Update: SEC Publishes Proposed Rule Amendments to Facilitate the Rights of Shareholders to Nominate Directors

In a release published on June 10, 2009 (the "June 10 Release"), the Securities and Exchange Commission ("SEC" or "Commission") proposed amendments to the proxy rules under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), designed to permit eligible shareholders access to company proxy materials for the purpose of including nominees for election to the board of directors.[1] The June 10 Release is consistent with the objectives set forth in the Commission's announcement regarding its decision to issue proposed rules relating to shareholder access, which was released on May 20, 2009.[2]

The June 10 Release cites the current economic crisis and concerns about "whether boards are exercising appropriate oversight of management, whether boards are appropriately focused on shareholder interests, and whether boards need to be more accountable for their decisions regarding such issues as compensation structures and risk management" as the triggers for the SEC's decision to "revisit whether and how the federal proxy rules may be impeding the ability of shareholders to hold boards accountable through the exercise of their fundamental right to nominate and elect members to company boards of directors." As a solution, the SEC has offered two main proposals: (1) create a new Exchange Act Rule 14a–11 providing for mandatory access to company proxy materials under prescribed circumstances, and (2) revise existing Exchange Act Rule 14a–8 to allow shareholder proposals to amend a company's governing documents regarding nominating procedures or disclosure related to shareholder nominations, thus reversing the SEC's 2007 prohibition on using Rule 14a–8 for shareholder proxy access proposals.[3] The SEC has also made certain other proposals which would supplement the new Rule 14a–11 and amend Rule 14a–8.

I. Background

Since 2003, the SEC has considered the issues surrounding proposed rules that would provide shareholders with access to companies' proxy statements for the purpose of nominating their own director candidates on four occasions and has conducted a number of forums to solicit input from public companies, investors and commentators.[4] In 2007, the SEC codified an exclusion from Rule 14a–8 that made it clear that a proxy access bylaw could be excluded by a company from its proxy statement.[5] According to the June 10

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1 *Proposed Rule: Facilitating Shareholder Director Nominations*, Release No. 34–60089 (June 10, 2009), *available at* http://www.sec.gov/rules/ proposed/2009/33–9046.pdf (the "June 10 Release").

2 Release No. 2009–116, U.S. Securities and Exchange Commission, *SEC Votes to Propose Rule Amendments to Facilitate Rights of Shareholders to Nominate Directors* (May 20, 2009), *available at* http://www.sec.gov/news/press/2009/2009–116.htm. For a more detailed discussion of the May 20, 2009 announcement and statements made at the May 20, 2009 open meeting, *see SEC Proposes Rule Amendments to Facilitate the Rights of Shareholders to Nominate Directors* (May 22, 2009), available at http://www.cahill.com/news/memoranda/000169 (the "CGR May22nd Memorandum").

3 *See Shareholder Proposals*, Release No. 34–56160 (July 27, 2007) (with respect to the proposed shareholder access rules).

4 *Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors*, Division of Corporation Finance (July 15, 2003) ("2003 Staff Report"), *available at* http://www.sec.gov/news/studies/proxyrpt.htm. *See also* Summary of Comments in Response to the Commission's Solicitation of Public Views Regarding Possible Changes to the Proxy Rules (July 15, 2003), attached as Annex A to the 2003 Staff Report. Release No. 34–48626, *available at* www.sec.gov/rules/34–48626.htm ("Summary of Comments").

5 *Shareholder Proposals Relating to the Election of Directors*, Release No. 34–56914, *available at* http://sec.gov/rules/final/2007/34–56914.pdf.

Release, the proposed amendments "build on the Commission's 2003 and 2007 proposals" and reflect the Commission's "experience with, and continued consideration of, the issue of shareholder involvement in the proxy process, the interaction between proxy rules and state law, and the extensive comment [they] have received over the past six years."[6]

II. The SEC's Proposed Rules

Proposed Exchange Act Rule 14a–11

If adopted, proposed Exchange Act Rule 14a–11 would, under certain circumstances, require a company to include shareholder nominees for director in the company's proxy materials. Rule 14a–11 would not be available to shareholders seeking to rely on the rule to change control of the company or to gain more than a specified number of seats on the board of directors.

Companies Subject to Rule 14a–11

Rule 14a–11 would apply to all companies subject to the proxy rules under the Exchange Act (including investment companies registered under Section 8 of the Investment Company Act of 1940 (the "Investment Company Act")), other than companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act.[7] This requirement would apply unless state law or a company's governing documents (which must be consistent with state law) prohibit shareholders from nominating directors.[8] In the event that a company's governing documents do prohibit nomination rights, shareholders who want to amend the governing documents to include such a provision may seek to do so by submitting a shareholder proposal pursuant to the proposed amendments to Rule 14a–8(i)(8). In that case, a company generally would not be permitted to exclude such a shareholder proposal under the proposed amendments to Rule 14a–8(i)(8).[9]

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6 During the past two years, the states of Delaware and North Dakota adopted comprehensive packages of shareholder–friendly changes to their respective state corporate laws. In addition, legislation to enhance shareholder rights has been proposed in the U.S. Senate. *See* CGR May 22nd Memorandum. For a more detailed discussion of the Delaware law regarding proxy solicitations, *see New Delaware Law Regarding Proxy Solicitations Involving Contested Director Elections* (April 21, 2009), *available at* http://www.cahill.com/news/memoranda/000161.

S. 1074, titled "A bill to provide shareholders with enhanced authority over the nomination, election, and compensation of public company executives." The proposed legislation would also give shareholders an advisory vote on executive compensation packages, and would require that corporate boards establish risk committees. Section 4 of the legislation proposed in the Senate, if passed, would require the Commission to establish rules relating to the use by shareholders of proxy solicitation materials supplied b the company for the purpose of nominating individuals to membership on the board of the company, with the qualification that the shareholder or shareholder group must have beneficially owned, directly or indirectly, an aggregate amount of not less than one percent of the voting securities of the company for at least the 2–year period preceding the date of the next scheduled annual meeting of the company.

7 Foreign Private Issuers are not subject to the proposed rule because they are exempted from the SEC's proxy rules under Exchange Act Rule 3a12–3 (17 CFR 240.3a12–3).

8 According to the June 10 Release, the SEC is "not aware of any law in any state … that prohibits shareholders from nominating directors." *See infra Federal and State Law Concerns.*

9 *See* June 10 Release at n. 106. *See infra* notes 22-25 and accompanying text under the heading *Federal and State Law Concerns.*

Number of Shareholder Nominees/Directors

As proposed, a company would be required to include in its proxy materials no more than the greater of one shareholder nominee or the number of shareholder nominees that represents 25 percent of the company's board of directors (with any fraction rounded down). Any director previously elected as a shareholder nominee pursuant to Rule 14a–11 and whose term of office extends past the date of the shareholder meeting would count toward that total. If multiple qualifying nominations are made, they would be honored on a "first–come, first–served" basis, up to the maximum number, rather than based on the size of the nominating shareholder's stake in the company, as was proposed in 2003. The SEC believes this first–in–time standard would provide companies more certainty and would be fairer to shareholders and shareholder groups that may want to have nominees included in the company's proxy material.

Nominating Shareholder and Shareholder Group Eligibility Requirements

Proposed Rule 14a–11 would be available only to those shareholders of a company that have a "significant, long–term interest" in the company. As such, a company will be required to include shareholder nominees in its proxy materials if the nominating shareholder or shareholder group satisfies certain eligibility requirements, including minimum ownership levels and duration of ownership period thresholds, as described below.

1. Minimum Beneficial Ownership Levels

The nominating shareholder or shareholder group would be required to possess a minimum ownership level, based on the size of the company, as follows:

- One percent of the voting securities of a "large accelerated filer" (a company with a worldwide common equity market value held by non-affiliates of $700 million or more) or of a registered investment company with net assets of $700 million or more;
- Three percent of the voting securities of an "accelerated filer" (a company with a worldwide common equity market value held by non-affiliates of $75 million or more but less than $700 million) or of a registered investment company with net assets of $75 million or more but less than $700 million; or
- Five percent of the voting securities of a "non–accelerated filer" (a company with a worldwide common equity market value held by non-affiliates of less than $75 million) or of a registered investment company with net assets of less than $75 million.

Groups of shareholders would be permitted to aggregate their holdings to meet these minimum ownership thresholds. However, as proposed, the formation of a shareholder group solely for the purpose of nominating one or more directors would not result in a nominating shareholder or shareholder group losing its eligibility to file on Schedule 13G.

2. Duration of Ownership

For the purposes of determining the ownership threshold, the nominating shareholder or shareholder group would be required to:

- Have held the securities relied upon to satisfy the minimum ownership threshold continuously for a period of at least one year as of the date the nominating shareholder or shareholder group provides notice to the company;

- State in writing its intent to hold the securities through the date of the annual meeting at which the directors are to be elected;[10] and
- Certify that it is not holding the securities for the purpose of changing control of the company or to gain more than a minority representation on the company's board of directors.

Director Nominee Eligibility Qualifications

In addition to the nominating shareholder eligibility requirements described above, the nominee must satisfy certain requirements. A company would not be required to include a nominee in the following circumstances:

- The nominee's candidacy or, if elected, board membership would violate controlling state law, federal law, or rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors)[11] and such violation could not be cured. The June 10 Release clarifies that even if a company's governing documents permit the inclusion of shareholder nominees in a company's proxy materials, but impose a more restrictive eligibility standard or mandate more extensive disclosures than those required by Rule 14a–11, the company could not exclude a nominee submitted by a shareholder in compliance with Rule 14a–11 on the grounds that the shareholder or nominee fails to meet the more restrictive standards included in the company's governing documents.[12]
- Under Rule 14a–11, shareholder nominees must satisfy the objective director–independence standards of the applicable national securities exchange or national securities association. Pursuant to proposed Rule 14a–18(c), the nominating shareholder or shareholder group must represent that the nominee is in compliance with these objective standards.[13]

Notice and Disclosure Requirements

Pursuant to the proposed rules as outlined in the June 10 Release, specifically proposed Rule 14n–1, a nominating shareholder or group would be required to file with the SEC proposed new Schedule 14N on the date the notice is sent to the company. Schedule 14N would require disclosure of (a) facts supporting the shareholder's eligibility to nominate a director and (b) information related to the nominating shareholder or group.

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[10] According to the June 10 Release, the SEC included this certification requirement based upon the belief that it is important that any shareholder or group that intends to submit a nominee to a company for inclusion in the company's proxy materials continues to have a significant economic interest in the company. To support this proposition, the SEC cited certain 2003 commentary that supported a holding requirement (although simultaneously rejecting the 2003 commentary that suggested an even longer holding period, for example, through the term of the nominee's service on the board, if elected).

[11] The SEC proposed a separate provision, Rule 14a–18, addressing independence standards.

[12] *See* the June 10 Release at n.152. *See infra* notes 22-25 and accompanying text under the heading *Federal and State Law Concerns.*

[13] To the extent a national securities exchange or national securities association rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), the nominee would not be required to represent that the nominee meets the subjective determination of independence as part of the shareholder nomination process. *See* proposed Rule 14a-18(c).

As proposed, the rule would not require a nominating shareholder to disclose economic interests in the nature of derivative securities that the shareholder holds in the issuer.

The information required to be disclosed on Schedule 14N would include, among other things, the following:

- The name and address of the nominating shareholder or each member of the nominating shareholder group;
- Information regarding the aggregate number and percentage of the securities entitled to be voted, including the amount beneficially owned and the number of shares that the nominating shareholder or each member of the group holds;
- A written statement from the record holder of the shares beneficially owned by the nominating shareholder or each member of the nominating shareholder group verifying that as of the date of the shareholder notice on Schedule 14N, the shareholder has continuously held the securities for at least one year;[14]
- A written statement of the nominating shareholder's or group's intent to continue to own the requisite shares through the shareholder meeting at which directors are elected. Additionally, the nominating shareholder or group would provide a written statement regarding the nominating shareholder's or group's intent with respect to continued ownership after the election;[15]
- A certification that to the best of the nominating shareholder's or group's knowledge and belief, the securities are not held for the purpose of, or with the effect of, changing the control of the company or gaining more than a limited number of seats on the board of directors;
- A representation that the nominating shareholder or group is eligible to submit a nominee under Rule 14a–11;[16]
- A representation that, to the knowledge of the nominating shareholder or group, the candidate's nomination or initial service on the board, if elected, would not violate controlling state law, federal law, or applicable listing standards (other than a standard relating to independence);
- A representation that, to the knowledge of the nominating shareholder or group, the nominee meets the objective criteria for independence from the company that are set forth in applicable rules of a national securities exchange or national securities association[17] or, in the case of a registered investment company or business development company, that the nominee to the board is not an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act;[18]

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[14] This requirement would be applicable only where the nominating shareholder is not the registered holder of the shares and where the shareholder has not filed a Schedule 13D, Schedule 13G, Form 3, Form 4 and/or Form 5, or amendments to those documents. *See* Item 5(a) to proposed Schedule 14N.

[15] *See* proposed Rule 14a–18(f).

[16] The eligibility standards for nominating shareholders are set forth in proposed Rule 14a–11(b).

[17] This representation is not required if the company is not subject to the rules of a national securities exchange or national securities association.

[18] *See* proposed Rule 14a–18(c). The criteria for independence would be those generally applicable to directors, and not particular independence requirements, such as the requirements for audit committee members. *See* the Instruction to Rule 14a–18(c).

- A representation that neither the nominee nor the nominating shareholder (or any member of the nominating shareholder group, if applicable) has an agreement with the company regarding the nomination of the nominee.[19] The Commission believes this requirement provides assurance to shareholders that there are no shareholders or groups receiving special treatment by the company or acting on the company's behalf. The nominating shareholder or member of the nominating shareholder group would be subject to liability for any false or misleading statements under a proposed amendment to Rule 14a–9 with respect to the disclosure included in the company's proxy materials. Negotiations or other communications limited to whether the company should include the nominee on the company's proxy would not be considered an agreement for this purpose. However, any financial transaction or business relationship since the beginning of the company's last fiscal year, or any currently proposed transaction, between the company and a shareholder nominee that exceeds $120,000 would be a required disclosure on the proposed new Schedule 14N. There would be no disclosure required with respect to the relationships between a nominating shareholder or shareholder group and its director nominees;
- A statement from the nominee that the nominee consents to be named in the company's proxy statement and to serve on the board if elected, for inclusion in the company's proxy statement;[20]
- The nominee's biographical information; and
- A disclosure identifying the nominee and nominating shareholder's participation in transactions with the company, involvement in certain legal proceedings, and any arrangements related to the nominee's selection as a nominee.

A company would be required to include disclosure relating to nominating shareholders and shareholder nominees similar to that required by the current disclosure requirements applicable to contested elections. However, a company would not be liable for any false or misleading information obtained from the nominating shareholder or shareholder group unless the company knew, or had reason to know, that the information was false or misleading.

Timing of Nominations

Under the proposed rules, nominations would need to be submitted to the company, and the Schedule 14N would have to be filed with the SEC, on the same time schedule as currently required by Rule 14a–8 proposals (the date set by the company's advance notice provision or, in the absence of such a provision, 120 days before the anniversary of the date that the company mailed the prior year's proxy materials). The following is a summary of the process and timing for excluding shareholder director nominations:

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[19] *See* proposed Rule 14a–18(d). Instruction 2 to proposed Exchange Act Rule 14a–11(d) clarifies that if a nominee, nominating shareholder or any member of a nominating group has an agreement with the company or an affiliate of the company regarding the nomination of a candidate for election, any nominee or nominees proposed by such shareholder or group shall not be counted in calculating the number of shareholder nominees for purposes of proposed Rule 14a–11(d).

[20] *See* proposed Rule 14a–18(e).

Due Date	Action Required
Promptly after the company's receipt of the nominating shareholder's or group's notice on Schedule 14N.	Company must make an affirmative determination whether it is permitted to exclude a nominee.
Within 14 calendar days after the company's receipt of the notice on Schedule 14N.	Company must notify the nominating shareholder or group of any determination not to include the nominee or nominees (an "Exclusion Notice").
Within 14 calendar days after the nominating shareholder's or group's receipt of the company's Exclusion Notice.	Nominating shareholder must respond to the company's deficiency notice.
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the SEC.	Company must provide notice to the SEC of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the SEC.
Within 14 calendar days of the nominating shareholder's or group's receipt of the company's notice to the SEC.	Nominating shareholder or group may submit a response to the company's notice to the SEC.
As soon as practicable following receipt of nominating shareholder's or group's response.	SEC would, at its discretion, provide an informal statement of its views to the company and the nominating shareholder or group.

Proposed Amendments to Exchange Act Rule 14a–8

The SEC is also proposing to narrow the existing Rule 14a–8 election exclusion, which as amended in 2007 allows a company to exclude a shareholder proposal from its proxy statement that "relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election."[21] The proposed amendment would allow a shareholder, if the shareholder satisfies the eligibility provisions of proposed Rule 14a–8 (which are materially different from the eligibility provisions of proposed Rule 14a–11), to submit proposals that would amend, or that request an amendment to, a company's governing documents (e.g., the bylaws) regarding nomination procedures or disclosures related to shareholder nominations. The proposed amendment to Rule 14a–8 would not restrict the types of amendments that a shareholder could propose; however, any proposals that would conflict with Rule 14a–11 or state law could be excluded. Having differing eligibility thresholds or requiring more disclosure than otherwise required under Rule 14a–11 would not be deemed to be conflicting; however, amending procedures that would prevent a shareholder or shareholder group from meeting the requirements of proposed Rule 14a–11 would be deemed conflicting.

The proposed amendment to Rule 14a–8 would also codify prior SEC interpretations. For example, a company would be permitted to exclude a proposal under Rule 14a–8 if it would:

- Disqualify a nominee who is standing for election;
- Remove a director from office before his or her term expires;

[21] This rule was amended following *AFSCME* v. *AIG*, 462 F.3d 121 (2nd Cir. 2006) which held that a shareholder proposal to amend a corporation's bylaws to establish a procedure by which shareholder-nominated candidates could be included on a corporate ballot did not relate to an election within the meaning of Rule 14a-8(i)(8) and therefore could not be excluded from corporate proxy materials under that rule.

- Question the competence, business judgment or character of one or more nominees or directors;
- Nominate a specific individual for election to the board of directors, other than pursuant to Rule 14a–11, an applicable state law provision or a company's governing documents; or
- Otherwise affect the outcome of an upcoming election of directors.

The SEC cautions that the proposed amendment to Rule 14a–8 should not be read so broadly that the provision could be used to permit exclusion of proposals regarding the qualifications of directors, shareholder voting procedures, board nomination procedures and other election matters of significance to shareholders that would not directly result in an election contest between management and shareholder nominees, and that do not present significant conflicts with the SEC's other proxy rules.

The eligibility provisions of Rule 14a–8 require a shareholder to continuously hold at least $2,000 in market value (or one percent, whichever is less) of a company's securities entitled to be voted for a period of one year prior to submitting a proposal.

Related Proposed Amendments

Schedules 13D and 13G

The SEC also has proposed a new exception to its beneficial ownership reporting rules for 5% shareholders that would permit reporting on Schedule 13G — rather than the more detailed Schedule 13D — for shareholders or groups who engage in activities in connection with a nomination under new Rule 14a–11. However, this new exception would not apply to nominating shareholders or groups that submit a nomination pursuant to an applicable state law provision or a company's governing documents.

Rules 14a–9 and 14a–11(e)

The proposed amendments also would provide that a nominating shareholder or group relying on Rule 14a–11, rather than the company, would be liable for any materially false or misleading information provided by the nominating shareholder or group for inclusion in company proxy materials (except where the company knows or has reason to know that information is false or misleading). Also, such information would not automatically be incorporated by reference into the company's other SEC filings that incorporate the proxy statement generally.

The proposed rules also set out the process to be followed if a company determines that it has the right to exclude a proposed shareholder nominee from its proxy materials, including a process for seeking staff no–action relief modeled on the process currently used in connection with shareholder proposals under Rule 14a–8.

Federal and State Law Considerations

The SEC views the proposed amendments as consistent with its "mission" of "investor protection," based on its belief that "investors are best protected when they can exercise rights they have as shareholders, without unnecessary obstacles imposed by the federal proxy rules." Perhaps in anticipation of criticisms (based upon the discussions initiated by Commissioners Casey and Paredes at the May 20, 2009 open meeting) that the SEC may be usurping "the traditional role of the states in regulating corporate governance," the June 10 Release notes that "[t]hese proposed amendments are intended to remove impediments so shareholders may more effectively exercise their rights under state law to nominate and elect directors at meetings of shareholders."

In the May 20, 2009 open meeting, a central point of dissent for Commissioners Casey and Paredes was that Rule 14a–11 would "encroach far too much on internal corporate affairs in the traditional domain of state

corporate law."[22] Commissioner Casey made clear in her statement that she believed this to be a "federal substantive proxy access regime ... which would place the Commission squarely into the territory of creating a federal corporate governance regime as it effects two matters at the heart of corporate governance: director elections and shareholder rights."

According to Commissioner Casey, Rule 14a–11 is potentially problematic in that certain of its provisions may directly conflict with substantive state corporate law. Rule 14a–11 includes detailed requirements and conditions under which a company would be obligated to provide a shareholder with access to the proxy materials such as the eligibility and disclosure requirements, discussed above. These requirements and conditions are identical to many of the provisions in the Delaware amendments to its General Corporation Law as well as those included in the North Dakota corporate statute.[23] Commissioner Casey cites this as evidence that Rule 14a–11 is not purely a procedural proxy rule, but rather "goes to the heart of the policy considerations left to state legislatures or, where state legislatures provide, to companies and shareholders." Commissioner Casey cites, as support for her proposition, the Supreme Court's decision that in the absence of an explicit federal law, state law governs the internal affairs of a corporation. Examples of areas where state corporate law controls are the principle that the board is charged with supervising the management and affairs of the company or the principles with respect to the appropriateness of using corporate resources — in the form of the corporate proxy card and solicitation materials — to solicit proxies for candidates who were not nominated by the company.[24] In addition, the District of Columbia Circuit Court has held proxy rules which are substantive rather than procedural or related to disclosure are not valid.[25]

When questioned by Commissioners Casey and Paredes on these issues, Deputy Directory Brian Breheny explained that there will be lots of "questions to think about" with respect to these conflicts and which he expected to see revealed in comment letters. In addition, other comments made by the Commissioners at the open meeting suggest that the SEC is particularly interested in receiving comments on the workability of the proxy access proposal and whether the rule should be mandatory or should permit companies or shareholders to select an alternative mechanism — or no mechanism at all — for proxy access.

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22 For a more detailed discussion of the May 20, 2009 announcement and statements made at the May 20, 2009 open meeting, *see* CGR May 22nd Memorandum. The webcast is available on the SEC Website at http://www.connectlive.com/events/secopenmeetings/ under the heading "Additional Archived Video Webcasts from 2009" (Wednesday, May 20, 2009).

23 H.B. 19, 145th Gen. Assem. ("H.B. 19"), § 1 (Del. 2009) (to be codified at Del. Code Ann. tit. 8, § 112); H.B. 19 § 2 (to be codified at Del. Code Ann. tit. 8, § 113); Chapter 10–35 of the North Dakota Century Code. The text of the law is available at http://www.legis.nd.gov/assembly/60–2007/bill–index/bi1340.html

24 The Securities Act of 1933 and the Exchange Act steer clear from the creation of a federal corporations system. *See* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev 29, 34-35 (1959) (describing the Securities Act and Exchange Act's focus on disclosure). Federal law supplements state laws regarding the responsibilities of corporate directors and the rights of shareholders with certain disclosure obligations, which are aimed at protecting corporate shareholders. *See* 15 U.S.C. § 77g (1988). *See Cort* v. *Ash*, 422 U.S. 66, at 84 (1975) (stating that corporations are "creatures of state law"); *see also Santa Fe Industries, Inc.* v. *Green*, 430 U,S. 462, at 474-76 (1977) (holding that Rule 10b-5 regulates manipulations and deceptions in the sale and trading of securities, but in the absence of such 10b-5 violations, breaches of the corporate fiduciary duty remain the province of state, not federal, law); *see also Cts Corp.* v. *Dynamics Corp. Of America*, 481 U.S. 69, at 89 (1987) (stating that "no principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations").

25 *Business Roundtable* v. *SEC*, 905 F.2d at 407, at 411-12 (D.C. Cir. 1990) (holding that Rule 19c-4 exceeded SEC authority by attempting to "interfere in the management of corporations."). According to the D.C. Circuit, the SEC can promulgate only regulations closely connected to the Exchange Act's principles of disclosure and the creation of a national market. *Id.* at 410, 415.

The SEC has solicited comments on all aspects of its proposal. Comments are due by August 17, 2009.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.