurgent's nominees. Sophisticated institutions understand that they can submit a ballot at the meeting cherry-picking from both the company's and the insurgent's nominees, but this is quite rare. The new proxy card required in a Rule 14a-11 solicitation will not permit the company to request authority for its nominees as a group, but instead will require the company to provide the proxy giver a means to indicate which of management's and the nominating shareholder or group's nominees it supports. As a result, shareholders will have ready means to split their ballot between the company's and the nominating holder or group's nominees. This will meaningfully increase the risk for those company nominees being targeted for replacement.

Litigation and No-Action Relief

As has long been the case under Rule 14a-8 for shareholder proposals to be included in a company's proxy statement, Rule 14a-11 will engender a spate of no-action requests from companies, challenging nominating shareholders' and groups' eligibility to submit nominations and challenging the eligibility of specific nominees. Companies will need to act promptly after receipt of Rule 14a-11 nominations, particularly because certain obvious areas of challenge, such as whether a nominating shareholder or group in fact satisfies the complex 3 percent/three-year continuous holding period requirement, may require meticulous research.

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[4] It should be noted that the test for what constitutes a control intent under Rule 14a-11 is different from that under Rule 13d-1(c), and persons who have acquired securities for the purpose of influencing—as opposed to changing—control of the issuer are not precluded from participating in a Rule 14a-11 campaign.

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In addition, it can be expected that a number of issues are likely to give rise to litigation, including: whether nominating groups that hold 5 percent or more of a class of securities are required to file a Schedule 13D rather than being able to rely on Schedule 13G; whether all group members have been properly disclosed; and whether the solicitation has the purpose or effect of causing a change in control. The frequency of Rule 14a-9 litigation relating to false and misleading disclosure is also likely to increase.

The Director Nominee Pool

In recent years some hedge fund activists have been able to attract relatively qualified candidates to serve on insurgent slates. But it remains somewhat difficult to recruit these candidates, due to the reluctance of many potential nominees to align themselves with dissidents, to participate in a contested election and to subject themselves to individual scrutiny, criticism, and, at times, personal attacks. Highly qualified individuals will be no less circumspect about participating in a Rule 14a-11 campaign, unless satisfied with regard to the members of the nominating group and assured of a vigorous solicitation effort. It is unclear to what extent individuals with strong business or financial expertise, as opposed to governance credentials, will consent to participate in Rule 14a-11 campaigns.

Negotiation and Settlement

Many companies have adopted a practice of constructive engagement with proponents of shareholder proposals, in order to resolve potential issues that otherwise would give rise to a shareholder proposal. Since the new rule permits post-nomination negotiation and settlement with the nominating shareholder or group, companies also will have opportunities to resolve shareholder nominations via settlement, which in some cases may be preferable for all parties.

Review of Nomination Bylaws

Companies should review their nomination bylaws in light of Rule 14a-11 to determine whether any changes are necessary or advisable. As noted, companies run the risk of being subject to both Rule 14a-11 and traditional proxy campaigns, and should ensure that their bylaws operate appropriately in light of the different timing and disclosure requirements of the two nomination schemes.

More Proxy Access Proposals

The adoption of Rule 14a-11 merely sets a floor for proxy access. Revised Rule 14a-8(i)(8) permits shareholders to propose precatory or binding bylaw amendments to expand the scope of proxy access beyond the limitations in Rule 14a-11. It is not clear that governance activists will be satisfied with the right of proxy access under Rule 14a-11, and they may use newly expanded Rule 14a-8(i)(8) to agitate for rights beyond those provided under Rule 14a-11.

Conclusion: The Critical Importance of Director Engagement

The most important consequence of proxy access is clear. Boards and management will have to spend additional time on corporate governance issues, especially board evaluation and nomination processes, and on shareholder relations activities related to those issues. Companies will need to ensure that—in addition to issues of strategy and financial performance—key investors have an appropriate understanding of the company's board-nomination and evaluation processes and the qualifications and contributions of individual directors. Chairmen and nominating committee chairmen may need to play an expanded role in shareholder relations, and individual directors generally may need to be more visible so that investors have greater familiarity with their value to the company.

In addition, public companies will need to expand their dialogue with key investors about potential director candidates. Many companies now engage proactively in dialogue with key investors when seeking new board members, and the practice of soliciting investor input should continue to grow under the proxy access regime in order to maximize the likelihood of support in the event of a Rule 14a-11 solicitation.

For any questions or more information on these or any related matters, please contact Warren de Wied, David Berger, Larry Chu, Katie Martin, Mike Ringler, Richard Cameron Blake, your regular Wilson Sonsini Goodrich & Rosati contact, or any member of the firm's corporate and securities practice.

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Appendix A
Summary of the New Proxy Access Rules

Companies Subject to the Rule

New Rule 14a-11 will apply to companies that are subject to the Securities Exchange Act (Exchange Act) proxy rules, including investment companies registered under Section 8 of the Investment Company Act of 1940. The rule also will apply to controlled companies and those companies that choose to voluntarily register a class of securities under Section 12(g). Companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act and foreign private issuers will be exempt. A company to which the rule would otherwise apply will not be subject to Rule 14a-11 if applicable state (or, in the case of foreign issuers, foreign) law or the company's governing documents prohibit shareholders from nominating candidates for the board of directors. However, companies will not be permitted to "opt out" of Rule 14a-11 and it is not apparent that any U.S. public company would fall within the state-law or governing-document exception, other than companies with non-voting common stock.

Who Can Use the New Rule

A company will be required to include a shareholder nominee or nominees in its proxy statement if the nominating shareholder or group:

- holds, as of the date of the shareholder notice on Schedule 14N, either individually or in the aggregate, at least 3 percent of the voting power (calculated as required under the rule) of the company's securities that are entitled to be voted on the election of directors at the annual meeting;
- has held the qualifying amount of securities used to satisfy the minimum ownership threshold continuously for at least three years as of the date of the shareholder notice on new Schedule 14N;
- continues to hold the required amount of securities through the date of the shareholder meeting;
- is not holding any of the company's securities with the purpose—or the effect—of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a-11;
- does not have an agreement with the company regarding the nomination;
- provides a notice to the company on Schedule 14N, and files the notice with the SEC of the nominating shareholder's or group's intent to require that the company include that nominating shareholder's or group's nominee in the company's proxy materials no earlier than 150 calendar days and no later than 120 calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting; and
- includes the certifications required by the rule in its Schedule 14N.

In determining whether the shareholder or group meets the ownership requirements, securities that have been loaned by or on behalf of the nominating shareholder or any member of the group may be counted toward the ownership requirement only if the nominating shareholder or group member has the right to recall the loaned securities and will recall the loaned securities upon being notified that any of the nominees will be included in the company's proxy materials.

In determining the total voting power of the company's securities held by or on behalf of the nominating shareholder or any member of the nominating shareholder group, the voting power will be reduced by the voting power of any of the company's securities that the nominating shareholder or any member of a nominating shareholder group has sold in a short sale during the relevant periods. In addition, the rule excludes borrowed shares.

Nominee Eligibility Requirements

Under Rule 14a-11, a nominee will not be eligible to be included in a company's proxy materials if his or her candidacy—or, if elected, board membership—will violate federal law, state law, or applicable exchange requirements, if any, other than those related to independence standards, and such violation could not be cured within 14 days following receipt of a notice of ineligibility from the company. In addition, board candidates must meet the objective independence standards of the relevant securities exchange, but are not required to meet the subjective independence criteria of the securities exchange or the company.

Number of Shareholder Nominees

Rule 14a-11(d) will not require a company to include more than one shareholder nominee or the number of nominees that represents 25 percent of the company's board of directors (rounded down to the nearest whole number), whichever is greater. Where a company has a director (or directors) currently serving on its board who was elected as a shareholder nominee pursuant to Rule 14a-11, and the term of that director extends past the date of the shareholder meeting for which the company is soliciting proxies for the election of directors, the company will not be required to include in its proxy materials more shareholder nominees than could result in the total number of directors serving on the board that were elected as shareholder nominees being greater than one shareholder nominee or 25 percent of the company's board of directors, whichever is greater.

In the case of a staggered board, the rule provides that the 25 percent limit will be calculated based on the total number of board seats, not the lesser number that is being voted on.

Under the final rule, where a company negotiates with the nominating shareholder

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or group that has filed a Schedule 14N before beginning any discussion with the company about the nomination and that otherwise would be eligible to have its nominees included in the company's proxy materials, and the company agrees to include the nominating shareholder's or group's nominees on the company's proxy card as company nominees, those nominees will count toward the 25 percent maximum set forth in the rule.

Priority of Nominees

A company will be required to include in its proxy statement and on its proxy card the nominee or nominees of the nominating shareholder or group with the highest qualifying voting-power percentage in the company's securities as of the date of filing the Schedule 14N, up to and including the total number of shareholder nominees required to be included by the company. Where the nominating shareholder or group with the highest qualifying voting-power percentage that is otherwise eligible to use the rule and that filed a timely notice does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the nominating shareholder or group with the next highest qualifying voting-power percentage that is otherwise eligible to use the rule and that filed a timely notice of intent to nominate a director pursuant to the rule will be included in the company's proxy materials, up to and including the total number of shareholder nominees required to be included by the company. This process continues until the company includes the maximum number of nominees it is required to include in its proxy statement and on its proxy card or the company exhausts the list of eligible nominees.

Shareholder Notice on Schedule 14N

In order to submit a nominee for inclusion in the company's proxy statement and form of proxy, Rule 14a-11 requires that the nominating shareholder or group provide a notice on Schedule 14N to the company of its intent to require that the company include that shareholder's or group's nominee or nominees in the company's proxy materials. The shareholder notice on Schedule 14N is required to be filed with the SEC on the date it is first sent to the company.

The Schedule 14N is required to include, among other things, detailed information about the nominating shareholder or group; its security holdings (and accompanying evidence of ownership); relationships with the issuer; the nominees; disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A, as applicable, in connection with a contested proxy solicitation; and, if desired, a supporting statement in favor of the nominating shareholder's or group's nominees, not to exceed 500 words for each nominee. Schedule 14N also must include certifications by the nominating shareholder or group as to their eligibility to submit Rule 14a-11 nominations, the eligibility of the nominees under Rule 14a-11, the absence of any control purpose or intent, and the accuracy and completeness of the information contained in the filing.

Schedule 14N must be amended promptly for any material change to the disclosure and certifications provided in the originally filed Schedule 14N. The nominating shareholder or group also will be required to file a final amendment to the Schedule 14N disclosing the nominating shareholder's or group's intention with regard to continued ownership of its shares within 10 days of the final results of the election being announced by the company.

Responding to Schedule 14N

If a company determines that it will include a nominee in its proxy statement, the company must give the nominating shareholder or group notice in writing, postmarked or transmitted electronically no later than 30 calendar days before the company files its definitive proxy statement and form of proxy with the SEC.

If a company objects to a nomination, its notification must be postmarked or transmitted electronically no later than 14 calendar days after the close of the window period for submission of nominations pursuant to Rule 14a-11. A nominating shareholder's or group's response to the company's notice must be postmarked or transmitted electronically no later than 14 calendar days after receipt of the company's notification.

Bases for Excluding a Nominee

Under new Rule 14a-11(g), a company may exclude a shareholder nominee because:

- Rule 14a-11 is not applicable to the company;
- the nominating shareholder or group or nominee failed to satisfy the eligibility requirements in Rule 14a-11(b); or
- including the nominee or nominees would result in the company exceeding the maximum number of nominees it is required to include in its proxy statement and form of proxy.

In addition, a company will be permitted to exclude a statement in support of a nominee or nominees if the statement exceeds 500 words for each nominee. In such cases, a company will be required to include the nominee or nominees, provided the eligibility requirements were satisfied, but will be permitted to exclude the statement in support.

The company must provide notice of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the SEC. If desired, the company may seek a no-action letter from the staff with regard to its determination no later than 80 calendar days prior to filing its definitive proxy statement with the SEC. If a company anticipates that it will seek a no-action letter from the staff with respect to its decision to exclude any Rule 14a-11 nominee or nominees, it should seek a no-action letter with regard to all nominees whom it wishes

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to exclude at the outset and should assert all available bases for exclusion at that time.

The Company's Proxy Statement and Proxy Card

A company that is including a shareholder director nominee in its proxy statement and form of proxy pursuant to Rule 14a-11 must include certain disclosure about the nominating shareholder or group and the nominee. This disclosure will be provided by the nominating shareholder or group in its notice on Schedule 14N. In addition, the company must include in its proxy statement the nominating shareholder's or group's statement in support of the shareholder nominee or nominees, if the nominating shareholder or group elects to have such statement included in the company's proxy materials and the statement does not exceed the 500-word-per-nominee limit and otherwise complies with the new rules.

To the extent that the company is opposing the shareholder nominees, it will be permitted to include its own statement in opposition, which will not be limited in length, and must include the disclosures required under current Rule 14a-12 for contested solicitations.

The company will not be responsible for disclosure provided by a nominating shareholder or group; rather, the nominating shareholder or group will have liability for any materially false or misleading statements contained in the information provided to the company.

Under revised Rule 14a-4, the company's proxy card will not be permitted to provide a means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group if the form of proxy includes one or more shareholder nominees in accordance with Rule 14a-11. Accordingly, shareholders will not be given a choice to vote for management's nominees en bloc and instead will be required to pick and choose among the pool of company and shareholder nominees.

Companies will not be required to file a preliminary proxy statement in connection with a nomination made pursuant to Rule 14a-11, an applicable state or foreign law provision, or a company's governing documents.

Exemptions from the Proxy Rules

Exemption for Certain Activities Related to Formation of a Nominating Group. New Rule 14a-2(b)(7) provides an exemption from the generally applicable disclosure, filing, and other requirements of the proxy rules for solicitations by or on behalf of any shareholder in connection with the formation of a nominating shareholder group, provided that the shareholder is not holding the company's securities with the purpose—or the effect—of changing control of the company or gaining a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a-11.

Any written communication may include no more than:

- a statement of the shareholder's intent to form a nominating shareholder group in order to nominate a director under Rule 14a-11;
- identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;
- the percentage of voting power of the company's securities that are entitled to be voted on the election of directors that each soliciting shareholder holds or the aggregate percentage held by any group to which the shareholder belongs; and
- the means by which shareholders may contact the soliciting party.

Any written soliciting material published, sent, or given to shareholders in accordance with the terms of this provision must be filed with the SEC by the nominating shareholder or group on Schedule 14N no later than the date the material is first published, sent, or given to shareholders.

Exemption for Solicitation Activities by a Nominating Shareholder or Group. Rule 14a-2(b)(8) provides an exemption from the generally applicable disclosure, filing, and other requirements of the proxy rules for solicitations by or on behalf of a nominating shareholder or group, provided that:

- the soliciting party does not, at any time during such solicitation, seek directly or indirectly the power to act as a proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent, or authorization; and
- each written communication includes: the identity of the nominating shareholder or group and a description of his or her direct or indirect interests, by security holdings or otherwise, and a prominent legend in clear, plain language advising shareholders that a shareholder nominee is or will be included in the company's proxy statement and that they should read the company's proxy statement when available because it includes important information.

Any soliciting material published, sent, or given to shareholders in accordance with this exemption must be filed by the nominating shareholder or group with the SEC on Schedule 14N no later than the date the material is first published, sent, or given to shareholders.

Transition Rule

Rule 14a-11 contains a window period for submission of shareholder nominees for inclusion in company proxy materials of no earlier than 150 calendar days and no later than 120 calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting. Shareholders seeking to use new Rule 14a-11 will be able to do so if the

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window period for submitting nominees for a particular company is open after the effective date of the rules. For some companies, the window period may open and close before the effective date of the new rules. In those cases, shareholders will not be permitted to submit nominees pursuant to Rule 14a-11 for inclusion in the company's proxy materials for the 2011 proxy season. For other companies, the window period may open before the effective date of the rules, but close after the effective date. In those cases, shareholders will be able to submit a nominee between the effective date and the close of the window period.

Beneficial Ownership Reporting Requirements

In connection with the adoption of Rule 14a-11, the SEC is amending Exchange Act Rule 13d-1 and Schedule 13G to provide an exception from the requirement to file a Schedule 13D (and permit filing on Schedule 13G) for activities undertaken solely in connection with a nomination under Rule 14a-11.

However, according to the final release, any activity other than those provided for under Rule 14a-11 will make the exception inapplicable. For example, approaching a company's board and urging them to consider strategic alternatives (such as a sale of non-core assets or a leveraged recapitalization) will constitute activities outside of the Rule 14a-11 nomination, and any nominating shareholder or group engaging in such activities most likely will be ineligible to file on Schedule 13G.

Rule 14a-18

New Rule 14a-18 applies to any submission of nominees for inclusion in the company's proxy materials pursuant to a procedure under state or foreign law or a procedure under the company's governing documents that differs from the Rule 14a-11 procedure. To have a nominee included in the company's proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the company's governing documents addressing the inclusion of shareholder director nominees in the company's proxy materials, the nominating shareholder or group must provide notice to the company of its intent to do so on a Schedule 14N. The time periods and required disclosures under Rule 14a-18 are similar to those for Rule 14a-11 solicitations.

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

As amended, Rule 14a-8(i)(8) will enable shareholders, under certain circumstances, to require companies to include in their proxy materials shareholder proposals that would amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with Rule 14a-11.

Companies will be permitted to exclude a shareholder proposal pursuant to Rule 14a-8(i)(8) if it:

- would disqualify a nominee who is standing for election;
- would remove a director from office before his or her term expired;
- questions the competence, business judgment, or character of one or more nominees or directors;
- seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
- otherwise could affect the outcome of the upcoming election of directors.

WSGR

Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on September 3, 2010. To receive future WSGR Alerts and newsletters via email, please contact Marketing at wsgr_resource@wsgr.com and ask to be added to our mailing list.

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