

LEGAL UPDATE

May 26, 2009 By: Michael T. Campoli

PROXY ACCESS PROPOSAL

On May 20, 2009, the Commissioners of the U.S. Securities and Exchange Commission (the “SEC”) voted by a 3-2 margin to propose amendments to the federal proxy rules under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), to facilitate the rights of shareholders to nominate candidates for election as a corporate director and have those nominees included in the company’s proxy materials.

The text of the proposed “proxy access” amendments has not yet been published, and this summary of the SEC’s proposal is based on the SEC’s public meeting and press release. Comments will be due 60 days after the proposal is published in the Federal Register. Nevertheless, the SEC appears intent on having final proxy access rules in place for the 2010 proxy season.

PROPOSED RULE 14A-11

Under proposed Rule 14a-11, eligible shareholders (including groups of shareholders) of companies that have a class of equity securities subject to the SEC’s proxy rules would be able to include their nominees for director in the company’s proxy materials unless they are otherwise prohibited – either by applicable state law or a company’s governing documents – from nominating a candidate for election as a director. Specifically, shareholders (or groups) who have held their shares for at least one year would be eligible to have their nominees included in the company’s proxy materials if the following ownership criteria, as applicable, are met:

- They own at least 1% of the voting securities of a “large accelerated filer” (a company with a worldwide market value of \$700 million or more) or of a registered

investment company with net assets of \$700 million or more.

- They own at least 3% of the voting securities of an “accelerated filer” (a company with a worldwide market value of \$75 million or more but less than \$700 million), or of a registered investment company with net assets of \$75 million or more but less than \$700 million.
- They own at least 5% of the voting securities of a “non-accelerated filer” (a company with worldwide market value of less than \$75 million) or of a registered investment company with net assets of less than \$75 million.

Shareholders would be able to nominate for election to the board of directors the greater of: (i) one candidate or (ii) candidates for up to 25% of the company’s board of directors. For example, if the board is comprised of three members, the shareholders could include one nominee in the proxy materials. However, if the board is comprised of eight members, up to two nominees of the shareholders could be included in the proxy materials. If the number of nominees submitted under the process exceeds the authorized number of permissible nominees, then the company would only need to include the earliest received nominations. Thus, as proposed, the timing of the nomination (by filing a Schedule 14N, as discussed below) can be critical to assuring that a particular shareholders’ nominees are included in the proxy materials.

Under the proposals, each nominee’s candidacy or, if elected, board membership must not violate applicable laws and regulations, and each

nominee must satisfy objective independence standards of the applicable national securities exchange or national securities association. Additionally, the nominating shareholder may have no direct or indirect agreement with the company regarding the nomination.

In order to submit their nominations, shareholders would be required to file with the SEC and submit to the company a new Schedule 14N. The Schedule 14N would require disclosure of the amount and percentage of securities owned by the nominating shareholder, the length of ownership, and intent to continue to hold the securities through the date of the meeting. The Schedule 14N would also require a certification that the nominating shareholder is not seeking to change the control of the company or to gain more than minority representation on the board of directors. The deadlines for submitting nominees (and filing the Schedule 14N) would be the deadline established by a company's advance notice bylaw or, in the absence of such a bylaw, 120 calendar days before the first anniversary of the date that the company's proxy statement was released in connection with the prior year's annual meeting.

Assuming that a valid Schedule 14N is filed, the company would include in its proxy materials disclosure concerning the nominating shareholder, as well as the nominee or nominees of such shareholder, that is similar to the disclosure currently required in a contested election. Additionally, proposed Rule 14a-9(c) would make the nominating shareholder liable for false or misleading statements supplied to a company and provide that a company would not be liable for false or misleading information it received from a nominating shareholder or director nominee, unless the company knew or had reason to know the information was false.

The federal right to nominate directors provided in Rule 14a-11 would preempt any proxy access provisions set forth in state law or in a company's charter or bylaws. For example, if the bylaws of a large accelerated filer permitted shareholders owning more than 5% of shares to submit director

nominations in company proxy materials, Rule 14a-11 would preempt this provision. As a result, the company's shareholders would only need to satisfy the 1% ownership threshold in Rule 14a-11 and its related requirements in order to include a director nominee in the company's proxy materials.

PROPOSED AMENDMENT TO RULE 14A-8(i)(8)

Exchange Act Rule 14a-8(i)(8) currently permits companies to exclude shareholder proposals that "relate to an election." The SEC is proposing to narrow this so-called "election exclusion" to allow more shareholder proposals regarding elections in the proxy materials. Specifically, shareholder proposals by qualifying shareholders that would amend, or that request an amendment to, provisions of a company's governing documents concerning the company's nomination procedures or other director nomination disclosure provisions (so long as those disclosure provisions do not conflict with proposed Rule 14a-11) would not be excludable. Shareholders that meet the eligibility provisions of Rule 14a-8 (i.e., that have continuously held the lesser of \$2,000 in market value or 1% of the company's securities entitled to be voted on the proposal at the meeting for a period of one year prior to submitting the proposal) would be permitted to submit such proposals.

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The foregoing is intended to summarize the principal issues relating to the SEC's "proxy access" proposal and is not intended to provide legal advice. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Edward Normandin at (212) 326-0892 or Michael Campoli at (212) 326-0468.

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Mr. Campoli devotes his practice to counseling public and private companies on a broad range of corporate matters, including Securities and Exchange Commission and self-regulatory organization reporting and compliance, corporate formation and governance, mergers and acquisitions, public and private debt and equity financing transactions, and limited liability company and partnership counseling.

Mr. Campoli's work at Pryor Cashman has included:

- Representation of MDRNA, Inc. (NASDAQ: MRNA) as outside general counsel in connection with its equity financings, and SEC and NASDAQ reporting and compliance requirements
- Representation of Javelin Pharmaceuticals, Inc. (NYSE - Amex: JAV) as outside general counsel in connection with its equity financings, and SEC and NYSE - Amex reporting and compliance requirements
- Represented Briad Restaurant Group in its prevailing tender offer for Main Street Restaurant Group, Inc., the largest T.G.I. Friday's franchisee
- Represented Open Range Communications Inc. in connection with a \$380 million financing that consisted of the issuance of a \$270 million promissory note to the U.S. Department of Agriculture and preferred stock to private investors
- Represented The Kushner Companies in connection with its acquisition of the office building located at 666 Fifth Avenue, New York, New York
- Represented Implantable Vision, Inc. (OTCBB: IMVS) as outside general counsel in connection with SEC compliance and reporting matters
- Represented a privately-held alternative media company in connection with general corporate matters and its acquisition of a coffee sleeve advertising business
- Represented a private medical devices manufacturer in connection with equity and debt offerings for aggregate gross proceeds of up to \$4,000,000
- Represented a private life sciences company in connection with the issuance of \$15 million of convertible notes
- Represented a private television production company in connection with the issuance of \$3.5 million of equity securities