

SEC Adopts New Proxy Access Rules

On August 25, 2010, by a 3-to-2 vote, the SEC adopted Exchange Act Rule 14a-11 and other related amendments to its proxy rules to require companies to include shareholder nominees for directors in the companies' proxy materials. Under current rules, shareholders who want to advocate the election of their own nominees are required to pay for the preparation and mailing of their own proxy materials. This Client Alert summarizes some of the more significant changes resulting from the new rules.

Covered Companies

- The new rules apply to all Exchange Act reporting companies, including investment companies, other than companies whose only public securities are debt securities.
- Smaller reporting companies (companies with a public float of less than \$75 million) are subject to Rule 14a-11, but it does not apply to them until after a three-year phase-in period.
- "Foreign private issuers" are not currently subject to the SEC's proxy rules and are not subject to these new rules.

Shareholders Eligible to Nominate Directors

A shareholder or a shareholder group (within the meaning of Section 13(d) of the Exchange Act) will be eligible to have its nominee or nominees included in a reporting company's proxy materials if:

- Individually, or as a group, it owns at least three percent of the total voting power of the company's securities that are entitled to be voted on the election of directors at an annual or special meeting. Borrowed shares and shares sold short will not count towards the three percent threshold.
- Such shareholder or group has held at least the required amount of securities for at least three years, and will be required to represent that it will continue to hold at least the required amount of securities through the date of the meeting at which directors are elected.
- Such shareholder or group must certify that it is not holding the securities for the purpose of changing control of the company, or to gain a number of seats on the board of directors that exceeds the number of shareholder nominees a company is required to include in its proxy materials under Rule 14a-11.

Number and Priority of Eligible Nominees

- A nominating shareholder or group will be able to include no more than one nominee, or a number of nominees that represents up to 25 percent of the company's board of directors, whichever is greater.
- If the company has a classified or staggered board, the 25 percent threshold is measured against the total number of board members, not the number standing for election in that year.
- Any shareholder nominee who is elected to a term of office of longer than one year will count against the maximum number of directors required by Rule 14a-11 in succeeding elections during his term of office.
- If 25 percent of the total number of directors is not a whole number, the company may round down to the nearest whole number.

- If, as a result of more than one shareholder or group of shareholders being eligible to have their nominee or nominees included in the company's proxy materials, the number of nominees would exceed the maximum number required by Rule 14a-11, priority is to be given to the inclusion of the nominee or nominees of the shareholder or group with the highest qualifying voting power percentage.

Eligibility of Nominees

- The nominee's candidacy and, if elected, service on the board of directors must not violate federal, state or foreign law, or the rules of the national securities exchange on which the company's shares are listed.
- The nominee must satisfy any objective independence standards of the applicable national securities exchange.
- Neither the nominee nor the nominating shareholder or group may have any direct or indirect agreement with the company regarding the nomination. Rule 14a-11 does not limit the ability of a shareholder or group to nominate directors with whom it has a prior or existing relationship.

Procedure for Excluding Nominees

- If a company intends to exclude a shareholder nominee from inclusion in its proxy materials, the company must provide notice of such intent to the shareholder no later than 14 days after the deadline for a shareholder or group to transmit a Schedule 14N (described below) to the company for such annual or special meeting.
- The nominating shareholder will have 14 days after it receives the notice from the company of its intent to exclude the shareholder nominee from its proxy materials to respond and correct any eligibility or procedural deficiencies identified in the company notice.
- If the company continues to believe that it can exclude the nominee from its proxy materials, the company must provide notice of the basis for its exclusion to the SEC no less than 80 days before it files its definitive proxy statement with the SEC.
- The company also may request that the SEC staff issue a no-action letter concurring in its conclusion that the company may exclude the director nominee or the statement in support of such nominee from its proxy materials.

Disclosure Requirements

- The nominating shareholder or group will be required to file with the SEC and submit to the company, no earlier than 150 days and no later than 120 days before the anniversary of the mailing of the company's proxy statement for the prior year, a Schedule 14N, which will be publicly available on EDGAR. The Schedule 14N requires, among other things, disclosure of the amount and percentage of the voting power of the securities owned by the nominating shareholder or group, the length of ownership, a statement that the nominating shareholder or group intends to continue to hold the securities through the date of the meeting, and a statement as to the nominating shareholder's or group's intent regarding continued ownership after the election.
- The disclosure required in the Schedule 14N also includes the identity of the nominee or nominees, including biographical information, and a description of the nature and extent of the relationships between the nominating shareholder or group and the nominee or nominees and the company. In addition, the Schedule 14N will require several certifications relating to eligibility and the accuracy of the information provided. A nominating shareholder or group can also include a statement of support for its nominee or nominees (up to 500 words each) in the Schedule 14N.

- Nominating shareholders or groups will be liable for any false or misleading disclosures provided to the company. The company will not be responsible for any information provided by the nominating shareholder or group and reproduced in the company's proxy materials.

Other Amendments

- Rule 14a-8 was amended to require companies to include in their proxy materials proposals that seek to establish other procedures in the company's governing documents for the inclusion of shareholder director nominees in company proxy materials, so long as those procedures do not limit the availability of Rule 14a-11.
- Rule 14a-2 was amended to exempt shareholder solicitations made to form a nominating group and shareholder solicitations to support the shareholder's nominee or nominees or to oppose the company's nominees. Such solicitations will be required to be reported on the Schedule 14N no later than the date on which they are first used.

Effective Date

- The new rules become effective 60 days after they are published in the Federal Register.
- Since shareholders or groups must submit nominees for inclusion in the company's proxy materials to a company no later than 120 days before the anniversary date of the mailing of the company's proxy statement in the prior year, if the rules become effective on November 1, 2010 (assuming they are published on or before September 2, 2010), Rule 14a-11 generally would be available to shareholders of companies that mailed their proxy statements for their last annual meeting no earlier than March 1, 2010.

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