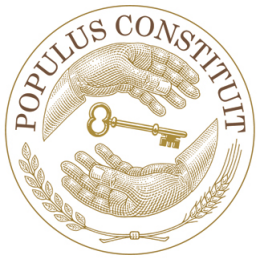

United States Proxy Exchange

proxyexchange.org

Model Shareowner Proposal for Proxy Access

http://proxyexchange.org/standard_003.pdf

November 10, 2011

This document presents a model shareowner proposal that can be presented to corporations for a shareowner vote under SEC Rule 14a-8 to ensure that long-term shareowners have a reasonable, but not necessarily easy, means for including board nominations in the proxy materials those corporations distribute—so called "proxy access". The document explains the Model Proposal's various provisions and places it in the context of recent efforts to achieve proxy access.

Text of the Model Proposal

[***** insert company name *****: Rule 14a-8 Proposal, ***** insert date *****]
Proxy Access

WHEREAS, Most long-term shareowners have no reasonable means to make board nominations; this is a standard "proxy access" proposal, as described at http://proxyexchange.org/standard_003.pdf; and ***** Opening statement may be customized for individual companies' specific circumstances by adding no more than 75 additional words. *****

RESOLVED, Shareowners ask our board, to the fullest extent permitted by law, to amend our bylaws and governing documents to allow shareowners to make board nominations as follows:

1. The Company proxy statement, form of proxy, and voting instruction forms, shall include nominees of:

a. Any party of one or more shareowners that has held continuously, for two years, 1% of the Company's securities eligible to vote for the election of directors, and/or

b. Any party of shareowners of whom one hundred or more satisfy SEC Rule 14a-8(b) eligibility requirements.

2. Any such party may make one nomination or, if greater, a number of nominations equal to 12% of the current number of board members, rounding down.

3. For any board election, no shareowner may be a member of more than one such nominating party. Board members, named executives under Regulation S-K, and Rule 13d filers seeking a change in control, may not be a member of any such party.

4. All members of any party satisfying item 1(a), and at least one hundred members of any party satisfying item 1(b) who meet Rule 14a-8(b) eligibility requirements, must affirm in writing that they are not aware, and have no reason to suspect, that any member of their party has an explicit or implicit, direct or indirect, agreement or understanding either to nominate or regarding the nature of any nomination, with anyone not a member of their party.

5. All board candidates and members originally nominated under these provisions shall be afforded fair treatment, equivalent to that of the board's nominees. Nominees may include in the proxy statement a 500 word supporting statement. All board candidates shall be presented together, alphabetically by last name.

6. Any election resulting in a majority of board seats being filled by individuals nominated by the board and/or by parties nominating under these provisions shall be considered to not be a change in control by the Company, its board and officers.

7. Each proxy statement or special meeting notice to elect board members shall include instructions for nominating under these provisions, fully explaining all legal requirements for nominators and nominees under federal law, state law and company bylaws.

Instructions for Submitting the Proposal

Submit the proposal as you would any other precatory proposal under Rule 14a-8. You can cut and paste the text for the proposal from a text file at:

http://proxyexchange.org/standard_003.txt

Portions of the text need to be edited. These are highlighted in yellow in the copy of the model proposal above:

1. Insert, where indicated in the header, the name of the corporation to which the proposal is being submitted.

2. Insert, where indicated in the header, the date on which the proposal is submitted.

3. Insert, where indicated at the end of the first paragraph, a discussion of issues at the corporation that might warrant the sort of shareowner intervention that proxy access facilitates. Issues that might be mentioned include, a dramatic fall in the share price, excessive executive compensation, or a proposal that was passed by shareowners but never implemented by the board. *This additional text may not exceed 75 words*, because proposals may not exceed 500 words in total.

Members of the United States Proxy Exchange (USPX) believe proxy access should be a universal right of shareowners. From that perspective, there should be no need to identify problems at a corporation to which a proxy access proposal is submitted. However, not all institutional investors agree. In the current environment, proxy access proposals are more likely to receive majority votes at corporations with significant governance or performance issues identified in the proposal's preamble.

Historical Background

Proxy statements are by law company documents, not management's personal documents. As such, access to the proxy for the purpose of listing director nominees should be available to shareowners, not just the board's nominating committee.

In 1977 the SEC held a number of hearings to address corporate scandals. At that time, the Business Roundtable (BRT) recommended amendments to Rule 14a-8 that would allow access proposals, noting such amendments

> … would do no more than allow the establishment of machinery to enable shareholders to exercise rights acknowledged to exist under state law.

Soon, we saw several proposals. In 1980 Unicare Services included a proposal to allow any three shareowners to nominate and place candidates on the proxy. Shareowners at Mobil proposed a "reasonable number," while those at Union Oil proposed a threshold of "500 or more shareholders" to place nominees on corporate proxies.

One company argued that placing a minimum threshold on access would discriminate "in favor of large stockholders and to the detriment of small stockholders," violating equal treatment principles. CalPERS participated in the movement, submitting a proposal in 1988 but withdrawing it when Texaco agreed to include their nominee.

These early attempts to win proxy access through shareowner proposals met with the same fate as most proposals in those days. As of 1986, only two proposals of hundreds submitted had ever been approved—but the tides of change were turning. A 1987 proposal by Lewis Gilbert to allow shareowners to ratify the choice of auditors won a majority vote at Chock Full O'Nuts Corporation and in 1988 Richard Foley's proposal to redeem a poison pill won a majority vote at the Santa Fe Southern Pacific Corporation.

In 1990, without public discussion or a rule change, the SEC began issuing a series of no-action letters on access proposals. The SEC's about-face may have been prompted by fear that "private ordering," through shareowner proposals, was about to begin in earnest.

Tensions over this giant leap backward rose until *AFSCME v AIG* (2006). That case involved a 2004 bylaw proposal submitted by the American Federation of State, County & Municipal Employees (AFSCME) to the American International Group (AIG) requiring that specified nominees be included in the proxy. AIG excluded the proposal after receiving a no-action letter from the SEC and AFSCME filed suit.

The court ruled the prohibition on shareowner elections contained in Rule 14a-8 applied only to proposals "used to oppose solicitations dealing with an identified board seat in an upcoming election" (also known as contested elections).

The SEC subsequently adopted a rule banning proposals aimed at prospective elections. But in 2010, the commission adopted both a new Rule 14a-11, specifying a minimum proxy access requirement for all public corporations, and amendments to Rule 14a-8(i)(8) to allow shareowners to submit proposals for more robust proxy access at corporations in which they own shares.

The US Court of Appeals for the DC Circuit found the economic analysis of the new Rule 14a-11 "arbitrary and capricious", in part, because the SEC failed to properly estimate how much boards would authorize companies to spend to keep themselves entrenched. The Court decision means shareowners' only current option for achieving proxy access is through proposals filed on a company by company basis under the amended Rule 14a-8.

Need for a Model Proxy Access Proposal

While ostensibly providing proxy access at public corporations, Rule 14a-11 was anti-democratic. Two particularly objectionable aspects of the rule were:

1. A high ownership threshold of 3% of a corporation's outstanding shares in order to nominate. This disenfranchised most shareowners.

2. A hard cap on the total number of shareowner nominations was set equal to the greater of one nominee or 25% of the number of board members, which ensured Rule 14a-11 would never have more than token impact.

While USPX members object to these provisions of Rule 14a-11, we applaud the SEC for amendments to Rule 14a-8 to allow shareowners to submit their own proposals for alternative—and presumably better—forms of proxy access at individual corporations. This "private ordering" approach to proxy access should allow shareowners to experiment with different approaches to proxy access at individual firms, to see what works.

With Rule 14a-11 vacated, prospects for private ordering experimentation dimmed. Several large institutional investors planned to submit proxy access proposals based on the vacated Rule 14a-11, rather than advancing innovative alternatives. In doing so, they would resurrect the two objectionable aspects of that rule mentioned above.

The USPX has developed the *Model Proxy Access Proposal* as a means of stimulating debate and experimentation with alternative approaches to proxy access. Implemented as-is, it will provide a reasonable—but not necessarily easy—means for *most long-term shareowners* to participate in nominating directors. It imposes no hard cap on the total number of shareowner nominations, although it provides safeguards that obstruct parties from seeking a change in control through proxy access.

We encourage shareowners to submit the *Model Proposal* or to use it as a starting point in developing their own proposals. We hope that shareowners will also submit completely different proposals of their own design. The discussion of issues presented below should assist shareowners in that process. The success of proxy access depends on experimentation to find what works. This entails risk, of course. Democracy always does. The USPX intends to fully support the process.

Safeguarding Against a Change in Control

Rule 405 defines "control" as:

> … the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise

where "person" is broadly understood to include artificial persons, such as corporations.

A change in control occurs in a board election when some party, other than the existing board, nominates candidates over which that party has control, and a majority of board seats are won by those candidates. That circumstance is different from one in which the board's nominees merely fail to win a majority of seats. If no one party has control over a majority of a new board's members, there is not a change in control.

While there is nothing necessarily wrong with a change in control, there is a perception that parties seeking a change in control should do so through the traditional mechanism of a competing proxy solicitation. They should not be allowed to do so through proxy access, which is designed to emphasize simplicity over safeguards.

The SEC's vacated Rule 14a-11 would have prevented changes in control with the astonishingly blunt mechanism of capping the total number of proxy access nominations at[1]

> … no more than one shareholder nominee or the number of nominees that represents 25% of the company's board of directors, whichever is greater.

Furthermore, careful wording ensured that, even after several years of elections, no more than 25% of board seats would ever be filled by proxy access nominees.

[1] SEC (2011). *Facilitating Shareowner Director Nominations* (http://www.sec.gov/rules/final/2010/33-9136.pdf) p. 138.

This was supposedly intended to prevent proxy access from being used to achieve a change in control. It also happened to gut proxy access. *An election isn't democratic if it is conducted under rules guaranteeing that candidates nominated by incumbents win a supermajority of seats.* For decades, corporate elections in the United States have tended to resemble Politburo elections in the former Soviet Union. The SEC's hard cap on the total number of proxy access nominations confirmed for many shareowners that the SEC is committed to keeping things that way.

USPX members support the notion that changes in control should be pursued through independent proxy solicitations and not through proxy access. The *Model Proposal* achieves this by erecting a variety of impediments to parties who might use proxy access to achieve a change in control. These are not intended to make it impossible to achieve a change in control through proxy access. Rather, they are designed to ensure that, compared to the option of organizing an independent proxy solicitation, proxy access is an unattractive alternative.

Various items in the *Model Proposal* work together to achieve this goal. In the next section, we describe the seven items that comprise the *Model Proposal*. Where relevant, we point out how individual items contribute to obstructing changes in control.

Discussion of Individual Items of the Model Proposal

Below we discuss the seven individual items in the *Model Proposal*.

Model Proposal – Item 1

> *1. The Company proxy statement, form of proxy, and voting instruction forms, shall include nominees of:*
>
> > *a. Any party of one or more shareowners that has held continuously, for two years, one percent of the Company's securities eligible to vote for the election of directors, and/or*
> >
> > *b. Any party of shareowners of whom one hundred or more satisfy SEC Rule 14a-8(b) eligibility requirements.*

This item specifies eligibility requirements that make it possible—but not necessarily easy—for shareowners to nominate. The requirements of Item 1(a) are mostly suited to large shareowners. Those of Item 1(b) are mostly suited for smaller shareowners.

The Need for Eligibility Requirements

Traditionally, rules of procedure make it easy to nominate candidates for elective office. Under *Roberts Rules*, a single person may nominate, and the nomination requires no "second." The reasoning would appear to be that the challenge of being elected should lie in the election itself and not in the nomination.

One reason for eligibility requirements, at least for the purpose of proxy access, is to prevent changes in control. On their own, eligibility requirements are ineffective for that purpose, unless they are prohibitively onerous. But in combination with Item 2, the Item 1 eligibility requirements effectively obstruct changes in control. We shall explain how in our discussion of Item 2 shortly.

Four other reasons to impose eligibility requirements on those who might nominate are:

1. Ensuring the quality of nominations. If effort or a long-term commitment to owning a substantial stake in the company are required to nominate, nominators will be likely to put effort into deciding whom to nominate.

2. Avoiding a "dilution" effect of numerous shareowner nominees competing for a limited pool of "opposition" votes, making it difficult for any of them to best board nominees.

3. Avoiding frivolous or nuisance nominations. Otherwise, for example, certain "activist" investment funds might conclude that media attention from submitting numerous nominations might help their marketing.

4. Keeping nominations to a manageable number for convenience or to limit election costs.

We have listed the above goals in more or less descending order, from most compelling to least. All must be balanced against the tendency for eligibility requirements to disenfranchise. In this regard, the fourth goal is often questionable. Preventing certain parties from nominating for the purposes of convenience or limiting election costs should be rejected in all but the most pressing of circumstances. Yet, that is the justification the SEC gave for onerous eligibility requirement—3% of outstanding shares held for three years—in the vacated Rule 14a-11. In the SEC's 451 page description of that rule, the only explicit justification provided for a 3% ownership threshold was:[2]

> … we believe that the 3% ownership threshold—combined with the other requirements of the rule—properly addresses the potential practical difficulties of requiring inclusion of shareholder director nominations in a company's proxy materials …

That ownership threshold—combined with the other requirements of Rule 14a-11—ensured that, at most medium- or large-cap corporations, only the largest of institutional shareowners could participate in nominating. The degree of disenfranchisement the SEC was willing to impose to achieve unspecified cost savings, relating primarily to printing and distributing proxy materials, is breathtaking. It suggests that the SEC might have been motivated by another unstated goal. Unlike the four possible goals mentioned above, this one is not justified:

[2] *ibid*, p. 81.

5. Limiting nominations to certain parties, such as the existing board or influential shareowners, based on a belief that they have a greater right to nominate.

This goal is unacceptable because it violates a basic tenet of rules of democratic procedure, including *Roberts Rules*. That tenet is:

The majority decides, but the minority is heard.

Voting is when the majority decides. Nominations are when the minority is heard. For that reason, it is undemocratic to impose eligibility requirements for the purpose of suppressing nominations from "unimportant" parties, such as individual shareowners or small institutional shareowners.

This is more than an issue of fairness. Deliberative bodies tend to make better decisions when all opinions—not just those of a chosen few—are heard. Based on experience with Rule 14a-8 shareowner proposals, where individual shareowners and small institutional shareowners have routinely shown successful leadership, we have every reason to believe that nominations by those same shareowners, if permitted, will benefit corporations.

As explained below, the eligibility requirements of the *Model Proposal* are designed to achieve legitimate goals while ensuring a maximum opportunity for all long-term shareowners to participate in nominating.

Item 1(a) Eligibility Requirement

The first of the *Model Proposal's* two eligibility requirements, Item 1(a), specifies that any shareowner, or group of shareowners, that has continuously held 1% of a company's shares for two years may nominate.

This eligibility requirement is intended primarily for large institutional shareowners. However, at small-cap companies, many individual shareowners may also qualify. For example, founders or angel investors often have long-term holdings in excess of 1% of a small company's outstanding shares. A group of five or ten shareowners, each possessing less than 1% of shares, might together control shares in excess of 1%.

The philosophy of this particular eligibility requirement is that shareowners with a demonstrated long-term commitment to holding a substantial stake in the company will be motivated to nominate quality candidates for the board. Its purpose is to achieve the first of the goals described above while also facilitating the other three justifiable goals. On its own, it might also facilitate the fifth, unjustifiable goal mentioned above. However, in combination with the *Model Proposal's* second eligibility requirement—tailored to the needs of smaller shareowners—it will not do so.

Holding periods are an accepted means for ensuring "long-term commitment" of nominators. But how long is reasonable? Given today's frenetic level of share trading, a holding period long enough to demonstrate that shares are not held as part of an "active management" strategy should be sufficient. Actively managed institutional portfolios

routinely have annual turnover of 75% or higher. Few shares in an actively managed portfolio are held for two years, which suggests that a two-year holding period might be reasonable.

A longer holding period, such as three years, would indicate long-term commitment even more strongly, but this advantage must be weighed against the disenfranchisement it would entail. The pool of investors who have held 1% of a given corporation's shares continuously for two years, and has the inclination to make nominations, is extremely small. Why narrow it even further?

We believe shareowners that have held 1% of a company's shares for two years will be highly motivated to make quality nominations, and that requiring that they hold the shares for an additional year will add little to that motivation. Since quality nominations are the primary goal of our eligibility requirements, and since other legitimate goals can be fully advanced with a two-year holding period, we settled on that holding period as reasonable in order to avoid unnecessary disenfranchisement.

The second component of the Item 1(a) eligibility requirement—an ownership threshold of 1% of outstanding shares—represents an even larger step back from Rule 14a-11. Ownership thresholds have greater potential to disenfranchise than do holding periods, as shareowners can more easily hold stock for an extended period than they can increase the size of their holdings. A strategy of holding larger positions in fewer stocks can only be taken so far before diversification becomes an issue. A 3% threshold would ensure that, at most medium- or large-cap firms, only a handful of the largest of institutions could nominate. Even then, they would likely have to pool their holdings to meet the threshold.

A 1% threshold opens up nominating to a larger, but still small, swath of shareowners. One study of S&P 500 companies cited by the SEC[3] found that, assuming no holding period, 14 institutional investors could, on their own, satisfy a 1% threshold at more than 100 companies, eight could meet that threshold at over 200 companies, five could meet it at over 300 companies, and three could meet it at 499 of the 500. Add a two-year holding period, and those numbers would drop dramatically.

A 1% threshold certainly satisfies the criteria of representing a significant stake in a corporation, which is its purpose with regard to ensuring quality nominations. With that goal in mind, and the need to avoid needless disenfranchisement, we settled on a 1% ownership threshold.

Item 1(b) Eligibility Requirement

The second of the *Model Proposal's* two eligibility requirements, Item 1(b), specifies that any party of shareowners, of whom one hundred or more satisfy SEC Rule 14a-8(b) eligibility requirements, may nominate. In the vast majority of cases, the relevant Rule 14a-8 requirement will be that a shareowner have held, continuously for one year, $2,000 of a company's stock.

[3] *ibid*, p.90.

This eligibility requirement is intended primarily for individual shareowners of medium- or large-cap corporations, but it will also facilitate nominations by small and medium sized institutional shareowners of such corporations.

The philosophy of this eligibility requirement is fundamentally different from that of our Item 1(a) eligibility requirement, discussed above. It needs to be understood in that light. Both eligibility requirements share the primary goal of ensuring quality nominations, but they do so in different ways. The philosophy of Item 1(a) is that shareowners with a demonstrated long-term commitment to holding a substantial stake in a company will be motivated to nominate quality candidates for its board. The philosophy of Item 1(b) is that shareowners who must invest considerable effort to nominate will tend to also invest effort in selecting quality nominees.

Item 1(b) embraces this philosophy with a requirement that shareowners form groups to nominate, and that at least 100 members of each such group satisfy the Rule 14a-8 eligibility requirements. Forming such groups will require considerable effort, so those who take on the challenge should be motivated to not squander their time on frivolous or poorly researched nominations.

This different philosophy is necessary if smaller shareowners are to not be disenfranchised. Ownership thresholds designed to ensure shareowners have a "significant stake" in a corporation do not work for them, because a stake that is significant for one small shareowner will be trivial for another.

In designing this eligibility requirement, we sought precedents, looking especially to experiences in other countries. In Australia, a group of 100 shareowners may nominate, and there is no holding period requirement. In the UK, groups of 100 shareowners may submit proposals. These are two examples of eligibility requirements based on a philosophy that requiring effort will ensure quality nominations (or quality proposals, in the case of the UK). In both cases, a group size of 100 individuals was deemed reasonable. In practice, such groups have rarely formed.

One shortcoming of eligibility requirements based on a philosophy that significant effort will ensure quality nominations is that "quality" must be assessed relative to the nominating party's intentions. For example, if a group of short sellers put a lot of effort into arranging a nomination, they would likely do so with the goal of damaging the corporation. A "quality" nominee for them might not be a "quality" nominee in other shareowners' eyes.

This problem should not arise with nominations under Item 1(a), as shareowners with a significant long-term stake in a company can be expected to act with the company's—and other shareowners'—best interests in mind. We address the issue in Item 1(b) with the requirement that 100 members of a nominating group satisfy the Rule 14a-8 eligibility requirements. Short sellers or speculative traders don't typically satisfy Rule 14a-8 requirements, and their strategies are sufficiently opportunistic as to make it

unlikely that they could arrange to do so, for a particular target company, a year in advance.

Items 2, 3 and 4 of the *Model Proposal* also address this issue. For example, Item 2 limits nominating groups to making (in most cases) a single nomination. Shareowners acting with the company's best interests in mind might put in the effort required to form a group and nominate out of a sense of cooperation with other shareowners who are presumably organizing for the same purpose. On the other hand, shareowners who might organize a nominating group for some purpose that conflicts with the company's best interests would have to confront the fact that making a single nomination—even if their nominee did manage to win a board seat—would be unlikely to materially impact the company. And they couldn't pursue their private agenda out of a sense of cooperation with other shareowners presumed to be organizing for the same purpose. Who else would be organizing nominating groups to cooperate with their hidden agenda? That would require collusion, which is barred by Item 4.

In summary, to avoid disenfranchising smaller shareowners—i.e. the vast majority of shareowners—the *Model Proposal* embraces the Item 1(b) eligibility requirement based on a philosophy that requiring effort on the part of nominators will ensure quality nominations. That same philosophy is evident in Australian and UK rules allowing groups of 100 shareowners to nominate or, in the case of the UK, submit a proposal. Item 1(b) adopts that same model of 100-member groups. To ensure such nominating groups are motivated by the best interests of the company, it requires that 100 members of such groups satisfy Rule 14a-8 eligibility requirements. It also relies on the safeguards of Items 2, 3 and 4.

Because Item 1(a) and Item 1(b) eligibility requirements are based on different philosophies, they achieve their purposes through entirely different mechanisms. We should not expect or intend that their provisions be aligned or made somehow "compatible."

For example, Item 1(a) requires a two-year holding period whereas Item 1(b) requires only a one-year holding period. This is reasonable because those holding periods serve different purposes. For Item 1(a), the holding period is intended to ensure nominators have a substantial long-term stake in a company. In item 1(b), its purpose is more to disqualify speculators or short sellers. Because that can be achieved with a one-year holding period, there is no reason to disenfranchise small shareowners with a more onerous two-year holding period.

Model Proposal – Item 2

> *Any such party may make one nomination or, if greater, a number of nominations equal to twelve percent of the current number of board members, rounding down.*

As a practical matter, this item is intended to limit nominating groups to one nomination each. Because we expect that entrenched boards will respond to proxy access by increasing the number of seats on boards, we added the following provision:

> … or, if greater, a number of nominations equal to 12% of the current number of board members, rounding down.

This will dissuade boards from growing beyond sixteen members.

Item 2 facilitates many of the goals we have already identified for eligibility requirements. For example, by limiting nominating groups to one nominee each, it focuses them on "quality not quantity."

Item 2 is primarily intended, in combination with Item 1, to prevent proxy access from being used by parties seeking a change in control. Item 1 places significant hurdles before parties who might nominate. Item 2 limits those parties to (in most cases) one nominee each.

Any party seeking to use proxy access to achieve a change in control would need to organize nominating groups equal in number to a majority of the board. That would be a significant undertaking, especially given Item 4's safeguards against collusion among nominating groups.

Model Proposal – Item 3

> *For any board election, no shareowner may be a member of more than one such nominating party. Board members, named executives under Regulation S-K, and Rule 13d filers seeking a change in control, may not be a member of any such party.*

Item 3 is necessary if Item 2 is to be effective. Limiting nominating groups to one nominee each would accomplish nothing if shareowners could form and participate in multiple groups.

Barring board members and named executives from joining nominating groups is merely a recognition that they are already able to participate in nominating through their presumed access to the board's nominating committee.

Rule 13d filers are individual shareowners or groups that own 5% of a corporation's voting shares. Item 3 bars Rule 13d filers seeking a change in control from submitting nominations through proxy access. The reasoning is that they should pursue the change of control exclusively through an independent proxy solicitation.

Model Proposal – Item 4

> *4. All members of any party satisfying item 1(a), and at least one hundred members of any party satisfying item 1(b) who meet Rule 14a-8(b) eligibility requirements, must affirm in writing that they are not aware, and have no reason to suspect, that any member of their party has an explicit or implicit, direct or indirect, agreement or understanding either to nominate or regarding the nature of any nomination, with anyone not a member of their party.*

The purpose of this provision is to obstruct parties who seek a change in control, or have some purpose counter to a company's best interests, from organizing several colluding nominating groups.

Let's illustrate with an example. Suppose a board has fourteen members, and some party wants to exploit proxy access to achieve a change in control. Conceivably, they could do so by forming eight nominating groups of 100 shareowners each. That would require 800 shareowners, all of whom satisfy Rule 14a-8 eligibility requirements and all of whom are willing to dishonestly sign a statement confirming that they are "not aware, and have no reason to suspect" that there is collusion. That would be a monumental task, and it would entail considerable legal risk, as any one of those 800 shareowners could be a whistleblower.

Model Proposal – Item 5

> *All board candidates and members originally nominated under these provisions shall be afforded fair treatment, equivalent to that of the board's nominees. Nominees may include in the proxy statement a 500 word supporting statement. All board candidates shall be presented together, alphabetically by last name.*

Item 5 is just a fairness provision designed to ensure that shareowner nominees are afforded the same treatment as board nominees, both during the election and once (if) they are elected to the board.

Because poorly—or "creatively"—designed ballots are known to sway elections, Item 5 sets basic requirements for how nominees are presented to voting shareowners.

Model Proposal – Item 6

> *Any election resulting in a majority of board seats being filled by individuals nominated by the board and/or by parties nominating under these provisions shall be considered to not be a change in control by the Company, its board and officers.*

Item 6 states what is legally obvious: The mere fact that a majority of board seats are won by individuals who are not board nominees does not mean there was a change in control. The purpose of proxy access is to allow shareowners to nominate individual board

candidates so shareowners can pick and choose from among all nominees to form a board.

We explicitly include Item 6 to preclude frivolous challenges or lawsuits. For example, a company officer with a "golden parachute" might sue for a payout under that golden parachute in the event of a board election in which proxy access nominees won a majority of seats. Such a frivolous lawsuit could pose a risk, especially since the company's officers might choose to mount only a half-hearted defense on behalf of the company. Requiring that, not only the company, but also its individual board members and officers, consider such an election to not be a change in control would complicate the efforts of such greedy individuals.

Model Proposal – Item 7

> *Each proxy statement or special meeting notice to elect board members shall include instructions for nominating under these provisions, fully explaining all legal requirements for nominators and nominees under federal law, state law and company bylaws.*

One simple way to deny peoples' rights is to not inform them of how they can exercise those rights. Item 7 requires full disclosure about how proxy access rights can be exercised. It is based on similar SEC requirements that companies disclose in their proxy materials how shareowners can submit proposals under Rule 14a-8.

We expect that companies will vet proxy access nominees, and reject some based on federal law, state law or company bylaws. To ensure fairness and transparency, Item 7 requires full disclosure of all applicable legal requirements.

Conclusion

This document presents a model shareowner proposal that can be submitted to corporations for a shareowner vote under SEC Rule 14a-8 to ensure that long-term shareowners have a reasonable, but not necessarily easy, means for including board nominations in the proxy materials those corporations distribute.

The USPX encourages shareowners to experiment with different approaches to proxy access so that, over time, we can see what approaches work best. Please submit the *Model Proposal* to corporations you think would benefit from it. We encourage shareowners to experiment with modifications to the *Model Proposal* or to submit entirely different proxy access proposals of their own design.

We welcome feedback, which we may incorporate into future versions of this *Model Proposal*. Please post comments at

> http://proxyexchange.org/2011/11/model-proxy-access-proposal/

or e-mail Jim McRitchie at jm@corpgov.net.

A drafting committee of USPX members organized by Jim McRitchie prepared this document. Other members of that committee were: Vincent Cirulli, Brett Davidson, Richard Foley, Glyn Holton and Steve Neiman.