M E M O R A N D U M

To: Board of Directors of The Great American Corporation

Re: Potential Bylaw Amendments and Shareholder Rights Plan

You have requested our view as to the legality of certain actions that the Board of Directors of The Great American Corporation, a Delaware corporation (the "Company"), is considering in response to the recent investment in the Company by activist hedge fund Crassus Advisers LLC ("Crassus").

Factual Background

Crassus, a hedge fund with $10 billion under management and a history of activist investing, has acquired a stake of 9.9% in the Company over the past month. In its Schedule 13D, Crassus states that it believes the Company is underleveraged and should pay a $1 billion extraordinary dividend (constituting virtually all of the Company's cash reserves), and effect a spin-off to separate the Company's main divisions into two public companies. Crassus argues that, although the Company has been performing well, investors can use the Company's cash more profitably in other investments, and that under current market circumstances both divisions would be attractive takeover targets if they were separated. Crassus stated that it intends to engage with the Board of Directors to convince it to support its proposed structural changes but that it will seek to replace the Company's directors if they do not support its agenda. Crassus also disclosed that it is considering buying additional shares of Company stock.

Since Crassus filed its Schedule 13D, the Company's stock price has risen 5% and approximately 12% of the outstanding shares have traded into the hands of other hedge funds. Crassus disclaims that it is acting as a group with any other shareholder. Crassus has conducted proxy contests on eight occasions in the past. In four of these proxy contests, Crassus was seeking a sale of the company and entered into agreements with its director nominees (sometimes referred to as "golden leash" arrangements) by which it agreed to pay them multimillion dollar bonuses if the target company was sold within two years after their election. Institutional Shareholder Services (ISS) and Glass Lewis, which historically have influenced or controlled approximately 20% and 5%, respectively, of the votes held by Company shareholders, have supported Crassus candidates in three quarters of its campaigns.

The Company has been the subject of significant class action litigation in the past. An acquisition by the Company two years ago resulted in lawsuits against it and the target company in Delaware, California and Texas which (after it spent several million dollars in defense costs) ultimately led to a disclosure-based settlement (and a large fee to the plaintiffs' law firms). The Company also spends millions of dollars each year defending against unmeritorious claims.

As a result of these events, you have requested our advice as to the legality of a number of actions that you are considering.

Summary of Potential Board Actions

1. Adopt a bylaw designating the courts of Delaware as the exclusive forum for most shareholder class and derivative litigation against the Company or its directors.

2. Adopt a bylaw disqualifying individuals who have entered into an agreement to receive special compensation from a third party in connection with their service as a director of the Company from serving as directors of the Company, unless the shareholders of the Company have expressly approved such agreement.

3. Adopt a bylaw providing that where a litigation claim is made against the Company by a shareholder plaintiff that is determined to be frivolous (based on the "Rule 11" standard), the plaintiff will bear the Company's reasonable costs associated with that claim unless either the Company's shareholders vote to have the plaintiff reimbursed or the courts determine that the claim did not violate Rule 11.

4. Adopt a one-year shareholder rights plan which will be triggered if anyone crosses a 10% ownership threshold, except that the trigger will be 20% for a passive investor.

Discussion and Overview

Exclusive Forum Bylaw

The exclusive forum bylaw would provide that, unless the Company consents in writing to the selection of an alternate forum each of the following are to be adjudicated solely and exclusively in the state courts of Delaware: (i) derivative litigation; (ii) actions asserting breaches of fiduciary duty; (iii) actions arising pursuant to any provision of the General Corporation Law of Delaware and the Company's charter or bylaws; and (iv) actions asserting claims governed by the internal affairs doctrine.

The bylaw focuses on these four types of lawsuits because they are the types most often brought in a representative capacity; *i.e.*, by one shareholder on behalf of a class of all or most shareholders or, in the case of derivative suits, on behalf of the Company itself.

The present environment of duplicative, multiforum litigation hurts corporations and their shareholders. Litigating the same suit at the same time in multiple states requires the retention of additional counsel and much more legal work with the accompanying increased costs, for no good reason. Equally significantly, duplicative litigation runs the risk of inconsistent results. When courts in two jurisdictions are considering the same questions of law and fact at the same time, the answers they reach may conflict, which would put the corporation and its constituencies in the impossible situation of trying to comply with incompatible orders.

The Delaware General Corporation Law provides that a company's bylaws "may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its shareholders, directors, officers or employees," and it provides that bylaws may be unilaterally adopted by boards of directors so long as they are empowered to do so in the certifi-

cate of incorporation. The Company's Certificate of Incorporation explicitly vests the Board with this power, and the power is reconfirmed in the Company's bylaws.

In recent months, the validity of exclusive forum bylaws of this type has been confirmed by the courts of Delaware and several other jurisdictions. In June 2013, the Delaware Court of Chancery affirmed that the directors of Delaware corporations have the statutory authority to adopt exclusive forum bylaws.[1] The Delaware Supreme Court, although not directly mentioning exclusive forum bylaws, embraced the rationale behind the Court of Chancery's 2013 decision in the context of a fee-shifting bylaw earlier this year.[2] While the confirmation by the Delaware courts of the validity of exclusive forum bylaws does not itself assure that other jurisdictions will necessarily consider themselves bound by them, it appears that most states are adhering to the doctrine of comity and respecting the determinations of the Delaware courts concerning Delaware bylaws.[3]

In short, the exclusive forum bylaw under consideration by the Board is a legal and valid bylaw. In light of the harm in terms of wasteful cost and distraction that arises from multiforum duplicative litigation, we believe that the exclusive forum bylaw offers significant advantages for the Company and its shareholders and is an appropriate matter for the Board to adopt in its business judgment. As always, we recommend that the Company engage with its major shareholders to ensure that they understand and appreciate the rationale for adoption of this bylaw.

The text of the proposed Exclusive Forum Bylaw is set forth in Annex A.

"Golden Leash" Bylaw

Activist hedge funds engaging in proxy contests sometimes implement special compensation schemes for their director nominees. The terms of these schemes vary, but generally provide that, if elected, the dissident directors would receive large payments if the activist's desired goals are met within specified near-term deadlines. In past proxy contests where Crassus was seeking a sale of a target company, it has agreed to pay its director nominees multimillion dollar bonuses if the target company was sold within two years after their election. These special compensation schemes threaten to create a subclass of directors who have a significant monetary incentive to sell the corporation or take other actions designed to maximize the stock price in the short-run, whether or not doing so would be in the best interests of all shareholders or would sacrifice long-term value for short-term gain. Additionally, these compensation schemes threaten to create conflicts in the boardroom and to undermine the Board's prerogative to set director pay and to select the timeframe over which corporate goals are to be achieved.

In order to address the threats that such schemes pose to the integrity of the boardroom and the Board decision-making processes, the Company can adopt a bylaw that would disqualify candidates that are party to any such arrangements from serving as directors. Such a bylaw falls

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[1] Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).
[2] ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554 (Del. 2014).
[3] *See*, *e.g.*, Groen v. Safeway Inc., No. RG14716641 (Cal. Super. Ct. May 14, 2014); Miller v. Beam, Inc., No. 2014 CH 00932 (Ill. Cir. Ct. Mar 5, 2014); Hemg Inc v. Aspen University, 2013 WL 5958388 (N.Y. Sup. Ct. Nov 14, 2013); *cf* Roberts v. TriQuint SemiConductor, Inc., No 1402-02441 (Or. Cir. Ct. Aug 14, 2014); Galaviz v Berg 2011 U.S. Dist. LEXIS 1626 (N.D. Cal. Jan. 3, 2011).

clearly within the ambit of bylaws the Board is allowed to adopt. Section 141(b) of the Delaware General Corporation Law expressly provides that "the certificate of incorporation or bylaws may prescribe other qualifications for directors." The Board is permitted to adopt or amend bylaws, and of course the shareholders of the Company can themselves adopt or amend bylaws, including this anti-golden leash bylaw if it is adopted by the Board. The Board's adoption of the anti-golden leash bylaw would thus effectively provide a default rule, which can be overturned or amended by the shareholders, that individuals who are subject to such third-party compensation schemes should not be eligible to serve as directors. To make the default nature of the anti-golden leash bylaw explicit, the form of bylaw proposed provides that the existence of a third-party compensation agreement or arrangement would not be disqualifying if the shareholders of the Company expressly approve such agreement or arrangement. The bylaw proposed also excludes certain fairly common arrangements covering the nominees' expenses, indemnification and a modest candidacy fee, so as to focus on the more egregious and conflicting differential compensation schemes Crassus and other activist funds have come to favor.

Although such a bylaw is legal and permissible under Delaware law and we believe will be beneficial to the Company's long-term interests, the Board should be aware that such bylaws are disfavored by ISS and other proxy advisory firms. Therefore it will be important for the Company to engage with its largest shareholders, explain the rationale behind the adoption of the anti-golden leash bylaw, and secure their support.

The text of the proposed Golden Leash Bylaw is set forth in Annex B.

Fee-Shifting Bylaw for Frivolous Shareholder Litigation

Shareholder litigation is both expensive and time-consuming for corporations. Over the years, the Company has had to spend substantial time and resources defending against manifestly unmeritorious and even frivolous litigation claims brought in the name of shareholders.

Earlier this year, the Delaware Supreme Court held (in the context of a non-stock corporation) that fee-shifting bylaws are not facially invalid.[4] It remains unclear whether a fee-shifting bylaw adopted by a public stock company would be enforceable against shareholders. In addition, it is expected that the Delaware General Assembly may implement legislation that would prohibit fee-shifting bylaws. The Board should also be aware that such bylaws are strongly disfavored by ISS and other proxy advisory firms.

We understand however that, given the Company's history of having wasted substantial resources defending against unmeritorious claims, the Board believes it would be in the best interests of the Company and its shareholders to adopt a fee-shifting bylaw aimed specifically at frivolous litigation. The bylaw would provide that where a claim is made against the Company by a shareholder plaintiff that is determined to be frivolous, the plaintiff will be required to reimburse the Company for its reasonable costs associated with that claim, subject to repayment in two circumstances. The determination of whether the claim is frivolous will be based on the standards of Rule 11 under the Federal Rules of Civil Procedure (see Annex C). The Board, or a committee of the Board, can either make the initial determination of whether a claim is frivolous itself or the Board can decide to delegate that determination to independent outside counsel (for

[4] ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554 (Del. 2014).

example, if the whole Board is conflicted). The Company will have to reimburse the plaintiff all amounts paid by it (with interest) if either the Company's shareholders vote to have the plaintiff reimbursed or the courts ultimately determine that the claim did not violate Rule 11.

Although this is a case of first instance, we believe that this bylaw should be held to be a legal and valid bylaw under Delaware law and within the Board's business judgment. Again, we urge shareholder engagement in connection with the adoption of this frivolous litigation fee-shifting bylaw.

The text of the proposed Fee-Shifting Bylaw for Frivolous Shareholder Litigation is set forth in Annex C.

Shareholder Rights Plan

As the Delaware Court of Chancery recently confirmed, the Board can, consistent with its fiduciary duties, adopt a shareholder rights plan in response to hedge fund activity in its stock.[5] The Board must conclude that the rights plan is reasonable in response to the threat posed by the hedge fund activity. Shareholder rights plans have been adopted both by companies facing activist situations as well as companies facing takeovers and are viewed as an effective device to ensure Board involvement in the timing and outcome of a takeover big or creeping accumulation of control.

In the Company's present circumstances, where hedge funds (including Crassus) control approximately 22% of the Company's stock and proxy advisory firms who have traditionally supported them control or influence an additional approximately 25% of the votes of the Company's stock, it is our view that it is reasonable for the Board to determine that there is an imminent threat to the Company. We believe that under these circumstances it would be permissible for the Board to implement a shareholder rights plan with a 10% trigger to prevent a creeping *de facto* change in control of the Company without payment of an appropriate control premium. We are also of the view that it would be entirely appropriate to allow passive investors (that is, those whose plans and intentions do not require them to file a Schedule 13D) to have greater flexibility to acquire shares in the Company (that is, have a higher triggering threshold) than activist investors who are required to file a Schedule 13D. Any concerns regarding the "discriminatory" nature of having differential triggers have been put to rest by the recent <u>Sotheby's</u> decision of the Delaware Court of Chancery.[6]

Importantly, the rights plan would not preclude the activist investors from running and winning a proxy fight to remove and replace the Company's directors, but is merely designed to avoid a situation where the activist's victory is a *fait accompli*. The rights plan would also not prevent "qualifying offers" to purchase the entire Company, and would expire after one year unless approved by the Company's shareholders.

Given the recent acquisition of the Company's stock by an activist hedge fund, we believe that the Board can, consistent with its fiduciary duties, adopt the proposed shareholder rights plan in response to Crassus' recent actions.

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[5] *See* Third Point LLC v. Ruprecht, 2014 WL 1922029 (Del Ch. May 2, 2014).
[6] *Id.*

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Annex A

AMENDMENT
TO THE BYLAWS OF
THE GREAT AMERICAN CORPORATION

The Bylaws of the Company are hereby amended to add the following new Section:

Exclusive Forum. Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director or officer or other employee of the Corporation to the Corporation or the Corporation's shareholders, (iii) any action asserting a claim against the Corporation or any director or officer or other employee of the Corporation arising pursuant to any provision of the Delaware General Corporation Law or the Corporation's Certificate of Incorporation or Bylaws (as either may be amended from time to time), or (iv) any action asserting a claim against the Corporation or any director or officer or other employee of the Corporation governed by the internal affairs doctrine shall be a state court located within the State of Delaware (or, if no state court located within the State of Delaware has jurisdiction, the federal district court for the District of Delaware).

<u>**Annex B**</u>

**AMENDMENT
TO THE BYLAWS OF
THE GREAT AMERICAN CORPORATION**

The Bylaws of the Company are hereby amended to add the following new Section:

> <u>Third Party Director Compensation Arrangements</u>. Subject to the exceptions set forth below, no person shall qualify for service as a director of the Corporation if he or she is a party to a compensatory, payment or other financial agreement, arrangement or understanding with a person or entity other than the Corporation (a "Third-Party Compensation Arrangement"), or has received any such compensation or other payment from a person or entity other than the Corporation (a "Prior Third-Party Payment"), in each case in connection with candidacy for or service as a director of the Corporation, unless the shareholders of the Company have expressly approved such Third-Party Compensation Arrangement or Prior Third-Party Payment; *provided*, *however*, that none of the following Third-Party Compensation Arrangements or Prior Third-Party Payments shall be disqualifying under this bylaw: (i) indemnification and/or reimbursement of out-of-pocket expenses in connection with candidacy for director (but not in connection with service as a director); (ii) arrangements or payments under a pre-existing employment agreement that a candidate has with his or her employer not entered into in contemplation of the employer's investment in the Corporation or such employee's candidacy for director; or (iii) cash compensation for activities related to candidacy (but not for service as a director) in a maximum aggregate amount up to $100,000.

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Annex C

AMENDMENT
TO THE BYLAWS OF
THE GREAT AMERICAN CORPORATION

The Bylaws of the Company are hereby amended to add the following new Section:

Recoupment of Expenses for Frivolous Litigation. In the event that (i) any shareholder, either as an individual, a class representative, or through a derivative suit (the "Plaintiff"), initiates or asserts any claim against the Company and/or any of the Company's directors or officers, related to the business of the Company, the conduct of the Company's affairs, the rights or powers of the Company, or the rights or powers of the Company's stockholders, directors, officers, or employees, (ii) the Board of Directors or any committee thereof (or, if the Board of Directors so determines, outside counsel independent of the Company and the members of the Board of Directors) determines in advance of the determination by a court of competent jurisdiction on the merits of the claim in question [that such claim violates Rule 11(b) of the Federal Rules of Civil Procedure ("Rule 11"),]* and (iii) the Plaintiff does not prevail in said court with respect to such claim, then the Plaintiff shall reimburse the Company (within thirty days of demand in writing with appropriate supporting documentation) for all of the Company's reasonable out-of-pocket expenses incurred in connection with such claim (plus interest compounding daily at a rate of 5% per annum from the date of such demand); *provided*, *however*, that the Company shall repay to the Plaintiff all amounts paid by the Plaintiff to the Company (plus interest at a rate of 5% per annum from the date such repayment is due) if either (x) a court of competent jurisdiction shall have made a final non-appealable determination that such claim did not violate Rule 11, or (y) the shareholders of the Company shall have adopted a resolution requesting the Board of Directors to cause the Company to repay to the Plaintiff all amounts paid by the Plaintiff to the Company under this provision.

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* Alternative formulation based on the wording of Rule 11(b):

(a) that such claim or any related pleading or motion was presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, (b) that such claim or any related legal contention was not warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law, or (c) that the factual contentions underlying such claim do not have evidentiary support or, if specifically so identified, will likely not have evidentiary support after a reasonable opportunity for further investigation or discovery,