

LEGAL UPDATES AND NEWS

SEC Requires Proxy Access For Shareholder Nominees

On August 25, 2010, by a 3-2 vote, the Securities and Exchange Commission approved Rule 14a-11, which will allow shareholders of a public company who meet specified eligibility criteria to require the company to include the shareholders' nominees for election to the company's board of directors in the company's proxy materials. The rule will not apply to smaller reporting companies until 2013.

Rule 14a-11 establishes the following criteria for shareholders to satisfy in order to nominate a director and require such nomination to be included in the company's proxy materials:

- Must hold voting and dispositive power over shares representing 3% or more of the company's voting power (the ownership test), and have held the shares for 3 years
- Shareholders can aggregate with other shareholders and can solicit other shareholders in order to meet the 3% ownership test
- The 3% ownership test excludes shares sold short and borrowed shares, but includes shares loaned, subject to certain conditions
- The proposing shareholder group must hold shares through the meeting date and disclose its intent as to holding shares thereafter
- Directors nominated by the shareholder group cannot represent more than 25% of the board (or at least one board member)
- The nominating shareholders cannot hold shares with purpose of effecting a change in control or obtaining seats in excess of 25% limit
- Nominee(s) must meet the "objective" independence criteria of the listing standards applicable to Company
- If more nominees are proposed by shareholders than the 14a-11 limit allows, the nominee(s) of the shareholder(s) with the largest ownership prevails

Nominating Shareholders must file a Schedule 14N with the SEC and the company no earlier than 150 days, and no later than 120 days, before the mail date for the prior year's annual proxy statement (the 14a-11 nominating "window period").

- The Rule will be effective 60 days after Federal Register publication, and will be applicable for the 2011 proxy season for many companies

Schedule 14N requires various disclosures for the nominees and nominating shareholders, including whether the nominees satisfy the director qualifications set forth in the company's governing documents.

The Rule establishes a process for consideration of nominations:

- A company must file with the SEC if it intends to exclude a nominee – within 14 days of close of the nominating window period, and can request a staff no action letter
- A company must notify the shareholder group that it intends to include the nominee(s) no later than 30 days before filing definitive proxy material

A proxy statement with 14a-11 nominees remains eligible for definitive statement filing with the SEC (i.e., the proxy statement does not have to be filed as preliminary material). Rule 14a-11 is available even if a company is subject to a proxy contest.

The shareholder proposal rule (Rule 14a-8) is still available to shareholders to adopt proxy access more liberal than and in addition to Rule 14a-11. Neither a Board of Directors nor stockholders can opt out of Rule 14a-11.

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