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December 8, 2009

Commissioner Ellise B. Walter  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

Dear Ellise:

I am enclosing an Explanatory Statement and related materials with respect to an alternative means to the creation of an access right.

I would be pleased to discuss these materials and respond to any questions.

Most sincerely,



Enclosure

cc: Meredith Cross (w/encl.)  
Brian Breheny (w/encl.)

## **EXPLANATORY STATEMENT**

A right of access would be created to enable eligible shareholders, subject to specific conditions, to include their nominees for election as directors in the corporation's proxy materials. In order to align the interests of the proponent with those of other shareholders of the corporation, this right should be exercisable by long term investors who have a meaningful interest in the corporation but do not have any control intent and without having the effect of changing or influencing the control of the corporation. The bylaw or other governing instrument which creates an access right for such defined purpose (the Bylaw) should establish a process which is workable, understandable and flexible.

Should the corporation not have in place a Bylaw consistent with the purpose of access, then, subject to timing considerations, a carveout from Rule 14a-8(i)(8) would be applicable at the next annual meeting of shareholders so that shareholders may use the corporation's proxy materials to submit a compliant Bylaw for a vote by the shareholders. The SEC would provide guidance as to compliance of a Bylaw with the defined purpose of access, but flexibility would be provided by enabling the corporation or shareholders to establish the terms of a compliant Bylaw which is valid under state law.

This structure is intended to: limit or eliminate workability issues since it would enable the corporation to adapt the access right to its other governing documents and arrangements; eliminate authority issues principally because of the lack of prescription; establish corporate action in a manner consistent with the hybrid federal-state allocation of responsibility and jurisdiction for corporate governance and in the process provide corporations with the needed flexibility to deal on a current basis with issues and events as they arise; and, provide an orderly process for the exercise and implementation of access rights without significant administrative burden on the SEC. A secondary but important objective of the implementation of an access right is to promote dialogue between the corporation and its shareholders in an effort to avoid a contest in the election of directors. With an access right structured to a corporation's specific circumstances, the nominating and governance committee of the corporation, mindful of the right of access, may in many circumstances accept a nominee of a shareholder or group as part of the management slate. This would also encourage shareholders to propose candidates for the board who are qualified to contribute as fiduciaries for all shareholders and, to avoid control implications, are independent of both the corporation and the proponent.

The consequences of the adoption of such an alternative are to establish a somewhat unique regulatory approach in terms of shareholder and corporate relations; to enable shareholders to submit a compliant access Bylaw for a shareholder vote should the corporation fail to adopt or maintain such a compliant Bylaw; to recognize an interpretive role of the SEC in the creation of access rights in assuring that the purpose of access is being pursued and not abused or misused by corporations or shareholders; and, in regulating the disclosure required in connection with the implementation of access rights. This provides the advantages of private ordering while enabling and encouraging the creation of access rights for the defined purpose.

It is anticipated that should this regime be adopted, many corporations, principally through director action, would adopt such a compliant Bylaw. To this end, the Illustrative Access Bylaw prepared by the Task Force on Shareholder Proposals of the Committee on Federal Regulation of Securities of the Section of Business Law of the ABA would be revised to accommodate such new arrangements and would be available to assist corporations, shareholders and their respective advisers in terms of the preparation and implementation of such a Bylaw. If a corporation does not follow this course of action, then shareholders would have the right to use the corporation's proxy materials to submit a compliant Bylaw to shareholders at the next annual meeting when it is practicable given timing considerations.

Attached is a summary of an alternative means to create an access right. It is anticipated that a compliant Bylaw would contain provisions to facilitate implementation of its terms.

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\*These materials have been prepared solely by Robert Todd Lang and do not necessarily reflect the views of his law firm or any other person, organization or entity including, without limitation, the Committee on the Federal Regulation of Securities, Section of Business Law of the American Bar Association or its Task Force on Shareholder Proposals.

## **AN ALTERNATIVE MEANS TO THE CREATION OF AN ACCESS RIGHT**

1. **Purpose** - The purpose of the creation of an access right should be clearly defined to establish the parameters of such right in order to avoid misuse or abuse either by corporations or by stockholders. The purpose should be defined substantially as follows: “to facilitate through use of the company’s proxy materials the ability of long term shareholders who have a meaningful ownership stake in the company and no-control purpose to seek election of a limited number of independent persons they nominate for election as directors in a manner that has no control effect.” This includes no purpose or effect of changing or influencing the control of the corporation.

The Bylaw that establishes the right of access should conform to this purpose, be valid under applicable state law and contain implementing provisions.

The corporation may seek to adapt its Bylaw to its other governing documents or contracts consistent with the defined purpose, and in the process may seek the consent or approval of shareholders of the corporation or of third parties to any such contracts. If consent or approval is not obtained, the Bylaw shall be adapted to defined purpose to the extent practicable.

2. **Rule 14a-8** - Rule 14a-8(i)(8) would not be changed, except a carveout would be created for a shareholder-proposed compliant Bylaw when there is no compliant access Bylaw in effect within a reasonable period after adoption of this process and thereafter. Such Bylaw would be submitted to shareholders at their next annual meeting subject to timing considerations.
3. **Guidance** - In order to provide guidance as to conformity of a Bylaw or proposed Bylaw with the purpose of access, the SEC would promulgate guidelines with respect to the subject matter of such Bylaw. The decision as to the terms and content of any such Bylaw will be made by the corporation or the shareholder or group who may propose any such Bylaw, provided that a shareholder proposal pursuant to the carveout under Rule 14a-8(i)(8) would need to be compliant with the defined purpose, as indicated. The Annex to this document sets forth proposed guidelines for consideration.
4. **Miscellaneous** - The purpose definition should be included in an SEC rule. Furthermore, this arrangement could become effective for the [2011] proxy season except in circumstances where change or adaptation requires a longer period.

It is assumed that the Commission would adopt related disclosure and filing rules similar to those recently proposed but adapted to this alternative. Such rules would apply in connection with the adoption, amendment and implementation of a compliant Bylaw.

## ANNEX

Set forth below are guidelines as to the content of the Bylaw creating the right of access so as to conform to defined purpose. The content of the compliant Bylaw shall be established by the corporation or the proponent shareholder. These guidelines are meant to be advisory and of assistance in the preparation, interpretation and implementation of the Bylaw so as to comply with defined purpose and avoid misuse or abuse.

### GUIDELINES:

- Beneficial ownership of voting securities may be by one or more shareholders but the number of members of a group may not exceed 10.
- Continuous minimum beneficial ownership of the shares may range from 1-3 years. Beneficial ownership shall mean a net long position in such shares including related voting rights. Continuity may not be deemed interrupted, among other reasons, by arrangements with respect to the voting of the shares by means of proxy, power of attorney or other instruments or arrangements principally related to death, disability, liquidation or occurrence of a comparable event.
- The number of such shares to be beneficially owned during such period may vary with the capitalization, size, voting arrangements and other relevant factors applicable to the particular corporation. By way of illustration, in the event the corporation has a single class of voting shares, the minimum range for the amount of such shares to be beneficially owned would be 2% to 5%.
- The number of access nominees in an annual election may vary with the size of the board of directors but with a board of twelve or fewer directors, the number may be not more than one.
- The maximum number of access nominees serving at a particular time may also relate to the number of directors, other contracts or arrangements to nominate directors and other relevant factors, but shall not exceed 15%.
- Each access nominee shall be independent of the corporation as defined by the rules of the applicable securities market or exchange and may be required to be independent of the shareholder proponent and its affiliates.
- The Bylaw may provide that there is no right of access if the corporation is controlled (to be defined) so long as a controlled status is maintained.
- The Bylaw may provide that there is no right of access during the pendency of a proxy contest (to be defined).

- The Bylaw or other instrument shall establish reasonable procedures for the exercise of the right of access, the notice and other provisions, including, without limitation, undertakings and indemnity arrangements with respect to liability of the corporation or any of its affiliates, directors, officers, employees or representatives as a result of legal or regulatory violations arising out of any information or communication made available to the corporation in connection with the exercise of the right of access.