

## **Illustrative Access Bylaw with Commentary**

These materials have been prepared by the members of the Task Force on Shareholder Proposals of the Committee on the Federal Regulation of Securities, Section of Business Law of the American Bar Association to assist companies and their counsel who wish to consider a bylaw that provides stockholders with access to corporate proxy materials in connection with the nomination of directors, including identification of issues that may need to be addressed in drafting such a bylaw. The Illustrative Access Bylaw with Commentary is an exposure draft that was prepared in all material respects prior to the availability of the SEC release proposing a proxy access rule and does not take the rule proposal into account.

These materials do not represent an official position of the American Bar Association nor do they necessarily reflect the views of individual Task Force members or their firms.

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**ILLUSTRATIVE ACCESS BY LAW**

The following bylaw provisions and the accompanying commentary are intended to identify matters that should be considered in the preparation of a bylaw establishing a shareholder right to access company proxy materials for shareholder nominees. The purpose is to help establish a workable and efficient access system.

**Introductory Notes:** This illustrative bylaw is based on the following assumptions:

1. The company is a publicly-owned corporation, is not an investment company, has authorized only one class of shares entitled to vote in the election of directors with each share having one vote in the election of directors (referred to as “common stock”) and the entire board of directors is elected annually.
2. The company’s bylaws separately require advance notice to the company of a nominee of a stockholder to be presented for election as a director, and include timing, delivery and informational requirements as well as information concerning beneficial ownership of the company’s securities by the sponsoring stockholder and his or her nominee. Notice requirements pertinent to obtaining access are provided below and it is assumed that all other relevant information regarding a stockholder nomination will be addressed by the advance notice provisions.
3. A plurality vote is required for the election of a director by the stockholders in a contested election, meaning any election where there are more nominees than the number of directors to be elected. Accordingly, where the right of access is being utilized, a plurality vote standard will apply even where a majority vote standard would apply in a non-contested election.
4. The board of directors has a nominating and governance committee composed of independent directors which recommends to the board the nominees to be presented by the board for election as directors by the stockholders.

The capital structure and other circumstances of a particular company will likely require modification and adaptation of the illustrative provisions.

**SECTION \_\_\_ Stockholder Access to the Corporation’s Proxy Materials.**

**A. Right of Access.** – The Corporation shall include in the proxy statement distributed on behalf of the Board of Directors for the Annual Meeting of Stockholders the information specified below (the “Required Information”) with respect to a nominee (an

“Access Nominee”) of an Eligible Stockholder for election as a director if the nomination complies with the requirements of this Section. The Corporation shall not be required to provide such access for more than the Maximum Number of Access Nominees. The Required Information shall be (i) such information concerning the Access Nominee and the Eligible Stockholder as is required under the rules of the SEC or otherwise required by applicable law to be provided by a stockholder in connection with a solicitation of proxies for the election of such nominee and (ii) if the Eligible Stockholder so elects, a statement (the “Statement”), of not more than \_\_\_\_ words in support of the nomination. The Required Information shall be furnished to the Corporation by the Eligible Stockholder in accordance with this Section. The form of proxy that the Corporation distributes for the Annual Meeting of Stockholders shall permit stockholders to give instructions for the voting of their shares with respect to the election of the Access Nominee in substantially the same manner as provided with respect to the nominees of the Board of Directors, but shall clearly distinguish between an Access Nominee and a nominee of the Board of Directors.

**B. Eligibility.** – In order for information about an Access Nominee of an Eligible Stockholder to be included in the Corporation’s proxy materials, the following requirements must be satisfied:

1. The Eligible Stockholder shall have provided to the Corporation notice of the nominee for whom it seeks access pursuant to this Section (“Notice of Access”) not later than \_\_\_\_ days before the last date by which notice of a nomination is required to be provided to the Corporation in accordance with [the Corporation’s advance notice bylaw]. The Notice of Access shall contain (a) the Required Information, (b) to the extent the Eligible Stockholder is not the record owner of the shares on which it bases its eligibility for access hereunder, the information regarding the record ownership of such shares required by paragraph E.4. below and (c) any additional information required by [the Corporation’s advance notice bylaw].
2. The Eligible Stockholder’s Notice of Access shall identify [only one Access Nominee] for election as a director at the Annual Meeting of Stockholders.
3. The Access Nominee shall be Independent and shall not be a Disqualified Repeat Nominee.
4. The Eligible Stockholder shall represent and undertake in its Notice of Access that it, its nominee and each of its Affiliates and Associates (a) has not nominated and will not nominate for election to the Board of Directors at the Annual Meeting of Stockholders any individual other than the individual named in its Notice of Access, (b) has not engaged and will not engage in a “solicitation” within the meaning of SEC Rule 14a-1(l) in support of the election of any other individual as a director at the Annual Meeting of Stockholders other than an individual named in the Notice of Access [or a nominee of the Board of Directors]

and (c) will not distribute to any stockholder any form of proxy for the Annual Meeting of Stockholders other than the form distributed by the Corporation.

5. The Eligible Stockholder shall represent and undertake in its Notice of Access that at the time of giving its Notice of Access and at all times until the election of directors at the Annual Meeting of Stockholders neither it nor the Access Nominee shall own any securities of the Corporation for the purpose, or with the effect, of changing or influencing the control of the Corporation, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction referred to in SEC Rule 13d-3(b), other than solely by reason of seeking the election as a director of the individual named in its Notice of Access.
6. The Eligible Stockholder shall comply with the requirements of paragraphs D.1. and D.2. of this Section.
- [7. The Eligible Stockholder shall not have submitted a Notice of Access with respect to the [immediately *OR* \_\_\_ preceding] Annual Meeting[s] of Stockholders, except where the individual named in such Notice of Access [was elected a director *OR* received at such meeting votes in favor of his or her election representing less than \_\_\_% of the total votes cast for or withheld from his or her election].]

**C. Process.** –The [Nominating and Governance Committee] shall consider a Notice of Access, shall determine if the Access Nominee is Independent and may, in its discretion, make a recommendation to the Board of Directors as to whether the Access Nominee should be nominated by the Board of Directors for election at the Annual Meeting of Stockholders.

If the Board of Directors nominates an Access Nominee as part of the Board's slate of nominees, the Notice of Access will be deemed withdrawn and the former Access Nominee shall be presented to the stockholders in the same manner as any other nominee of the Board of Directors. If the Board of Directors does not so nominate the Access Nominee, access to the Corporation's proxy materials shall be provided in accordance with the terms and subject to the conditions of this Section.

The Board of Directors or a committee thereof may adopt such rules or guidelines for applying the provisions of this Section as it determines are appropriate. These may include timing and other such adjustments as may be appropriate in the event an Access Nominee for whom Notice of Access has been provided becomes unavailable or unwilling to serve or becomes ineligible.

If there are more than the Maximum Number of nominations for which access to the Corporation's proxy materials has been sought in compliance with this Section, access hereunder shall be provided for only the Maximum Number of nominations, which shall be [the nomination(s) made by the Eligible Stockholder(s) Beneficially Owning the most shares of common stock of the Corporation, as determined in the case

of each Eligible Stockholder based on its Beneficial Ownership on the date as of which it reported its Beneficial Ownership in its Notice of Access, assuming the nomination continues to comply with this Section].

**D. Other Requirements.**

1. The Eligible Stockholder shall have executed and delivered to the Corporation not later than \_\_\_ days after delivering its Notice of Access an undertaking acknowledging its responsibility for the Required Information, all other information submitted to the Corporation pursuant to this Section and all of its and its Access Nominee's communications to stockholders in connection with the election of directors at the Annual Meeting of Stockholders. In such undertaking, the Eligible Stockholder shall assume all liability to which the Corporation or any of its Affiliates, or any director, officer, employee or representative thereof, may be subject as a result of any legal or regulatory violation arising out of any such information or communication made available by or on behalf of the Eligible Stockholder or any of its Affiliates or its Access Nominee to the Corporation or any stockholder of the Corporation in connection with the election of directors at the Annual Meeting of Stockholders.
2. The Eligible Stockholder and its nominee shall each provide to the Corporation prompt written notice of (a) any material change in its Beneficial Ownership of common stock of the Corporation occurring since the Notice of Access was provided and before the election of directors at the Annual Meeting and (b) any material error recognized by the Eligible Stockholder or its nominee in, or any change in circumstances that makes incorrect or misleading in any material respect, the information previously provided by the Eligible Stockholder or its nominee in the Notice of Access or otherwise provided in accordance with this Section.

**E. Definitions.** – For the purposes of this Section, the following definitions shall apply:

1. An “Affiliate” of a person shall mean another person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with such person.
2. A person shall be the “Beneficial Owner” of only those shares of common stock of the Corporation as to which the person possesses both (i) the full voting rights pertaining to the shares and (ii) after giving effect to any swap, hedging, derivative or synthetic ownership contract or arrangement with respect to securities of the Corporation or its Affiliates to which the person or any of its Affiliates or Associates is a party or is bound or is the beneficiary, the full economic interest in (including the right to dispose of and the opportunity for profit and risk of loss on) such shares. A person shall Beneficially Own shares held in the name of a nominee or other intermediary so long as the person retains the right to instruct how the shares are voted with respect to the election of

directors and possesses the full economic interest in the shares. A person's Beneficial Ownership of shares shall be deemed to continue during any period in which the person has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the person or in which any fiduciary, attorney-in-fact or distributee succeeds to or otherwise acts for such person by reason of the death, disability, liquidation or occurrence of a comparable event with respect to such person.

3. A "Disqualified Repeat Nominee" in respect of an Annual Meeting of Stockholders shall mean an individual as to whom access to the Corporation's proxy materials for the [immediately *OR* \_\_\_\_] preceding Annual Meeting[s] of Stockholders was provided and who withdrew from or became ineligible or unavailable for election at the meeting [or was not elected as a director at the Annual Meeting of Stockholders *OR* received at such meeting votes in favor of his or her election representing less than \_\_\_\_% of the total votes cast for or withheld from his or her election].
4. An "Eligible Stockholder" shall mean a person or a group of not more than [ten] persons who has been the Beneficial Owner continuously of not less than \_\_\_\_% of the outstanding common stock of the Corporation for a minimum of \_\_\_\_ [months/year(s)] at the date of submission of its Notice of Access and thereafter continuing through the date of the election of directors at the Annual Meeting of stockholders as to which it submitted its Notice of Access and who complies with the other provisions of this Section. To the extent that an Eligible Stockholder is not the record holder of shares of common stock of which it has Beneficial Ownership, the Eligible Stockholder shall submit with its Notice of Access evidence from the record holder showing that the shares that it holds are and have for at least the required minimum period been held for the benefit of the Eligible Stockholder or one or more intermediaries from whom the Eligible Stockholder derives its Beneficial Ownership and, if the Eligible Stockholder derives its Beneficial Ownership through any such intermediary, like evidence from such intermediary of the Eligible Stockholder's interest in the shares. For purposes of this Section, Beneficial Owners of shares who jointly nominate an individual for election as a director shall be considered a group if they have agreed in writing to so act, are so identified in the Notice of Access and the information and the undertakings required by this Section are provided with respect to each such person. For purposes of determining if a group satisfies the foregoing stock ownership requirement, the common stock of the Corporation Beneficially Owned by any member of a group continuously for at least the foregoing minimum period shall be aggregated with the common stock Beneficially Owned continuously for at least the foregoing minimum period by each other member of such group and no person may be a member of more than one group in respect of the Annual Meeting of Stockholders for which the group gave a Notice of Access.
5. "Independent" with respect to an Access Nominee shall mean (a) that the nominee would be considered an independent director in accordance with the listing

standards of the principal U.S. securities market in which the common stock of the Corporation trades or, if no such listing standards are applicable at the time, in accordance with the standards used by the Board of Directors or a duly authorized committee thereof in determining and disclosing the independence of the Corporation's directors in accordance with the rules of the SEC and (b) the nominee is not an employee or officer of, or consultant to, the Eligible Stockholder or any of its Affiliates and has no other material association, by agreement, understanding or familial or other relationship, with the Eligible Stockholder or any of its Affiliates or Associates.

6. The "Maximum Number" of nominees for which access to the Corporation's proxy materials may be provided in respect of an Annual Meeting of Stockholders shall be the remainder of (a) \_\_\_\_\_\* less (b) [the sum of (i)] as of the last date by which advance notice of the nomination by a stockholder of an individual for election as a director at the Annual Meeting of Stockholders may be timely given to the Corporation in accordance with [the Corporation's advance notice bylaw], the number of available nominees for whom notice has been properly given in accordance with such provisions and not been withdrawn (other than any nominee for whom a Notice of Access has been given in accordance with this Section) [, and (ii) the number of directors in office on such date for whom access to the Corporation's proxy materials was provided pursuant to this Section, other than any who has served as a director continuously for at least \_\_ years]. The Maximum Number of nominees shall be zero if the number of nominees referred to in clause (b) of this paragraph shall equal or exceed the number of positions on the Board of Directors referred to in clause (a) of this paragraph.
7. All references in this Section to rules of the SEC shall refer to the rules of the Securities and Exchange Commission as in effect on the date this Section becomes effective and as such rules may be amended from time to time thereafter or any successor provision of the SEC's rules.
8. An "Annual Meeting of Stockholders" shall include a special meeting of stockholders to elect directors held in lieu of an annual meeting of stockholders and any adjournment of an annual meeting of stockholders or any such special meeting.

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\* To be determined based on the size of the board. Alternatives include a fraction, such as twenty-five percent, of the board or a number determined by a formula varying with the size of the board. Access would be provided only with respect to a limited number of board seats, consistent with the restriction on the use of access for control purposes. See the accompanying Commentary.

## **Commentary on Illustrative Access Bylaw**

**Introduction.** This bylaw is intended to provide a long term stockholder with a right of access to the corporation's proxy materials for that stockholder's qualified nominee for election as a director. Use of the corporation's proxy materials would be based on the premise that a long term beneficial owner of a meaningful number of shares of voting common stock would have a continuing interest in the success of the enterprise consistent with the interests of other stockholders. Accordingly, access would not be provided to a stockholder who has a control intent. Access would be available on terms intended to promote a workable and efficient nomination and election process and, generally, only under circumstances where an election contest is not already underway.

The bylaw identifies specific provisions to be completed by each corporation consistent with its own capital structure, size and other characteristics. The objective is to adopt provisions that will accomplish the purposes of the bylaw and, most importantly, enable the board of directors, however elected, to function effectively in the best interests of the corporation and its stockholders. Every effort should be made to facilitate a good working relationship among all the directors in order to serve the corporate interest.

**Guiding Principles.** The operative terms of the bylaw reflect the following principles:

- Eligibility for access is dependent upon a substantial long-term holding of voting common stock by a stockholder or a group of stockholders who have agreed to sponsor a candidate, as reflected by a percentage of ownership held over a specified minimum period.
  - The required percentage of stock ownership should be established in relation to the size and capitalization of the corporation.
  - A substantial minimum period of continuous ownership is contemplated. The required ownership would be expected to continue through the upcoming election.
  - While a group of sponsors is permitted, consistent with the substantial ownership requirement, a sponsoring group is limited to a small number of members.
  - Stock ownership is intended to include all voting rights and economic interests so that the interests of the sponsoring stockholder are fully aligned with those of the stockholders in general. Accordingly, "unbundled" stock ownership interests ordinarily would not count toward the required minimum ownership requirement.
  - However, the bylaw recognizes certain means of stock ownership which should not be disqualifying such as record but not beneficial ownership by

a nominee or other intermediary, and confirms the permissibility of a successor owner or of directed voting rights in certain circumstances affecting a sponsoring stockholder's ownership such as death, disability and the like.

- Consideration should be given to whether a sponsoring stockholder should be entitled to submit in a consecutive year a nomination where it sponsored an access nominee in a previous year who was not elected or did not receive a minimum number of votes.
- The nominee must be independent in relation to any interests in and relationships with the corporation as well as the sponsoring stockholder. This means that the nominee, if elected, would qualify as an independent director (applying customary listing standards) and would have no disqualifying relationship with the sponsoring stockholder. The purpose of the latter requirement is to discourage so-called "special interest" or "constituency" directors.
- The access process will be integrated with the board's nominating process. It is presumed that the corporation has an independent nominating and governance committee that, in the performance of the customary duties of such a committee, can consider the nominee's candidacy as well as compliance with the eligibility and other requirements of the bylaw. Accordingly, sufficient time should be provided as part of the access process so that the committee has the opportunity to perform such duties.
- Access is not intended to facilitate efforts to acquire the corporation or to cause a sale or other transaction or to produce a change in control of the corporation. Control initiatives are subject to systems of regulation established for different purposes than the prescribed right of access and that involve checks and balances which cannot be effectively applied in the circumstances where it is practicable to provide access. Nor is it intended that an access nomination become part of a separate effort to influence control of the corporation. An access nomination should not, for example, become pivotal in determining whether or not an effort underway to affect control of a board prevails. Exercise of the right of access provided by the bylaw would not be considered an effort to influence control as the sponsoring stockholder and nominee would not participate during the election period in any proxy solicitation in support of a nominee other than the sponsoring stockholder's nominee or in other control activity. The bylaw's prohibition on solicitation activity in support of another nominee is not intended to prevent a sponsoring stockholder, when soliciting in favor of its nominee, from soliciting against the election of a nominee of the board of directors or another stockholder's nominee. Consideration should be given to whether the sponsoring stockholder should also be permitted under the bylaw to solicit in favor of the election of such nominees of the board of directors as the sponsoring stockholder

chooses (Any solicitation activity in which the sponsoring stockholder engages would be subject to the sponsoring stockholder's compliance with the proxy rules, including any required filing with the SEC of proxy materials.)

- Consistent with barring the use of access as a control device and the bylaw's other purposes the bylaw provides that, in connection with any one election, an eligible stockholder would be able to nominate only one nominee and all eligible stockholders may nominate a maximum number of nominees intended to constitute a limited portion of the board. In determining the maximum (and whether more than one nominee per eligible stockholder would be appropriate), consideration would be given to the size of the board and other factors affecting its composition.
- In addition, there are circumstances where the maximum number of permitted access nominees will be reduced and may be zero. Providing access in circumstances where another stockholder is pursuing a proxy contest for control is fundamentally inconsistent with the purposes of the bylaw and would inevitably disrupt the control contest. In most situations where another stockholder is presenting a "short slate" the potential for an access nominee to have a deciding influence on control could be substantial and, accordingly, permitting access in such circumstances would be inconsistent with the principle that access should not be used as a control mechanism. Under the bylaw, the maximum number of access nominees will initially be the portion of the board stated in the bylaw but will be reduced by the number of nominees for election at the meeting for whom access has not been sought but who have been nominated by other stockholders by notice given under the advance notice bylaw. Consideration should be given as to whether the maximum number may be further reduced by the number of directors serving who had been elected through the exercise of the right of access. However, in the event a director elected through access has been serving continuously for a specified number of years, that director would no longer affect the calculation.

**Adaptation.** The illustrative terms are intended to be adapted to take into account the individual characteristics of the corporation, including its capital structure and other circumstances, particularly as they may vary from the assumptions. Such changes should be consistent with the purposes of the bylaw. By way of illustration:

- If there are two or more classes of voting common stock with each class entitled to elect a specified number of directors, the eligible stockholder may be permitted and obliged to satisfy the beneficial ownership requirement with respect

to a class of stock separately and the maximum number of nominees may depend on the number of directors that a particular class of stockholders can elect.

- The bylaw does not provide an access right to holders of preferred stock or debt with respect to any voting rights they may have to elect directors. Where the holders of preferred stock or debt vote on the election of directors with the common stockholders modifications may be considered.
- In the event of a classified board of directors where, for example, each director serves a three year term, the right of access would be adjusted so that the maximum number of directors who may be elected by the access mechanism in any one year would take into account the classification and the multi-year tenure of a director so elected.
- The terms of the bylaw will be subject to and may be limited by regulatory requirements applicable to the corporation's business or other applicable state or federal law.

It is contemplated that affected aspects of the bylaw may be amended (even where the bylaw has been adopted by stockholders), or its application modified, by the board of directors so as to address a change in the pertinent circumstances of the corporation, including a transaction or agreement that may affect the size, composition or other features of the board of directors.

### **Other Considerations.**

- Under existing SEC rules, the sponsor of a nominee under the right of access may solicit support for such nominee but would be precluded from solicitation for either the nominees of the corporation or any other candidates without filing separate proxy materials (subject to limited solicitation exceptions). Thus, the bylaw's restriction of the sponsor and the nominee from soliciting for other candidates nominated by the board of directors is based upon legal as well as practical considerations.
- The bylaw provides that the non-solicitation restriction and other provisions relating to participation in control activities terminate at the meeting at which an access nominee is presented for election. The corporation may elect in the bylaw to extend some or all of such provisions beyond that date.
- The bylaw establishes priority for access among eligible stockholders in relation to the greatest number of common shares beneficially owned by each such stockholder at the time it filed its notice of access. Alternative priority measures could be considered.
- Should a designated access nominee become unavailable or unwilling to serve or become ineligible, the board of directors or the nominating and

governance committee may adopt procedures to enable a replacement candidate sponsored by an eligible stockholder to be selected consistent with the priority criteria so long as this can be achieved in a timely manner taking into account the preparation and distribution of proxy materials, the date of the annual meeting of stockholders and other relevant factors.