

RR DONNELLEY

# ANNUAL MEETING HANDBOOK

2008 EDITION

Providing a General Overview of the State and  
Federal Laws and Stock Exchange Rules Relating  
to Annual Meetings of Shareholders

Latham & Watkins LLP  
Craig M. Garner  
Jonathan B. Kaplan



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## **About This Handbook**

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## **INTRODUCTION**

Every public company in the United States is required by its charter documents, the corporate law of its state of incorporation and the federal securities laws to hold a meeting of shareholders at least once each year. Holding an annual meeting of shareholders, however, is much more than merely fulfilling a legal requirement. The annual meeting allows shareholders to express a judgment on management's stewardship of their company, allows management to obtain shareholder approval of important matters and provides a forum for management and shareholders to discuss the progress and direction of the company's business.

This handbook is intended to assist companies in preparing for the annual meeting. It provides a general outline of the key legal requirements contained in the federal securities laws and state corporate laws, as well as the requirements of the stock exchanges and other trading markets. In addition, a discussion of some practical tips relating to the preparation and conduct of an annual meeting is included. Although this handbook addresses issues primarily of concern to companies with publicly traded securities, many of the same issues are also relevant to annual meetings of privately held companies.

This handbook is not intended as a substitute for a careful review of the relevant provisions of: the federal securities laws, rules and regulations; the state corporate law applicable to the company; stock exchange or stock market rules and regulations; the company's charter and bylaws; and any resolutions of the board of directors of the company that may affect the annual meeting. Readers should review the laws, rules and regulations that govern their company and its charter and bylaws in preparing for and conducting any meeting of shareholders, whether an annual meeting or a special meeting, and in preparing the required proxy solicitation materials.

## DEVELOPMENTS IN THE LAW FOR THE 2008 PROXY SEASON

New laws are enacted each year that impact the proxy solicitation process and conduct of the annual meeting of shareholders. In addition, the Securities and Exchange Commission (SEC) issues new rules and interpretations from time to time and, on occasion, certain trends and other developments emerge, which influence proxy materials and annual meeting preparations. A description is provided below of the more significant legislative and regulatory developments that are expected to significantly impact the 2008 proxy season. The information provided is not, however, intended to be an exhaustive examination of the relevant statutory changes and other developments that may concern any particular company. In addition to statutory changes, decisions rendered in court cases often impact shareholder meetings and related proxy materials. Readers are urged to discuss their specific situations with legal counsel to ascertain the changes that may influence their annual meeting preparations.

### I. PROXY SOLICITATION—E-PROXY RULES

In December 2006, the SEC amended the proxy rules under the Securities Exchange Act of 1934, as amended (Exchange Act), to provide that companies could furnish shareholders with the company's proxy statement and annual report by posting these materials on a web site and providing shareholders with notice of the availability of the proxy materials. In June 2007, the SEC issued final rules which provide that companies may deliver proxy materials, including notices of shareholder meetings, proxy statements, forms of proxy, annual reports and any amendments to such materials that are required to be furnished to shareholders, either by the new "notice and access option" or the traditional method of delivering a full set of printed materials, also referred to as the "full set delivery option." Companies choosing to use the traditional full set delivery option, however, must still undertake limited elements of the notice and access option, thus creating a mandatory e-proxy requirement.

*Notice and Access Option.* The notice and access option may be used in connection with the delivery of proxy materials for all shareholder meetings other than business combination transactions. To adopt the notice and access option, companies must (1) send a notice of Internet availability of proxy materials to shareholders at least 40 days before the meeting date or the date that consents may be used to effect a corporate action if no meeting is scheduled, (2) post the proxy materials on an Internet web site which meets certain criteria by the time the notice is first sent to shareholders and (3) provide shareholders with a voting method at the time the notice is first sent to shareholders. Companies can satisfy the final requirement by providing electronic voting platforms, a toll-free phone telephone number for voting or a downloadable, printable proxy card on a web site. To avoid an instance where shareholders execute a proxy without having reviewed the proxy statement, the telephone number for voting of the proxy may not be included in the notice, though the phone number may be posted to the web site.

The notice of Internet availability of proxy materials constitutes "other soliciting material" that must be filed with the SEC no later than the date on which the notice is first sent to shareholders. The notice must conform to plain English requirements. Other than the notice of a shareholders meeting required by state law, no other information may accompany the notice of Internet availability of proxy materials. A proxy card may only be sent to shareholders ten or more days after sending the notice, though the proxy card may be sent before the end of the ten-day period if it is accompanied by the proxy statement and annual report. If a company chooses not to send the proxy statement and annual report with the proxy card, another copy of the notice of Internet availability of proxy materials must accompany the proxy card.

Companies adopting the notice and access option must send paper copies of the proxy materials to shareholders upon request, free of charge. Shareholders have the right to make a permanent election to receive either paper or e-mail copies of proxy materials in connection with future proxy solicitations, and companies are required to record such elections. Shareholder requests to receive paper proxy materials must be met within three business days, provided such request is received prior to the

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company's meeting. Thereafter, companies are obligated to provide copies of the proxy materials for a period of one year after the date of the shareholders meeting or corporate action to which the materials relate.

*Full Set Delivery Option.* Companies may operate under the traditional proxy rules and deliver paper copies of the proxy materials to shareholders by mail as in the past. Under the new mandatory e-proxy rules, companies choosing the full set delivery option also must (1) send a notice of Internet availability of proxy materials accompanied by a full set of proxy materials, or incorporate all of the information required to appear in the notice of Internet availability of proxy materials into the proxy statement and proxy card, and (2) post the company's proxy materials on an Internet web site. Companies that elect to use the full set delivery option need not comply with the 40-day deadline above and are not required to respond to requests for copies of proxy materials.

Companies are not limited to one option as the exclusive means for providing proxy materials to shareholders. Rather, they may use the notice and access option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders.

Notwithstanding the mandatory e-proxy requirement, it is expected that many companies may elect the full set delivery option initially to allow time to evaluate the notice and access option and to avoid potential conflicts with state law that might occur if written proxy materials are not provided. One such potential conflict between the new notice and access option and state law exists in California. Under California law, companies incorporated or having a principal executive office in California are required to deliver annual reports to shareholders not later than 120 days after the close of the fiscal year. While California law permits electronic transmission of annual reports, the recipient is required to have first provided an unrevoked consent, which is not a feature of the notice and access option, and the electronic transmission must comply with other legal requirements. Readers are urged to discuss their specific situations with legal counsel to address any particular issues they may face as a result of the new e-proxy rules.

*Transitional Rules.* The e-proxy rules are effective for large accelerated filers, i.e. companies subject to the Exchange Act requirements for at least twelve months with \$700 million or more of public float that have filed at least one annual report (other than registered investment companies), for solicitations occurring on or after January 1, 2008, and for all other companies and soliciting persons beginning January 1, 2009. Companies can voluntarily begin compliance with the new e-proxy rules on and after January 1, 2008.

## II. SHAREHOLDER ACCESS AND OTHER PROPOSALS

Activist investors are once again focusing their efforts on implementing binding bylaw amendments to implement corporate governance reforms in addition to utilizing non-binding proposals recommending specific board action. This trend has been supported by a number of related developments, including increased frustration by shareholder proponents with boards of directors that fail to act, or act less vigilantly than desired, on successfully passed non-binding shareholder proposals, academic and investor initiatives for more responsive corporate governance and the SEC's unwillingness to grant no-action requests for exclusion of shareholder proposals in areas where the underlying law is unsettled.

### A. SHAREHOLDER ACCESS GENERALLY

*What Is Shareholder Access.* Under the current SEC rules, only the company's director nominees are included in the company's proxy statement and proxy card. If shareholders wish to nominate their own candidates, they must prepare their own proxy statement and proxy card. Shareholder access refers to an alternative regime in which shareholders could include director nominees in the company's proxy materials in opposition to the company's nominees.

*Historical Background.* Rule 14a-8 of the Exchange Act requires a public company to include a shareholder proposal in its proxy statement if the proponent meets modest share ownership, time-

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liness and length of proposed submission requirements. If a company seeks to exclude a shareholder proposal from its proxy statement, the company must, following receipt of a qualifying shareholder submission, establish that the proposal satisfies an SEC established justification for exclusion. With respect to the election of directors, for many years the SEC permitted companies to exclude shareholder access proposals under the so-called “director election exclusion” of Rule 14a-8(i)(8) on the grounds that the proposals could have the effect of causing proxy contests in future years. In a 2006 case, the Second Circuit Court of Appeals rejected the SEC’s longstanding position and held that a company could not rely on Rule 14a-8(i)(8) to exclude a shareholder access proposal. Within days of the court’s decision, the SEC announced that it would resolve the issue for the 2007 proxy season; however, no resolution was achieved in this time frame. During the 2007 proxy season, the SEC took an official position of “no view” on corporate requests to exclude shareholder access proposals. Corporate governance activists exercised restraint and filed only a handful of access proposals for the 2007 proxy season, thus giving the SEC a year to find a solution.

In July 2007, the SEC issued two distinct rule proposals regarding shareholder access. One proposal, referred to as the “access proposal,” would require companies to include in their proxy materials proposals for binding bylaw amendments that establish a procedure by which shareholder nominees would be included in company proxy materials, subject to certain conditions including a threshold requirement that the proponents of the bylaw being submitted under Rule 14a-8 own at least five percent of the company’s stock and not have a control intent. The other proposal, referred to as the “exclusion proposal,” would codify the SEC’s interpretation of Rule 14a-8(i)(8) that companies may exclude from their proxy materials any shareholder proposal that would result in an immediate election contest or set up a process for shareholders to conduct a future election contest by requiring the inclusion of a shareholder nominee in subsequent proxy materials.

*Current Rules.* At its November 28, 2007 meeting, the SEC amended Rule 14a-8(i)(8) to adopt the exclusion proposal for the 2008 proxy season. This amendment codified the SEC’s longstanding position that companies may continue to exclude shareholder access proposals from proxy materials under the director election exclusion of Rule 14a-8(i)(8). The current rules, however, may be short-lived as SEC Chairman Christopher Cox has announced that due to widespread dissatisfaction with both the exclusion proposal and the access proposal, the SEC will re-open the proxy access issue for the 2009 proxy season to arrive at a new rule proposal that will likely differ from the SEC’s existing position on this matter. In addition, several shareholders have filed access proposals in a stated intent to force a judicial review of the SEC’s adoption of the exclusion rule.

*Impact of Shareholder Access.* If approved in the future, shareholder access would likely increase the leverage of activist shareholders and lead to a greater number of contested elections, largely because shareholder access eliminates some or all costs of dissident election campaigns and enhances the legitimacy of activists by virtue of inclusion in the company’s proxy materials. As a result, commentators predict that shareholder access may develop into a major tool for hedge funds and other “destabilizers.”

### B. SHAREHOLDER PROPOSALS FOR MAJORITY ELECTION OF DIRECTORS

*What Is Majority Voting for Directors.* Historically, most companies employed plurality voting for electing directors. Under a plurality voting system, directors receiving the largest number of votes “for” their election are elected and, in an uncontested election, a director receiving at least one “for” vote would be elected. In contrast, under a majority voting system, a director nominee is elected only if such nominee receives at least a majority of the “for” votes cast in his or her election.

There are two principal versions of majority voting, often referred to as “plurality plus” and “true majority” voting. The plurality plus regime is essentially the plurality voting system accompanied by a director resignation policy which requires a director to submit his or her resignation if he or she does not receive a majority of the votes cast. The company’s board then determines whether to accept the director’s resignation within a specified period and typically publishes the reasons for its decision in a press release. In contrast, under true majority voting, companies typically adopt a bylaw or charter

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provision which provides that a director must receive a majority of the votes cast to be elected in an uncontested election, i.e. an election in which the number of nominees does not exceed the number of vacant seats on the board of directors. An incumbent nominee who fails to secure the required majority vote would remain in office under the so-called “holdover rule,” under which an incumbent director who is not reelected remains in office until his or her successor is duly elected and qualified. To address the holdover rule, true majority voting typically also features a director resignation policy, which generally requires each director, as a condition of his or her nomination, to execute and deliver a resignation effective upon the director’s failure to garner a majority of votes in an uncontested election.

*Legal Developments Facilitating Majority Voting.* Recent developments have changed the landscape regarding director voting systems, resulting in an increased number of shareholder proposals seeking to adopt bylaws requiring majority voting for directors. Delaware law was amended in 2006 to facilitate majority voting in the election of directors. The two key aspects of those amendments provide that (1) a shareholder-adopted majority voting bylaw cannot be amended by subsequent action of the board of directors, and (2) a director’s resignation may be made effective upon the occurrence of a future event or events (such as failure to receive a majority of votes cast). Other states also now permit the adoption of a majority voting structure through bylaw or charter amendment, including California as discussed below. In addition, the Model Business Corporation Act was amended in 2006 to permit implementation of majority voting through bylaw amendment (rather than via charter amendment, as had previously been the case), thereby providing a vehicle in most states for activist shareholders to propose binding bylaw adoption of a majority voting structure and eliminating the basis historically used by companies for exclusion of such proposals from proxy statements.

Effective January 1, 2007, California domestic “listed corporations” which have eliminated cumulative voting may amend their bylaws or articles of incorporation to require that directors be elected by “approval of the shareholders” in uncontested elections. Listed corporations are those companies with outstanding shares listed on the New York Stock Exchange (NYSE), the American Stock Exchange or the Nasdaq Global Market. The “approval of the shareholders” voting system is similar, though not identical, to a majority voting standard as the law requires both that director nominees receive the affirmative vote of a majority of the shares represented and voting at a duly held meeting at which a quorum is present and that the shares voting affirmatively constitute at least a majority of the quorum required for the meeting. The term of a director who fails to meet this standard ends at the earlier of 90 days after the vote is determined or the date on which a successor is appointed by the company’s board, effectively eliminating the holdover rule.

*Where Does Majority Voting Stand.* Of the two majority voting systems, true majority voting is typically favored by shareholder activists because it adopts an actual majority-vote standard rather than just a resignation policy and, with the majority voting provisions included in the company’s charter documents, is more difficult to change or eliminate than a corporate governance principle adopted by the company’s board. Institutions have pressed hard for implementation of the true majority voting standard combined with a director resignation policy. As of November 2007, Institutional Shareholder Services’ (ISS) corporate governance policy recommended in favor of true majority voting proposals provided that such proposals contain a carve-out for a plurality voting standard in contested elections. ISS’ corporate governance policy also encouraged companies to adopt director resignation policies to eliminate the holdover problem.

As of November 1, 2007, an estimated 64% of S&P 500 companies had adopted either a plurality plus or true majority voting system, a sharp increase from less than 20% in 2006. Overall, ISS reports that as of September 2007, 496 companies it tracked had adopted majority voting provisions, though it noted that not all those companies had adopted resignation policies or provided exceptions for contested elections.

*Withhold Vote Campaigns and Majority Voting.* Under a plurality voting system, withheld votes are largely symbolic because even if 99% of the votes for a particular director are withheld, as long as that director receives at least one “for” vote, the director would be elected. As a result, under a plurality system, the likelihood of a failed election is quite low and the principal negative effect of withheld

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votes is public embarrassment. However, under plurality plus or true majority voting systems, a so-called “withhold vote campaign” has significant legal consequences because a large number of withheld votes may result in a failed election. In 2007, 15 directors failed to receive majority support, as compared to eight directors in 2006. Further, in 2007, 17 directors at S&P 500 companies received 40-50% of votes withheld and 62 directors at S&P 1500 companies received 40-50% of votes withheld. Despite the significant consequences of a failed election arising out of a withhold vote campaign, there is no indication that ISS will change its policies of using withhold vote campaigns as a means of coercing companies to comply with its desired corporate governance reforms.

*Engagement.* ISS reported that investors withdrew more than half of their proposals on majority voting and similar proposals after negotiations with companies. Out of the 1,145 shareholder proposals tracked by ISS in 2007, 306 were withdrawn by shareholders as of September 2007, as compared to 189 withdrawn out of the 947 proposals tracked during the same period in 2006. In all, ISS describes 2007 as a year of unprecedented engagement between companies and shareholders with respect to shareholder proposals.

### C. SAY ON PAY PROPOSALS

*What Are Say on Pay Proposals.* So called “say on pay” proposals allow shareholders an annual advisory vote on a company’s executive compensation practices. These proposals first appeared in the United States in 2006 out of growing frustration with executive compensation practices, partly due to certain highly publicized excesses in compensation and also due to a perceived disconnect between corporate pay and company performance. Shareholder activists claim that say on pay proposals are a means of ensuring transparency and accountability and encouraging constructive dialogue regarding executive compensation practices.

*U.K. Experience with Say on Pay.* Say on pay proposals in the United States are at least partly modeled on the advisory votes on executive compensation provided for in the United Kingdom, Australia, the Netherlands, Sweden and Norway, where advisory votes are required by law. At least one study on the experience of companies in the U.K. has found that shareholder advisory votes on compensation have markedly increased dialogue between companies and institutional investors, transformed the way in which companies structure compensation policies, helped tame the annual rate of increase in executive pay and enhanced the role of proxy advisory services. Despite fears that shareholders would too readily vote against board pay policies, ISS reports that just eight U.K. companies received so-called “no on pay” votes during the last four years.

*Say on Pay in 2007 and 2008.* According to ISS, 39 say on pay proposals were voted on in 2007, as compared to seven such proposals in 2006, with approximately 40% average support in each year. ISS reports that during the 2007 proxy season seven say on pay resolutions received a majority of votes cast as of September 2007, including Verizon Communications, Blockbuster, Motorola and Ingersoll Rand. Only two public companies, Aflac and Verizon, have agreed to hold an annual say on pay vote, and Verizon did so only after a say on pay proposal had received a majority of votes cast in favor of the proposal. Say on pay proposals are expected to take center stage for the 2008 proxy season.

## III. ELECTRONIC SHAREHOLDER FORUMS

In November 2007, the SEC amended the proxy rules to facilitate the use of electronic shareholder forums in an effort to improve the free flow of information, ideas and opinions among shareholders and between shareholders and companies. The amendments permit both companies and shareholders to establish and maintain electronic forums under the federal securities laws, provided persons using the forum do not seek, directly or indirectly, the power to act as a proxy for a shareholder and do not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of proxy or revocation, abstention, consent or authorization regarding voting, and further provided that the forum is otherwise conducted in compliance with applicable state law and the company’s charter and bylaws. Additionally, to be exempt, any solicitation using an electronic forum must occur more than 60 days



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prior to the date announced by the company for its meeting, or if the company announces the meeting less than 60 days before the meeting, then not later than two days after the company's announcement. The amended rules also provide that neither a company nor a shareholder who established, maintained or operated the electronic shareholder forum would be liable under the federal securities laws for any statement or information provided by another person to the forum.

### **IV. DIRECTOR AND OFFICER COMPENSATION AND RELATED PARTY DISCLOSURES**

In response to investor concerns regarding the quality and transparency of executive compensation disclosure, the SEC adopted new rules in 2006 which comprehensively amended the disclosure of executive and director compensation required in public company proxy statements, annual reports and registration statements. The amended rules became effective for the 2007 proxy season and substantially revised and expanded existing executive and director compensation disclosure rules. This was accomplished by both enhanced narrative disclosure relating to companies' compensation policies and practices in a new Compensation Discussion and Analysis (CD&A) section, increased tabular disclosure contained in the Summary Compensation Table and the addition of new tabular presentations addressing equity related holdings, post-employment compensation and director compensation. See "The Proxy Statement—Executive Compensation Disclosure" for additional information.

In October 2007, the staff of the SEC's Division of Corporation Finance (the Staff) published a report summarizing its observations from its initial review of the executive compensation disclosures in proxy statements filed in 2007 by 350 public companies. In connection with the publication of the Staff's report, John White, the Director of the Division of Corporation Finance, gave a speech amplifying on the report, in which he stated his overall assessment that "the positives are substantial" and that "investors have been provided with the most comprehensive disclosure ever regarding how much public companies pay their executives and directors." However, Mr. White also stated that there was a need for improvement in "some very important areas" and that the greatest shortcoming of the disclosures was in their failure to provide "meaningful analysis."

Two main themes emerged from the Staff's report. First, the Staff continues to believe that the CD&A section needs to be clear, concise and understandable with a focused analysis on how and why compensation committees make specific compensation decisions. Second, the manner of presentation is key. The compensation disclosure must be in plain English and techniques such as executive summaries, overviews and layered disclosure should be used in tandem with charts and graphs to present executive compensation information in a way that helps readers better understand the company's plans, policies and practices.

*Compensation Discussion and Analysis.* The overarching message from the Staff's report and Mr. White's speech is that more "analysis" is needed in the CD&A. Companies have been asked to focus their CD&As on how they analyzed compensation information and why their analysis resulted in particular forms and amounts of compensation. The key points of such an analysis and disclosure, as discussed by Mr. White in his speech, include, as appropriate: (1) the key analytic tools used by the compensation committee; (2) the findings that emerged from the analysis; and (3) the resulting actions taken impacting executive compensation in the prior year.

*Manner of Presentation.* Companies have been asked to make material information more prominent and de-emphasize less important information. For example, companies have been asked to emphasize how and why they established certain compensation levels and to shorten discussions of compensation program mechanics. The report also stated that additional charts, tables and graphs, not specifically required by the revised rules, were helpful and that careful drafting with plain English principles can result in shorter, more concise and effective disclosures. Where companies use boilerplate disclosure, they have been asked to provide a clear and concise discussion of their own facts and circumstances, and where companies repeat information from the compensation tables in the CD&A, they have been asked to replace the repetitive disclosure with analysis.

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*Practical Suggestion.* Mr. White ended his speech by making the following practical suggestion for preparing CD&As for the upcoming proxy season: before drafting the CD&A, each key participant in a company's compensation decision-making process should provide, in a one-page bullet point format, what he or she views as the key "hows" and "whys" of compensation decisions, including, as appropriate, discussions of the three key points of analysis discussed above.

### **V. BROKER DISCRETIONARY VOTING**

NYSE Rule 452 currently permits brokers to vote shares held by them on behalf of "street name" holders in routine matters, including uncontested director elections. The NYSE has proposed to revise Rule 452 and the corresponding NYSE Listed Company Manual Section 402.08 to provide that an election of directors, even if uncontested, would no longer be considered a routine matter. This change could have a significant impact, particularly for those companies that have implemented majority voting systems, because brokers historically have voted large blocks of shares in favor of the board's recommended director slate. Also, this rule change could result in increased costs to companies resulting from the need to solicit shareholders who previously did not vote. In September 2007, the NYSE announced that the rule will not be revised for the 2008 proxy season, notwithstanding the NYSE's previous intent that the revision of Rule 452 be effective by January 2008.

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### **THE LEGAL REQUIREMENT THAT AN ANNUAL MEETING BE HELD**

The legal requirement that an annual meeting of shareholders be held and the rules and regulations governing preparation of proxy solicitation materials are found generally in the law of the company's state of incorporation, in Section 14(a) of the Securities Exchange Act of 1934, as amended (Exchange Act), in the rules and regulations promulgated by the SEC under the Exchange Act, in the rules and regulations promulgated by the stock exchange or stock market on which the company's stock is listed and in the company's charter or formation documents.

#### **I. STATE CORPORATE LAWS**

The requirement that a meeting of shareholders be held each year is initially a matter of the corporate law of the state in which the company is incorporated. Every state requires that a meeting of shareholders be held annually to elect directors and to transact other appropriate business, including, in many cases, obtaining the approval of the shareholders for fundamental corporate changes such as mergers, dissolutions or amendments of the company's articles or certificate of incorporation. Examples of state corporate statutes requiring annual meetings of shareholders include Section 602 of the New York Business Corporation Law and Section 600 of the California Corporations Code (CCC). In addition, Section 211 of the Delaware General Corporation Law (DGCL) requires an annual meeting be held to elect directors if they are not elected by written consent.

State law also governs many of the procedural aspects of the annual meeting of shareholders, including, among others, location, notice and record date requirements, quorum requirements, number of votes required for approval of matters about which state governments are concerned, the ability of shareholders to vote by proxy, the right of shareholders to review the company's shareholder list, the duties and powers of inspectors of election and the procedures for adjourning the meeting.

Although annual shareholders' meetings are usually held in person, most state statutes allow actions required or permitted to be taken at an annual meeting, including the election of directors, to be taken without a meeting upon the written consent of the shareholders. These statutory provisions typically provide that action may be taken without a meeting only if a consent in writing, setting forth the action to be taken, is signed by the holders of outstanding shares having at least the minimum number of votes required to take such action at the meeting. If a matter is approved by less than unanimous consent of shareholders without a meeting, these statutes typically also require that notice of the action be provided to the shareholders who did not consent to the matter. If a public company wishes to take action by written consent (and its charter or bylaws do not prohibit such action), it must provide its shareholders with an information statement containing much of the same information included in the proxy statement described below.

If an annual meeting of shareholders is not held, state statutes generally provide that the directors must call a special meeting for the purpose of electing directors. A company's failure to hold an annual meeting also may trigger the rights of other parties. In Delaware, pursuant to Section 211 of the DGCL, the Court of Chancery, upon the application of any shareholder or director, may order a meeting if no annual meeting for the election of directors has been held for 13 months after the last annual meeting or for a period of 30 days after the date designated for the annual meeting. Other states provide that a specified percentage of the shares entitled to vote in the election of directors may demand the calling of a meeting for the election of directors.

#### **II. FEDERAL SECURITIES LAWS**

Federal regulation of the proxy solicitation process focuses on the proxy solicitation materials rather than the annual meeting itself. In Section 14 of the Exchange Act, Congress conferred on the SEC broad authority to enact appropriate rules and regulations to govern the proxy solicitation process. The SEC has used this authority to enact a comprehensive set of rules and regulations—also known as the “proxy rules”—intended to increase the availability of accurate information to assist

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shareholders in making informed decisions on whether or not to approve, reject or abstain from voting on matters presented at the annual meeting. The federal government has extended its regulation of proxy solicitations through the enactment of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).

The proxy rules establish the legal framework for the solicitation of proxies under the federal securities laws by regulating the form and substance of the proxy statement, the form of proxy and the annual report that are distributed to shareholders in connection with annual meetings of publicly held companies. They also impose filing requirements on companies or others engaged in proxy solicitations and regulate the distribution of proxy materials to the company's shareholders.

### III. STOCK EXCHANGE RULES

Companies with securities listed on the New York Stock Exchange (NYSE), The Nasdaq Stock Market (Nasdaq) or the American Stock Exchange (AMEX) must also comply with the applicable listing requirements of the relevant exchange. Each of these entities has requirements that listed companies hold annual meetings—found in Section 302 of the NYSE Listed Company Manual, Section 4350(e) of the NASD Manual and Section 705 of the AMEX Company Guide—as well as requirements relating to notice of the record date for the meeting, the filing and distribution of the proxy material and the reporting to the entity of actions taken at the meeting.

The national stock exchanges also regulate the types of matters that are required to be submitted to shareholders for approval and the communications between beneficial owners and street name owners, including the authority and procedures for some street name owners to vote proxies on behalf of beneficial owners. For additional information, readers are encouraged to review the relevant sections of the manual or guide of the exchange on which their stock is traded.

### IV. CORPORATE CHARTER AND BYLAWS

Most companies also have charter and bylaw provisions that address a host of matters related to the annual meeting of shareholders. The more typical of these provisions include requirements as to the appropriate location, date and time of the annual meeting, the manner for calling the annual meeting, the proper notice required to be given to shareholders and the procedures for establishing a record date for the annual meeting.

Some less typical charter and bylaw provisions that may impact the annual meeting include supermajority voting requirements for some matters submitted to the shareholders, which may make it more difficult to obtain approval of the matter, and so-called “advance notice” provisions, which require director nominations and shareholder proposal submissions to be received by the company for consideration at the annual meeting prior to a specified date. These provisions allow the company to plan and conduct a more orderly annual meeting with fewer surprises.

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# FEDERAL PROXY RULES AND THE PROXY STATEMENT

## I. APPLICATION OF THE PROXY RULES

### A. BACKGROUND

The right of shareholders to appoint an agent to vote on their behalf at an annual meeting developed within the United States in the early 1800s. The right to proxy representation has since become an essential element in the progress of corporate democracy that has allowed for the tremendous growth in the size and number of publicly held companies. This right is governed by state corporate law and the company's charter documents, nearly all of which now permit proxy voting.

By authorizing another person to act as an agent of the shareholder to vote on the proposals submitted at the annual meeting, proxy representation allows shareholders to participate in the corporate decision-making process even if they are unable to attend the annual meeting in person. Due to the broad geographic shareholder base of most public companies, which makes it difficult for shareholders to attend and participate in the annual meeting in person, in recent years the proxy solicitation process, rather than the annual meeting, has become the primary means by which corporate governance by shareholders is conducted and fundamental shareholder actions by the company are considered and approved. This process allows the company's management to seek approval of matters that require shareholder approval and compels them to make a yearly accounting of their operation of the company's business to the company's owners.

State corporate law and provisions found in corporate charter documents are generally silent on disclosure requirements for proxies and proxy solicitation materials, and until the 1930s, the federal government did not involve itself in the proxy solicitation process. The federal government first became involved in the proxy solicitation process with the adoption of the Exchange Act in 1934. In the Exchange Act, Congress authorized and required the SEC to, among other things, design appropriate rules and regulations regarding the solicitation of proxies "in the public interest and for the protection of investors."

In response to the broad rulemaking authority provided in the Exchange Act, the SEC promulgated Regulation 14A, "Solicitation of Proxies," and Schedule 14A, "Information Required in Proxy Statement"—the proxy rules. Readers should be aware that a review of Regulation 14A and Schedule 14A alone will not provide all of the information required to prepare proxy solicitation materials in compliance with the federal securities laws. Like other rules and regulations of the SEC, the proxy rules are part of the SEC's integrated disclosure system and reference various items found in other SEC regulations, including Regulation S-K. Since the adoption of the Exchange Act and the initial proxy rules, the SEC has played an active role in the proxy solicitation process by reviewing solicitation materials and adopting new rules or amending the current rules. The federal securities laws also give the SEC broad enforcement tools, including monetary penalties for noncompliance and cease-and-desist orders.

### B. SOLICITATION

The proxy rules do not apply to all proxy solicitations. The rules extend only to solicitations to holders of securities registered under Section 12 of the Exchange Act, regardless of whether such securities are actively traded at the time of the solicitation.

Entities whose securities are exempt from registration under Section 12 of the Exchange Act are generally also exempt from requirements of the proxy rules. Such entities include any of the following entities that do not have equity or debt securities traded on any stock exchange or market:

- savings and loan associations (and similar institutions subject to state or federal supervision);
- specified foreign corporations;
- agricultural and other similar cooperatives;
- insurance companies;

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- banks; and
- non-profit corporations.

In determining what communications are governed by the proxy rules, it is first important to determine what is a “proxy” and what is a “solicitation” under federal securities law. The proxy rules contain a broad definition of proxy that includes any assignment of the power to vote or express consent or dissent with respect to any securities on behalf of the record owner of such securities. The proxy rules also define the term “solicitation” broadly in Rule 14a-1 of Regulation 14A to include any request for a proxy and any request to execute or not execute, or to revoke, a proxy. Thus, any communication requesting that shareholders execute, withhold or revoke a proxy will be treated as a solicitation within the meaning of the proxy rules. The definition of solicitation also includes any communication furnished to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

### **1. Actions not within the definition of solicitation**

The proxy rules also exclude some activities from the definition of solicitation, such as furnishing a form of proxy to a shareholder upon an unsolicited request, performing actions required by the proxy rules relating to shareholder lists, mailing proxy materials and performing ministerial acts on behalf of a soliciting person. The SEC has also removed from the coverage of the proxy rules a public announcement by a shareholder of how the shareholder intends to vote on a particular matter and the reasons for such vote; provided that the shareholder is not otherwise soliciting proxies; and provided further that the communication is made publicly, or is directed to persons to whom the shareholder owes a fiduciary duty in connection with voting, or is made in response to an unsolicited request for information. *See* Rule 14a-1(l) of Regulation 14A.

### **2. Solicitations exempt from one or more of the proxy rules**

Although the definitions of proxy and solicitation have been broadly interpreted, the SEC has adopted amendments to the proxy rules to create safe-harbor exemptions for some solicitations and to exclude others from the definition of solicitation altogether. Private solicitations meeting the following requirements have been exempted from the application of the proxy rules:

- solicitations by persons with respect to securities carried in the person’s name, in the name of the person’s nominee (except as a voting trustee) or held in the person’s custody;
- solicitations by persons in respect of securities of which the person is the beneficial owner;
- some solicitations in connection with offers and sales of securities registered under the Securities Act of 1933, as amended (Securities Act);
- solicitations in connection with actions taken under specified laws of the United States (such as the Public Utility Holding Company Act, the Bankruptcy Reform Act and others); and
- solicitations via newspaper advertisement that provide to shareholders nothing more than information regarding how to obtain the proxy statement, form of proxy and other proxy materials.

To qualify for these exemptions, the person making the subject solicitation must comply with additional conditions and requirements found in the proxy rules.

In an effort to increase participation in the proxy solicitation process by interested third parties, specifically institutional investors who the federal government determined to be well equipped to provide some protection to all security holders, the SEC has excluded the following types of solicitations from all of the proxy rules other than the anti-fraud provisions found in Rule 14a-9 of Regulation 14A and the shareholder list requirements of Rule 14a-7 of Regulation 14A:

- solicitations by persons not seeking the power to act as proxy for the shareholder at any time during the solicitation;
- the rendering of voting advice by financial advisors to persons with whom the financial advisor has a business relationship;

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- solicitations made (other than by the company) to no more than ten persons; and
- solicitations in connection with roll-up transactions in which the soliciting party is engaging in preliminary communications with other security holders to determine whether or not to solicit proxies in opposition to such transaction.

These exemptions also require compliance with numerous conditions. Persons wishing to take advantage of any of the exemptions discussed above should thoroughly review the proxy rules for more information on use of these exemptions, particularly Rule 14a-2 of Regulation 14A, “Solicitations to Which §240.14a-3 to §240.14a-15 Apply.”

In addition, in November 2007, the SEC amended the proxy rules to facilitate the use of electronic shareholder forums, thereby excluding certain communications in electronic forums from the definition of solicitation. The amendments permit both companies and shareholders to establish and maintain electronic forums under the federal securities laws, provided persons using the forum do not seek, directly or indirectly, the power to act as a proxy for a shareholder and do not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of proxy or revocation, abstention, consent or authorization regarding voting, and further provided that the forum is otherwise conducted in compliance with applicable state law and the company’s charter and bylaws. Additionally, to be exempt, any solicitation utilizing an electronic forum must occur more than 60 days prior to the date announced by the company for its meeting, or if the company announces the meeting less than 60 days before the meeting, then not later than two days after the company’s announcement.

### 3. Solicitation before furnishing a proxy statement

The proxy rules generally require the delivery of a proxy statement prepared in compliance with the proxy rules at or before any solicitation is made for a shareholder’s proxy. The proxy rules also include a safe harbor exemption from the proxy delivery requirements that allows more communication among management and shareholders regarding matters submitted for consideration at an annual meeting so long as no proxy is solicited until a proxy statement is delivered. Under this safe harbor, written solicitations may be made prior to furnishing a proxy statement if the communication:

- is filed with the SEC on the date it is first used;
- identifies the soliciting parties and provides other specified information about the soliciting parties; and
- contains a prominent legend which, among other things, advises shareholders to read the proxy statement when it becomes available.

To take advantage of this safe harbor, additional requirements must be met. Among others, the soliciting party may not deliver a proxy before a definitive proxy statement complying with the proxy rules is also delivered to the shareholders. *See* Rule 14a-12 of Regulation 14A.

### 4. Prohibited solicitations

While establishing requirements relating to permitted proxy solicitation activities, the proxy rules entirely prohibit the solicitation of any undated or post-dated proxies or any proxies that provide for a deemed effective date that is subsequent to the date on which the proxy is signed by the shareholder. *See* Rule 14a-10 of Regulation 14A.

## II. THE PROXY STATEMENT

Rule 14a-3 of Regulation 14A requires that each shareholder receive a proxy statement in connection with any solicitation of the shareholder’s proxy. The proxy rules contain detailed requirements concerning the contents and form of a proxy statement. Although the proxy rules contain line item requirements as to information that must be included, only responses to the line items concerning matters to be acted upon at the annual meeting must be included.

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### A. NOTICE OF THE MEETING

State corporate law establishes the requirement that shareholders receive adequate notice of the annual meeting and that a record date be fixed for the meeting. Under state corporate law, written notice of the meeting must generally be given to all shareholders not more than nor fewer than a fixed number of days before the date of the meeting. For example, Delaware and California corporate law require notice of an annual meeting be provided not more than 60 nor fewer than ten days prior to the annual meeting (DGCL Section 222 and CCC Section 601). The same or a similar time period applies to the fixing of the record date by the company's board of directors. Many state corporate laws also allow a company to close the transfer books of the company some number of days prior to the annual meeting in lieu of setting a record date. Closing the transfer books interferes with trading markets, so most companies choose to establish a record date instead. The corporate law of some states now allows companies to deliver a single notice to numerous shareholders that reside at the same address if specified conditions are met. *See* "Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders—Householding."

In addition to the state corporate law issues discussed above, the proxy rules also bear on the notice requirement. Several factors should be considered in determining the amount of advance notice given to shareholders, including:

- if the company is adopting the traditional full set delivery method under the new e-proxy rules, the dates required by stock exchange organizations for mailing the annual report (because most companies mail the proxy materials and the annual report together to reduce expenses, the date for mailing the annual report often influences the notice date for the annual meeting);
- if the company is adopting the notice and access option under the new e-proxy rules, the requirement that the notice of Internet availability of proxy materials be sent at least 40 days prior to the annual meeting and the amount of time needed to post and properly format all materials on the company's web site;
- the types of matters to be considered at the annual meeting (the consideration of controversial matters may require additional time to solicit proxies); and
- the requirement that companies ensure that soliciting materials be provided to beneficial owners: (1) broker-dealers and banks are obligated to forward proxy materials to beneficial owners within five business days of receipt if the company meets requirements specified in the proxy rules and provides reasonable assurance of reimbursement of expenses; and (2) companies must send broker-dealers and banks the notice of Internet availability of proxy materials required under the new e-proxy rules in sufficient time for those intermediaries to send their own notice to beneficial owners at least 40 days prior to the annual meeting (intermediaries are likely to require at least five days for the process involved in compiling and distributing their own notice of Internet availability of proxy materials).

For more information on the foregoing, *see* "Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders."

The bylaws of the company may also contain provisions governing the delivery of notice and establishment of a record date for an annual meeting, some of which may be more restrictive than the requirements of state law. Stock exchange or stock market listing rules also need to be consulted as they often require notice to the exchange or market of the record date and annual meeting date. These provisions should be reviewed in preparing the notice section of the proxy statement.

It is common to begin the proxy statement with the official notice of the annual meeting. The notice of the annual meeting and the section immediately following the notice usually provide the following information required to be included in the proxy statement:

- the date, time and place of the annual meeting (or if action is to be taken by written consent, the date by which consents are to be submitted) (Item 1 of Schedule 14A);
- the mailing address of the principal executive office of the company (Item 1 of Schedule 14A);
- the date on which the proxy statement and form of proxy are first sent or given to shareholders (Item 1 of Schedule 14A);



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- whether the proxy may be revoked and the procedure for revoking it (Item 2 of Schedule 14A);
- whether the shareholder has dissenter or appraisal rights and, if so, the procedures for exercising such rights (Item 3 of Schedule 14A);
- information relating to the person making the solicitation (Item 4 of Schedule 14A);
- the method by which the solicitation will be made, the anticipated costs of the solicitation and how such costs will be borne (Item 4 of Schedule 14A);
- the number of shares outstanding of each class of voting securities entitled to be voted at the annual meeting, as well as the number of votes to which each class is entitled (Item 6 of Schedule 14A);
- the record date for the meeting (Item 6 of Schedule 14A); and
- whether cumulative voting rights are involved and, if so, information describing the cumulative voting rights, the conditions precedent to their exercise, and whether discretionary authority to cumulate votes is solicited (Item 6 of Schedule 14A).

As an alternative, some companies prepare a separate notice that accompanies the proxy statement in the mailing to shareholders.

### B. VOTING INFORMATION

The proxy rules also require a description of the voting procedures relating to each matter submitted to a vote of shareholders. Specifically, the proxy statement must state the vote required for approval or election (other than for the approval of auditors) of each proposal and the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state corporate law and the company's charter and bylaws. A "broker non-vote" occurs when a broker is unable to vote on a particular matter without instructions from the beneficial holder and such instructions are not received. Typically, abstentions and broker non-votes are not considered "votes cast" on the proposal, and therefore, they do not affect proposals that require the affirmative vote of a majority of the votes cast on the proposal, whereas they have the effect of votes "against" proposals requiring the affirmative vote of a majority of outstanding shares. Abstentions and broker non-votes are generally considered present at the meeting for purposes of determining whether a quorum is present. *See* Item 21 of Schedule 14A.

### C. INFORMATION ABOUT DIRECTORS, DIRECTOR NOMINEES AND EXECUTIVE OFFICERS

If action is to be taken at an annual meeting with respect to the election of directors, the proxy rules require a variety of information about the company's directors, executive officers and persons nominated to become a director or executive officer to be provided in tabular form to the extent practicable. Item 7 of Schedule 14A cross references Item 401 of Regulation S-K, which requires a description of:

- each person's name, age and position(s) and/or office(s) held with the company;
- the term of office and the period the office has been held;
- any arrangement between the director, executive officer or person nominated to become a director or executive officer and any other person(s) pursuant to which the director, executive officer or person nominated to become such was or is to be selected to his or her position or office;
- any family relationship between a director, executive officer or person nominated to become such;
- a brief five-year history of the business background of each director, executive officer or person nominated to become such, including any other public company directorships held by the person; and
- a description of any legal proceedings that would be material to an evaluation of the ability or integrity of any director, director nominee or executive officer and that occurred within the five years prior to the time of the proxy solicitation.

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If the company provides this information regarding executive officers in its Annual Report on Form 10-K under the caption “Executive Officers of the Registrant,” the information need not also be provided in the proxy statement. Alternatively, such information may be incorporated by reference into the company’s Annual Report on Form 10-K if it is contained in a definitive proxy statement that involves the election of directors and is filed with the SEC within 120 days after the end of the fiscal year covered by the Form 10-K. *See* Instruction G to Form 10-K.

The proxy rules also require that the proxy statement describe any transactions or relationships between the company and any director, director nominee, executive officer or principal shareholder or between the company and entities affiliated with these persons.

### D. BOARD OF DIRECTORS AND COMMITTEE INFORMATION

Proxy statements also must include information regarding the function of the board of directors of the company. The proxy statement must state the total number of board meetings (including regularly scheduled meetings and special meetings) held during the preceding fiscal year, whether or not any director attended fewer than 75 percent of the board meetings and meetings of committees of the board on which the director served and the name of any director failing to attend 75 percent of such meetings. The proxy statement also must indicate whether the company has standing audit, nominating and compensation committees, or committees performing similar functions. If such committees exist, the company must provide a description of the functions performed by such committee, the identity of each committee member and the number of committee meetings held during the preceding fiscal year. In the case of the nominating or similar committee, the proxy statement must state whether the committee will consider nominees recommended by security holders, and, if so, describe the procedure for submitting recommendations. *See* Item 7 of Schedule 14A. One item to keep in mind is the related disclosures in quarterly and annual reports if there has been a material change to the company’s procedures for security holder director nominations. Such a change will need to be reported in the company’s Quarterly Report on Form 10-Q or Annual Report on Form 10-K. The SEC has stated that the adoption of procedures by which security holders may recommend director nominees, where the company previously disclosed that it did not have in place such procedures, will constitute a material change.

The proxy rules also provide that (1) if any director has resigned or declined to stand for reelection since the date of the last annual meeting because of a disagreement with management over the company’s operations, policies or practices and (2) if the former director requests disclosure of the matter, then the company must include within the proxy statement a summary of the director’s description of the disagreement and must state the date of the resignation or declination to stand for reelection. If the company believes that the director’s description is inaccurate, the proxy rules allow the company to include a brief statement presenting its views of the disagreement. *See* Item 7 of Schedule 14A.

The composition and duties of audit committees and nominating committees were modified by the adoption of Sarbanes-Oxley and the amended corporate governance standards of the NYSE and Nasdaq. Although Sarbanes-Oxley does not directly modify proxy disclosure requirements, several of its provisions required new or modified disclosures under the proxy rules. This impact is discussed briefly below under “Federal Proxy Rules and the Proxy Statement—The Proxy Statement—Audit Committee Disclosure; Nominating Committee Disclosure.” For a full understanding of the impact of Sarbanes-Oxley on corporate governance and proxy disclosure obligations, readers should thoroughly review the provisions of Sarbanes-Oxley and consult with legal counsel regarding its impact on their particular company.

### E. EXECUTIVE COMPENSATION DISCLOSURE

In response to investor concerns regarding the quality and transparency of executive compensation disclosure, the SEC adopted new rules in 2006 regarding disclosure of executive and director compen-

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sation required in public company proxy statements, annual reports and registration statements. These rules, referred to herein as the amended rules, became effective for the 2007 proxy season and comprehensively revised and expanded existing executive and director compensation disclosure rules. This was accomplished by both enhanced narrative disclosure relating to companies' compensation policies and practices in a new Compensation Discussion and Analysis (CD&A) section, increased tabular disclosure contained in the Summary Compensation Table and the addition of new tabular presentations addressing equity related holdings, post-employment compensation and director compensation.

The proxy rules require extensive disclosures about the compensation paid by public companies to certain of their executive officers. These so-called "named executive officers" are defined in the proxy rules to include: (1) any person who served as the principal executive officer (PEO) of a company at any time during the prior fiscal year; (2) any person who served as the principal financial officer (PFO) of a company at any time during the prior fiscal year; and (3) the company's three most highly compensated executive officers, other than the PEO and PFO, serving as of the end of the preceding fiscal year. The determination of who qualifies as a named executive officer is based on total compensation (rather than just base salary and bonus as was previously the case), except that pension value and non-qualified deferred compensation earnings are excluded when making this determination.

Under the rules as originally proposed, companies would have been required to disclose the compensation of any employee (up to a maximum of three) who, during the prior fiscal year, was more highly compensated than any named executive officer. This proposal has been referred to as the "Katie Couric" rule because it was expected to apply to entertainers, athletes and other highly-compensated non-executives. The final rules did not adopt the Katie Couric rule. Instead, the SEC has proposed requiring such disclosure only for employees of large accelerated filers who are more highly compensated than any named executive officer, and who have responsibility for significant policy decisions in the company, a significant subsidiary or a principal business unit, division or function. The SEC is currently soliciting comments regarding this proposal and may still act on the measure.

The information relating to the named executive officers' compensation must be presented, to the extent applicable, in narrative form and tabular form as described below. However, the proxy rules allow disclosure not to be made in response to the requirements of Item 402 of Regulation S-K if the disclosure relates to a transaction between the company and a third party with the primary purpose of furnishing compensation to a named executive officer and if the disclosure is provided elsewhere in the proxy statement in accordance with Item 404 of Regulation S-K. *See* "Federal Rules and the Proxy Statement—the Proxy Statement—Certain Relationships and Related Transactions." The information presented below is a summary of the general provisions of the proxy rules related to compensation disclosure. Because these terms and provisions are complex and often difficult to understand, readers are urged to review the proxy rules (specifically Item 8 of Schedule 14A and Item 402 of Regulation S-K) for more information relating to executive compensation disclosure in proxy statements.

### 1. Compensation discussion and analysis

The CD&A provides a narrative general overview and analysis of a company's compensation policies, programs and practices for named executive officers during the last fiscal year and, if appropriate, any actions taken since the end of such fiscal year and prior to the filing of the proxy statement. The CD&A should identify the principles underlying the company's executive compensation policies and decisions. It must be comprehensive in scope and should provide perspective on the compensation policies underlying the numerical disclosure and other information contained in the tabular disclosure, and it should not simply repeat such disclosure. This section must contain disclosure regarding the material elements of a company's executive compensation program and how compensation is determined and paid. Such disclosure must specifically answer the following six questions:

1. What are the objectives of the company's compensation program?
2. What is each compensation program designed to reward?
3. What is each element of compensation?

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4. Why does the company choose to pay each element?
5. How does the company determine the amount (and, where applicable, the formula) paid for each element?
6. How does each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?

To aid in formulating responsive disclosure, the SEC has identified 15 topics that may be appropriate for inclusion in this section, depending on the issuer's facts and circumstances. *See* Item 402(b) of Regulation S-K. Discussion of each topic is not required, however, discussion should be included if material to the company's executive compensation policies in light of the company's particular facts and circumstances.

Applicable disclosure must also include specific statements outlining corporate policies or practices in effect regarding the timing of stock option grants and the release of material information, the reasons the company chose a particular grant date for option awards and the methodology for selecting exercise prices and other terms of options, including, if applicable, the method for determining the price of the option award if not based on the stock's closing trading price on the applicable grant date. With respect to performance-based compensation, the CD&A must discuss the performance factors considered in setting executives' pay. In addition, if the compensation decisions or policies applicable for any named executive officer differ from those applicable to other named executive officers, such differences, and the reasons for such differences, must be discussed.

Notably, the CD&A will be deemed "filed" with the SEC and therefore subject to the general disclosure and liability provisions of the Securities Act and the Exchange Act. Because the CD&A will be incorporated by reference or in some cases directly included in the Form 10-K, the CD&A will be subject to the Chief Executive Officer and Chief Financial Officer certifications required by Sarbanes-Oxley. The SEC has indicated that the CD&A is a company disclosure and, in making such certifications, a company's Chief Executive Officer and Chief Financial Officer are not being called upon to certify any deliberations of the company's compensation committee and are permitted to rely on the "furnished" compensation committee report discussed below.

### **2. Summary compensation table**

The "Summary Compensation Table" is the principal table prescribed for use in presenting compensation information for the named executive officers. Under the amended rules, the Summary Compensation Table, which remains the centerpiece of a company's tabular disclosure of executive compensation for the prior three fiscal years and provides a comprehensive overview of executive compensation, must include, in addition to the name and other descriptive information, a description of the salary, bonus, stock awards, option awards, non-equity incentive plan compensation, change in pension value and non-qualified deferred compensation earnings, all other compensation and total compensation paid to or earned by the named executive officers during the three preceding fiscal years. *See* Item 402(c) of Regulation S-K. In addition, the amended rules require that the Summary Compensation Table be supplemented by a number of additional tables which are discussed in further detail below.

All compensation included in the Summary Compensation Table must be included in the fiscal year in which it was earned (rather than actually paid), even if subject to forfeiture conditions. In addition, all columns in the Summary Compensation Table are to be denominated in dollar values (rather than share or unit numbers). The adopting release accompanying the amended rules confirmed that there will be a transition period to the amended rules with the compensation information required to be included in the Summary Compensation Table expanding from one to two to three years' information over time. For example, for companies with calendar fiscal years, the Summary Compensation Table in the 2008 proxy will include information for 2006 and 2007, and in 2009, the Summary Compensation Table will include information for the full three prior years (2006, 2007 and 2008). Accordingly, there will be no need for companies to restate compensation disclosure for fiscal years covered by the previous rules.

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*Salary and Bonus.* Under the proxy rules, all earned salary and bonus (cash and non-cash, including salary and bonus that is deferred) is included in the fiscal year in which it is earned in the appropriate column. If earned but deferred salary or bonus compensation is not calculable at the time of disclosure, the company must include footnote disclosure and is obligated to update its disclosure with a Form 8-K when such compensation becomes calculable (either through a payment, a decision to make a payment or another occurrence of which the amount becomes calculable in whole or in part). Furthermore, bonuses received by a named executive officer under a company's performance-based bonus plan will generally be included in the Non-Equity Incentive Plan Compensation Column, rather than the Bonus column.

*Stock Awards.* The grant date fair market value for all stock awards (e.g., restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or other similar awards which do not have option-like features) is required to be included in the Stock Awards column. The amended rules require that the grant date fair value of such awards be computed in accordance with Statement of Financial Accounting Standards No. 123 (revised 2004), *Share Based Payment* (SFAS 123R). In addition, footnote disclosure is required of the assumptions used in the fair value determination.

*Option Awards.* The amended rules require that the grant date fair value of all stock option awards (including stock appreciation rights), as determined in accordance with SFAS 123R, be disclosed in the Option Awards column. Footnote disclosure is also required of the assumptions used in the fair value determination.

*Non-Equity Incentive Plan Compensation.* The Non-Equity Incentive Plan Compensation column requires the disclosure of all awards earned during a fiscal year pursuant to non-equity incentive plans. It includes all incentive awards that are not included in the Stock Awards or Option Awards columns. Most significantly, this column will include amounts earned under performance-based cash bonus plans (whether single or multi-year) that previously would have appeared in the Bonus column. If the performance measure for an award is satisfied in a fiscal year, the award must be disclosed even if payment of the award is deferred. Also, earnings on the outstanding awards must be disclosed. Footnote disclosure must identify and quantify awards and payment terms.

*Change in Pension Value and Non-Qualified Deferred Compensation Earnings.* Under the amended rules, the aggregate increase in the actuarial value of any defined benefit pension plan must be disclosed. This disclosure applies to both tax-qualified defined benefit plans and non-tax-qualified supplemental executive retirement plans. In addition, for plans that are not defined benefit plans, above-market earnings on non-qualified deferred compensation must be disclosed (and disclosure may be limited to the above-market or preferential portion). Footnote disclosure must separately identify and quantify these amounts.

*All Other Compensation.* All other compensation not disclosed in any other column of the Summary Compensation Table is required to be disclosed in the All Other Compensation column. Included in this column is the value of any severance payments, change in control payments, contributions by the company to defined benefit contribution plans, company-provided insurance premiums, company-provided tax gross-ups and all perquisites and other personal benefits (unless all such perquisites and other personal benefits have an aggregate value of less than \$10,000). Perquisites and other personal benefits must be described in the footnotes in a level of detail sufficient that a shareholder may identify the particular nature of the benefits received. The SEC has provided guidance in evaluating when a particular item is a perquisite or personal benefit. In particular, an item is *not* a perquisite or personal benefit if it is integrally and directly related to the performance of the executive's duties. For example, the provision to a named executive officer of a "Blackberry" or laptop computer may be integrally and directly related to the performance of the executive's duties and thus not a perquisite. Otherwise, an item is a perquisite or personal benefit if it confers a direct or indirect benefit that has a personal aspect, regardless of whether it is provided for some business reason or for the convenience of the company, unless it is generally available on a non-discriminatory basis to all employees.

*Total Compensation.* The Total Compensation column, which under the amended rules appears on the far right hand side of the Summary Compensation Table, sets forth the sum total of all of the pre-

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ceding columns of the table. As the name suggests, it is intended to provide a single aggregate dollar value for compensation of each named executive officer with respect to a fiscal year.

### 3. Companion compensation tables

The amended rules require proxy statements to also disclose in several additional tables other compensation paid to or earned by the named executive officers.

*Grants of Plan-Based Awards Table.* The rules have consolidated all disclosure for plan-based awards (including stock awards, option awards and non-equity incentive compensation awards) into a single table called the Grants of Plan-Based Awards Table. As discussed above, non-equity incentive compensation awards will include performance-based awards which, under the current rules, were included in the Bonus column of the Summary Compensation Table. The Grants of Plan-Based Awards Table includes each award's (1) grant date, (2) estimated future payouts, (3) the number of shares of stock or units underlying a stock or option award and (4) the exercise or base price of an option award. Estimated future payouts must be disclosed at threshold, target and maximum amounts (shown in dollars for non-equity incentive plan awards and shares for equity incentive plan awards). *See* Item 402(d) of Regulation S-K.

In conjunction with the Grants of Plan-Based Awards Table, additional tabular disclosure is required with respect to options if (1) the exercise or base price is different than the closing market price as of the date of the grant (in which case an adjoining column showing the closing market price as of the date of the grant would be required) or (2) the grant date is different from the date on which the compensation committee or full board of directors took action to grant the option or was deemed to have taken such action (in which case an adjoining column showing such date would be required). Additionally, if the exercise or base price is different than the closing market price as of the date of the grant, narrative disclosure including a description of the methodology for determining such price is required.

*Outstanding Equity Awards at Fiscal Year-End Table.* The Outstanding Equity Awards at Fiscal Year-End Table discloses all equity-based compensation awards outstanding at fiscal year-end, whether or not performance based. It is designed to provide a method of estimating potential amounts realizable by each named executive officer with respect to outstanding equity-based awards. With respect to option awards, the table requires disclosure on an award-to-award basis regarding (1) the number of securities underlying unexercised options (with separate columns for options that are unexercisable), (2) the number of securities underlying unexercised unearned options issued pursuant to an equity incentive plan, (3) the exercise price and (4) the expiration date. With respect to stock awards, this table requires disclosure regarding the number of shares that have not vested and the market value of shares that have not vested (in both cases, distinguishing between those granted pursuant to an equity incentive plan and those which were not). Footnote disclosure must include a description of the vesting dates of awards. *See* Item 402(f) of Regulation S-K.

*Option Exercises and Stock Vested Table.* This table summarizes all amounts realized on the vesting and exercise of any equity-based compensation awards in the latest fiscal year. With respect to both option and stock awards, this table requires disclosure of the number of shares acquired and the value realized upon exercise or vesting. *See* Item 402(g) of Regulation S-K.

*Pension Benefits Table.* The Pension Benefits Table requires disclosure of the actuarial present value of each named executive officer's accumulated benefit under any of the company's defined benefit plans (including tax-qualified and non-qualified defined benefit plans). The present value is calculated as of the measurement date used in the financial statements for the company's last completed fiscal year, taking into account the executive's current compensation, the plan's normal retirement age, and the same actuarial assumptions used for financial reporting purposes under GAAP. However, disclosure is made without regard to the forms of benefits available under the plan. The table also requires disclosure of each named executive officer's years of credited service and payments received during the company's last fiscal year under each plan. A separate row of disclosure is required for each defined benefit plan in which the named executive officer participates. In addition, the table must be accompanied by a narrative description of all material factors necessary to interpret the table. *See* Item 402(h) of Regulation S-K.

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*Non-Qualified Deferred Compensation Table.* This table requires disclosure, with respect to each named executive officer during the prior fiscal year, of such named executive officer's and the company's contributions and all earnings, withdrawals and distributions under any non-qualified defined contribution plans (including non-qualified deferred compensation plans). Disclosure of each named executive officer's last fiscal year-end balance under such plans is also required. Narrative disclosure of all material facts necessary to understand the table must also be included. *See* Item 402(i) of Regulation S-K.

*Severance and Change of Control Payments.* The amended rules require companies to provide specific narrative disclosure of the amount of any payment or benefit that a named executive officer may receive upon termination of employment, change in responsibilities, or upon a change of control, including any tax gross-up payments and post-termination health care benefits. Specifically, the amended rules require disclosure of the following regarding such payments and benefits:

- the specific circumstances that would trigger the payment;
- quantitative and narrative disclosure regarding the estimated payments and benefits, even where uncertainties exist as to amounts payable under the particular arrangement;
- disclosure regarding when the payments and benefits are paid (*e.g.*, lump sum or over time);
- how the payments and benefits are determined;
- the material conditions and obligations applicable to the receipt of the payments and benefits (*e.g.*, non-competition restrictions), including any provisions regarding waiver or breach of these provisions; and
- any other material factors regarding the agreement governing such payments.

Companies are not required to disclose payments or benefits that do not discriminate in favor of a company's executive officers and are available generally to all salaried employees. *See* Item 402(j) of Regulation S-K.

#### 4. New developments regarding the CD&A

In October 2007, the staff of the SEC's Division of Corporation Finance (the Staff) published a report summarizing its observations from its initial review of the executive compensation disclosures in proxy statements filed in 2007 by 350 public companies. The report completes the second phase of the Staff's "targeted review project" on the implementation of the amended proxy compensation disclosure rules.

In the first phase of the project, the Staff issued comment letters to these companies concerning the executive compensation disclosures in their 2007 proxy statements. The report, which is available at <http://www.sec.gov/divisions/corpfin/guidance/execcompdisclosure.htm>, discusses the principal areas on which the Staff commented.

In connection with the publication of the Staff's report, John White, the Director of the Division of Corporation Finance, gave a speech amplifying on the report, in which he stated his overall assessment that "the positives are substantial" and that "investors have been provided with the most comprehensive disclosure ever regarding how much public companies pay their executives and directors." However, Mr. White also stated that there was a need for improvement in "some very important areas" and that the greatest shortcoming of the disclosures was in their failure to provide "meaningful analysis."

Two main themes emerged from the Staff's report. First, the Staff continues to believe that the CD&A section needs to be clear, concise and understandable with a focused analysis on how and why compensation committees make specific compensation decisions. Second, the manner of presentation is key. The compensation disclosure needs to be in plain English and techniques such as executive summaries, overviews and layered disclosure should be used in tandem with charts and graphs to present executive compensation information in a way that helps readers better understand the company's plans, policies and practices.

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### **(a) Increased analysis**

The overarching message from the Staff's report and Mr. White's speech is that more "analysis" is needed in the CD&A.

*Analysis.* Companies have been asked to focus their CD&As on how they analyzed compensation information and why their analysis resulted in particular forms and amounts of compensation. The key points of such an analysis and disclosure, as discussed by Mr. White in his speech, include, as appropriate: (1) the key analytic tools used by the compensation committee; (2) the findings that emerged from the analysis; and (3) the resulting actions taken impacting executive compensation in the prior year.

*Performance Targets.* With respect to the disclosure of performance targets, a company first needs to determine if its prior year and/or current year performance targets are material elements of its compensation policies and decisions. If they are not, they do not need to be discussed. But if they are, the company is required to disclose these prior year and/or current year targets unless it is able to demonstrate that disclosure of these targets would result in competitive harm. If the company withholds disclosure of these targets on the basis of competitive harm, it needs to disclose with specificity the difficulty or likelihood of achieving the targets.

*Difference in Compensation Policies and Decisions.* Where policies or decisions for individual named executive officers appear to be materially different based on the disclosure, companies have been asked to discuss these differences and the rationale for such differences.

*Benchmarks.* Where companies state that they use comparative compensation information, they have been asked to provide a more detailed explanation of how they used this information and how the information affected their compensation decisions, and in some circumstances specifically identify the companies which were used in the benchmark analyses.

*Change-in-Control and Termination Arrangements.* Companies have been asked to disclose the basis for the material terms and payment provisions in their change-in-control and termination arrangements.

*Corporate Governance.* Companies have been asked to describe more specifically the role of their principal executive officers in making compensation decisions, as well as the role of, and any material instructions provided to, their compensation consultants.

### **(b) Manner of presentation**

Companies have been asked to make material information more prominent and de-emphasize less important information. For example, companies should emphasize how and why they established certain compensation levels and shorten discussions of compensation program mechanics. The report also stated that additional charts, tables and graphs, not specifically required by the revised rules, were helpful and that careful drafting with plain English principles can result in shorter, more concise and effective disclosures. Where companies use boilerplate disclosure, they have been asked to provide a clear and concise discussion of their own facts and circumstances, and where companies repeat information from the compensation tables in the CD&A, they have been asked to replace the repetitive disclosure with analysis.

### **(c) Practical suggestions**

Mr. White ended his speech by making the following practical suggestion for preparing CD&As for the upcoming proxy season: before drafting the CD&A, each key participant in a company's compensation decision-making process should provide, in a one-page bullet point format, what he or she views as the key "hows" and "whys" of compensation decisions, including, as appropriate, discussions of the three key points of analysis discussed above.



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### F. COMPENSATION COMMITTEE REPORT

Under the amended rules, the proxy statement must continue to include a report by the compensation committee of the board of directors (or, in the absence of such committee, the entire board of directors). However, the compensation committee report has been shortened significantly and must now only contain a statement as to whether the compensation committee has reviewed and discussed the CD&A with management and whether it has recommended that the CD&A be included in the company's annual report and proxy statement.

The proxy rules require the compensation committee report to be included only in proxy statements for meetings at which directors are to be elected. Further, the compensation committee report must be presented over the names of the committee members. *See* Item 407(e) of Regulation S-K. Because directors are ordinarily elected at annual meetings, the compensation committee report is generally included in proxy statements for the annual meeting of shareholders.

The compensation committee report is considered "furnished" and not "filed" with the SEC and therefore will be subject to less stringent liability standards under applicable securities laws than the CD&A.

### G. DIRECTOR COMPENSATION DISCLOSURE

The amended rules substantially revise discussion of directors' compensation and require the inclusion of a Directors Compensation Table with accompanying narrative disclosure. The Directors Compensation Table resembles the Summary Compensation Table for executive officers discussed above, but only presents information with respect to the company's last fiscal year. Columns in the table include the following:

- fees earned and paid in cash;
- stock awards;
- option awards;
- non-equity incentive plan compensation;
- change in pension value and non-qualified deferred compensation earnings;
- all other compensation; and
- total compensation.

The All Other Compensation column includes items similar to those included in the Summary Compensation Table for executive officers. The final rules identify several items that must be included in that column, the most significant of which are:

- value of perquisites and other personal benefits unless the aggregate amount of such compensation is less than \$10,000;
- awards under director legacy or charitable award programs;
- consulting fees;
- tax reimbursements;
- discount stock programs not generally available to employees;
- contributions or allocations to defined contribution or other deferred compensation plans;
- actuarial increases in defined pension plans;
- value of life insurance premiums paid by the company for the director's benefit; and
- payments in connection with the director's resignation, retirement, termination or change in control of the company.

In addition, any material information necessary to understand the amounts disclosed in the table must be described in narrative format following the table. *See* Item 402(k) of Regulation S-K.

### H. BENEFICIAL OWNERSHIP INFORMATION

The proxy statement must also include information relating to the beneficial ownership of securities of the company by the named executive officers, the company's directors and director nominees (naming them), holders of more than five percent of any class of the company's voting securities and

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all directors and executive officers of the company as a group (without naming them). *See* Item 5 of Schedule 14A and Item 403 of Regulation S-K. The required information regarding beneficial ownership of the company's securities includes:

- the title of the class of securities;
- the name and address of the beneficial owner;
- the amount and nature of the beneficial ownership; and
- the percentage of the class of securities so owned.

Under the proxy rules, "beneficial ownership" is determined in accordance with Rule 13d-3 promulgated under the Exchange Act, which defines a beneficial owner as a person with possession of sole or shared voting power or investment power with respect to the securities. "Voting power" is defined to include the power to vote or direct the vote of a security, and "investment power" is defined to include the power to dispose or direct the disposition of a security. A person is also deemed to have beneficial ownership of all securities that the person has the right to acquire within 60 days of the determination date through the exercise or conversion of an option, warrant or other security. Securities that are the subject of a voting trust, proxy, power of attorney or other similar agreement are also deemed to be "beneficially owned" for purposes of proxy statement disclosure.

Although the company collects the required information about directors and executive officers through the use of annual questionnaires sent to them by the company, the information regarding five percent holders may be more difficult to obtain if the five percent holders are not officers or directors. In such an event, the company can obtain this information from statements filed with the SEC by such parties. The proxy rules specifically provide that the company may rely upon information set forth in such statements unless the company knows or has reason to believe that the information is not complete or accurate, or that a statement or amendment should have been filed and was not.

### I. SECTION 16 REPORTS

The federal securities laws contain requirements that each director, executive officer and holder of ten percent or more of any class of a company's equity securities file with the SEC reports disclosing transactions by such persons in the company's securities. A failure to file these reports on a timely basis during the company's last completed fiscal year must be disclosed in the proxy statement under a caption entitled "Section 16(a) Beneficial Ownership Reporting Compliance." In addition, where a company is incorporating by reference certain information disclosed in the proxy that is required in the company's Annual Report on Form 10-K, the company may have to disclose on the front page of its Annual Report on Form 10-K that it will be reporting such delinquency. The disclosure must include the identity of each person failing to make a report, the number of reports filed late, the number of untimely reported transactions and any known failure to file a required report. The proxy rules specifically allow the company to rely upon a review of Forms 3, 4 and 5, and amendments thereto, submitted to it, as well as any written representations from the persons required to make such filings that no Form 5 is required. *See* Item 7 of Schedule 14A and Item 405 of Regulation S-K.

Sarbanes-Oxley, and the rules issued by the SEC thereunder, accelerated the dates by which Section 16 reports must be filed following most transactions in the company's securities by directors, executive officers and ten percent holders to two business days following the transaction and require that all Section 16 reports be filed with the SEC electronically. The accelerated filing requirements became effective in August 2002 and the electronic filing requirements became effective in June 2003. Persons responsible for preparing the company's proxy materials should review insiders' transactions carefully to ensure compliance with the accelerated filing requirements and report in the proxy statement any failures.

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### J. AUDIT COMMITTEE DISCLOSURE

The proxy rules require significant disclosures about the composition and function of the audit committee, including the following:

- if the company's securities are listed, a statement whether the members of the audit committee are "independent," within the meaning of the listing standards applicable to the company;
- if the audit committee includes a director who is not independent, the company must disclose the nature of the relationship that makes the individual not independent and the reasons the board appointed such person to the audit committee;
- if the company's securities are not listed, a statement whether the company has an audit committee established in accordance with the Exchange Act, and if so, whether the members of the committee are "independent," within the meaning of the listing standards of any registered national securities exchange or association; provided that the listing standards used are applied consistently to all members of the committee; and
- whether the board of directors has adopted a written charter for the audit committee (if so, the charter must be included as an appendix to the proxy statement if not attached in the previous three years).

Pursuant to the requirements of Sarbanes-Oxley, the SEC enacted Rule 10A-3 promulgated under the Exchange Act. Rule 10A-3 requires national securities exchanges and associations such as the NYSE and Nasdaq to decline to list securities of any company that fails to comply with certain audit committee requirements mandated by Sarbanes-Oxley. The NYSE and Nasdaq have adopted corporate governance rule changes that parallel and expand the requirements of Rule 10A-3 and Section 10A(m) of the Exchange Act. Listed companies were required to begin complying with the new listing requirements beginning in 2004. The following discussion explains the general requirements of Rule 10A-3 and identifies certain variations in the NYSE and Nasdaq rules. In addition, differences exist in the application and content of Rule 10A-3 and the NYSE and Nasdaq requirements as they apply to investment companies and foreign private issuers. Such companies should consult legal counsel for additional information.

#### **1. Audit committee independence**

Rule 10A-3 requires all audit committee members to be independent. Under the rule, audit committee members may not accept any consulting, advisory or other compensatory fee from the company or any of its subsidiaries. Thus, the rule prohibits payments to an audit committee member for services as an officer, employee or consultant of the company, but does not forbid an audit committee member from accepting payments for service as a director or member of any board committee or under a retirement plan. The rule also prohibits indirect compensation by prohibiting payments to current spouses, minor children or stepchildren or children or stepchildren currently sharing a home with the audit committee member. The NYSE and Nasdaq rules broaden this prohibition by also forbidding payments to additional family members, including parents, adult children, mothers-and fathers-in-law, sons-and daughters-in-law, sisters-and brothers-in-law and anyone (other than domestic employees) residing in the audit committee member's home. Rule 10A-3 further restricts indirect compensation by prohibiting payments to certain associated entities of which the audit committee member is currently a partner (unless merely a limited partner) or member, serves as a managing director or executive officer or occupies a similar position. Such associated entities include entities that provide accounting, consulting, legal, investment banking or financial advisory services to the company or any of its subsidiaries.

Rule 10A-3 also forbids any person affiliated with the company or any of its subsidiaries from serving on the audit committee. With respect to this requirement, the SEC adopted a safe harbor that excludes any person or entity from affiliate status if that person or entity is not an executive officer or shareholder owning ten percent or more of any class of voting equity securities of the company. Additionally, Rule 10A-3 excludes outside directors and passive owners of an affiliate of the company from

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automatic designation as affiliates themselves. Automatic designation as an affiliate does apply to executive officers, directors who are also employees of an affiliate, and general partners and managing members of an affiliate.

The NYSE and Nasdaq rules apply the following additional independence criteria:

- the rules require the board of directors of each listed company to affirmatively determine that each audit committee member has no material relationship with the company that would jeopardize the director's ability to exercise independent judgment;
- the rules prohibit any person who is employed or whose family member is employed as an executive officer of another corporation from serving on the company's audit committee if at any time within the past three years any of the company's executive officers served on the compensation committee of the other company;
- under the rules, any person who is or whose family member is employed by or affiliated with any of the company's current or former auditors, and under Nasdaq's rules, any person who has helped to prepare the company's or any of its subsidiaries' financial statements, may not serve on the audit committee until three years after that affiliation or employment relationship ends, and under NYSE's rules, any person with an immediate family member who is a partner in the company's auditing firm, regardless of that person's position in a "professional capacity" at the firm, will not be considered independent;
- the rules prevent audit committee service by persons having certain employment or ownership relationships with organizations that pay significant sums to or receive significant sums from the company (the precise level of those sums varies under the rules of each of the NYSE and Nasdaq, but both rules state such sums in terms of absolute amounts and percentages of consolidated gross revenue); and
- although Rule 10A-3 contains no look-back period for its independence requirements, both the NYSE and Nasdaq rules include a three-year look-back period applicable to all of the independence criteria, even those that parallel the Rule 10A-3 requirements.

Rule 10A-3 and the NYSE and Nasdaq rules contain various exemptions from the independence requirements. The rules exempt new public companies from the independence requirements for a limited transition period. Under the exemption, a new public company must have one independent audit committee member at the time of its initial listing, a majority of independent members within 90 days and a fully independent committee within one year. Moreover, under the Nasdaq rules, an audit committee member who fails to meet the Nasdaq independence requirements may still serve (for no more than two years) on the audit committee if (1) the director otherwise meets the requirements of Section 10A(m)(3) of the Exchange Act and the associated rules, including Rule 10A-3, (2) neither the director nor any of his or her family members is a current officer or employee of the company, (3) the board of directors determines that the company's best interests are furthered by the director's service on the audit committee and (4) the board discloses the reasons for its determination and the nature of the relationship between the company and the audit committee member in the next annual proxy statement (or Annual Report on Form 10-K if the company does not file a proxy statement). The Nasdaq rules also allow audit committee members who cease to be independent for reasons outside their control to continue to serve on the audit committee until the next annual shareholders meeting or one year, whichever period is shorter, provided that the company notifies Nasdaq immediately.

### **(a) Responsibility for the appointment, compensation, retention and oversight of the work of independent accountants**

Rule 10A-3 requires public company audit committees to assume responsibility for hiring, overseeing and terminating the independent accountants engaged to prepare or issue an audit report or perform other audit, review or attest services for the company. Such services include all of the services encompassed by the "Audit Fees" category in the corporation's disclosure of fees paid to its independent accountants, such as services necessary to perform an audit, comfort letters, statutory audits and assistance with documents filed with the SEC. *See* "Federal Proxy Rules and the Proxy Statement—The Proxy Statement—Disclosure Related to Independent Auditors."

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This provision of Rule 10A-3 does not preempt any law of the company's governing jurisdiction that might require or permit shareholders, the board of directors as a whole, a tribunal or any other governmental entity to select or oversee the company's outside auditors. In the case of such an apparent conflict, the audit committee must, to the extent permitted by the company's governing law, recommend outside auditors to the shareholders or board of directors.

The NYSE and Nasdaq corporate governance rules require an audit committee to perform certain additional duties that must be set forth in the audit committee charter. These duties relate largely to holding regular discussions with management and independent auditors about matters pertaining to risk management or audit problems and issues. Companies requiring additional information about such matters should consult legal counsel.

### **(b) Funding for the operation of the audit committee**

Under Rule 10A-3, the audit committee determines the extent of funding that the company must provide to it. The funds provided to the audit committee should be sufficient to compensate the company's independent auditors engaged and overseen by the audit committee, to compensate any advisors engaged by the audit committee and for ordinary administrative expenses necessary or appropriate for the audit committee to carry out its duties.

### **(c) Exemptions from compliance; disclosure requirements**

Rule 10A-3 contains a number of exemptions from compliance with requirements of the rule, including exemptions for boards of auditors of foreign private issuers, foreign government issuers, overlapping boards, security futures products, standardized options, asset-backed issuers, unit investment trusts and multiple listings. Companies must disclose their reliance on these exemptions in annual reports and proxy statements for shareholders meetings at which directors will be elected. Such companies must also disclose whether and how reliance on the exemption will materially adversely affect the audit committee's ability to act independently and otherwise comply with Rule 10A-3. These disclosure requirements apply to all exemptions under Rule 10A-3 other than:

- the exemption for unit investment trusts;
- subsidiaries relying on the multiple listing exemption;
- the exemption for overlapping boards;
- the exemptions for securities futures products and standardized options;
- the exemption for securities issued by foreign governments; and
- the exemptions for securities issued by asset-backed issuers and similar passive issuers.

Rule 10A-3 also modifies certain existing disclosure requirements. For instance, the disclosure about audit committee members that companies must presently include in proxy statements must now appear or be incorporated by reference in the listed company's Annual Report on Form 10-K. Related to this requirement, Rule 10A-3 deems a company's entire board of directors to be the audit committee in the absence of a separately designated audit committee and requires such a company to state in its disclosure that the entire board of directors serves as the audit committee. However, the rule does not require such a company to comply with this requirement if the company is not required to disclose its reliance on an exemption under Rule 10A-3, as discussed above.

Additionally, Rule 10A-3 requires companies with securities listed on a national securities exchange or an automated inter-dealer quotation system of a national securities association (such as the NYSE and Nasdaq) to disclose in proxy statements for shareholder meetings at which directors will be elected whether their audit committee members are independent according to the definition in the applicable listing standards, and companies with non-listed securities must disclose whether their audit committee members are independent according to any SEC-approved definition of independence developed by a national securities exchange or association (the rules further require the company to state which definition it chose and to apply that definition consistently in making independence determinations).

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### 2. Audit committee report

Each proxy statement relating to an annual meeting at which directors are to be elected must also contain an audit committee report, which must state that:

- the audit committee has reviewed and discussed the audited financial statements with management;
- the audit committee has discussed with the independent accountant the matters required to be discussed by Statement on Auditing Standards 61, which includes a review of the findings of the independent accountant during its examination of the company's financial statements;
- the audit committee has received the written disclosures and the letter from the independent accountant required by Independence Standards Board Standard No. 1, and has discussed with the independent accountant the independent accountant's independence; and
- based on the above review and discussions, the audit committee recommended to the board of directors that the audited financial statements of the company be included in the Annual Report on Form 10-K for the last fiscal year for filing with the SEC.

Like the compensation committee report found elsewhere in the proxy statement, the audit committee report must appear over the names of each audit committee member. *See* Item 7 of Schedule 14A and Item 407(d) of Regulation S-K.

### K. NOMINATING COMMITTEE DISCLOSURE

The SEC's disclosure rules regarding nominating committees are contained in paragraph (d) of Item 7 of Schedule 14A. As with other Item 7 disclosures, the nominating committee disclosures are required in proxy materials relating to any meeting at which directors will be elected. The rules require proxy materials prepared by public companies to indicate whether the company has a standing nominating committee (or a committee performing similar functions) and, if not, why the board of directors believes that operating without a nominating committee is appropriate and who among the board members considers director nominees. In addition, the rules require proxy statements to provide the following information regarding the company's director nomination process:

- if the nominating committee has a charter, the company is required to disclose whether a current copy of the charter is available to shareholders on the company's web site, and if so, to provide the web site address. If a current copy of the charter is not available on the company's web site, the company must include a copy of the charter as an appendix to its proxy statement at least once every three fiscal years. If a current copy of the charter is not available on the company's web site, and is not included as an appendix to its current proxy statement, the company must identify in which of the prior proxy statements the charter was included;
- if the nominating committee does not have a charter, the company is required to make a statement to that effect;
- a company with securities listed on a national securities exchange or an automated inter-dealer quotation system of a national securities association with independence requirements for nominating committee members is required to disclose whether the members of its nominating committee are independent under the listing standards of the applicable national securities exchange or association;
- a company with non-listed securities is required to disclose whether the members of its nominating committee are independent according to any SEC-approved definition of independence in the listing standards of a national securities exchange or association (the rules further require the company to state which definition it chose and to apply that definition consistently in determining the independence of nominating committee members and audit committee members);
- the company is required to describe the material terms of any nominating committee policy that governs the consideration of shareholder-recommended director candidates, including a statement as to whether the nominating committee will consider director candidates recommended by shareholders;

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- if the nominating committee does not have a policy with regard to consideration of director candidates recommended by shareholders, the company must so state that fact;
- if the nominating committee will consider candidates recommended by shareholders, the company must describe the procedures by which shareholders can recommend director candidates;
- the company must also describe any specific, minimum qualifications that a nominating committee-recommended candidate must meet for a position on the company's board of directors as well as any qualities or skills that the nominating committee believes are prerequisites to board membership;
- the company must describe the process by which the nominating committee identifies and evaluates nominees and any particularities in the process arising in the case of shareholder-recommended nominees;
- for each non-incumbent nominee (other than current executive officers) who received nominating committee approval for inclusion in the company's proxy card, the company must state which one or more of the following categories of persons or entities recommended that nominee: security holder, non-management director, chief executive officer, other executive officer, third-party search firm or other specified source;
- the company must disclose the functions performed by any third party that the company pays to help identify or evaluate director nominees; and
- if the nominating committee received a nominee recommendation within the timeframe required by the rules from a shareholder beneficially owning more than five percent of the company's voting common stock for at least one year as of the date of the recommendation (or from a group of shareholders beneficially owning, in the aggregate, more than five percent of the voting common stock, with the securities used to calculate that ownership held for at least one year as of the date of the recommendation), the company is required to identify the candidate and the shareholder (or shareholder group) that recommended the candidate and disclose whether the nominating committee chose to nominate the candidate; provided, however, that no such identification or disclosure is required without the written consent of both the shareholder or shareholder group and the candidate to be so identified.

### L. COMPENSATION COMMITTEE DISCLOSURE

The amended proxy rules also adopt the following compensation committee disclosures, which follow those already applicable to the audit committee and nominating committee. Under the new rules, the company is required to disclose:

- whether the compensation committee has a charter, and whether the charter is available through the company's web site or proxy materials; and
- the committee's processes and procedures for the consideration and determination of executive and director compensation, including the committee's scope of authority, the role of executive officers in determining or recommending executive officer and director compensation, and the identity and role of compensation consultants.

Recent SEC commentary regarding the amended rules emphasizes that this disclosure is intended to focus on aspects of corporate governance affecting the determination of executive compensation and supplements the separate CD&A section required by the amended rules. *See* Item 407(e) of Regulation S-K.

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### M. SHAREHOLDER COMMUNICATIONS WITH THE BOARD OF DIRECTORS

As with the shareholder nomination disclosures and other Item 7 disclosures, the disclosures regarding shareholder communications with directors of public companies are required in proxy materials relating to any meeting at which directors will be elected. The rules require the company's proxy materials relating to director elections to:

- disclose whether the company provides a process by which shareholders may send communications to the board of directors and, if not, why the board believes it is appropriate not to have such a process;
- if the company does have such a process, the company must:
  - state the manner in which shareholders should send communications to the board and, if applicable, to specified individual directors; and
  - if all shareholder communications are not sent directly to directors, describe the company's procedure for determining which shareholder communications will be delivered to directors; and
- describe the company's policy, if any, with regard to board members' attendance at annual shareholders meetings and state the number of board members who attended the prior year's annual meeting.

### N. DISCLOSURE RELATED TO INDEPENDENT AUDITORS

Under Item 9 of Schedule 14A, proxy statements related to annual meetings at which directors are to be elected (or special meetings or written consents in lieu of an annual meeting) or any meeting at which selection of the independent auditors is approved must include:

- the name of the principal accountant selected or being recommended to shareholders for election, approval or ratification, or, if no accountant has been selected or recommended, the reasons why one has not been selected or recommended;
- the identity of the company's principal accountant for the previous fiscal year if it is different from the accountant selected or recommended for the current year;
- if the company's principal accountant at any time during the past two fiscal years is no longer acting in that capacity, or a new principal accountant has been hired, specified additional information relating to the facts and circumstances of the change in accountant; and
- whether a representative of the principal accountant will attend the annual meeting and, if so, whether the representative will have an opportunity to make a statement and be available to respond to appropriate questions.

The company is also required to disclose:

- the aggregate fees billed by the principal accountant under the captions noted below:

<b>Caption</b>	<b>Description</b>
<i>Audit Fees</i>	Aggregate fees billed in each of the last two fiscal years for professional services rendered in connection with the audit of the company's annual financial statements and for reviews of the financial statements included in its Quarterly Reports on Form 10-Q.
<i>Audit-Related Fees</i>	Aggregate fees billed in each of the last two fiscal years for assurance and related services by the principal accountant that are reasonably related to the performance of the audit or review of the company's financial statements that are not reported under the caption "Audit Fees" above, including a description of the nature of the services comprising the fees disclosed under this category.



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Caption	Description
<i>Tax Fees</i>	Aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant for tax compliance, tax advice and tax planning, including a description of the nature of the services comprising the fees disclosed under this category.
<i>All Other Fees</i>	Aggregate fees billed in each of the last two fiscal years for all other products and services provided by the principal accountant that are not otherwise disclosed above, including a description of the nature of the services comprising the fees disclosed under this category.

- the audit committee’s pre-approval policies and procedures related to products and services provided by the principal accountant and the percentage of the products and services provided under the captions “Audit-Related Fees,” “Tax Fees” and “All Other Fees” that were pre-approved by the audit committee; and
- if the percentage is greater than 50 percent, the percentage of hours expended on the principal accountant’s audit of the company’s financial statements for the most recent fiscal year that was attributed to work performed by persons other than the principal accountant’s full-time, permanent employees.

Although there is no legal requirement that shareholders approve or ratify the selection of a company’s independent accountant, it has become customary to submit the selection of the independent accountant to a shareholder vote at the company’s annual meeting.

### O. CERTAIN RELATIONSHIPS AND RELATED TRANSACTIONS

If action is to be taken at an annual meeting with respect to the election of directors, the proxy rules require disclosure of a variety of information about transactions between the company and specified related parties. Item 7 of Schedule 14A cross references Item 404 of Regulation S-K, which was revised in 2006 by the amended rules and now adopts a principles based approach to disclosure as opposed to prior bright line standards. The amended rules expand the scope of the transactions covered by the disclosure requirements to include any individual or series of related financial transactions, arrangements or relationships in which:

- the company benefits from the transaction, even if not a contractual party to the arrangement;
- the amount exceeds \$120,000; and
- the related person had or will have a direct or indirect material interest, determined on the basis of the significance of the information to investors, in light of all of the circumstances, including consideration of the relationship of the related persons to the transaction, their relationship to each other and the importance of the interest to the person having the interest.

The amended rules provide a number of exceptions to the disclosure requirements, including, but not limited to, executive compensation arrangements otherwise reported under Item 402 of Regulation S-K (other than in the case of an immediate family member), indebtedness incurred in connection with the purchase of goods and services on usual trade terms, ordinary course business and travel advances and reimbursements, and pro rata benefits applicable to a class of equity security holders.

In addition, the amended rules require disclosure of the policies and procedures adopted by the company and its board of directors for the review, approval and ratification of related party transactions. The disclosure requires a description of the material features of the policies and procedures, such as:

- the types of transactions that are covered and the standards to be applied;
- the members of the company’s board of directors responsible for applying the policies and procedures; and
- whether the policies and procedures are in writing , and if not, how such policies and procedures are documented.

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The amended rules expressly require the identification of any transactions where the company's policies and procedures do not otherwise require review, approval or ratification, or circumstances in which the policies and practices were not followed.

Each of these disclosure requirements contains a number of instructions to assist and direct the company in providing the necessary disclosure. Readers are encouraged to review the relevant provisions of Item 404 of Regulation S-K to determine the appropriate disclosures for their company.

### P. EQUITY COMPENSATION PLAN SHAREHOLDER APPROVAL RULES

The NYSE and Nasdaq listing standards require shareholder approval of listed company's equity compensation plans. With a few limited exceptions, shareholder approval of all equity compensation plans, including stock option plans as well as all material amendments to such plans are required. The NYSE and Nasdaq prior exemptions for "broad-based" equity compensation plans and plans excluding officers and directors from a shareholder approval requirement have been eliminated by recent amendments to the NYSE and Nasdaq listing standards. The specific requirements of the recent NYSE and Nasdaq equity compensation plan shareholder approval rules are summarized below.

#### 1. The New York Stock Exchange Rules

*Plans Covered.* Under the NYSE listing standards, an "equity-compensation plan" that requires shareholder approval is "a plan or other arrangement that provides for the delivery of equity securities (either newly issued or treasury shares) of the listed company to any employee, director or other service provider as compensation for services." Any compensatory grant of options or other equity securities that is not made under such a plan is an equity compensation plan for these purposes.

The following are specifically exempted from the equity compensation plan definition even if the brokerage and other costs of the plan are paid for by the listed company:

- plans that pay all benefits in cash;
- plans adopted prior to June 30, 2003 (but not material revisions to such plans described below);
- plans that are made available to shareholders generally, such as a typical dividend reinvestment plan;
- plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value, regardless of whether:
  - the shares are delivered immediately or on a deferred basis; or
  - the payments for the shares are made directly or by giving up compensation that is otherwise due (for example, through payroll deductions);
- tax-qualified plans, such as 401(k) plans and employee stock option plans;
- employee stock purchase plans intended to meet the requirements of Section 423 of the Internal Revenue Code of 1986, as amended (the Code); and
- parallel excess plans, which are defined generally as a pension plan within the meaning of the Employee Retirement Income Security Act of 1974, as amended (ERISA), that is designed to work in parallel with a tax-qualified plan to provide benefits in excess of various Code limits.

The NYSE listing standards require that, in circumstances in which equity compensation plans and amendments do not require shareholder approval, the plans and amendments still must be considered and approved by the company's compensation committee or a majority of the company's independent directors.

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*Material Revisions and Amendments.* Under the NYSE listing standards, any material revision of an equity compensation plan also requires shareholder approval. A “material revision” includes, but is not limited to:

- a material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spinoff or similar transaction), provided that:
  - if a plan contains a formula for automatic increases in the shares available or for automatic grants pursuant to a formula, each such increase or grant will be considered a revision requiring shareholder approval unless the plan has a term of not more than ten years (a Formula Plan); and
  - if a plan contains no limit on the number of shares available and is not a Formula Plan, then each grant under the plan will require separate shareholder approval regardless of whether the plan has a term of not more than ten years (a Discretionary Plan);
- an expansion of the types of awards available under the plan;
- a material expansion of the class of employees, directors or other service providers eligible to participate in the plan;
- a material extension of the term of the plan;
- a material change to the method of determining the strike price of options under the plan (a change in the method of determining “fair market value” from the closing price on the date of grant to the average of the high and low prices on the date of grant is an example of a change that the NYSE would not view as material); and
- the deletion or limitation of any provision prohibiting repricing of options. See the next section for details.

It is important to note that an amendment to an equity compensation plan will not be considered a “material revision” requiring shareholder approval if it curtails rather than expands the scope of the plan in question.

*Option Repricings.* Under the NYSE rules, a plan that does not specifically permit option repricing will be considered to prohibit repricing. Accordingly, any actual repricing of options will be considered a material revision of a plan even if the plan itself is not revised. The NYSE rules define “repricing” broadly to include any of the following or any other action that has the same effect:

- lowering the strike price of an option after it is granted;
- any other action that is treated as a repricing under generally accepted accounting principles; and
- canceling an option at a time when its strike price exceeds the fair market value of the underlying stock in exchange for another option, restricted stock or other equity, unless the cancellation and exchange occurs in connection with a merger, acquisition, spin-off or other similar corporate transaction.

*Inducement Awards and Awards Assumed in Mergers and Acquisitions.* The NYSE rules exempt “employment inducement grants” and certain grants with respect to options and plans that are assumed in mergers and acquisitions, but require companies relying on one or more of these exemptions to make a press release and/or written notification to the SEC, depending on the exemption. Such inducement awards are also available for rehires following a bona fide period of non-employment.

*Broker Voting.* The NYSE rules prohibit member organizations of the NYSE (brokers) from giving a proxy to vote on equity compensation plans unless the beneficial owner of the shares covered by the proxy has given voting instructions. This prohibition will have as significant an impact on the approval of equity compensation plans as any of the other changes to the shareholder approval requirements. In the past, companies could expect to receive the vote of member organizations if the proposed plan or amendment did not cover more than five percent of the company’s outstanding shares. Without the expected broker votes, companies will be required to solicit shareholder approval of equity compensation plans much more aggressively. In addition, significant shareholders will be able to exert more influence in the equity compensation plan shareholder approval process.

*Notification Requirement.* The recent amendments also require NYSE-listed companies to notify the NYSE in writing when they rely on one or more of the shareholder approval exemptions described

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above, including the inducement grant exemption, the merger and acquisition exemption and the exemptions for certain types of plans.

### 2. The Nasdaq Stock Market Rules

*Plans Covered.* Like the NYSE rules, the Nasdaq rules govern a wide range of equity compensation arrangements. Specifically, the rules require shareholder approval of all “stock option plans and other equity compensation arrangements.” As with the NYSE, Nasdaq also excludes certain plans from the shareholder approval requirements, including:

- plans adopted before June 30, 2003 (but not material revisions to such plans described below);
- plans that are made available to shareholders generally, such as a typical dividend reinvestment plan;
- arrangements that merely provide a convenient way for employees, directors or other service providers to purchase stock at fair market value;
- tax-qualified plans, such as 401(k) plans and employee stock option plans;
- parallel non-qualified plans, which are defined generally as a pension plan within the meaning of ERISA that is designed to work in parallel with a tax-qualified plan to provide benefits in excess of various Code limits; and
- plans or arrangements relating to an acquisition or merger.

The Nasdaq rules limit the term of any Formula Plans to ten years unless shareholder approval of the plan is obtained every ten years. Plans that do not limit the number of shares available for grant require shareholder approval of each grant under the plan.

*Material Revisions and Amendments.* Like the NYSE rules, the Nasdaq rules also require shareholder approval of material amendments to stock option plans or other equity compensation arrangements and provide a non-exclusive list of potential amendments requiring shareholder approval, including:

- a material increase in the number of shares available under the plan (other than an increase as a result of a stock split, merger, spinoff or similar transaction);
- a material increase in benefits to participants, including any material change to:
  - permit a repricing;
  - reduce the price at which shares or options may be offered; or
  - extend the duration of the plan;
- a material expansion of the class of participants eligible to participate in the plan; and
- an expansion in the types of options or awards provided under the plan.

*Option Repricings.* Under the Nasdaq rules, amending a plan to permit option repricings constitutes a material revision and requires shareholder approval. The Nasdaq rules do not otherwise expressly prohibit option repricings. Instead, the rules and interpretive materials thereunder require that plans meant to permit repricing should explicitly and clearly state that repricing is permitted. To the extent that repricing is not expressly permitted, the rules and interpretive materials appear to imply that a Nasdaq-listed company with a plan that is silent about repricings should not undertake option repricings without obtaining shareholder approval. Nasdaq’s recommendation that any plan intending to allow repricings include clear language to that effect and statements by the SEC related to the Nasdaq rules will in practice likely result in an outcome similar to that under the NYSE rules (i.e., no repricings unless specifically permitted in the plan).

*Inducement Awards and Awards Assumed in Mergers and Acquisitions.* The Nasdaq rules exempt “employment inducement grants” and certain grants with respect to options and plans that are assumed in mergers and acquisitions. Unlike the NYSE rules, the Nasdaq rules require inducement grants to be approved by the company’s compensation committee or by a majority of the company’s independent directors. Under the Nasdaq rules, inducement awards are available for rehires following

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a bona fide period of non-employment. Awards assumed in connection with a merger or acquisition do not require shareholder approval only if:

- shareholder approval is not required to convert, replace or adjust outstanding options or other awards to reflect the transaction; and
- shares available under certain plans acquired in mergers and acquisitions may be used for certain post-transaction grants without further shareholder approval.

### Q. SHAREHOLDER ACCESS TO COMPANY PROXY MATERIALS FOR DIRECTOR NOMINATIONS

*What Is Shareholder Access.* Under the current SEC rules, only the company's director nominees are included in the company's proxy statement and proxy card. If shareholders wish to nominate their own candidates, they must prepare their own proxy statement and proxy card. Shareholder access refers to an alternative regime in which shareholders could include director nominees in the company's proxy materials in opposition to the company's nominees.

*Historical Background.* Rule 14a-8 of the Exchange Act requires a public company to include a shareholder proposal in its proxy statement if the proponent meets modest share ownership, timeliness and length of proposed submission requirements. If a company seeks to exclude a shareholder proposal from its proxy statement, the company must, following receipt of a qualifying shareholder submission, establish that the proposal satisfies an SEC established justification for exclusion. With respect to the election of directors, for many years the SEC permitted companies to exclude shareholder access proposals under the so-called "director election exclusion" of Rule 14a-8(i)(8) on the grounds that the proposals could have the effect of causing proxy contests in future years. In a 2006 case, the Second Circuit Court of Appeals rejected the SEC's longstanding position and held that a company could not rely on Rule 14a-8(i)(8) to exclude a shareholder access proposal. Within days of the court's decision, the SEC announced that it would resolve the issue for the 2007 proxy season; however, no resolution was achieved in this time frame. During the 2007 proxy season, the SEC took an official position of "no view" on corporate requests to exclude shareholder access proposals. Corporate governance activists exercised restraint and filed only a handful of access proposals for the 2007 proxy season, thus giving the SEC a year to find a solution.

In July 2007, the SEC issued two distinct rule proposals regarding shareholder access. One proposal, referred to as the "access proposal," would require companies to include in their proxy materials proposals for binding bylaw amendments that establish a procedure by which shareholder nominees would be included in company proxy materials, subject to certain conditions including a threshold requirement that the proponents of the bylaw being submitted under Rule 14a-8 own at least five percent of the company's stock and not have a control intent. The other proposal, referred to as the "exclusion proposal," would codify the SEC's interpretation of Rule 14a-8(i)(8) that companies may exclude from their proxy materials any shareholder proposal that would result in an immediate election contest or set up a process for shareholders to conduct a future election contest by requiring the inclusion of a shareholder nominee in subsequent proxy materials.

*Current Rules.* At its November 28, 2007 meeting, the SEC amended Rule 14a-8(i)(8) to adopt the exclusion proposal for the 2008 proxy season. This amendment codified the SEC's longstanding position that companies may continue to exclude shareholder access proposals from proxy materials under the director election exclusion of Rule 14a-8(i)(8). The current rules, however, may be short-lived as SEC Chairman Christopher Cox has announced that due to widespread dissatisfaction with both the exclusion proposal and the access proposal, the SEC will re-open the proxy access issue for the 2009 proxy season to arrive at a new rule proposal that will likely differ from the SEC's existing position on this matter. In addition, several shareholders have filed access proposals in a stated intent to force a judicial review of the SEC's adoption of the exclusion rule.

*Impact of Shareholder Access.* If approved in the future, shareholder access would likely increase the leverage of activist shareholders and lead to a greater number of contested elections, largely because shareholder access eliminates some or all costs of dissident election campaigns and enhances

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the legitimacy of activists by virtue of inclusion in the company's proxy materials. As a result, commentators predict that shareholder access may develop into a major tool for hedge funds and other "destabilizers."

### R. PRESENTATION OF INFORMATION

The proxy rules also contain specific rules regarding the manner in which information is to be presented in the proxy statement. Among other things, Rule 14a-5 of Regulation 14A requires that:

- information in the proxy statement be clearly presented and organized according to subject matter with appropriate headings for the various categories of information;
- information in the proxy statement be presented in Roman type at least as large and as legible as ten-point modern type (such as this, AaBbCc123), except that financial statements and tables (but not the notes thereto) may be in eight-point modern type (such as this, AaBbCc123) if necessary for convenient presentation;
- the proxy statement must include the deadline for any proposals shareholders intend to present at the company's next annual meeting; and
- the proxy statement must include the date after which notice of a shareholder proposal that is not submitted in accordance with the provisions of Rule 14a-8 of Regulation 14A will be considered untimely.

### S. OTHER REQUIREMENTS RELATED TO PROXY SOLICITATION MATERIALS

In addition to the requirements described in this handbook, the proxy rules contain numerous additional items and instructions relating to information required to be presented in materials used to solicit proxies, depending on the type of meeting and the matters to be considered at the meeting. These additional items relate to, among other things, the prohibition against false or misleading statements in proxy materials and the inclusion of information specific to the types of matters to be considered at the annual meeting, such as equity plans and combination transactions.

### T. PLAIN ENGLISH

Although the proxy statement is prepared to meet legal requirements, it also is a valuable shareholder communications tool. One way to make the proxy statement useful as a shareholder communications tool is to prepare a document that is well-organized, more visually appealing and more readable. The SEC's plain English rules do not currently govern proxy statements, however, as discussed above, the SEC has expressed its support for the use of plain English principles with respect to executive compensation disclosure in the proxy statement. Although not required to do so, more and more companies are using the plain English rules as a guide to prepare proxy statements that are more easily understood by their shareholders. Preparing the proxy statement in accordance with the plain English rules benefits the shareholders and the company—shareholders are able to better understand the matters discussed and to make an informed decision and the company is presented in a more positive light with disclosure that is more easily read and understood. There are many resources available for assistance in preparing the proxy statement and other documents in accordance with the plain English rules. Companies should consult with legal counsel or their RR Donnelley representative for more guidance on these matters.

## III. FORM OF PROXY

The proxy card on which shareholders actually mark their votes is largely dictated by the computer forms that most public companies now use to enable the proxies to be tallied electronically. The proxy card should be prepared in close cooperation with the company that will be tabulating the results for the meeting to ensure that it will work correctly with its technology. The company should also discuss the form of proxy with its inspector of election.

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The form of proxy must comply with a number of requirements contained in Rule 14a-4 of Regulation 14A, which require the form of proxy to:

- identify in boldface type the person or entity on whose behalf the proxy is being solicited;
- contain a blank space for shareholders to date the proxy;
- identify clearly and impartially each matter to be acted upon regardless of whether it is conditioned upon approval of another matter or whether it was proposed by the company or a shareholder; and
- provide means by which the shareholder may approve, disapprove or abstain with respect to each separate matter (other than the election of directors) by marking the appropriate box.

Where the proxy relates to the election of directors, the proxy card must set forth the name of each person nominated for election as a director. The proxy card may allow shareholders the opportunity to grant authority to vote for all nominees as a group only if similar means are provided to allow shareholders to withhold authority to vote for all nominees as a group. Conversely, the proxy card must include one of the following means for shareholders to withhold authority to vote for each nominee:

- a box opposite the name of each director nominee that may be marked to indicate a vote to withhold authority for that nominee;
- an instruction in bold face type indicating that a shareholder may withhold authority to vote for a specific nominee by lining through or otherwise striking out the name of the nominee;
- designated blank spaces in which the shareholder may write the names of the nominees with respect to whom authority to vote is withheld; or
- any other similar means if appropriate instructions are provided indicating how a shareholder may withhold authority for any director nominee.

The form of proxy may grant discretionary authority with respect to matters as to which a choice is not specified by the shareholder if certain conditions are met, as more fully described in the proxy rules. In addition, the proxy rules allow persons soliciting support of a minority slate of nominees to also seek authority to vote for one or more of the nominees named in the company's proxy statement if additional specified conditions are satisfied. The specific rules relating to granting or seeking authority to vote by proxy depend upon the type of matter upon which authority is being granted or sought. Readers should review the proxy rules regarding granting discretionary authority found in Rule 14a-4 of Regulation 14A before including any statement in a form of proxy purporting to grant such authority.

As discussed previously, no form of proxy or consent may be delivered to or requested from any person before such person has received a definitive proxy statement filed with the SEC. In filing the form of proxy with the definitive proxy statement in accordance with the requirements of the proxy rules, the form of proxy should be filed as an appendix at the end of the proxy statement.

### IV. DUE DILIGENCE REGARDING PROXY MATERIALS

The proxy rules contain anti-fraud regulations similar to those contained elsewhere in the federal securities laws. Specifically, the proxy rules prohibit the use of proxy solicitations that:

- contain any statement that, at the time and in light of the circumstances in which it is made, is false or misleading with respect to any material fact;
- omit to state any material fact necessary to make the statements in the proxy materials not false or misleading; or
- omit to state any material fact necessary to correct any statement in any earlier communication related to the solicitation of a proxy for the same meeting or subject matter that has become false or misleading.

To ensure compliance, persons responsible for preparation of the company's proxy materials must ensure that directors and officers of the company are provided ample time prior to their filing or mailing to review and verify the information contained in the solicitation materials and annual report to shareholders.

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Most companies also circulate a formal questionnaire for all directors and officers in order to obtain or confirm the personal information that must be included in the proxy statement. Preparation of the “D&O Questionnaire,” as they are called, involves a review of disclosure requirements, government regulations and officer and director biographies. As these forms can be difficult to prepare, persons responsible for preparing the D&O Questionnaire should consult with legal counsel to ensure compliance with the legal and technical disclosure requirements. Once the questionnaires have been completed and returned by the directors and officers, the information included must be reviewed and summarized for inclusion in the proxy statement and other year-end documents. Adequate time should also be provided for the review of the CD&A by members of the compensation committee and members of management who participate in the compensation process.

### V. DISTRIBUTION OF PROXY MATERIALS TO SHAREHOLDERS

The proxy rules prohibit the solicitation of proxies prior to the delivery to each solicited shareholder of a proxy statement that complies with the disclosure requirements of the proxy rules. The proxy rules also require that an annual report to shareholders accompany or precede the proxy statement if directors are to be elected at the meeting. *See* Rule 14a-3 of Regulation 14A. Historically, companies have mailed paper copies of proxy statements, annual reports and additional solicitation materials to shareholders.

In December 2006, the SEC amended the proxy rules to provide that companies could furnish shareholders with the company’s proxy statement and annual report by posting these materials on a web site and providing shareholders with notice of the availability of the proxy materials. In June 2007, the SEC issued final rules which provide that companies may deliver proxy materials, including notices of shareholder meetings, proxy statements, forms of proxy, annual reports and any amendments to such materials that are required to be furnished to shareholders, either by the new “notice and access option” or the traditional method of delivering a full set of printed materials, also referred to as the “full set delivery option.” Companies choosing to use the traditional full set delivery option, however, must still undertake limited elements of the notice and access option, thus creating a mandatory e-proxy requirement.

Companies are not limited to one option as the exclusive means for providing proxy materials to shareholders. Rather, they may use the notice and access option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders.

#### A. NOTICE AND ACCESS OPTION

The notice and access option may be used in connection with the delivery of proxy materials for all shareholder meetings other than business combination transactions. To adopt the notice and access option, companies must (1) send a notice of Internet availability of proxy materials to shareholders at least 40 days before the meeting date or the date that consents may be used to effect a corporate action if no meeting is scheduled, (2) post the proxy materials on a publicly-accessible Internet web site which meets certain criteria by the time the notice is first sent to shareholders and (3) provide shareholders with a voting method at the time the notice is first sent to shareholders. Companies can satisfy the final requirement by providing electronic voting platforms, a toll-free phone telephone number for voting or a downloadable, printable proxy card on a web site. To avoid an instance where shareholders execute a proxy without having reviewed the proxy statement, the telephone number for voting of the proxy may not be included in the notice, though the phone number may be posted to the web site.

Other than the notice of a shareholders meeting required by state law, no other information may accompany the notice of Internet availability of proxy materials. Further, the notice must conform to plain English requirements. The notice constitutes “other soliciting material” that must be filed with the SEC no later than the date on which the notice is first sent to shareholders.

*Contents of the Notice of Internet Availability of Proxy Materials.* The new rules provide that the notice is required to contain certain prominent legends and other information. *See* “Appendix D—



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Selected Contents of the Notice of Internet Availability of Proxy Materials” for a list of the information required in the notice.

*Delivery of Proxy Card.* A proxy card may only be sent to shareholders ten or more days after sending the notice, though the proxy card may be sent before the end of the ten-day period if it is accompanied by the proxy statement and annual report. If a company chooses not to send the proxy statement and annual report with the proxy card, another copy of the notice of Internet availability of proxy materials must accompany the proxy card.

*Delivery of Written Proxy Materials.* Companies adopting the notice and access option must send paper copies of the proxy materials to shareholders upon request, free of charge. Shareholders have the right to make a permanent election to receive either paper or e-mail copies of proxy materials in connection with future proxy solicitations, and companies are required to record such elections. Shareholder requests to receive paper proxy materials must be fulfilled by first class mail or other reasonably prompt method of delivery within three business days, provided such request is received prior to the company’s meeting. Thereafter, companies are obligated to provide copies of the proxy materials for a period of one year after the date of the shareholders meeting or corporate action to which the materials relate, though the materials need not be sent within three business days nor by first class mail.

*Design of the Publicly Accessible Web Site.* All proxy materials identified in the notice must be made publicly accessible, free of charge, at the web site address specified in the notice, which cannot be the SEC’s EDGAR web site, on or before the date that the notice is sent to shareholders. The materials must be presented on the web site in a format or formats convenient for both reading online and printing on paper, and must remain available on that web site through the conclusion of the shareholders meeting. As noted above, the web site must provide shareholders with at least one method to execute proxies as of the time the notice is first sent to shareholders, such as an electronic voting platform, a toll-free telephone number for voting, or a printable or downloadable proxy card on the web site.

*Web Site and E-mail Confidentiality.* Companies must ensure that their web site is designed such that users remain anonymous, including the elimination of any cookies or tracking features. Companies also may not use an e-mail address provided solely to request a copy of proxy materials for any purpose other than to send copies of those materials to shareholders.

*Transitional Rules.* The e-proxy rules are effective for large accelerated filers, i.e. companies subject to the Exchange Act requirements for at least twelve months with \$700 million or more of public float that have filed at least one annual report (other than registered investment companies), for solicitations occurring on or after January 1, 2008, and for all other companies and soliciting persons beginning January 1, 2009. Companies can voluntarily begin compliance with the new e-proxy rules on and after January 1, 2008.

*Suggested Actions for Companies Planning to Employ the Notice and Access Option.* It is recommended that companies planning to adopt the notice and access option consider the following:

- Determine whether it is appropriate to continue to use the full set delivery option initially to allow time to evaluate the notice and access option and to assess other companies’ experience with the new regime.
- Begin planning and complete the company’s proxy materials earlier than in the past because, among other things, the notice and access option will require that the materials be posted not later than 40 days prior to the shareholders meeting. In addition, careful coordination will be required between the company and its proxy solicitor (if any) and intermediaries because companies will be required to supply intermediaries with the information required for intermediaries to prepare their own notices and post the proxy materials to their own web site, which will add several days to the process (intermediaries are likely to require at least five days for the process involved in compiling and distributing their own notice of Internet availability of proxy materials).
- Review state laws because some states have laws that conflict with and diminish the utility of the notice and access option. One such potential conflict between the new notice and access option and state law exists in California. Under California law, companies incorporated or having a principal executive office in California are required to deliver annual reports to shareholders not

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later than 120 days after the close of the fiscal year. While California law permits electronic transmission of annual reports, the recipient is required to have first provided an unrevoked consent, which is not a feature of the notice and access option, and the electronic transmission must comply with other legal requirements. Companies are advised to consult with legal counsel before utilizing the new regime.

- Many companies' bylaws require that proxy materials be sent by mail. This is an appropriate time to update bylaws to provide for electronic notice. Companies are advised to consult with legal counsel regarding this matter.
- Companies should make sure they have plans in place to comply with web site anonymity requirements and to process requests from intermediaries for proxy materials.

### B. FULL SET DELIVERY OPTION

Companies may operate under the traditional proxy rules and deliver paper copies of the proxy materials to shareholders by mail as in the past. Under the new mandatory e-proxy rules, companies choosing the full set delivery option also must (1) send a notice of Internet availability of proxy materials accompanied by a full set of proxy materials, or incorporate all of the information required to appear in the notice of Internet availability of proxy materials into the proxy statement and proxy card, and (2) post the company's proxy materials on a publicly-accessible Internet web site which meets certain criteria by the time the notice is first sent to shareholders.

*Differences Between the Full Set Delivery Option and the Notice and Access Option.* The full set delivery option varies from the notice and access option in, among others, the following ways:

- The company need not send the notice of Internet availability of proxy materials and full set of proxy materials at least 40 days before the meeting date because shareholders will not need extra time to request printed copies of the proxy materials.
- The notice may be accompanied by a copy of the proxy statement, annual report to shareholders if required by Rule 14a-3(b) and proxy card.
- The text of the prescribed legend and the required contents of the notice differ; specifically, the company need not include the portion of the prescribed legend relating to shareholder requests for copies of the proxy materials and instructions on how to request a copy of the proxy materials. See "Appendix D—Selected Contents of the Notice of Internet Availability of Proxy Materials" for a list of the information required in the notice.
- A separate notice is not required if the company incorporates all of the notice information into the proxy statement and proxy card.
- Because the full set of proxy materials includes a proxy card, the company need not provide another means for voting on the publicly accessible web site. Otherwise, the requirements for the web site (including the confidentiality requirements) are essentially the same as under the notice and access option.
- Because the company has already provided shareholders with a full set of proxy materials, the company need not provide the shareholder with copies of the proxy materials upon request.

### C. INTERMEDIARIES

As discussed above, Rule 14a-13 of Regulation 14A establishes the rules by which the company works with broker-dealers, banks, voting trustees and other record holders to ensure that the proxy materials are provided to the beneficial holders of the company's voting securities. Companies are required to survey, by first class mail, these organizations at least 20 business days prior to the record date for the annual meeting to determine the number of copies these organizations will require for distribution to beneficial holders. Following receipt of this information, the company is required to supply each organization with copies of the proxy statement and other proxy solicitation materials and annual reports in the number and assembled in the manner as requested by the record holder to ensure delivery to the beneficial holders of the company's voting securities. The company is also required, upon the

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request of the record holder, to pay its reasonable expenses for completing the mailing of the proxy materials to the beneficial holders.

Under the new e-proxy rules, broker-dealers, banks, voting trustees and other record holders are required to adopt the notice and access option if the company requests them to do so. In that case, intermediaries are required to send their own notice of Internet availability of proxy materials to shareholders. Companies choosing the notice and access option must provide each intermediary with the information necessary to prepare the intermediary's notice of Internet availability of proxy materials with sufficient time for the intermediary to prepare and send its notice and post the proxy materials on a publicly available web site at least 40 days before the shareholder meeting date. Intermediaries may not adopt the notice and access option if the company has chosen not to do so.

*Contents of the Intermediary's Notice.* Although a specific list of the required contents of the intermediary's notice is beyond the scope of this publication, the intermediary's notice is generally the same as that sent by the company, though tailored specifically for beneficial owners. Among other things, the intermediary's notice must provide instructions on when and how to request paper copies and the web site where the beneficial owner can access his or her request for voting instructions. The intermediary may direct beneficial owners to the company's web site or its own web site to access the proxy materials. If it directs beneficial owners to the company's web site, the intermediary must inform beneficial owners that they can submit voting instructions to the intermediary, but that the beneficial owner cannot execute a proxy directly unless the intermediary has executed a proxy in favor of the beneficial owner.

*Responsibilities of the Intermediary.* In addition to sending its own notice, intermediaries must permit beneficial owners to make a permanent election to receive paper or e-mail copies of the proxy materials, keep records of beneficial owner preferences, provide proxy materials in accordance with those preferences and provide a means to access a request for voting instructions no later than the date on which the intermediary's notice is first sent.

### D. HOUSEHOLDING

The SEC permits the delivery of a single proxy statement or annual report to all shareholders of record having the same address if:

- the proxy statement or annual report is addressed to all shareholders at the same address as a group;
- the company receives either affirmative consent or implied consent in accordance with the requirements of the proxy rules to household delivery;
- each shareholder at the shared address receives a separate proxy card; and
- the company includes an undertaking in the proxy statement to deliver upon request a separate copy of the annual report or proxy statement, as applicable.

As discussed previously, the requirements relating to delivery of the notice of annual meeting are governed by state corporate law. Any company considering the delivery of proxy statements under the householding rules should confirm that household delivery will comply with the corporate law of its jurisdiction of incorporation. Section 233 of the DGCL allows companies to make use of the "householding" rules promulgated under the Exchange Act. Under Section 233, a notice given by a Delaware corporation under the DGCL or the company's charter or bylaws is effective if given by a single written notice to shareholders sharing the same address so long as the shareholders consent. Section 233 further provides that any shareholder who fails to object in writing to the company within 60 days after receiving written notice from the company of its intention to send a single notice to shareholders sharing the same address is deemed to have consented to receiving such single written notice.

## VI. FILING PROXY MATERIALS

### A. SECURITIES AND EXCHANGE COMMISSION

All proxy materials filed with the SEC, whether preliminary or definitive, must include a cover page in the form set forth in Schedule 14A identifying the filing party, the nature of the filing (e.g., preliminary proxy statement, definitive proxy materials), and providing instructions relating to the payment of the filing fee in cases where a fee is required. *See* Rule 14a-6 of Regulation 14A.

The SEC's Electronic Data Gathering, Analysis and Retrieval (EDGAR) system is a helpful resource in obtaining examples of disclosure used by other companies for similar matters. If the matter requires SEC review, using these examples may facilitate prompt SEC clearance.

#### 1. Preliminary proxy materials

Rule 14a-6(a) of Regulation 14A requires preliminary proxy soliciting materials to be filed with the SEC at least ten days prior to the date they are first sent or given to shareholders. The rule states that a shorter period may be authorized upon a showing of good cause.

There is no filing requirement for preliminary proxy materials that relate to an annual meeting at which only the following "routine" matters will be considered:

- the election of directors;
- the approval or ratification of independent auditors;
- shareholder proposals submitted in accordance with Rule 14a-8 of Regulation 14A (the proxy rule governing the submission of proposals by shareholders); and
- the approval or ratification of benefit plans, or any amendment thereto, that falls within restrictions imposed by the federal securities laws.

Each preliminary proxy filing must include the preliminary proxy statement, the preliminary form of proxy and any other soliciting material. In addition, the preliminary proxy materials must be filed electronically and clearly marked "Preliminary Copies" and accompanied by a statement of the date on which definitive copies of such preliminary materials are intended to be provided to security holders. There are no filing fees for proxy statements unless the proxy materials relate to an acquisition, merger or similar transaction.

Under the proxy rules, the SEC has ten days following the filing to advise the company if it intends to commence a complete review of the proxy materials. If the company is not notified by the SEC within ten days of filing that a review is being undertaken, the company is free to distribute the proxy materials to its shareholders without further consultation with the SEC. Nevertheless, because the SEC does not provide notice if no review is to be undertaken, it is advisable to contact the SEC to confirm that the SEC will not review the filing or that the review is complete before materials are sent to shareholders.

#### 2. SEC review

If the SEC elects to undertake a complete review of the preliminary proxy materials, the review period may take up to 30 days or more. The SEC's review of preliminary proxy materials focuses on the company's compliance with the proxy rules and the regulations contemplated thereby. The SEC's authority does not extend to any consideration of the fairness or the merits of a proposal. If a company anticipates that a preliminary proxy filing will be required, the timetable for holding the annual meeting should allow for the 30 or more day review period as well as additional time to respond to the SEC's comments. In addition, the preliminary materials should be filed as early as possible to allow sufficient time to revise the proxy statement in response to comments from the SEC and still be able to mail the materials to shareholders within the timetable established to hold the annual meeting.

#### 3. Revised proxy materials

Upon review, the SEC may require substantive changes to be made to the preliminary proxy materials. In such event, revised materials must be submitted to the SEC prior to distributing definitive copies of the proxy materials to shareholders. The filing of revised proxy materials does not recommence

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the ten-day time period unless the revised materials contain material revisions or material new proposals that constitute a fundamental change in the proxy materials. If the revisions to the proxy materials are material or material new proposals are included, the final proxy materials must be reviewed and cleared by the SEC before they are delivered to shareholders. Rule 14a-6(h) of Regulation 14A requires that any revised or amended proxy material filed with the SEC be marked, by underscoring or some other appropriate manner, to indicate clearly and precisely the changes effected therein.

### 4. Definitive proxy materials

Definitive proxy materials relating to an annual meeting at which only routine matters are to be considered must be filed with the SEC no later than the date the materials are first sent or given to shareholders. *See* Rule 14a-6(b) of Regulation 14A. Like the preliminary filing requirements, the company must file the proxy statement, proxy card and all other soliciting material, in the form in which such material is furnished to shareholders, on the date they are first mailed to shareholders. Like preliminary materials, definitive proxy materials must be filed electronically. The proxy rules require that companies file three copies of the definitive proxy materials with each national securities exchange on which the company has a class of securities listed or registered. Definitive proxy materials must also be accompanied by a statement of the date on which copies of such materials were provided to security holders, or, if not yet provided, the date on which copies thereof are intended to be released. AMEX and Nasdaq allow proxy materials filed with the SEC electronically to satisfy the company's filing requirements with these organizations. The NYSE's electronic filing provisions do not include proxy materials and require listed companies to file hard copies of all proxy materials directly with the NYSE.

### 5. EDGAR

Since 1993, the SEC has required public companies to submit at least some of the documents they file with the SEC electronically via the EDGAR system, and by 1999, all domestic companies were subject to electronic filing requirements. With a few limited exceptions, generally relating to confidential proxy materials for business combinations and the company's annual report to shareholders, all proxy materials must be submitted to the SEC electronically through EDGAR.

Regulation S-T under the federal securities laws, the rule specifically requiring electronic filing, contains numerous rules and regulations governing electronic filings through EDGAR, including the requirement that first-time filers obtain EDGAR access codes and corporate account numbers, requirements related to signatures filed electronically and the format of documents filed electronically, among others. Filers should contact their RR Donnelley representative for further information relating to these rules and preparing documents for electronic filing.

### B. STOCK EXCHANGES

Each of the NYSE, Nasdaq and AMEX also requires the filing of proxy solicitation materials. The NYSE requires listed companies to file six definitive copies of all proxy materials with the NYSE not later than the date on which such materials are sent to shareholders. In addition, the NYSE requires listed companies to file preliminary materials with the NYSE if any action is to be taken at an annual meeting relating to matters that may affect substantially the rights or privileges of listed securities of the company or result in the creation of new issues or classes of securities that the company may desire to list on the NYSE. In such an event, the NYSE staff will review preliminary materials and submit such comments as it may have before such materials become final. Nasdaq requires listed companies to file with Nasdaq copies of all proxy solicitation materials and three copies of all reports and other documents that the company files with the SEC. AMEX requires listed companies to file with AMEX five copies of the proxy statement, form of proxy and other soliciting materials that are mailed to shareholders. As discussed above, AMEX and Nasdaq allow proxy materials filed via EDGAR to satisfy these organizations' filing requirements, but the NYSE requires listed companies to file hard copies of proxy materials.

## THE ANNUAL REPORT TO SHAREHOLDERS

### I. PREPARATION

If the company's proxy statement relates to an annual meeting at which directors are to be elected, the proxy rules require that it be accompanied or preceded by an annual report to shareholders that complies with the requirements of Rule 14a-3 of Regulation 14A. The annual report is a different document than the proxy statement and the Annual Report on Form 10-K that public companies must file with the SEC, and is subject to much less regulation and supervision by the SEC.

Although the SEC does not dictate the contents of the annual report to shareholders to the extent of the proxy statement, the annual report to shareholders must include the following items required by Rule 14a-3 of Regulation 14A:

- consolidated, audited balance sheets as of the end of each of the two most recent fiscal years and audited statements of income and cash flows for the three most recent fiscal years for the company and its subsidiaries, that are:
  - prepared in accordance with the rules and regulations promulgated by the SEC in Regulation S-X; and
  - presented in Roman type at least as large and as legible as ten-point modern type, except that financial statements (but not the notes thereto) may be in eight-point modern type if necessary for convenient presentation;
- additional information required by Items 301–305 of Regulation S-K, including selected financial data for the preceding five-year period (Item 301), supplementary quarterly and other financial information (Item 302), management's discussion and analysis of the financial condition and results of operations of the company (Item 303), information concerning changes in or disagreements with the company's independent auditors on accounting and financial disclosures (Item 304) and quantitative and qualitative disclosures about market risk (Item 305);
- a brief description of the business conducted by the company and its subsidiaries during the preceding fiscal year;
- information relating to the company's industry segments, products and services, operations and export sales required by Item 101 of Regulation S-K;
- information identifying each of the company's executive officers and directors and indicating each person's principal occupation or employment;
- information required by Item 201 of Regulation S-K relating to the market price, trading market and security holders of the company's equity securities and dividends paid by the company; and
- unless included in the company's proxy statement, an undertaking in boldface type that a copy of the company's Annual Report on Form 10-K will be provided free of charge to any person solicited who requests the report in writing, except that the company is not required to provide copies of all exhibits to the Annual Report on Form 10-K free of charge.

In addition, the company's "performance graph" should now be presented under the disclosure item entitled "Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters" in the company's annual report to shareholders that accompanies or precedes a proxy or information statement relating to an annual meeting at which directors are to be elected, rather than in the company's proxy statement. A company's performance graph is the graph comparing the company's "cumulative shareholder return" for a minimum five-year period (or such period of time as the company's securities have been registered under the Exchange Act) with the cumulative total return of a broad market index (such as the Standard & Poor's 500 Stock Index) and the cumulative return of an index of companies similar to the company. *See* Item 201(e) of Regulation S-K.

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### II. INTEGRATION OF ANNUAL REPORT TO SHAREHOLDERS AND OTHER SECURITIES LAW FORMS

Some companies have chosen to include their Annual Report on Form 10-K as part of their annual report to shareholders or to deliver to shareholders their Annual Report on Form 10-K in satisfaction of the proxy rules' annual report delivery requirements. All information required to be included in the annual report to shareholders is also required to be included in the Annual Report on Form 10-K. Other companies elect to incorporate by reference into their Annual Report on Form 10-K some of the information presented in the annual report to shareholders. Companies that elect to bind their Annual Report on Form 10-K into the annual report to shareholders will sometimes also include a "wrap-around" forepart containing the president's or chairperson's letter and glossy photographs of the company's management or operations. Companies considering integrating their annual report and Annual Report on Form 10-K should be aware of the implications of Rule 14a-3(d), which states that information in such an integrated document in response to items required by Form 10-K is subject to liability under Section 18 of the Exchange Act, including information from the annual report that otherwise would not be subject to such liability.

### III. FILING REQUIREMENTS

#### A. SECURITIES AND EXCHANGE COMMISSION

Seven copies of the annual report to shareholders must be provided to the SEC, solely for informational purposes, not later than the date the proxy statement is first mailed to shareholders or the date the preliminary proxy materials (or definitive proxy materials in the absence of a preliminary filing) are first filed with the SEC, whichever is later. Unless the annual report to shareholders is incorporated by reference into other documents filed with the SEC by the company, it may, but is not required to be, filed using EDGAR. *See* Rule 14a-3 of Regulation 14A.

#### B. STOCK EXCHANGES

In certain circumstances, companies are also required to file the annual report to shareholders with their stock exchange. As a result of rule changes enacted in August 2006, companies are no longer required to file hard copies of the annual report with the NYSE if the company has elected to provide shareholders with the Annual Report on Form 10-K in satisfaction of the annual report requirement. *See* NYSE Listed Company Manual Rule 204.00. Presumably if a company chooses not to provide the Annual Report on 10-K to shareholders, the company would be required to file its annual report with the NYSE notwithstanding the fact that annual reports are not listed among the items required to be filed in hard copy with the NYSE under its amended rules. Nasdaq requires the annual report to be filed with Nasdaq at the time it is distributed to shareholders, however if the company has elected to send the Annual Report on Form 10-K to shareholders in satisfaction of the annual report requirement, then Nasdaq will consider the filing of the Annual Report on Form 10-K with the SEC as filing the annual report with Nasdaq. *See* Nasdaq Marketplace Rule 4350(b)(1). AMEX requires three copies of the annual report to be filed with AMEX at the time it is distributed to shareholders, unless the annual report was otherwise filed electronically with the SEC. *See* AMEX Company Guide § 701.

### IV. DELIVERY TO SHAREHOLDERS

As stated above, an annual report to shareholders must be delivered to each shareholder either before or with any proxy statement related to an annual meeting at which directors will be elected. Many companies send the proxy statement, proxy card and annual report to shareholders together in one package. If the documents are sent in separate mailings, they must be sent in a manner reasonably designed to ensure that the annual report reaches the shareholder first. To save on mailing costs, some companies mail the proxy statement by third class or bulk mail and the annual report by first class mail

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to ensure that it arrives first. The company will be under the same obligations to survey the broker-dealers, banks, voting trustees or other clearing agencies prior to the mailing as they are with the proxy statement. *See* “Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders.”

Like proxy statements, the company may deliver a single copy of the annual report to all shareholders of record having the same address if specified conditions are met. See the discussion relating to householding delivery of proxy materials above for a description of the conditions that must be satisfied to take advantage of these provisions for delivery of the company’s annual report to shareholders. The proxy rules also allow for electronic delivery of the annual report to shareholders. In addition, the listing requirements of each of the NYSE, Nasdaq and AMEX contain a requirement that companies with listed securities prepare and deliver to shareholders an annual report containing audited financial statements of the company and its subsidiaries.



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### SHAREHOLDER PROPOSALS

Rule 14a-8 of Regulation 14A, the shareholder proposal rule, permits shareholders to submit matters for inclusion in the company's proxy statement and consideration at the company's annual meeting. Rule 14a-8 is presented in a plain-English style and question-and-answer format to make the requirements relating to shareholder proposals more easily understood by shareholders. Even with a more readable shareholder proposal rule, however, only a small proportion of public companies actually receive shareholder proposals for consideration at their annual meeting. The SEC has reviewed the proxy rules and regulations relating to shareholder proposals, particularly the rules discussed below providing the company with substantive grounds to exclude shareholder proposals from its proxy materials. The SEC's proposals and rulemaking on this matter have largely focused on shareholder access as discussed more fully above in the section entitled "The Proxy Statement—Shareholder Access to Company Proxy Materials for Director Nominations." In June 2005, the SEC released Bulletin No. 14C, which discussed a variety of issues related to Rule 14a-8. Readers should consult with legal counsel before responding to a proposal submitted by a shareholder under Rule 14a-8.

#### I. PROCEDURAL REQUIREMENTS

To properly submit a shareholder proposal, the proxy rules require the shareholder submitting the proposal to satisfy specified conditions, including:

- holding a minimum of \$2,000 in market value, or one percent, of the company's securities entitled to vote on the proposal for at least one year prior to the date the proposal is submitted and through the date of the annual meeting (if the shareholder fails to hold the required number of securities through the annual meeting date, the company may exclude any proposal submitted by the shareholder for meetings held in the following two years) (Rule 14a-8(b));
- providing information regarding the shareholder submitting the proposal for inclusion in the proxy statement (Rule 14a-8(l));
- submitting no more than one proposal to the company for a particular annual meeting of shareholders (Rule 14a-8(c));
- submitting a proposal and accompanying supporting statement not exceeding 500 words (Rule 14a-8(d));
- attending the annual meeting, or arranging for a qualified representative to attend the annual meeting on the shareholder's behalf, to present the proposal (if the shareholder, or its qualified representative, fails to attend the annual meeting and present the proposal without good cause, the company may exclude any proposal submitted by the shareholder for meetings held in the following two years) (Rule 14a-8(h)); and
- submitting the proposal prior to the deadline required by the proxy rules, which is 120 days before the one-year anniversary of the date the company's proxy statement for the previous year's annual meeting was first mailed to shareholders (Rule 14a-8(e)).

A proposal that is not submitted in compliance with the eligibility or procedural requirements discussed above may be excluded by the company. If a company wishes to exclude a proposal on eligibility or procedural grounds, the company must first notify the shareholder of the deficiency within 14 days of receipt of the proposal and allow the shareholder to correct the problem. The shareholder then has 14 days following receipt of the company's notice to correct the deficiency. The company can only exclude the proposal if the shareholder fails to adequately remedy the deficiency. If a deficiency cannot be remedied, such as failure to submit the proposal prior to the deadline, the company is not required to provide the shareholder notice or an opportunity to cure. *See* Rule 14a-8(f).

## II. SUBSTANTIVE GROUNDS FOR EXCLUSION OF A SHAREHOLDER PROPOSAL

In addition to the eligibility and procedural rules, Rule 14a-8(i) provides several substantive means by which a company may exclude shareholder proposals from the proxy statement and proxy card, including any proposal that:

- is not a proper subject for action by shareholders under the laws of the company's jurisdiction of incorporation;
- would, if implemented, cause the company to violate any state, federal or foreign law to which it is subject, or that is contrary to any of the proxy rules;
- relates to a personal claim or grievance against the company or any other person, or that is designed to result in a benefit to the shareholder submitting the proposal that is not shared by the company's shareholders at large;
- relates to operations that account for less than a specified percentage of the company's total assets, net earnings and gross sales for its most recent fiscal year, or is not otherwise significantly related to the company's business;
- the company does not have the power or authority to implement;
- relates to an election for membership on the company's board of directors;
- directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;
- the company has already substantially implemented;
- substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the proxy materials for the same meeting;
- deals with substantially the same subject matter as another proposal that was previously included in the company's proxy materials within the preceding five calendar years and received fewer than a specified number of votes at the meeting or meetings; or
- relates to the payment of cash or stock dividends, or to the company's ordinary business operations.

If a company desires to exclude a shareholder proposal based on one or more of the substantive requirements described above, the proxy rules include detailed procedures that must be followed. *See* Rule 14a-8(i).

## III. RESPONSES TO SHAREHOLDER PROPOSALS

Upon receiving a proposal for inclusion in a company's proxy materials, the company has numerous alternatives for responding to the proposal. The company may elect not to dispute inclusion of the proposal, in which case the proposal must be included in the company's proxy statement and the proxy card to be used at the annual meeting. In such an event, the company may make a recommendation to the shareholders to vote for or against the proposal or may take no position on the proposal. If the company determines to recommend a vote against the proposal and desires to include in the proxy statement a statement in opposition to the proposal, the company must follow specified filing requirements contained in the proxy rules.

The company may also seek to exclude the proposal from the proxy materials based on the procedural or substantive rules discussed above. If the company desires to exclude the proposal, the company must follow the requirements contained in the proxy rules. As the procedures for opposing a shareholder proposal can be complicated, readers are urged to consult with legal counsel to ensure compliance.

In addition, the company may meet with the submitting shareholder and negotiate a mutually agreed resolution of the issue. In 2007, nearly half the proposals submitted by shareholders were later withdrawn and never included in the proxy statement or considered at the annual meeting as a result of these negotiations.

## PREPARING FOR THE ANNUAL MEETING

### I. TIME AND RESPONSIBILITY SCHEDULE AND CHECKLIST

One of the most important components in conducting a successful annual meeting of shareholders is early and consistent preparation. For some, this preparation begins more than a year prior to the date of the annual meeting. To prepare properly for and coordinate the many activities involved in conducting a successful annual meeting, most companies prepare a detailed time and responsibility schedule. As its name indicates, the time and responsibility schedule outlines the tasks that must be completed prior to the annual meeting, establishes the expected deadline for completion of the tasks and allocates responsibility among the persons preparing for the annual meeting to complete the required tasks. A good place to start in preparing the time and responsibility schedule for the upcoming annual meeting is with the schedule that was prepared for the most recent annual meeting. Each party that may be responsible to perform any of the required tasks should be consulted and have an opportunity to comment on the form of the time and responsibility schedule.

While the prior year's time and responsibility schedule is an appropriate starting place for the preparation of the schedule for the upcoming meeting, care should be taken to ensure that lessons learned from last year's meeting are incorporated into the current time and responsibility schedule and that any revisions required by changes to the laws, rules and regulations governing the annual meeting are also incorporated. It is important to review the time and responsibility schedule frequently to make corrections required as events change during preparation for the annual meeting. Although the time and responsibility schedule will differ among companies, it should contain expected deadlines and allocate responsibility for the following tasks at a minimum:

- determination of appropriate notice and record dates for the annual meeting in accordance with applicable rules and regulations;
- determination of an appropriate location in accordance with the company's charter documents and reservation of appropriate meeting facilities;
- determination of the company's director nominees;
- preparation and adoption of board of directors resolutions to:
  - establish the annual meeting date and record date;
  - approve the company's director nominees and other matters to be considered at the annual meeting;
  - approve the proxy statement, annual report to shareholders and other proxy materials for distribution to shareholders; and
  - appoint the inspector of elections for the meeting;
- determination of final date for receipt of shareholder proposals and responsibility for submission of such proposals;
- preparation and distribution of D&O Questionnaires (*See* "Federal Proxy Rules and the Proxy Statement—Due Diligence Regarding Proxy Materials");
- preparation of the notice of Internet availability of proxy materials, proxy statement and form of proxy, and determination of the appropriate date for filing such materials with the SEC and appropriate stock exchange organizations;
- preparation of the annual report to shareholders and filing the annual report with the SEC and appropriate stock exchange organizations;
- distribution of letters to broker-dealers, banks, voting trustees and other clearing organizations regarding beneficial owners;
- arrangements with financial printers to print and distribute the proxy materials and annual report;
- arrangements with internal information technology personnel or with external vendors, as applicable, to post the company's proxy materials on a publicly-accessible web site which complies with the proxy rules and regulations;
- coordination with intermediaries for a proxy distribution;

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- coordination of physical arrangements for the annual meeting, including meeting facilities, security, promotional items for shareholders and transportation and accommodation arrangements for directors, officers and other support people; and
- preparation of appropriate annual meeting documents such as an agenda, script and management presentations.

This is not an exhaustive list of the items that may be included in a time and responsibility schedule for many companies. The schedule will need to be continually revised and updated throughout the preparation for the annual meeting. Additionally, preparing for and conducting an annual meeting requires extensive coordination among many of the company's internal departments, including representatives of the executive, legal, finance and communications departments, as well as among the company's outside advisors, such as legal counsel, auditors, transfer agent and proxy solicitor, if one is used.

### **II. SETTING THE ANNUAL MEETING DATE**

Some states require annual meetings to be held within a specified time period following the company's prior annual meeting. If a meeting is not held within the specified time period, these states generally give shareholders the right to demand that a meeting be held. Most states leave the setting of the specific annual meeting date to the company, whether pursuant to a set date in the company's bylaws or by a resolution of the board of directors. In addition, companies with shares listed for trading on the NYSE are required to hold their annual meeting within a reasonable time after the end of the company's fiscal year so that the information in the annual report is relatively timely. The annual meeting is usually held shortly after the financial statements for the most recent fiscal year have been audited and the annual report of the company has been distributed to shareholders. As a result, for a company whose fiscal year is the calendar year, the annual meeting of shareholders is generally held in late spring.

### **III. SETTING THE RECORD DATE**

All state corporate statutes allow for the use of a record date to establish the persons eligible for notice of and voting at an annual meeting, whether as an alternative to or replacement of the closing of shareholder records for some time prior to the annual meeting. State corporate law generally allows the record date to be fixed in the bylaws of the company or established by a resolution of the board of directors. In addition, the record date must generally be no more than, nor fewer than, a fixed number of days before the date of the annual meeting. For example, under Delaware corporate law, the record date must be no more than 60, nor fewer than ten, days before the meeting date (DGCL Section 213). Companies typically establish a record date far enough in advance to allow sufficient time for the solicitation of proxies prior to the meeting. Federal proxy rules require that companies contact institutional record holders at least 20 business days prior to the record date of the annual meeting to inquire whether other persons are the beneficial owners of the company's securities and the number of proxies and other soliciting material to supply to the record holder for such beneficial owners. *See* Rule 14a-13 of Regulation 14A.

### **IV. DETERMINING THE ORDER OF BUSINESS; PREPARING THE AGENDA AND RULES OF CONDUCT**

There is no required order of business that must be followed in conducting an annual meeting of shareholders. Nonetheless, a well-organized order of business and agenda are essential elements to conducting a successful annual meeting. Another important element to maintaining control at the annual meeting is preparing clear and understandable rules of conduct for the meeting and making them available for shareholders as they enter the meeting. Such rules will increase the control that the chairperson has over the conduct of the meeting. In preparing the rules of conduct for the annual

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meeting, readers should note that Robert's Rules of Order are not required and most practitioners recommend against their use. The rules of conduct prepared for the annual meeting should be designed to provide guidelines for an orderly meeting, while providing flexibility to the chairperson to make appropriate modifications and adjustments as the meeting progresses and as the situation may require. In addition, the rules of conduct should include limits on the number of questions that shareholders may ask and the time periods for which shareholders may speak during the meeting. Sample agenda and rules of conduct for an annual meeting are included in this handbook as Appendix B. *See* page B-1.

In addition, most companies prepare a detailed script for speakers to follow during the meeting, including alternate scenarios to manage various events that may arise during the meeting (e.g., dealing with an unruly shareholder, a request to speak to matters not on the agenda or a request for cumulative voting, where allowed by state law). For more information on the type of information to include in an annual meeting script, see "Preparing for the Annual Meeting—Preparing for Unexpected Events; Informational Packages and Detailed Meeting Script."

### V. PRE-MEETING LOGISTICS

#### A. LOCATION

The proper location of the annual meeting of shareholders is generally governed by state corporate statutes. Under most of these statutes, annual meetings are permitted to be held inside or outside the state of incorporation in accordance with the bylaws of the company. Some states require the meetings to be held at the company's principal office unless expressly permitted to be held elsewhere by its charter or bylaws. Bylaws typically defer the actual location decision to the board of directors of the company. Some companies hold their meetings at the same location (generally at or near their corporate headquarters) each year, while some larger companies with a national shareholder base have found it beneficial to rotate their annual meeting location among a number of metropolitan areas where they have large shareholder density and where a large facility is located. Recent technological advancements offer companies even more flexibility, including satellite transmissions to various locations or use of the Internet or other electronic sources to hold a meeting with no physical location. *See* "The Meeting—Electronic Annual Meetings and Supplemental Broadcasts" for more information regarding regional and electronic meetings.

Factors to consider in selecting a location for the annual meeting include, among other things:

- the ability of a sufficient number of shareholders to attend the meeting at that location;
- access to the company's headquarters or other facilities;
- access to suitable meeting facilities;
- access to appropriate transportation alternatives; and
- the absence of mitigating factors, such as local anti-business climate, previous demonstrations at similar meetings or election-year campaign issues.

Once the geographic location has been selected, the specific meeting facilities should be chosen and reserved as soon as possible. Some meeting facilities are booked a year or more in advance. Factors to consider in selecting a meeting facility include, among other things, exhibit areas, appropriate meeting rooms, access for handicapped shareholders, adequate sound equipment, lighting, seating and ventilation, access to technology connections and expense.

#### B. PHYSICAL ARRANGEMENTS

Following reservation of the meeting facilities, preparation of the physical arrangements begins. Persons responsible for preparing the physical accommodations for the annual meeting should consider the following items:

- seating arrangements for the directors, officers, legal and accounting advisors, shareholders and other necessary participants;

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- shareholder access to microphone stations to address the meeting;
- adequate audio-visual equipment for participants;
- adequate telephone, data and other telecommunications connections;
- arrangements for beverages or other refreshments for meeting participants; and
- hotel accommodations, transportation and parking arrangements for meeting participants.

Those responsible for the physical arrangements should make themselves familiar with the layout of the building and its audio-visual equipment and coordinate the availability of the various services or special arrangements that will be necessary to conduct the meeting. Social events and hotel accommodations for the directors and officers of the company, if desired, should also be arranged prior to the meeting.

### C. ATTENDANCE RULES

Although shareholders (or their proxy holders) are the only parties with an enforceable right to enter the meeting, many companies also allow admission to other persons, such as employees of the company, representatives of the press, legal counsel, accounting advisors, the inspector of elections, representatives of the company's transfer agent and other invited guests. Once it is determined who will be allowed to enter the meeting, those responsible for conducting the meeting must ensure that ample space is provided to allow attendance by all such parties. Companies should also establish clear policies in advance concerning the attendance of these parties at the annual meeting. Policies that may restrict access by shareholders based on room size, late arrival, etc., should be publicized in the company's proxy materials.

To enforce these attendance restrictions, some companies require attendees to present admission tickets, usually obtained by returning a card provided with the company's proxy materials. In addition, many companies require shareholders to present picture identification prior to entering the meeting. A registration desk is also an important part of enforcing attendance rules. A registration desk will allow verification of the shareholder status of any person who decides to attend the meeting at the last minute. In addition, registration procedures can alert the company as to the number of shareholders wishing to address the meeting. Some companies also arrange for an attorney to be present at the registration desk to arbitrate any non-standard request for admission.

### D. SECURITY

Even though fewer disruptive demonstrations have been seen in recent years, with the current state of the economy and recent corporate scandals, many commentators believe that shareholder attendance at annual meetings will increase, and that shareholders will be more active in voicing questions and concerns. With this in mind, security will likely be more important to conducting a successful meeting in coming years. Persons responsible for coordinating security arrangements should consider the following (depending on the likelihood of disruptions):

- becoming aware of the security offered by the facility hosting the annual meeting;
- assigning individuals in the company's security or legal department to assist with escorting disruptive shareholders from the meeting;
- contacting the local police department to alert them of the annual meeting, to provide any information that may be known regarding possible disturbances and to coordinate between the police and company or hired security personnel; and
- preparing a detailed meeting script containing scenarios to provide guidance in the event of various disruptions.

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### VI. PREPARING FOR UNEXPECTED EVENTS; INFORMATIONAL PACKAGES AND DETAILED MEETING SCRIPT

At even the most well-planned annual meetings, unexpected events will occur. The best way to minimize the impact of unexpected events is to provide the chairperson and other participants in the meeting with the information needed to handle the various situations that may arise at the annual meeting. Individuals who deal with shareholder questions and comments at the annual meeting must have access to the information needed to respond to a wide array of questions and concerns about the company and its business. This information is often prepared by persons in the company's communications department and provided to directors and officers for their review prior to the meeting. The chairperson and other corporate personnel should also receive information outlining the legal matters that must occur to properly transact business at the annual meeting, including:

- determination that a quorum is present at the annual meeting;
- the vote required to approve the matters to be considered at the meeting;
- the availability of corporate records and the shareholder list; and
- the procedures for processing and tabulating the votes received by proxy prior to the meeting and/or in person at the meeting.

Preparing a detailed script for the annual meeting will also assist the directors and officers in conducting the meeting. The script generally follows the meeting agenda and adds the specific text that the chairperson can follow to ensure that the meeting proceeds in an orderly manner. In addition to including appropriate text for conducting the meeting, the person preparing the meeting script should also consider the following:

- The script should provide that all legally required items be accomplished early in the meeting so that the meeting may be adjourned if a disruption occurs during the question and answer session or during management's presentation regarding the company's business.
- Instructions and alternative text should be included to respond to various scenarios that may arise, including:
  - requests for cumulative voting;
  - shareholders who exceed the time limits for making comments;
  - generally disruptive shareholders;
  - requests to be heard on matters outside the approved agenda; or
  - shareholders wishing to bring a motion before the meeting.
- The script should include procedures in the event that an emergency or major disturbance occurs that requires evacuation of the meeting facilities. These procedures may include:
  - announcing that a quorum is present for transacting business at the meeting;
  - announcing preliminary results of matters presented at the meeting;
  - adjourning the meeting if necessary; and
  - exiting the meeting room in an orderly fashion, including a description of the appropriate exits for different participants.

A sample annual meeting script is included in this handbook as Appendix C. *See* page C-1.

### VII. CORPORATE GADFLIES

Another event that companies, particularly larger companies with numerous shareholders, should prepare for is the attendance at the annual meeting of shareholders of so-called corporate "gadflies," who attend annual meetings solely to make complaints, ask disruptive questions or submit proposals that do little more than disrupt the meeting and further their specific social or political agenda. These parties sometimes take extreme positions at meetings to dramatize what they view as a lack of corporate democracy. Some try to dominate the meeting by shouting management down or refusing to abide by the rules of conduct. The tactics used by these shareholders can add additional time to the meeting, and can be very disruptive to the proceedings of the meeting. A well-prepared meeting script, easily understood rules of conduct and an understanding of the company's charter documents and the state

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law governing the annual meeting will assist the chairperson of the meeting in dealing with these parties. Although corporate gadflies can disrupt the meeting, they have little power to effect change if sufficient proxies have been received to transact business at the meeting and to approve the matters submitted to shareholders. If these shareholders do attempt to cause a disruption, practitioners generally advise companies to wait out the disruption or, as often occurs, allow other shareholders to request the disruptive shareholders to be silent and permit the meeting to proceed. Rules of conduct that limit the time shareholders are allowed to address the meeting and that are made clear at the beginning of the meeting also assist in discouraging overly disruptive behavior.

### **VIII. SHAREHOLDER LISTS**

Most states provide shareholders the right to inspect a list of the shareholders of the company under specified conditions. Shareholders may wish to review the company's shareholder list for purposes of soliciting proxies for the upcoming annual meeting. The proxy rules also contain provisions that require companies to assist parties wishing to solicit proxies or provide information to shareholders. Under Rule 14a-7 of Regulation 14A, companies are generally required, upon the request of a shareholder and at the company's option, to either provide a shareholder list or mail the requesting shareholder's materials on his or her behalf.

In addition, state corporate statutes in most states require that companies make available to shareholders prior to the annual meeting a list of shareholders entitled to vote at the meeting. Nearly all states require the shareholder list to be available at the meeting, however, some states require shareholders to comply with specified conditions to gain access to the list.



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### THE MEETING

#### I. TRANSACTION OF BUSINESS AT THE ANNUAL MEETING

##### A. VOTING PROCEDURES—QUORUM

State corporate law governs the requirements to properly transact business at an annual meeting, including the requirement that a quorum of votes be present in person or by proxy at the meeting. State law also establishes the procedures by which the presence of a quorum is determined, some of which are found in the state corporate statutes and others of which are found in the company's charter documents. Although not determined until the beginning of the meeting, most public companies seek to determine through the receipt of proxies that a quorum will be present at the meeting well before the meeting date.

In determining whether a quorum is present at an annual meeting, the following should be considered:

- votes represented by shareholders who attend the meeting will generally be included even if the shareholder does not vote at the meeting (unless the shareholder is attending solely to contest the legality of the meeting, in which case the shareholder's shares will not be included in the quorum determination);
- shares represented by proxies with instructions to vote on less than all of the matters are considered present at the annual meeting for quorum purposes; and
- treasury shares and shares held by subsidiaries of the company conducting the annual meeting are generally not included in the number of shares present at the annual meeting.

After a quorum has been established, a shareholder leaving the meeting will generally not nullify the presence of a quorum for the meeting or invalidate any action taken at the meeting.

##### B. VOTING PROCEDURES—VOTE REQUIRED

Requirements differ among state corporate statutes regarding the vote required to approve matters submitted at an annual meeting. Most states require the affirmative vote of a majority of the shares voting at the annual meeting to approve most matters submitted at the meeting. Some states require a higher threshold, the affirmative vote of a majority of the company's outstanding voting stock, to approve fundamental corporate matters, while other states have even higher super-majority voting requirements to approve fundamental corporate transactions. In some states, companies are allowed to specify in their charter documents, within limits, the vote required to approve matters submitted to shareholders at the annual meeting that may be different from a baseline established in the state corporate law. State corporate statutes should also be reviewed to determine the proper treatment of abstentions, broker non-votes and votes to withhold authority, the determination of which can be complicated.

In addition, the stock exchanges may have requirements regarding shareholder votes on certain matters mandated to be submitted to a vote of the shareholders. For example, Nasdaq Marketplace Rule 4350(i) requires a vote of a company's shareholders for certain issuances of additional stock, and the minimum vote that will constitute shareholder approval in such case is a majority of the total votes cast on the proposal.

##### C. VOTING PROCEDURES—ELECTRONIC VOTING

A technological advancement that has impacted the annual meeting is the use of electronic voting. Although commentators generally believe that electronic voting does not increase the number of votes cast at the meeting, they do believe that electronic votes are often cast earlier, which provides the company with information regarding the shareholder vote earlier in the process and allows the company to change its solicitation efforts if the early results are not as expected. Before allowing shareholders to vote electronically, a company must ensure that electronic voting is allowed under (1) the

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corporate laws of its state of incorporation (*See* Section 212 of the DGCL and 178 of the CCC, which allow shareholders to authorize a proxy through an electronic transmission), (2) the company's charter documents and (3) the rules of the stock exchange or market on which the company's stock is listed for trading.

If the company is authorized to use electronic voting, a technology must be selected that will satisfy state and federal proxy rules. Companies that elect to use electronic voting should consider providing disclosure in their proxy materials regarding the procedures for using electronic voting and the validity of the procedures under state corporate law. Other issues to consider in creating electronic voting procedures include:

- *Security and Authenticity.* Any complaint that a company's voting system can be manipulated electronically could result in negative publicity or even invalidate the results of the meeting.
- *Costs and Expenses.* Although there will be a fee associated with initiating electronic voting, electronic votes are generally less expensive per vote compared to votes received by mail.

## II. UNEXPECTED PROPOSALS

The chairperson of the meeting should be prepared to respond to unexpected proposals that may be presented during the meeting. Although these proposals can disrupt the meeting, they can usually be excluded based on provisions contained in the company's charter documents and the state corporate law governing the meeting. Corporate charter documents generally require shareholders to submit matters for consideration at the annual meeting a specified number of days prior to the annual meeting. If proposals are submitted to the company after the deadline, they may be excluded on that basis alone. Proposals may also be excluded if they are inconsistent with state corporate law, including if the proposed matter would be illegal or relates to activities that have been delegated by state corporate law to the board of directors of the company. If the proposal is not in order for the meeting, the chairperson has a variety of alternatives to exclude the matter rather than taking a vote at the meeting. The chairperson can explain why the matter is out of order and request the shareholder to withdraw the matter and submit it for consideration at next year's meeting.

Proposals that are valid for consideration at the annual meeting should be presented at the meeting. Proposals relating to the conduct of the meeting may be submitted to a vote of the shareholders present. Because most proxy statements grant discretionary authority to the proxy holders to act on matters that properly come before the annual meeting, it is not likely that any undesired proposal that is properly presented will be approved.

## III. SHAREHOLDER QUESTIONS

At most annual meetings, the company's management makes a presentation to the shareholders on the company's progress during the prior fiscal year. The presentation is often followed by a question and answer period during which shareholders are allowed to ask questions of management. Although some shareholders ask questions about actions being considered at the meeting or about the company's business, many shareholders, such as the corporate gadflies discussed above, attend the annual meeting simply to make complaints about the direction of the company, its stock price or operations or to further a personal agenda. The chairperson of the meeting and the other officers responsible for responding to these questions should be provided sufficient information about the operations of the company and should be prepared for the types of questions or comments that may be expected from shareholders.

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### IV. INFORMATION PROVIDED TO SHAREHOLDERS AT THE ANNUAL MEETING

In addition to state corporate statutes that require companies to make available a list of the shareholders authorized to vote at the annual meeting, good corporate practice suggests that companies should make available to shareholders who attend the annual meeting copies of their annual report to shareholders, proxy statement and other proxy materials and Exchange Act reports, such as the company's Annual Report on Form 10-K. Some companies also use the annual meeting to prepare displays or provide promotional materials to shareholders regarding the company's business.

### V. ADJOURNMENT

State law governs the procedures for adjourning a meeting of shareholders and will typically determine the need for (1) notice of the adjourned meeting, (2) a new record date and (3) a quorum count, and whether new business may be validly taken at the adjourned meeting.

### VI. ELECTRONIC ANNUAL MEETINGS AND SUPPLEMENTAL BROADCASTS

Recent technological advances allow companies to hold electronic meetings with no physical location or to broadcast their annual meetings over the Internet or by satellite or other telecommunications medium to numerous locations and to shareholders, employees or other participants who may be unable to attend the meeting.

#### A. SIMULCASTING THE ANNUAL MEETING TO NUMEROUS LOCATIONS

A number of companies now supplement their official meeting with simultaneous broadcasts. Providing expanded access to the annual meeting can be a useful investor and employee relations tool by allowing shareholders and employees who otherwise would be unable to attend the annual meeting to access and participate in the meeting. Some companies also allow online participants to e-mail questions to management.

#### B. ELECTRONIC MEETINGS

Delaware companies are able to not only broadcast their meetings to remote locations, but to hold their annual meetings entirely electronically without a physical location. Section 211(a)(1) of the DGCL allows boards of directors of Delaware companies that are authorized to select the location for the annual meeting to determine that the meeting not be held at a physical location, but instead be held solely by means of remote communication.

Holding an annual meeting electronically offers the company advantages such as:

- reducing the expense of conducting the annual meeting, which can be a costly process for some companies;
- reducing the amount of senior management and board member time that is occupied by the annual meeting through the elimination of travel that is sometimes required to attend remote annual meetings; and
- providing access to the annual meeting to a broader group of shareholders and employees, who may be unable or unwilling to travel to a physical meeting held at a remote location.

Holding a meeting electronically, however, is still a novel concept with its share of critics. Companies considering an electronic meeting should consider the following factors:

- Delaware was the first state to authorize entirely electronic annual meetings and few other states have adopted similar changes to their corporate statutes. Companies should consult with legal counsel to determine if an electronic meeting is authorized by corporate statutes in their state of incorporation.

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- The technology used to conduct the meeting must meet state corporate law requirements for shareholder participation. For a shareholder to be “present” for purposes of a quorum and voting under Delaware corporate law, the company must have the reasonable ability to:
  - verify that each person deemed present and permitted to vote at an electronic meeting is a shareholder or proxyholder;
  - provide shareholders and proxyholders a reasonable opportunity to participate in and vote at the meeting, including the ability to concurrently read or hear proceedings of the meeting; and
- maintain a record of each vote or other action taken by a shareholder or proxyholder at the meeting by means of remote communication.
- Because electronic meetings are so new, companies should review their charter documents (and make any appropriate amendments) to ensure that an electronic meeting is authorized.
- Because electronic meetings will likely increase the number of shareholders participating in the meeting, results may be less predictable as shareholders wait to vote at the meeting or change their vote at the meeting. This is particularly the case with meetings at which controversial proposals will be submitted.
- If more shareholders participate in the electronic meeting, companies should also be prepared for increased shareholder activism. Electronic meetings have been criticized by institutional investors and corporate gadflies because they eliminate the shareholders’ face to face contact with the company’s management.

Although electronic meetings will likely result in less certainty by corporate management about the outcome of the annual meeting, some commentators believe that the electronic meeting may ultimately provide companies and shareholders some of the advantages the annual meeting was intended to provide. It is uncertain how many other states will follow Delaware’s lead in allowing electronic meetings or how many companies will take advantage of the technological and statutory changes to hold electronic meetings, but some believe electronic meetings are here to stay and will be an integral part of corporate democracy in the future.

### **VII. REGIONAL MEETINGS**

In addition to supplementing their annual meeting through remote broadcast of the principal meeting, some companies with geographically diverse shareholder bases have chosen to hold regional open houses or forums around the country to provide shareholders an opportunity to meet and hear first-hand from corporate executives. Even though no action is taken at these meetings, they are shareholder communications tools that allow shareholders to evaluate and interact with management of the company.

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### POST-MEETING ACTIVITIES

#### I. MINUTES OF THE MEETING AND CORPORATE DOCUMENTS

Preparing minutes of the annual meeting is generally the responsibility of the corporate secretary pursuant to state corporate law or the company's charter documents. While minutes of the annual meeting do not affect the validity of the actions taken at the meeting, they are kept to ensure that the records of the company are complete. Accurate minutes also avoid confusion relating to the actions taken at the annual meeting. After the minutes have been prepared, the corporate secretary should file the minutes and the other critical meeting documents (such as the Inspector of Election Report, the Oath of the Inspector of Election, the voting results and meeting transcripts) with the corporate records.

Companies often use recording devices or court reporters to accurately document the proceedings at the annual meeting. Although these tapes or transcripts may be useful to the corporate secretary in preparing the minutes, they should not be a substitute for the preparation of written minutes of the meeting. If a meeting is taped or recorded, companies often make copies of the tapes available to shareholders upon request. Some companies also include an archived version of the annual meeting on their web site. Companies that provide access to archived copies of their annual meeting should also consider the information that is discussed at the annual meeting and how that information will be received by shareholders. Commentators suggest that the archive should be placed in a section of the company's web site where other information is archived and clearly marked. In addition, at some time following the meeting the archived annual meeting should be removed entirely from the company's web site to avoid access to information that is no longer accurate or current.

#### II. ORGANIZATIONAL BOARD MEETING FOLLOWING SHAREHOLDERS MEETING

Many companies hold a board of directors meeting following their annual shareholders meeting. If the company's directors are present for the annual meeting, this is an excellent time to convene a meeting of the board of directors. The types of matters discussed and action taken at such meetings, in addition to any action that needs to be taken related to the business of the company, generally include:

- electing the officers of the company for the ensuing year;
- designating the executive officers of the company who are subject to the requirements of Section 16 under the Exchange Act;
- conducting annual shareholders meeting proceedings for the company's wholly-owned subsidiaries, if any, to elect directors and officers of such subsidiaries; and
- reviewing the functioning of the just-completed annual meeting of shareholders, and taking any action that may be required for the company's next annual meeting of shareholders.

#### III. REPORT ON THE RESULTS OF VOTING

Because the large majority of shareholders of publicly traded companies do not attend annual meetings, many companies issue press releases announcing the results of voting at the meeting. Some companies also circulate to their shareholders a newsletter or bulletin describing the highlights of the meeting. Companies can also provide a more detailed discussion of the results of the meeting to shareholders who request a more detailed review. As discussed above, some companies provide access to an archived version of the annual meeting on their web site. These archived recordings can be accompanied by a written description of the results of voting at the meeting. The final determination as to what information to provide and the means by which it is provided is generally based on the investor relations, marketing and expense impact of the various alternatives.

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The federal securities laws require that public companies report the voting results of shareholders meetings in the company's Quarterly Report on Form 10-Q covering the quarter in which the meeting took place. Specifically, the Quarterly Report on Form 10-Q must contain:

- the date of the meeting and whether it was an annual or special meeting;
- if applicable, the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting; and
- a brief description of each matter voted upon at the meeting, stating the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes, as to each such matter, including a separate tabulation with respect to each nominee for office.

### **IV. POST-MEETING REVIEW**

Following the annual meeting, many companies find it useful for all of the staff participants to meet and review the execution of the annual meeting. At such a meeting, the participants review the time and responsibility schedule and meeting agenda to note any items that can be improved for the following year's annual meeting. All aspects of the meeting should be examined for possible improvement, including the proxy solicitation materials, annual report, meeting facilities, agenda, script, security, logistics, proxy solicitor and shareholder participation.

Following the annual meeting, sometimes shortly after the post-meeting review is complete, many companies begin planning for the following year's meeting, including preparing a new time and responsibility schedule and selecting and arranging the facilities for the next meeting.

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### CONCLUSION

Preparing for the annual meeting is a complex process requiring the company to comply with state and federal laws, stock exchange rules and the company's charter documents. Persons preparing for the annual meeting should consult with legal counsel to ensure the numerous requirements are satisfied. In addition, the actions of a host of participants must be coordinated, including representatives of the company's executive, legal, finance and communications departments, and representatives of the company's outside legal counsel, independent auditors, transfer agent and possibly a proxy solicitor. The key to a successful meeting is starting the preparation process early, enlisting the help of the necessary participants and working diligently to see the process through to completion.

**RESOURCES**

- APPENDIX A: GENERAL NOTICE AND FILING REQUIREMENTS FOR ANNUAL MEETINGS AND RELATED MATTERS**
- APPENDIX B: SAMPLE AGENDA AND RULES OF CONDUCT**
- APPENDIX C: SAMPLE ANNUAL MEETING SCRIPT**
- APPENDIX D: SELECTED CONTENTS OF THE NOTICE OF INTERNET AVAILABILITY OF PROXY MATERIALS**
- APPENDIX E: SELECTED BIBLIOGRAPHY**



**APPENDIX A**

**General Notice and Filing Requirements for Annual Meetings and Related Matters<sup>1</sup>**

<b>Meeting and Record Date</b>	<b>Annual Report to Shareholders</b>	<b>Preliminary Proxy Materials</b>	<b>Definitive Proxy Materials</b>	<b>Report of Actions Taken</b>
<p>Notice must be provided and a record date established that is within a specified number of days prior to the annual meeting.<sup>2</sup></p> <p>State Law</p>	<p>No Specific Requirement</p>	<p>No Specific Requirement</p>	<p>No Specific Requirement</p>	<p>No Specific Requirement</p>
<p>The proxy rules require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials and annual reports to those beneficial holders. These inquiries must be made no later than 20 business days prior to the record date for the annual meeting. (Rule 14a-13)</p> <p>Federal Securities Law</p>	<p>An annual report complying with Rule 14a-3 of Regulation 14A under the Exchange Act must be delivered to each shareholder and seven copies must be mailed to the SEC no later than the later of the date on which the annual report is first sent or delivered to shareholders or the date that the company files preliminary proxy materials (or definitive materials if preliminary materials are not required) with the SEC. (Rule 14a-3)</p>	<p>Preliminary proxy statement and proxy card relating to any meeting at which non-routine matters will be considered must be filed with the SEC at least 10 days (or such shorter period as the SEC may authorize) before definitive proxy materials are mailed to shareholders. (Rule 14a-6(a))</p>	<p>Concurrently with or before the mailing of the definitive proxy statement, proxy card and other soliciting materials to shareholders, the company must file copies of such materials with the SEC and provide copies to each national securities exchange on which the company's securities are listed. (Rule 14a-6(b))</p>	<p>For each matter submitted to a vote of shareholders, the company must provide the following information in its Annual Report on Form 10-K or its Quarterly Report on Form 10-Q for the period in which the meeting was held: (a) the date and type (annual or special) of meeting; (b) if directors were elected, the name of each director elected or whose term continues after the meeting; (c) a brief description of each matter voted upon, including the number of votes cast for, against or withheld (as well as the number of abstentions and</p>
<p>The proxy rules also require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials to those beneficial holders. (Rule 14a-13)</p>	<p>The proxy rules also require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials to those beneficial holders. (Rule 14a-13)</p>	<p>The proxy rules also require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials to those beneficial holders. (Rule 14a-13)</p>	<p>The proxy rules also require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials to those beneficial holders. (Rule 14a-13)</p>	<p>The proxy rules also require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials to those beneficial holders. (Rule 14a-13)</p>

<u>Meeting and Record Date</u>	<u>Annual Report to Shareholders</u>	<u>Preliminary Proxy Materials</u>	<u>Definitive Proxy Materials</u>	<u>Report of Actions Taken</u>
	reports to those beneficial holders. (Rule 14a-13)			broker non-votes) for each matter and a separate tabulation for each director nominee and (d) a description of the terms of any settlement with any participant terminating a solicitation in opposition, including the cost to the company.
Notice must be provided to the NYSE immediately (in no event later than 10 days before the record date) of the meeting and record date, and the company must publicize any meeting to consider non-routine matters. (Listed Company Manual §§ 204 & 401)	An annual report containing audited financial statements (in the format and by the means allowed or permitted by applicable law) must be made available to shareholders on or through the company's web site when such report is filed with the SEC. Companies must also post to their web site a prominent undertaking to provide all holders the ability to receive a hard copy of the company's complete audited financial statements free of charge. So long as the company files its annual report through EDGAR, it is not required to file a hard copy with the	Preliminary proxy materials relating to specified matters must be filed with the NYSE for review and comment before they become final. (Listed Company Manual §§ 204 & 402)	Definitive proxy statement and proxy card must be filed with the NYSE before or at the same time they are provided to shareholders. (Listed Company Manual § 402)	Companies must notify the NYSE of the occurrence of numerous specified events. (Listed Company Manual § 204)

Federal Securities Law

NYSE

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**2008 ANNUAL MEETING HANDBOOK**

<b>Meeting and Record Date</b>	<b>Annual Report to Shareholders</b>	<b>Preliminary Proxy Materials</b>	<b>Definitive Proxy Materials</b>	<b>Report of Actions Taken</b>
AMEX	<p>Shareholders and AMEX must receive notice of the annual meeting at least 10 days before the meeting. AMEX must receive notice of the record date immediately upon its establishment. (AMEX Company Guide §§ 701 &amp; 703)</p>	<p>NYSE. (Listed Company Manual §§ 203 &amp; 204)</p> <p>An annual report containing audited financial statements (in the format and by the means allowed or permitted by applicable law) must be delivered to shareholders and filed with AMEX, unless the material was otherwise filed electronically with the SEC. (AMEX Company Guide §§ 610 &amp; 701)</p>	<p>Preliminary proxy materials relating to specified matters must be filed with AMEX for review. (AMEX Company Guide § 122, Commentary)<sup>3</sup></p> <p>Definitive proxy statement, proxy card and other materials must be filed with AMEX. (AMEX Company Guide § 701)<sup>3</sup></p>	<p>Companies must notify AMEX of the occurrence of numerous specified events. (AMEX Company Guide Part 9)</p>
NASDAQ	<p>Companies are required to hold an annual meeting. (Marketplace Rule 4350(e))</p>	<p>An annual report containing audited financial statements (in the format and by the means allowed or permitted by applicable law) must be delivered to shareholders and concurrently filed with Nasdaq. The annual report must be made available to shareholders either: (1) by mailing the report to shareholders; or (2) by posting the report on or through the company's web</p>	<p>Preliminary proxy materials relating to matters subject to Nasdaq's Voting Rights Policy must be provided to Nasdaq for review. (DM-4351)<sup>3</sup></p> <p>Proxies must be solicited and proxy statements provided to shareholders for all meetings and copies concurrently delivered to Nasdaq. (Marketplace Rule 4350(g))<sup>3</sup></p>	<p>Companies must notify Nasdaq of the occurrence of numerous specified events. (Marketplace Rules)</p>

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<u>Meeting and Record Date</u>	<u>Annual Report to Shareholders</u>	<u>Preliminary Proxy Materials</u>	<u>Definitive Proxy Materials</u>	<u>Report of Actions Taken</u>				
	site. Companies must also post to their web site a prominent undertaking to provide all holders the ability to receive a hard copy of the company's complete audited financial statements free of charge. So long as the company files its annual report through EDGAR, it is not required to file a hard copy with Nasdaq. (Marketplace Rules 4310(c)(14) & 4350(b))							
		<u>Not More Than</u>	<u>Not Less Than</u>	<u>Not More Than</u> <u>Not Less Than</u>				
Delaware	60 days	10 days	Massachusetts	60 days	New Jersey	60 days	10 days	
California	60 days	10 days	Pennsylvania	90 days (record date only)	7 days (notice only)	Maryland	90 days	10 days (notice only)
New York	60 days	10 days	Nevada	60 days	10 days (notice only)	Illinois	60 days	10 days

<sup>1</sup> The information provided in this Appendix A is not intended to be an exhaustive list of the notice and filing requirements that may be applicable to all companies. Readers are urged to consult with legal counsel for the requirements applicable to their particular company.

<sup>2</sup> The following is a list of notice and record date requirements for annual meetings at which routine matters will be considered in states that are popular jurisdictions of incorporation:

<sup>3</sup> AMEX and Nasdaq rules allow companies' EDGAR filings to satisfy these proxy material filing requirements. See AMEX Company Guide § 1101 and Nasdaq Marketplace Rule 4310.

NASDAQ

## 2008 ANNUAL MEETING HANDBOOK

### APPENDIX B

The sample agenda and rules of conduct provided below are intended to be a general guide in preparing for the meeting. The sample agenda and rules are not intended to include all of the matters that may be required for any particular company. Readers are urged to review the law applicable to their company to ensure that matters required to be completed during the meeting are included in the agenda, and to ensure that any rules of conduct applicable to their company are provided to shareholders upon entering the meeting.

#### SAMPLE ANNUAL MEETING OF SHAREHOLDERS OF [NAME OF COMPANY] AGENDA [DATE]

##### A. CALL THE MEETING TO ORDER

1. Introductions
2. Instructions on Rules of Conduct and Procedures
3. Proof of Notice of Meeting
4. Proxies; Existence of Quorum

##### B. PROPOSALS AND DISCUSSION

1. Proposal No. 1 – Election of Directors
  - [List Director Nominee Names]
2. Proposal No. 2 – [Describe additional proposals and include full text of resolutions being considered rather than reading them in their entirety during the meeting.]

##### C. VOTING

1. Opening of Polls
2. Voting on Proposals
3. Closing of Polls

##### D. RESULTS OF VOTING

##### E. ADJOURNMENT

##### F. MANAGEMENT PRESENTATION

##### G. QUESTIONS AND ANSWERS

If you have sent in your proxy card your shares will be voted accordingly.

PLEASE DO NOT SIGN A BALLOT AT THIS MEETING UNLESS YOU WANT TO  
CHANGE THE WAY YOU VOTED ON YOUR PROXY.

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**SAMPLE RULES AND PROCEDURES FOR THE CONDUCT OF  
ANNUAL MEETING**

We would like to welcome you to the [year] Annual Meeting of Shareholders of [Name of Company]. In fairness to all shareholders in attendance and in the interest of an orderly meeting, we require that you honor the following rules of conduct:

1. All shareholders and proxy holders must register at the reception desk before entering the room for the meeting.
2. The taking of photographs and use of audio or video recording equipment is prohibited.
3. The meeting will follow the Agenda provided to all shareholders upon entering the meeting.
4. Only shareholders of record or their proxy holders may address the meeting.
5. All questions and comments should be directed to the chairperson of the meeting. You may address the meeting only after you have been recognized.
6. If you wish to address the meeting, please **[go to the nearest microphone station] [raise your hand]**. Upon being recognized, please state your name clearly, your status as a stockholder or a proxy holder and present your question or comment.
7. Each speaker is limited to a total of no more than three questions or comments, no more than one of which may be on any single topic and each of which must be no more than one minute in length.
8. Please permit each speaker the courtesy of concluding his or her remarks without interruption.
9. The views and comments of all stockholders are welcome. However, the purpose of the meeting will be observed and the chairperson or secretary will stop discussions that are:
  - irrelevant to the business of the company or the conduct of its operations;
  - related to pending or threatened litigation;
  - derogatory references that are not in good taste;
  - unduly prolonged (longer than one minute);
  - substantially repetitious of statements made by other stockholders; or
  - discussions related to personal grievances.

## 2008 ANNUAL MEETING HANDBOOK

### APPENDIX C

Provided below is a sample annual meeting script intended as a general guide in preparing for the meeting. This sample script is not intended to include all of the matters that may be required for any particular company. Readers are urged to review the law applicable to their company to ensure that matters required to be completed during the meeting are included in the script.

#### SAMPLE SCRIPT FOR ANNUAL MEETING [COMPANY NAME] ANNUAL MEETING OF SHAREHOLDERS [DATE AND TIME]

### I. CALL THE MEETING TO ORDER

#### A. INTRODUCTIONS

**Chairperson:** Hello, ladies and gentlemen. Will the meeting please come to order. I want to welcome all of you to the annual meeting of shareholders of [Company Name]. I am [Name], Chairperson of the Board of [Company Name], and I will be presiding at this meeting.

Also present at the meeting today are: [Introduction of directors, officers and invited guests present at the meeting.] [Name] will act as secretary of the meeting. [Name of Inspector of Election], our transfer agent, has been appointed to act as Inspector of Election.

[Name of representative from independent auditor], a representative from [name of independent auditor], is also present at the meeting. During the question and answer period at the end of the meeting, [he/she] will be available to answer questions concerning the company's financial statements.

#### B. INSTRUCTIONS ON RULES OF CONDUCT AND PROCEDURES

**Chairperson:** Each of you should have registered at the desk as you entered the meeting. If there are any of you who have not registered, would you at this time please step over to the desk and sign the register.

Upon entering the meeting, each of you was presented with an agenda for the meeting. On the reverse side of the agenda is a list of the rules of conduct for the annual meeting. To conduct an orderly meeting, we ask that participants abide by these rules.

As stated in the rules of conduct, shareholders should not address the meeting until recognized. Should you desire to ask a question or speak during the meeting, please raise your hand. After being recognized, first identify yourself and your status as a shareholder or representative of a shareholder, then state your point or ask your question. As stated in the rules of conduct, we ask that you restrict your remarks to the item of the agenda that is before us.

Thank you for your cooperation with these rules.

[USE ANNEXES A-E, AS NECESSARY.]

#### C. PROOF OF NOTICE OF MEETING

**Chairperson:** The Secretary has delivered an Affidavit of Mailing establishing that notice of this meeting was duly given. A copy of the notice of meeting and the Affidavit of Mailing will be incorporated into the minutes of this meeting. All shareholders of record at the close of business on [record date] are entitled to vote at the annual meeting.

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**D. PROXIES; EXISTENCE OF QUORUM**

**Chairperson:** Our first order of business at this meeting is to determine whether the shares represented at the meeting, either in person or by proxy, are sufficient to constitute a quorum for the purpose of transacting business. **[Secretary's Name]** do you have a report?

**Secretary:** Yes, the shareholders list shows that holders of [ ] shares of common stock of the company are entitled to vote at this meeting. We are informed by **[Inspector of Election]** that there are represented in person or by proxy [ ] shares of common stock or approximately [ ]% of all of the shares entitled to vote at this meeting.

**Chairperson:** Thank you. Because holders of a majority of the shares entitled to vote at this meeting are present in person or by proxy, I declare this meeting to be duly convened for purposes of transacting such business as may properly come before it.

**II. PROPOSALS AND DISCUSSION**

**A. PROPOSAL NO. 1—ELECTION OF DIRECTORS**

**Chairperson:** The next order of business is a description of the matters to be voted on at today's meeting. The first proposal before the shareholders of the company is the election of [ ] directors to serve until the annual meeting of shareholders in [ ] and until their successors are duly elected and qualified. The management of the company recommends the election of the following persons as directors of the company:

[Names of Director Nominees]

**B. PROPOSAL NO. 2—ADDITIONAL PROPOSALS**

[PREPARE APPROPRIATE SCRIPT DESCRIBING ADDITIONAL PROPOSALS.]

**III. VOTING**

**A. OPENING POLLS**

**Chairperson:** The polls are now open. If you desire a ballot, please raise your hand to so indicate and it will be provided. The Inspector of Election will provide ballots to those who desire them. If you previously voted by proxy, you do not need to vote today unless you wish to change your vote.

**B. Voting on Proposals**

**Chairperson:** The Inspector of Election will now collect any outstanding ballots. If you have brought your proxy or wish to vote by ballot, please provide your proxy or ballot to the Inspector of Election. Again, if you have already voted by proxy, you need not vote today unless you would like to change your vote. Please hold up your hand so that your ballot can be collected.

**C. Closing Polls**

**Chairperson:** We now seem to have all the ballots, and since all those desiring to vote by ballot have done so, I hereby declare the polls closed. The ballots and proxies will be held in the possession of the Inspector of Election. The Inspector of Election will count the votes.

[ALLOW BALLOTS AND PROXIES TO BE COUNTED.]



## 2008 ANNUAL MEETING HANDBOOK

### IV. RESULTS OF VOTING

**[CONFIRM WITH THE INSPECTOR OF ELECTION  
THAT BALLOTS HAVE BEEN COUNTED.]**

**Chairperson:** Will the Secretary please report the results of the voting.

**Secretary:** We have been informed by the Inspector of Election that the ballots have been counted and that the nominees for election to the Board of Directors have been duly elected and **[report any additional results of voting]**.

### V. ADJOURNMENT

**Chairperson:** Thank you for attending today's meeting. The meeting is adjourned. We will now have a presentation by the company's management, after which we will have a brief question and answer period.

### VI. MANAGEMENT PRESENTATION

[REMARKS BY MANAGEMENT.]

### VII. QUESTIONS AND ANSWERS

[OPEN THE MEETING TO QUESTIONS BY SHAREHOLDERS.]

## SHAREHOLDER'S COMMENTS EXCEED TIME LIMIT

**Chairperson:** I'm sorry, but you have exceeded the time limit set forth in the rules. Please promptly conclude your remarks.  
[IF SHAREHOLDER PERSISTS.]

**Chairperson:** I repeat, you have exceeded the time limit set forth in the rules. Time limits have been imposed so that everyone may have a chance to speak and so that we may conduct the meeting in an orderly manner. Now please take your seat [**so that we may respond to your comments**].

**[IF SHAREHOLDER STILL PERSISTS—SEE ANNEX B REGARDING DISRUPTIVE SHAREHOLDERS.]**

## **RESPONSE TO DISRUPTIVE SHAREHOLDER CONDUCT**

### **Request for Quiet**

Chairperson: I must request that if you are not recognized, please refrain from speaking out so that we may continue with the orderly conduct of this meeting. **[If not in the question and answer period also state—You will have the opportunity to ask questions about the business and financial condition of the company after we have conducted the formal items of business of the meeting.]**

[IF SHAREHOLDER PERSISTS.]

### **Second Warning**

Chairperson: I repeat that if you are not recognized, your conduct is out of order. Please keep quiet so that we may continue with the meeting in an orderly manner. Otherwise you will be asked to leave the meeting, and, if necessary, removed from this room.

[IF SHAREHOLDER STILL PERSISTS.]

### **Removal of Shareholder**

Chairperson: Sir (or madam), I have repeatedly asked you to stop your disruptive conduct and have advised you that your action is out of order. However, you have chosen not to comply with my request and as Chairperson of this meeting, I must now ask you to leave the meeting. Security, would you please escort this individual from the meeting.

**SHAREHOLDER DEMANDING TO BE HEARD ON  
MATTERS OUTSIDE THE AGENDA**

Chairperson: We have established an order of business which is set out in the agenda for this meeting so that we can conduct the meeting in an orderly manner. All discussion at this meeting should be limited to the proposals that are the subject of this meeting.

[IF SHAREHOLDER PERSISTS.]

Chairperson: Your comments go beyond the business of the meeting as set forth in the agenda and are out of order. If you would like to speak with someone from the company about this issue, please wait until after the meeting when one of the officers will discuss the matter with you or arrange a mutually convenient time to discuss the matter.

[IF SHAREHOLDER CONTINUES TO PERSIST.]

Chairperson: Rather than debate this point, I will ask the shareholders present to decide whether they agree with me that we follow the order of business as set forth in the agenda or depart from the printed agenda and listen to your remarks at this time.

The question is: Do the shareholders present desire to follow the order of business set forth in the agenda? All shareholders in favor, say "aye." All opposed, "no." The "ayes" have it. We will therefore proceed with the order of business as set forth in the agenda.

[IF SHAREHOLDER CONTINUES TO PERSIST.]

Chairperson: Your comments and conduct at this time are out of order, and if you persist, I will be forced to ask you to leave the meeting.

## SHAREHOLDER WISHING TO BRING A MOTION BEFORE THE MEETING

Chairperson: Our Bylaws provide that only business brought before this meeting by or at the direction of our Board of Directors may be considered. The only business noticed and brought before this meeting by the Board is to elect directors and **[other proposals]**. As a result, we are prohibited from addressing your motion at this meeting.

Additionally, the vast majority of our shareholders are voting today by proxy. These shareholders have not been given notice of your proposal and it would be unfair to act on your motion without first giving them notice and the opportunity to consider the substance of your motion.

[IF SHAREHOLDER PERSISTS AND COMPANY HAS SUFFICIENT PROXIES TO CARRY THE VOTE.]

Chairperson: May I have a motion to table the shareholder's motion.

[Name]: I so move.

[Name]: I second the motion.

Chairperson: All shareholders in favor, say "aye." All opposed, "no." The "ayes" have it. The motion is tabled.

## EMERGENCY PROCEDURES

**While unlikely, a situation may arise before or during the shareholders meeting that requires deviation from the agenda. In the event of a major disturbance, it may be necessary or desirable to adjourn the meeting as promptly as possible while making sure that all the legal prerequisites to effect corporate action at the meeting have been satisfied.**

Chairperson: As Chairperson of this meeting I now rule:

- 1) notice of this meeting has been properly served;
- 2) a quorum is present—over [ ]% of the voting power of the company is represented by proxy;
- 3) all items of business are properly before the meeting;
- 4) the polls are open and will stay open for 48 hours to receive any votes you may wish to cast by proxy or ballot. Mail them to **[address of company]**; and
- 5) I declare the meeting adjourned.

Ballots are available from ushers. A post-meeting report will include the final vote tabulation.

## APPENDIX D

### SELECTED CONTENTS OF THE NOTICE OF INTERNET AVAILABILITY OF PROXY MATERIALS

Companies are advised to consult legal counsel for additional information regarding the contents of the notice of Internet availability of proxy materials in each particular instance. The notice must contain certain information, including the items listed below:<sup>1</sup>

- A prominent legend in bold-face type that states:

**“Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**

- **This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.**
- **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert web site address].**
- **If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery.”**
- The date, time and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on, and the company’s recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified web site;
- (1) A toll-free telephone number, (2) an e-mail address or (3) an Internet web site address where the shareholder can request a copy of the proxy materials for all meetings and for the particular meeting to which the notice relates;
- Any control/identification numbers that the shareholder needs to access his or her proxy card;
- Instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement; and
- Information about attending the shareholders meeting and voting in person.

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<sup>1</sup> The notice used by companies adopting the full set delivery option need not include the portion of the prescribed legend relating to shareholder requests for copies of the proxy materials nor the instructions on how to request a copy of the proxy materials.

## 2008 ANNUAL MEETING HANDBOOK

### APPENDIX E

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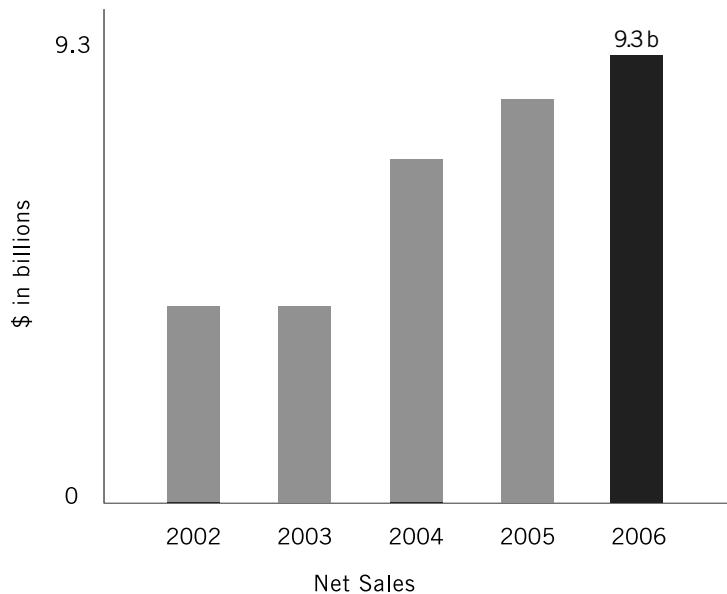


## NOTES

## NOTES

# RR DONNELLEY AT A GLANCE

- 144** Years in Operation
- \$9.3 billion** 2006 Net Sales
- 60,000+** Full-Time Employees
- 601** Global Locations
- 177** Manufacturing Locations
- 271** 2007 Fortune 500 Rank
- 25+** Issued and pending emerging technology patents
- \$1.5 billion** Capital investment over the past five years



# RR DONNELLEY

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