

Corporate Governance Commentary

Proxy Access Analysis No. 4

November 3, 2009

Latham & Watkins LLP and Georgeson Inc. are pleased to publish the next in our series of *Proxy Access Bulletins* and *Analyses*. By combining thoughtful legal analysis from Latham & Watkins with Georgeson's expertise on trends related to corporate governance, the shareholder voting process and other shareholder matters, we hope to provide you with timely, useful and practical guidance as you navigate the issues created by proxy access.

The Latham & Watkins-Georgeson *Proxy Access Bulletins* and *Analyses* are designed to:

- Facilitate your understanding of the various proposals being made on multiple fronts to enable shareholder proxy access
- Support your efforts to shape the outcome of these proposals on the legislative and regulatory fronts
- Assist you in taking concrete action in response to the final rules as a matter of both procedure and best practices as they emerge

Our *Proxy Access Bulletins* will be brief updates on "breaking" events related to proxy access, to be delivered quickly following material new developments. They will be short, fact-specific alerts intended to keep our clients and friends up-to-date on a real time basis.

Our *Proxy Access Analyses* will focus on in-depth analysis of the relevant legal and practical issues of proxy access as they develop and will suggest concrete actions we think companies should consider in response to proxy access developments.

For additional resources regarding this topic, please [click here](#) and [here](#).

Proxy Access: Where Are We Now And Where Should We Go

Summary

- The SEC rule proposal for proxy access drew more than 500 comment letters, many of which suggested significant and often conflicting revisions to the proposed rule and identified issues that were not addressed by the proposed rule.
- Because of the complexity of the substantive issues and the importance of proxy access to corporate governance, the SEC has deferred action on proxy access until early 2010, with the result that a SEC proxy access regime will not be in place for the 2010 proxy season.
- Additionally, three SEC commissioners have made clear that they are not prepared to adopt an amendment permitting shareholder proposals for proxy access as an interim or final outcome, and that they remain focused on adopting a prescriptive federal rule that mandates proxy access for public companies.

- Accordingly, the key issues relating to proxy access are whether:
 - The SEC's prescriptive access rule will allow shareholders to adopt a different access regime for their company or, if they choose, no access regime (often referred to as a shareholder right of "opt-out")
 - The timing of implementation of the SEC rule, which is particularly important if the rule does permit shareholder opt-out
 - The SEC rule will effectively preclude "misuse" of access for control purposes
 - The rule will be workable in practice and sufficiently flexible to deal with the large number of different capital and board structures that are or could be put in place at all of the public companies that will be subject to the rule
 - The rule will withstand the inevitable legal challenges to the SEC's authority to adopt a prescriptive proxy access rule and to its adherence to applicable administrative law in the adoption process
 - Congress will intervene with legislation and, if so, how extensively
- Pending final SEC action on proxy access, we recommend that companies:
 - Keep their senior management and boards current on the on-going proxy access debate
 - Consider the strategy of preparing a bylaw setting forth a "reasonable" but tailored proxy access regime for proposal at the 2010 annual meeting to take advantage of any opt-out rights contained in the final rule prior to its effectiveness for the 2011 annual meeting cycle

Recap of SEC Comment Letters

We reviewed 135 letters sent by companies, domestic and foreign public employee pension funds, labor unions, traditional for-profit institutional investors, hedge funds, bar and trade associations, law firms, academics, proxy advisory firms and others in response to the SEC's request for comments. The letters were selected to reflect a broad cross-section of the various constituencies that participated in the comment process and were limited to those that contained either a substantive discussion of proxy access issues or answered specific questions raised by the SEC in its proposing release.

As would be expected, the comment letters from corporate governance activists (consisting principally of public employee pension funds, labor unions and proxy advisory firms) and those from the corporate community (consisting principally of companies, company-sponsored trade associations and the private bar) sharply differed on the wisdom of adopting a prescriptive proxy access rule, the pros and cons of private ordering and a number of other key policy issues. However, these two philosophical groupings tended to break down on a number of subsidiary issues and actually achieved what could be characterized as a consensus on others.

The results of our review with respect to what we think are the more important issues are briefly described below. A more complete summary in tabular format is attached [here](#).

- *Private Ordering.* The most basic policy issue addressed in the comment letters was the desirability and scope of private ordering that would be permitted under the new SEC proxy access regime. Of the letters we reviewed, 74 percent supported the SEC's proposal to amend Rule 14a-8 to permit shareholder proposals on proxy access (either in conjunction with, or as an alternative to, adoption of Rule 14a-11), while only 33 percent supported the SEC's proposal to adopt a prescriptive proxy access rule (either as proposed by the SEC or with suggested revisions). Predictably, the corporate community was a strong supporter of reliance exclusively or principally on private ordering (encouraged by the threat or actuality of shareholder proposed proxy access bylaws under

an amended Rule 14a-8). The corporate governance activists, on the other hand (with only one arguable exception), were united behind adoption of a prescriptive proxy access rule, such as proposed Rule 14a-11.¹

- *Shareholder opt-out from Rule 14a-11.* Private ordering was also at the heart of the debate regarding the desirability of allowing shareholders of a company to vary the SEC's prescriptive rule in any way they determined. A significant majority (77 percent) of the 60 letters that addressed this issue was in favor of shareholders having the ability to adopt bylaws varying the SEC prescribed regime, without regard as to whether the end result made access easier, harder or even totally unavailable ("full" opt-out). Almost all letters supporting a full opt-out right were submitted by the corporate community. The other 14 letters addressing the issue (23 percent), almost all of which were from public employee pension funds and labor unions, urged the SEC not to grant any opt-out right to shareholders that would have the effect of making proxy access more difficult than the SEC regime. Many of the proponents of full opt-out rights cited the philosophical inconsistency of mandating an access regime to vindicate shareholder democracy, while at the same time denying the shareholders the right to vote on whether they wanted access and, if so, in what form. Opponents of full opt-out frequently relied on the premise that other SEC prescriptive rules do not permit any form of opt-out and the Securities Exchange Act of 1934 itself contains an anti-waiver provision.
 - *Minimum ownership under Rule 14a-11.* Most commentators favored a flat ownership threshold (applicable to all categories of filers), and higher ownership percentages than those proposed by the SEC. Only a few commentators endorsed without reservation the tiered ownership percentages proposed by the SEC.
 - *Threshold for nominating shareholder.* One hundred and 10 letters made a recommendation regarding the threshold that should apply to large accelerated filers, 84 percent of which argued for a higher threshold than the 1 percent proposed by the SEC. Of these, 65 letters (59 percent) supported a threshold of 5 percent. Only 18 letters (16 percent), mostly from labor unions and public pension funds, as well as RiskMetrics,² supported the 1 percent SEC-proposed threshold. Notably, a number of the letters supporting a higher threshold came from the corporate governance activists and/or for-profit institutional investors including Calvert Group, Ltd. (3 percent), the Committee on Investment of Employee Benefit Assets (3 percent), several foreign public employee pension funds (3 percent), TIAA-CREF (5 percent), T. Rowe Price Associates, Inc. (5 percent), ValueAct Capital (10 percent), Capital Research and Management Company (10 percent), Vanguard Group, Inc. (10 percent), Pershing Square Capital Management, L.P. (unspecified), Barclays Global Investors (5-15 percent). The Council of Institutional Investors, while supporting the SEC-proposed threshold, noted that its policy provides for a 3 percent threshold.
 - *Threshold for nominating groups.* With the exception of four letters from the corporate community, no commentators objected to allowing shareholders to aggregate their shares and form a nominating group. The commentators who endorsed the SEC proposed thresholds did not separately comment on the thresholds that should apply to nominating groups. Those who rejected the SEC-proposed thresholds as being too low overwhelmingly suggested a 10 percent threshold for nominating groups (at least for large accelerated filers).
 - *Minimum holding period for nomination under Rule 14a-11.* Of the 77 letters that addressed the appropriate length for a required continuous holding period, 75 percent recommended two years, 21 percent recommended one year and 4 percent recommended three years.
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- The recommendation of a two-year holding period came not only from the corporate community, but also from the Committee on Investment of Employee Benefit Assets and from a number of labor unions and public employee pension funds (American Federation of Labor and Congress of Industrial Organizations, Central Pension Fund, International Association of Machinists and Aerospace Workers, International Brotherhood of Teamsters, Laborers' International Union of North America, Ohio Public Employees Retirement System, Sheet Metal Workers' National Pension Fund, TIAA-CREF).
 - The support for a one-year holding period came mostly from labor unions, public employee pension funds, hedge funds and for-profit institutional investors, as well as from proxy advisory firms.
 - Moreover, a number of commentators (including several public employee pension funds, RiskMetrics and the Council on Institutional Investors), while endorsing or not opposing the proposed one-year period, stated that they would not object to a longer period.
 - *Definition of beneficial ownership.* This is one area in which the various constituencies achieved true consensus.³ Many commentators noted that the SEC proposal lacked a definition of beneficial ownership, and a significant subset specifically suggested that beneficial ownership be defined by reference to "net long positions." While most of the letters that contained comments on this issue came from the corporate community, it is interesting to note that a definition of beneficial ownership referring to "net long positions" was also supported by CalPERS, the Central Pension Fund, the Florida State Board of Administration, the American Federation of Labor and Congress of Industrial Organizations, T. Rowe Price Associates, Inc., ValueAct Capital, the Committee on Investment of Employee Benefits Assets, and several major bar and trade associations. It is also worth noting that 14 labor unions and public employee pension funds, and at least one bar association, urged the SEC to allow shares on loan to be counted for purposes of determining beneficial ownership.
 - *Independence of nominee from nominating shareholder.* Of the 82 letters that took a position on the issue whether the nominee should be required to be independent from the nominating shareholder, a large majority (82 percent) was in favor of such a requirement (generally based on concern regarding special interest directors and control implications if there were no independence requirement), while only 18 percent rejected it (generally arguing that such a requirement is not applicable in traditional proxy contests). Those in favor of the independence requirement were virtually all from the corporate community, but did include five foreign public employee pension funds and The Corporate Library. Those opposed to such a requirement consisted principally of labor unions, public employee pension funds and other corporate governance activists.
 - *Maximum number of access directors (at any given time).* There was great variety in the comments with respect to this issue. For example, different commentators defined the maximum as: (a) a percentage, (b) a number or (c) the greater/lower of a percentage and a number. Also, there was no consensus regarding whether the percentage / number should be fixed or should be dependent upon the size of the board.
 - The 71 letters that addressed this matter can be grouped as follows: 30 percent (from various categories of commentators) supported the SEC's proposal of defining the maximum as the greater of 25 percent or one nominee, 30 percent (mostly from companies) either supported a 15 percent maximum or recommended that access be limited to one nominee, and 21 percent (comprised exclusively of public employee pension funds and unions) requested that the minimum number be raised to two nominees (instead of one) pointing out, for example, that a single director customarily would not be able to table motions at a board meeting without a second to the motion. The remaining letters included other formulas or did not contain specific recommendations.
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Key Issues For Prescriptive SEC Proxy Access Rule

The Fate of Private Ordering (Shareholder Opt-Out)

The SEC's proposed access rule contained a very limited, "one-way" right for boards or shareholders to vary the SEC's prescriptive proxy access regime—only bylaws that made access easier, not harder, would have been permitted. As noted above, 77 percent of the comments on this point advocated that the rule be revised to permit shareholders to engage freely in private ordering by adopting bylaws varying the SEC prescribed regime, with the majority of recommendations made by companies and the private bar. Notably, no labor unions or public employee pension funds favored private ordering in general, or a full shareholder opt-out in particular.

Opt-out is the most important of the issues confronting the SEC. If the final rule contains a full right to opt-out, companies would have the ability to tailor proxy access to their particular conditions and to the wishes of their particular investors. Flexibility would be provided to deal with widely varying situations confronting different companies. Workability and control issues could be dealt with in the context of specifics, not generalities. Investors could choose a proxy contest reimbursement regime in lieu of proxy access or in combination with a far more limited right of proxy access.⁴ Complicated capital and board structures could be taken into account without doing damage to their purpose and effect. Finally, a full right to opt-out would eliminate the anomaly of adopting proxy access as a vindication of shareholder democracy, while in the very same rule precluding shareholders from exercising their franchise by denying them the right freely to vary the terms of proxy access.

In the run-up to the SEC vote on the proxy access proposal, two of the three Democratic Commissioners supporting proxy access were rumored to be leaning toward including an opt-out provision that would have allowed, at least under certain circumstances, shareholders to adopt a more restrictive, as well as a less restrictive, proxy access regime. Reportedly, the third Democratic Commissioner did not agree, and the two favoring some form of opt-out wound up supporting the proposed rule that, as noted, would only permit bylaws that made access less restrictive than the SEC regime. If this dynamic continues to prevail, the fate of a full opt-out provision seems to be in the hands of the Republican Commissioners. Presumably, if one of the Republicans were to join the two Democrats rumored to favor broader opt-out rights, a final rule might be adopted including a full opt-out provision.

The potential adoption of a full opt-out provision poses two additional issues:

- The first issue is whether the full opt-out right will be limited solely to shareholder-adopted bylaws or some provision will be made for boards to adopt or modify access bylaws between annual meetings. Given the controversy surrounding full opt-out and the policy justification that shareholders should have the ability to decide on their governance regime, it is reasonable to assume that any right given to boards to modify proxy access, as a minimum, will be subject to shareholder ratification at the next annual meeting. Indeed, it is not unlikely that any board right to modify a proxy access regime will be limited in scope so that it can be exercised only to "fix" so-called "workability" problems in an existing proxy access bylaw, not to adopt a proxy access bylaw *ab initio*.
 - The second issue is how long a transition period will be provided in the final proxy access rule.
 - The importance of the length of a transition period is a factor of the natural desire of boards to wait until a final proxy access rule is adopted before considering whether they wish to propose an alternative access regime to their shareholders. Moreover, most companies considering this course would also want to consult with their larger shareholders in advance of going public with their alternative access proposal in their proxy statements.
 - However, if the rule is not adopted until sometime in 2010 and is effective for the 2011 proxy season, companies that take a wait-and-see approach until a final SEC rule is adopted would have to call special meetings of shareholders to vote on their alternative proxy access proposal to avoid being subject to the SEC rule for at least
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their 2011 annual meetings. It seems safe to predict that few, if any, companies would call special meetings of shareholders just to propose an alternative proxy access regime.

- This consideration argues that in order to provide time for companies to consider the desirability of proposing an alternative access regime, the SEC should provide a long transition period, with the rule not taking effect until the 2012 proxy season. In this way, companies would be able to bring an alternative access regime to a shareholder vote at their 2011 annual meetings, without the need to design their alternative proposals in advance of adoption of a final SEC rule or to call special meetings.
- However, 2012 seems a long way from now, and it is not likely that the SEC would wait that long to implement its mandatory proxy access rule. If the rule is effective for the 2011 proxy season, companies wishing to propose alternative proxy access regimes to their shareholders would have to do so, as a practical matter, at their 2010 annual meetings.
- Proposing an alternative proxy access regime at 2010 annual meetings imposes a very short time frame for companies to design such alternative regimes and, if they wish, consult with their investors, particularly given that many companies would ordinarily be reluctant to act until the final rule is adopted and proxy access is a reality. However, it probably is the only alternative to becoming subject to the SEC proxy access regime, at least for the 2011 proxy season.

Control Issues

Although the SEC made clear in its proposing release that it did not intend proxy access to be used to change or affect control, a number of comment letters from the corporate community pointed out quite forcefully that additional safeguards are necessary in order to achieve that goal. Frequent suggestions included:

- A requirement that access nominees be independent of the nominating shareholder
- A limit to one on the number of nominations that a single shareholder or group could submit in any year
- A limit on the number of shareholders that could be solicited to create a nominating group or that could participate in a nominating group (for example, no more than 10)
- A limit to one on the number of nominating groups any single shareholder could join
- Elimination of any new exemption from existing proxy rules or solicitations to join a nominating group
- Preclusion of a proxy access election contest concurrently with a conventional election contest
- If there is no ban on concurrent proxy access and conventional election contests, a prohibition on the proponents in the conventional election contest from including proxy access nominees on the insurgents' proxy card and a requirement that supporters of a proxy access candidate use only the "universal" proxy card mandated under the proxy access rule and that they not solicit for any insurgents in the concurrent conventional election contest
- A prohibition on nominations by shareholders who filed a Schedule 13D (thereby acknowledging a lack of passive investment intent) or lost a conventional election contest during preceding years

Many observers believe that the lack of such safeguards in a final proxy access rule would allow shareholders aspiring to affect company policy or otherwise exert control room to utilize proxy access to achieve at least some of their goals. Moreover, it is uncertain whether the SEC appreciates that the proposed rule contains so many holes in its anti-control protections.

Unfortunately, relatively few of the comment letters identified the potential holes that would permit the rule to be used to change or affect control in practice.⁵ For this reason, it may well be that the SEC will fail to plug enough of the control related holes in its final rule to preclude abuse. This concern is all the more reason why a full right of private ordering through an opt-out mechanism is the single most critical issue in the proxy access debate.

Workability Issues

An important theme that has been sounded by the SEC, and is reflected in a number of the comment letters, is the importance of ensuring that an SEC access rule be “workable” in practice (see, for example, the letters submitted by the Committee on Federal Regulation of Securities of the American Bar Association, the Council of Institutional Investors, the Business Roundtable, and the letters submitted collectively, and in several cases separately, by Latham & Watkins and six other prominent law firms). Workability encompasses many issues, some that go to the core of an access regime and others that are peripheral. The following are what we consider to be some of the more important workability issues flowing from the proposed rule:

- The rule should take into account the reality that the some 7,000 public companies that will be subject to a prescriptive access regime have a myriad of capital and board structures. While this concern is often dismissed on the grounds of “mere technicalities,” it is important that the final rule take into account application to companies with multiple classes of stock entitled to vote for directors (including, classes with disparate voting and/or economic interests) and to companies with classes of directors elected by different classes of stock or subject to contractual agreements regarding rights to designate directors. An access rule that does not make adequate provision for the variety of capital and board structures utilized by companies subject to the rule will inevitably lead not merely to an on-going need for interpretation, but also to incentives on the part of various constituencies to “game” the rule.⁶
 - The rule should not create perverse incentives on the part either of shareholders or boards. For example, one troubling aspect of the proposed rule is its timeline that would require notice of access nominations in the late fall, well before most boards have made decisions regarding their director nominations for a spring election of directors. A possible consequence of this timing disparity, particularly with respect to directors elected by access in a prior year, is that shareholders may feel compelled to notice nomination of the sitting access director (or a replacement) to ensure a place on the ballot, not knowing whether the board would do so voluntarily.⁷ This, in turn, might lead a board to react by not including the access nominee on the board’s slate. Such an outcome would run counter to an integration of access directors into the board room and tend to perpetuate an “us versus them” dynamic on the part both board-nominated directors and access directors.
 - A related workability issue is sometimes referred to as “access-creep.” Because the proposed rule does not impose access status on access directors who are re-nominated by the board, access nominations in succeeding years could result in a board composed of far more directors elected through the access process than the cap set forth in the rule. Although this may not be an issue if the proxy access directors integrate well with their new boards, this will not always be the case. To avoid the latter outcome, some boards undoubtedly will deny re-nomination to access directors, a result that can only increase the divisiveness of the access process and is likely to lead to dysfunctional board dynamics.
 - As proposed, the SEC’s rule would permit annual proxy access contests. Even if the final rule limited the rights of shareholders to propose access nominees in successive years by imposing a minimum vote requirement or the like, it is possible that some number of public companies will receive access nomination year after year unless and until access nominees are seated on the board. While many companies maintain successful “engagement” programs with their shareholders and by so doing may be able to avoid annual proxy access election contests, such “engagement” programs will not always be sufficient to avoid this result. The enervating effect of the threat or actuality of annual proxy access election contests could create significant leverage for shareholders seeking to place candidates on a company’s board, far beyond their ability actually to win a proxy access election contest. Add to this threat the ability (at least under the proposed rule) of shareholders to use nominating groups with different compositions to end-run limitations
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based on prior low votes for access candidates, to nominate multiple candidates (up to whatever cap is adopted in the final rule), and/or to align with other shareholders running traditional proxy contests. The result for some number of companies, particularly those which have been targeted by activists for whatever reason, could be to subject them to a “sword of Damocles” like environment. The time and resource demands of fighting repeated proxy access election contests cannot be good for those companies, nor is it what access is presumably about.

A Modest Proposal

A review of the comment letters makes clear that coming to grips with all of the workability and other issues in an access rule will not be an easy task. As so many commentators have observed, it is very difficult to get a “one size fits all” rule to work across the public company spectrum in a way that does not implicate significant control issues and that has sufficient flexibility to allow adaptation to a potentially endless variety of different corporate situations.

We do believe, however, that incorporation of three relatively simple provisions in a final access rule would solve, at least in large part, many of the workability, control and flexibility issues inherent in the access concept.

- First, permit unlimited private ordering by shareholder vote, with an additional limited right for directors to adopt or amend bylaws to correct mistakes, cure ambiguities and the like, subject to subsequent shareholder ratification at the next annual meeting. This is the only practical way in which flexibility can be achieved. Also, as noted above, it would vindicate the shareholder franchise and thus be totally consistent with the purpose and philosophy of an access rule.
- Second, limit the access nomination process to a triennial schedule by putting a moratorium on access nominations for the two-year period following an access nomination, so that companies are not faced with the prospect of annual access election contests and so that directors elected through access can be re-nominated by the board without fear of “access creep.” This limitation would also go a long way in preventing the abuse of proxy access for control-related purposes.
- Finally, require a continuous two-year “net long” holding period (excluding participation in share lending programs prior to the submission of a notice of an access nomination) to ensure that access nominations are available only to true long-term holders. As discussed above, a two-year holding period has been endorsed by prominent representatives of every constituency involved in the access debate: companies and the private bar, trade associations, traditional institutional investors, and labor unions and public employee pension funds. Moreover, both the proposed Shareholder Bill of Rights Act in the Senate and the proposed Shareholder Empowerment Act in the House contemplate a two-year holding period.

Conclusion

Proxy access is a complicated subject and one with potentially significant ramifications for any company that receives an access nomination. Moreover, the very existence of a right to make access nominations will inevitably change board and shareholder relationships in ways that are far from clear. If, as many of its supporters claim, proxy access is rarely used and reserved for only the most egregious circumstances, it may not matter very much. But if, as some observers fear, proxy access is used to promote special interest directors, divisive or inappropriate agendas of certain shareholder groups or directors with aspirations to affect a company’s policies or strategies materially, proxy access could become a very big deal, indeed.

At this point in time, the comment process is essentially completed and the staff and SEC are focused on fashioning a final proxy access rule. However, this does not mean that companies should passively stand by and await the outcome.

- First, the SEC and staff appear willing to continue to dialog with interested parties. Industry groups, bar associations and the like may still have an opportunity to communicate their views. As important, perhaps, Congress has yet to be heard from. Bills that contain provisions regarding proxy access are pending in both the House and the Senate. Lobbying on this front could be productive.
- Second, it seems clear that there will be a prescriptive proxy access rule. While its details are not known, its general scope is. Further, there may be developments in the proxy access debate on any number of fronts. Accordingly, it is important that senior managements and boards be educated, not only about the basics of proxy access, but also its evolution to the extent that can be determined.
- Finally, senior managements and boards should be prepared for the possibility that the SEC will adopt proxy access with a full opt-out right, but will not provide a lengthy transition period. In that case, as noted above, companies may only have their 2010 annual meetings at which to propose an alternative proxy access regime before the SEC's version becomes operative for 2011. Companies should focus on the possibility that they may have only a very time-constrained opportunity to act and consider preparing a proxy access bylaw for proposal at their 2010 annual meeting.⁸

Endnotes

¹ The United Brotherhood of Carpenters supported the proposed amendment to Rule 14a-8 but did not support the adoption of Rule 14a-11.

² RiskMetrics' own company bylaws contain more restrictive conditions for shareholder access to the proxy: the nominating person must have owned at least 4 percent of the outstanding common stock continuously for at least two years.

³ A general consensus among the commentators applied to a number of other issues, including: (1) how to determine priority in case of multiple nominations, and (2) limitations on repeat access nominations by a shareholder or shareholder group whose candidate did not win a significant vote. With respect to priority, of the 105 letters that addressed this issue, only one endorsed the SEC's proposed "first-in" approach, while 89 percent recommended that priority be based on largest ownership and/or longest holding period. With respect to re-submissions, 90 percent of the letters that addressed this point urged the SEC to provide that if a nominee fails to receive a minimum number of votes (most commonly 25 percent or 30 percent), the nominating shareholder would not be permitted to submit other nominees for a certain period of time (most commonly two or three years). This proposal came mostly from the corporate community but was also endorsed by for-profit institutional investors and by at least one public employee pension fund.

⁴ On October 26, 2009, HealthSouth Corp. announced that its Board of Directors had approved the general terms of a corporate bylaw that will provide for reimbursement of shareholder expenses in connection with a proxy solicitation campaign, subject to certain conditions. This is one of the first proxy contest reimbursement bylaws adopted under the recent amendments to the Delaware General Corporation Law.

⁵ See, for example, the letters submitted by Latham & Watkins and six other prominent law firms, the Committee on Federal Regulation of Securities of the American Bar Association, the Business Roundtable and the Society of Corporate Secretaries and Governance Professionals.

⁶ For example, companies with the right to issue preferred stock with terms designated by the board might be tempted to create new classes of voting stock with disproportionate voting rights. Or, aggressive investors might buy outstanding "super-voting" shares of stock to get more "access bang" for their bucks when trying to amass sufficient shares to comply with access thresholds. For more details on this topic, please see the comment letter submitted on August 31, 2009 by the Committee on Federal Regulation of Securities of the American Bar Association (in particular, section II.G.2 which discusses variations in board and capital structures).

⁷ Although companies could have discussions with their shareholders and sitting access directors to avoid such situations, in practice that may not always happen. Relying on the possibility of such a dialog to avoid the tension that could be created by an access nomination of the sitting director (or a replacement) ignores certain issues. For example, it presupposes that all nominating committees and boards will be able to fairly and fully evaluate the quality and performance of their access directors in the approximately six months between their election and the proxy access deadline for the following annual meeting. It also presupposes that no other shareholder(s) will submit notice of an access nomination creating the very dynamic of an access election contest that the board was seeking to avoid by agreeing to re-nominate the sitting access director.

⁸ A good starting point for a comprehensive proxy access bylaw can be found in the Exposure Draft of an Illustrative Access Bylaw with Commentary prepared by the Task Force on Shareholder Proposals of the Committee on Federal Regulation of Securities of the American Bar Association (click [here](#) to view).

If you have any questions regarding this *Commentary* or dealing with the new Delaware corporate law changes, please contact the Latham & Watkins LLP representatives or the Georgeson Inc. representatives listed below or the representative of such firm with whom you normally consult.

Latham & Watkins LLP Representatives

[Adel Aslani-Far](#)

[Scott Hodgkins](#)

[Raluca Papadima](#)

[Barry Bryer](#)

[Peter Kerman](#)

[David Schwartzbaum](#)

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[David S. Drake](#)

[Rhonda L. Brauer](#)

[Rachel L. Posner](#)

[Rajeev Kumar](#)

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