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**M E M O R A N D U M**

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**To :** Commission File No. S7-10-09

**From :** Tamara Brightwell  
Senior Special Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission

**Re :** Facilitating Shareholder Director Nominations  
Release No. 34-60089

**Date :** April 30, 2010

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On April 23, 2010, Meredith Cross, Director of the Division of Corporation Finance, attended a meeting of the Business Law Section of the American Bar Association. She participated in a program that discussed, among other topics, the Commission's proposals regarding shareholder director nominations. Attached is a document provided to Ms. Cross by Todd Lang of Weil, Gotshal & Manges.

OUTLINE  
AN ALTERNATIVE MEANS OF PROXY ACCESS

This Outline summarizes the terms and workable means of creating a right of eligible shareholders to include their nominees for election as director in the corporation's proxy materials. This would be accomplished in a manner contemplated by an SEC-adopted access rule which would establish a transition period during which corporations would have the opportunity to adopt and maintain a compliant Bylaw or other appropriate means of establishing the access right for the Purpose and in a manner permitted by and applicable under state law and the governing documents of the corporation. Such rule would provide the Principal Terms of access to the extent that such a Bylaw has not been adopted by the end of the transition period and maintained thereafter unless shareholders elect to opt-out of an access regime.

- Purpose - The Purpose of the creation of an access right should be clearly defined to establish the parameters of such a right in order to avoid misuse or abuse either by corporations or by shareholders. 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.
- Bylaw - The Bylaw, including any other appropriate means that establish the right of access, shall conform to Purpose, be valid under applicable state law, be consistent with the governance provisions of the corporation and contain implementing provisions. The terms and content of any such Bylaw shall be established by the corporation (by means of director action or otherwise) or the shareholder or the shareholder group who may propose such Bylaw. Implementing provisions of the Bylaw shall apply to the Principal Terms when applicable.
- Guidelines - The SEC would promulgate Guidelines to facilitate the adoption of a compliant Bylaw during the transition period and thereafter. The Annex to this Outline sets forth Guidelines for consideration. The Guidelines shall constitute the Principal Terms. The Guidelines are advisory except that the Principal Terms shall be binding after the transition period when a corporation does not have a compliant Bylaw in effect to the extent provided or required or as excepted under Default and other provisions hereof.
- Rule 14a-8- Rule 14a-8(i)(8) would be amended by the SEC effective at the end of the transition period to permit shareholder proposals to adopt a compliant Bylaw when and so long as a corporation (by means of director action or otherwise) had not adopted or maintained such a Bylaw.

- Opt-out- A corporation may opt-out of the SEC access rule by vote of the shareholders in accordance with state law and its governing documents. In such event, Rule 14a-8(i)(8) as amended or any comparable provision could not be used to present an access proposal for a five-year period from the date of the meeting at which shareholders adopted resolutions to opt-out of an access regime. Thereafter, such rule or any comparable provision cannot be used in such manner during succeeding five-year periods on the same basis.
- Default – At the end of the transition period the Principal Terms of access would become effective for the period of default in adopting and maintaining a compliant Bylaw except to the extent shareholders have approved an opt-out from the access regime or the corporation has adopted by director or shareholder action and maintained a compliant Bylaw. The SEC shall (i) establish the specific number or amount where the Guidelines provide a range or other such determination to be made and (ii) enable the corporation to adapt one or more Principal Terms to its governance provisions or agreements with third-parties as provided under Adaptation.
- Adaptation – (i) In the event that the creation or implementation of the right of access is inconsistent with or would be limited by any of the governing documents of the corporation or would constitute a breach of an agreement with one or more third-parties, the corporation may seek to adapt the terms of such access right to such documents or agreements in a manner consistent with Purpose. If such adaptation is not approved or ratified by shareholders where such approval is required or agreed by third-parties to any such agreement, the board of directors of the corporation may seek to adapt the Bylaw to Purpose to the extent practicable and shall make suitable disclosure as to the reasons for any limitation on its ability to comply with Purpose. In such event and so long as such a limitation or condition exists, the corporation shall not be deemed to be in default.  
  
(ii) In the event that the board of directors of a corporation determines that a future opportunity or other need of the corporation requires some modification of the access right or Bylaw which may not be compliant with Purpose, the board of directors may authorize such change provided that it discloses in its proxy materials for the next annual meeting of shareholders such determination and undertakes to conform it to Purpose as soon as practicable when the reasons for the need for such modification no longer exist.
- Miscellaneous - The provisions of this alternative shall be included in the SEC access rule. It is assumed that the SEC will adopt related disclosure and filing rules similar to its recently proposed Rule 14a-11 but adapted to this alternative. Timing and dispute resolution should be established after the effective date of the new rule to allow sufficient time for compliance with the rule and other applicable SEC rules, governing documents of the corporation as well as adaptation and implementation.

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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.

## ANNEX

Set forth below are Guidelines so that the right of access would conform to Purpose. These Guidelines are meant to be advisory and of assistance in the preparation, interpretation and implementation of a Bylaw or other means of providing access so as to comply with Purpose and avoid misuse or abuse. These Guidelines also constitute Principal Terms as provided in the Outline.

### 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.
- The continuous minimum period of 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 to elect directors, the minimum range for the amount of such shares to be beneficially owned would be 2% to 5% of the outstanding shares entitled to vote generally in the election of directors.
- 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, contracts or arrangements to nominate directors and other relevant factors. By way of illustration, it shall not exceed one if the board has eight or fewer directors, two if the board has nine through sixteen directors and three if the board has seventeen or more directors.
- Each access nominee shall be independent of the corporation as defined by the rules of the principal securities market or exchange on which its shares are listed and shall 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.

- There would be no right of access during the pendency of a proxy contest. For this purpose, a proxy contest would exist if there are more nominees, excluding access nominees, than the number of directors to be elected at the election.
- The Bylaw or other means shall establish reasonable procedures for the exercise and implementation 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.
- If access is sought for more than the permitted maximum number of access nominees at an election, the nominating shareholder or shareholder group beneficially owning the greatest number of shares shall have priority.
- Uniform eligibility requirements applicable to all directors of a corporation shall include all candidates nominated by means of the exercise of the right of access.