

UPDATE: Amendments to Proxy Rules Designed to Facilitate Nomination of Directors by Shareholders Will Not be Finalized Until Early 2010

I. Delay in Vote on Finalized Rules

It now appears the Securities and Exchange Commission (“SEC” or “Commission”) will not vote until early 2010 on finalizing a proposed series of proxy access related amendments to the proxy rules under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). This delay means the proposed amendments are unlikely to be effective in time to apply during the spring 2010 proxy season.¹ The proposed amendments, which were published in a release dated June 10, 2009 (the “June 10 Release”), are designed to permit eligible shareholders to access company proxy materials for the purpose of including nominees for election to the board of directors. The June 10 Release generated in excess of 500 comment letters, which the SEC is still in process of reviewing.² In an October 2, 2009 speech before the Corporate Counsel Institute, in the context of discussing proposed Exchange Act Rule 14a-11, SEC Commissioner Elisse B. Walter (one of three Commissioners to vote in favor of publishing the proposed rules) voiced her doubts over whether the Commission would be in a position to make a fully informed decision in November, as had been expected, and further stated that while she would have preferred to have the new rules in place in time for the 2010 proxy season, “[e]xcellence should triumph over speed.”³

II. The Proposed Rules

The June 10 Release cited 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.” The main proposals contained in the June 10 Release are: (1) to create a new Exchange Act Rule 14a-11 providing for mandatory access to company proxy materials for shareholders that have a “significant, long-term interest” in the company and (2) to 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, which would reverse the current prohibition on using Rule 14a-8 for shareholder proxy access proposals.⁴ The June 10 Release likewise contains certain related proposed amendments that would supplement the new Rule 14a-11 and amend Rule 14a-8. For a more detailed

¹ SEC Chairman Mary Schapiro has been widely quoted as stating “I am committed to bringing final rules before the Commission It is my hope to finalize the rules early in the new year.” *SEC Won't Issue Shareholder Access Rules This Year*, The Associated Press (Oct. 2, 2009), available at <http://www.nytimes.com/aponline/2009/10/02/business/AP-US-SEC-Investor-Access.html>.

² The proposed amendments and the comment letters are both available from the SEC website: <http://www.sec.gov/rules/proposed/2009/33-9046.pdf> (*Proposed Rule: Facilitating Shareholder Director Nominations*, Release No. 34-60089 (June 10, 2009)); <http://www.sec.gov/comments/s7-10-09/s71009.shtml> (comment letters to proposed amendments).

³ Speech by SEC Commissioner: “SEC Rulemaking — ‘Advancing the Law’ to Protect Investors”, Commissioner Elisse B. Walter (Oct. 2, 2009), available at <http://www.sec.gov/news/speech/2009/spch100209ebw.htm>.

⁴ See *Shareholder Proposals*, Release No. 34-56160 (July 27, 2007) (with respect to proposed shareholder access rules).

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discussion of the June 10 Release and the proposed amendments, please refer to the earlier Cahill memorandum on the topic.⁵

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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; or Collin McDonald at 212.701.3156 or cmcdonald@cahill.com.

⁵ *Update: SEC Publishes Proposed Rule Amendments to Facilitate the Rights of Shareholders to Nominate Directors* (July 14, 2009), available at http://www.cahill.com/news/memoranda/000178/res/id=sa_File1/CGR%20Memo%20-%20Update-%20SEC%20Publishes%20Proposed%20Rule%20Amendments%20to%20Facilitate%20the%20Rights%20of%20Shareholders%20to%20Nominate%20Directors.pdf.