

ILLUSTRATIVE PROXY EXPENSE REIMBURSEMENT BYLAW

The following bylaw provisions (the “Bylaw”) and accompanying commentary are intended to identify matters that should be considered in the preparation of a bylaw establishing a stockholder’s right to be reimbursed for expenses incurred in soliciting proxies in an election of directors. The purpose is to help establish a workable and reasonable system for proxy expense reimbursement. The Bylaw is illustrative only, however, and not intended to be a model for companies to follow.

Introductory Notes: The Bylaw is based on the following assumptions:

1. The company (the “Company”) is a widely-held public corporation, is not an investment company, has only one class of capital stock 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 disclosure requirements concerning beneficial ownership of the Company’s securities by the sponsoring stockholder and his, her or its nominee(s).
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 a stockholder seeks reimbursement for expenses incurred in a proxy contest, a plurality vote standard will apply even where a majority vote standard would apply in a non-contested election.
4. Cumulative voting is not permitted.

The various circumstances of a particular corporation will require modification and adaptation of the illustrative provisions.

Section X. Reimbursement of Certain Proxy Expenses.

(a) Following the annual meeting of stockholders and subject to the terms and conditions of this Section X and applicable law, the Board of Directors shall cause the Company to reimburse the Expenses that an Eligible Stockholder has actually incurred in connection with nominating and soliciting proxies with respect to one or more Nominees of the Eligible Stockholder (the “Nomination”) if all of the following conditions are met:

(i) the election of not more than [one-fourth] of the number of seats on the Board of Directors shall have been contested in the election at such annual meeting (rounded down to the nearest whole number but not less than one);

(ii) at least a majority of the Nominees of the Eligible Stockholder shall have been validly elected to the Board of Directors by the stockholders of the Company at the annual meeting;

(iii) (A) no member of the Nominating Group shall have received reimbursement of proxy expenses from the Company, pursuant to this Bylaw or otherwise, in any of the preceding three years, and (B) no current or former stockholder of the Company shall have received reimbursement of proxy expenses from the Company, pursuant to this Bylaw or otherwise, in the preceding [fifteen calendar months];

(iv) the Nominee(s) of the Eligible Stockholder shall not have been included on the proxy cards solicited by the Company or by any person other than the Eligible Stockholder;

(v) the Proxy Materials shall have included a statement disclosing each member of the Nominating Group and the other information required to be delivered to the Secretary pursuant to Section [Advance Notice Bylaw] of these Bylaws;

(vi) the Nominating Group shall not have collectively owned, whether beneficially or of record and including the notional amount of any Synthetic Equity Interests, in excess of [10%] of the Company’s outstanding voting power or any class or series of its voting stock during the [two-year period] prior to the [Advance Notice Date] and through the conclusion of the annual meeting; and

(vii) with respect to each member of the Nominating Group:

(A) each member shall have complied with all provisions of the Certificate of Incorporation and these Bylaws (including Section [Advance Notice Bylaw] of these Bylaws), and all laws, rules and regulations applicable to the solicitation of proxies and nomination and election of directors;

(B) during the [two-year period] prior to the date of the annual meeting, no such member shall have (i) publicly proposed to acquire 10% or more of (a)

the total voting power of any class or series of equity securities of the Company or (b) the consolidated total assets (including equity securities of the Company's subsidiaries) of the Company, (ii) publicly proposed to enter into a merger, consolidation, share exchange, joint venture or other business combination with the Company; (iii) requested the Company to repurchase any securities of the Company held by any member of the Nominating Group; (iv) requested the Company to call or hold a special meeting of stockholders for any purpose; (v) held any securities of the Company for the purpose, or with the effect, of changing or influencing the control of the Company, other than solely by reason of the Nomination; (vi) nominated one or more persons for election to the Board of Directors other than solely with respect to the Nomination; or (vii) solicited proxies or written consents from the Company's stockholders for any purpose other than soliciting proxies with respect to the Nomination; and

(C) prior to the annual meeting, each member shall have delivered to the Company a representation in writing (in a form provided by the Secretary of the Company upon request) that such member has no present intention to take any of the actions described in Section X(a)(vii)(B) (except in the case of clauses (v) through (vii) thereof with respect to the Nomination).

(b) If an Eligible Stockholder is entitled to reimbursement pursuant to Section X(a), then (1) if less than all of the Nominees were elected, the Company shall reimburse the Eligible Stockholder in an amount equal to the product of (a) the amount of all such Eligible Stockholder's Expenses times (b) the quotient of (x) the number of Nominees that were elected divided by (y) the total number of all Nominees of such Eligible Stockholder, and (2) if all of the Nominees were elected, the Company shall reimburse the Eligible Stockholder for all Expenses, in each case subject to the other terms and conditions of this Section X; provided, however, that in no event shall the amount paid to the Eligible Stockholder pursuant to this Section X(b) exceed the amount of expenses incurred by the Company in soliciting proxies in connection with the election of directors at the same meeting. Any reimbursement of Expenses pursuant to this Section X(b) shall be made within 60 calendar days after the later of (i) the final certification by the inspector of election of the results of the director elections at the annual meeting and (ii) the Company's receipt of reasonably detailed written documentation of the Expenses and any other information reasonably requested by the Company demonstrating the Eligible Stockholder's eligibility for reimbursement of Expenses; provided, however, that notwithstanding the foregoing, the Company shall not reimburse the Eligible Stockholder if there is any threatened or pending investigation, suit or proceeding that could reasonably result in reimbursement being prohibited pursuant to Section X(c)(2) (including, without limitation, an action brought under Section 225 of the DGCL).

(c) Notwithstanding any other provision of these Bylaws, the Company shall not reimburse any Eligible Stockholder for any Expenses if (1) making such a payment would cause the Company to violate any applicable law, render the Company insolvent, or cause the Company to breach a material obligation incurred without reference to the obligations imposed by this Section X or (2) any member of the Nominating Group violated any applicable laws, rules or regulations in connection with the Nomination.

(d) For purposes of this Section X, the following definitions shall apply:

(i) “Affiliate” and “Associate” shall have the meanings given such terms in Rule 12b-2 of the Exchange Act.

(ii) “Eligible Stockholder” means a stockholder or group of [not more than ten] stockholders of the Company that (A) has been the beneficial owner continuously of shares of the Company’s common stock from the date that is [one year] prior to the [Advance Notice Date] through the conclusion of the meeting at which the Nomination was made, (B) shall have nominated directors to fill not more than [one-fourth] of the number of seats on the Board of Directors to be filled in the election of directors (rounded down to the nearest whole number but not less than one), and (C) shall not have engaged in a “solicitation” within the meaning of Rule 14a-1(1) of the Exchange Act in support of the election of any individual as a director at the meeting other than a Nominee of such stockholder or group of stockholders (or a nominee of the Board of Directors) and shall not have distributed to any stockholder any form of proxy for the meeting other than a form including only such Nominee(s) and individuals nominated by the Board of Directors.

(iii) “Exchange Act” means the Securities Exchange Act of 1934, as amended.

(iv) “Expenses” means the out-of-pocket costs of printing and mailing the Proxy Materials and the fees and expenses of one law firm for reviewing the Proxy Materials and one proxy solicitor for conducting the related proxy solicitation (in each case, only such costs, fees and expenses that are actually and reasonably incurred by the Eligible Stockholder directly in connection with the Nomination, which determination shall be made in the good faith judgment of the Board of Directors), so long as: (A) one or more members of the Nominating Group shall be liable for such amounts regardless of the outcome of the election of directors or the receipt of reimbursement by the Company; and (B) any party to which such amounts are payable is not a member of the Nominating Group.

(v) “Nominating Group” shall mean the Eligible Stockholder and its Affiliates and Associates.

(vi) “Nominee” shall mean a person nominated by the Eligible Stockholder for election to the Board of Directors and for whom such Eligible Stockholder solicits proxies who (A) is considered an independent director in accordance with listing standards of the principal securities markets or exchanges in which the Company’s common stock trades (or, if no such standards are applicable at the time, in accordance with the standards used by the Board of Directors in determining the independence of the Company’s directors in accordance with the rules of the SEC), (B) is not an employee or officer of, or consultant to, any member of the Nominating Group, and has no other material association, by agreement, understanding or familial or other relationship, with any member of the Nominating Group, (C) has complied with all provisions of these Bylaws and (D) has submitted to the Company a written

representation and agreement (in the form provided by the Secretary upon request) that such person (1) is not and will not become a party to (a) any contract, agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such person, if elected as a director of the Company, will act or vote on any issue or question (a “Voting Commitment”) that has not been disclosed to the Company or (b) any Voting Commitment that could limit or interfere with such person’s ability to comply, if elected as a director, with such person’s legal duties under applicable law, (2) is not and will not become a party to any contract, agreement, arrangement or understanding with any person or entity other than the Company with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director that has not been disclosed therein, and (3) would be in compliance, if elected as a director, and will comply with all applicable publicly disclosed corporate governance, conflict of interest, corporate opportunities, confidentiality and share ownership and trading policies and guidelines and all director qualifications of the Company.

(vii) “Proxy Materials” shall mean the proxy statement included in the proxy materials and any form of proxy solicited by or on behalf of the Eligible Stockholder.

(viii) “Synthetic Equity Interests” shall mean any derivative, swap or other transaction or series of transactions engaged in, directly or indirectly, by any member of the Nominating Group, the purpose or effect of which is to give such member economic risk similar to ownership of shares of any class or series of the Company, including due to the fact that the value of such derivative, swap or other transactions are determined by reference to the price, value or volatility of any shares of any class or series of the Company, or which derivative, swap or other transactions provide, directly or indirectly, the opportunity to profit from any increase in the price or value of shares of any class or series of stock of the Company, regardless of whether (A) the derivative, swap or other transactions convey any voting rights in such shares to such member or are required to be, or are capable of being, settled through delivery of such shares, or (B) such member may have entered into other transactions that hedge or mitigate the economic effect of such derivative, swap or other transactions.¹

Commentary on Illustrative Proxy Expense Reimbursement Bylaw

1. **Mandatory and Permissive Reimbursement of Expenses.** The Bylaw provides for mandatory reimbursement of an Eligible Stockholder’s expenses incurred soliciting proxies in an election of directors. The Bylaw imposes a condition that at least a majority of the Eligible Stockholder’s nominees shall have been elected by the stockholders, though some corporations might impose a higher or lower requisite level of success. The Bylaw does not address stockholder nominations and elections at special meetings or

¹ Note: If the advance notice requirements in the Company’s bylaws require disclosure of a stockholder’s derivative interests, then this definition should be replaced to conform with any such definition contained in the advance notice provisions.

through consent solicitations. The Bylaw also does not address a decision by a board of directors in the exercise of its fiduciary duties to reimburse a stockholders' expenses outside of the Bylaw's requirements.

2. Reimbursement of Expenses. The Bylaw authorizes reimbursement of expenses in a contested election where the election of not more than one-fourth of the number of seats on the Board of Directors were contested. Although some corporations may adjust this condition based on the size of their respective boards of directors, its purpose is to limit reimbursement of expenses to "short slates" and not facilitate a change-in-control.

In order to be eligible for reimbursement, the Eligible Stockholder's nominees must be considered independent under applicable listing standards and not be employees or officers of, or consultants to, any member of the Nominating Group. The purpose of the latter requirement is to avoid subsidizing the election of directors who are motivated to serve the interests of a particular constituency, rather than the interests of the corporation and its stockholders as a whole. The Bylaw also requires that each nominee elected to the Board of Directors agree to comply with all applicable board policies, including minimum stock ownership requirements, confidentiality requirements, and, in the case of a corporation with a majority voting policy or standard in uncontested director elections, the corporation's director resignation policy, if any. Some corporations may revise the Bylaw to disqualify any nominee who was nominated at one or more prior annual meetings and not elected by the stockholders.

3. Basic Qualifications of Eligible Stockholder. Only an "Eligible Stockholder" is entitled to mandatory reimbursement of expenses under the Bylaw. An Eligible Stockholder may be a single stockholder, but the Bylaw also recognizes that a small group of stockholders might act in concert for purposes of a proxy contest. The Bylaw does not impose any minimum share ownership requirements, though it does require that the Eligible Stockholder have been a stockholder for a one-year period preceding the annual meeting. Although the Bylaw proceeds on the premise that the electoral success of a Nominee, and not the size of the Eligible Stockholder's investment, is what justifies reimbursement of expenses, corporations might require stockholders to have owned a minimum number of shares if it is believed that reimbursement should also be dependent upon a substantial long-term economic interest in the corporation. Any such requirement should be established in relation to the size and capitalization of the corporation and possibly the number of nominees elected to the board of directors.

The Bylaw requires that the Nominating Group have complied with the Company's advance notice requirements set forth in its bylaws with respect to the nomination of directors, which might include, among other things, requirements to submit a director questionnaire with respect to each nominee, disclose fully the Nominating Group's economic, derivative, and voting interests in the Company's securities, and represent that the Eligible Stockholder intends to appear in person or by proxy at the annual meeting. The Bylaw also imposes a two-year look-back period that precludes stockholders from being reimbursed if, among other things, they purchased securities with the intent of changing or influencing control of the Company (other than with respect to the Nomination), requested that the Company repurchase their securities,

or publicly proposed to engage in a business combination with the Company. Such a condition discourages greenmailing and does not reimburse any person seeking to change control of the Company. Corporations must determine whether the same look-back period should apply to each proscribed activity.

4. Reimbursement of Expenses Based on Requisite Level of Support. The Bylaw provides for the pro rata reimbursement of the Eligible Stockholder's expenses based on the number of its nominees who were elected to the Board of Directors. For example, if an Eligible Stockholder nominated three persons for election and only two were elected, the Eligible Stockholder would be entitled to reimbursement for two-thirds of its expenses. There are numerous methods by which corporations can determine how much of an Eligible Stockholder's expenses should be reimbursed and under what conditions. For example, the Bylaw could require reimbursement of an Eligible Stockholder's expenses (a) so long as at least one of its nominees was elected or (b) only if all of its nominees were elected. Alternatively, a corporation might reimburse an Eligible Stockholder for its expenses attributable to each nominee, even if not elected, who received votes equal to a minimum level of support (e.g., 35%) from the stockholders, which level could be expressed as a percentage of votes cast, shares present in person or by proxy, or total number of shares outstanding. Corporations adopting any of these latter standards might still require that at least one or more nominees have been elected to the board of directors before an Eligible Stockholder is entitled to reimbursement.

5. Types of Expenses and Cap on Reimbursement. The Bylaw defines the term "expenses" in order to limit reimbursement to out-of-pocket expenses actually and reasonably incurred directly in connection with the preparation and solicitation of proxies. The Eligible Stockholder may incur a variety of expenses, including legal fees, proxy solicitor fees, printing and mailing costs, public relations firm fees, investment banking fees, travel and hotel costs, and advertising expenses. The Bylaw limits reimbursement to one law firm and one proxy solicitor while excluding expenses related to public relations firms, investment bankers and litigation. Because the issue of whether expenses were "reasonably" incurred may be at issue, the Bylaw provides that the Board of Directors shall make that decision in good faith. If a corporation determined to include litigation expenses at all, one potentially useful approach would be to limit reimbursement to situations in which the Eligible Stockholder is the prevailing party in any action brought by the Company or its Board of Directors.

The Bylaw limits reimbursement to the Eligible Stockholder's "reasonable" expenses, as determined by the Board of Directors. Corporations may desire to impose a more definite cap on reimbursable expenses, such as an amount (i) in proportion to the per-nominee expenses incurred by the Company in the proxy contest or (ii) in proportion to the number of shares voted in favor of the Eligible Stockholder's nominees. If expenses are capped in relation to the amount spent by the Company, the Company should consider specifying which of its expenses incurred in connection with the stockholders meeting should be excluded for purposes of determining the cap (including, for example, costs associated with the proxy solicitation on matters other than director elections).

6. Certain Additional Exceptions to Reimbursement. The Bylaw provides that the Company shall not reimburse the otherwise Eligible Stockholder for its expenses if the Company is insolvent or such reimbursement would cause the Company to breach a material obligation. The Bylaw further provides that the Company shall not reimburse an otherwise Eligible Stockholder for any expenses if there are any pending or threatened investigations or proceedings alleging that the Eligible Stockholder or its associates or affiliates committed any violation of law in connection with the election of directors, including any violation of applicable securities laws in connection with the solicitation of proxies.

7. Other Considerations.

a. No Recent Reimbursement. The Bylaw precludes reimbursement if any stockholder of the Company has been reimbursed under the Bylaw within the prior 15 months. Because this provision recognizes that proxy contests have the potential to cause significant disruption to a corporation's business, corporations may consider use of a longer period so as to avoid subsidizing frequent election contests.

b. Multiple Eligible Stockholders. Corporations should consider whether reimbursement should be available if two or more unaffiliated Eligible Stockholders have nominated persons for election to the Board.

c. Standstill. Although the Bylaw disqualifies a stockholder from seeking reimbursement if it has engaged in certain proscribed actions (such as publicly proposing a change-in-control transaction), it does not contemplate any standstill requirements following the annual meeting with respect to an Eligible Stockholder whose Nominees are elected. Some corporations may require that the Eligible Stockholder enter into such an agreement to ensure that such Eligible Stockholder maintains a minimum economic interest in the corporation while its nominees are serving on the board of directors. It might also preclude such Eligible Stockholder from seeking control of the corporation or conducting another proxy solicitation. The purpose of such a requirement is to avoid facilitating a change-in-control transaction that the board of directors does not believe to be in the best interests of the corporation and its stockholders. Alternatively, the standstill might require the Eligible Stockholder to repay the corporation for any Expenses that were reimbursed if the Eligible Stockholder takes such actions.

d. Fiduciary Out. The mandate to provide for reimbursement of an Eligible Stockholder's expenses incurred in soliciting proxies in an election of directors is "subject to applicable law." The Bylaw does not address whether a fiduciary out, allowing a Board of Directors to decline to provide reimbursement if it believes that reimbursement would not be in the best interests of the corporation, is required under applicable law. Corporations should consider whether to include an express "fiduciary out," particularly if it is believed that the omission of such a provision would result in the

invalidation of the Bylaw. *See CA, Inc. v. AFSCME Emp. Pension Plan*, 953 A.2d 227 (Del. 2007). The existence of a statute explicitly authorizing a bylaw requiring reimbursement of proxy solicitation expenses should alleviate concern over such a basis for invalidation of the Bylaw.

e. Proxy Access. To the extent that a corporation is required to permit an Eligible Stockholder to include director nominees in the corporation's proxy materials, the corporation needs to consider whether to provide that reimbursement under the Bylaw is not available.