

## ALERTS AND UPDATES

### SEC Amended Rule 14a-8 Allows Shareholders Proxy Access to Director Nominations for 2012 Season

September 16, 2011

**New SEC rule provides shareholder access to director nomination process by way of amendments to issuer's bylaws. Issuers need to plan effective responses to potential proposals for 2012 proxy season.**

Amendments to U.S. Securities and Exchange Commission ("SEC") Rule 14a-8(i)(8)<sup>1</sup> will permit shareholders to influence the director election process by requiring public companies to include in their proxy materials shareholder proposals that would amend, or request an amendment to, a company's governing documents regarding director nomination procedures. Consequently, public companies could face a more active shareholder environment for the 2012 proxy season and should begin planning to respond to potentially greater shareholder activism in the 2012 season.

The effectiveness of the amendments to Rule 14a-8, allowing eligible shareholders<sup>2</sup> to propose amendments to a company's governing documents to establish proxy access standards, may encourage shareholder proposals for the 2012 proxy season.<sup>3</sup> Prior to these amendments, a public company was permitted to exclude from its proxy statement a shareholder proposal that related to a nomination or an election for membership on the company's board of directors or a procedure for such nomination or election. Following the effectiveness of the amendments to Rule 14a-8, companies – including investment companies and smaller reporting companies – will no longer be able to rely on Rule 14a-8(i)(8) to exclude shareholder proposals relating to shareholder-nomination-bylaw amendments under the election exclusion. As a result of these changes, shareholders will have the ability to influence proxy access standards under what is commonly referred to as "private ordering."

The effectiveness of these amendments will afford shareholders sufficient time to submit shareholder-access proposals for consideration during the 2012 proxy season. However, despite the ability to submit proposals for the 2012 proxy season, there still may not be a flood of proxy access proposals next year, due to institutional investors' mixed feelings on these proposals and some complex dynamics, as Ted Allen, an analyst for Institutional Shareholder Services, Inc. ("ISS"), points out in the RiskMetrics Blog, "Will Investors File Proxy Access Proposals in 2012?"

"So far, it appears that the activist investor community is undecided about whether to file access proposals in 2012 and how many companies to target. There is a concern that the filing of dozens of access resolutions next season might bolster corporate arguments that the SEC should refrain from

adopting a new marketwide access rule and just allow private ordering to work. There also is a concern that low support levels for poorly targeted proposals would be cited by corporate critics as evidence that most shareholders don't want access. Conversely, some activists argue that strong shareholder votes for access in 2012 could help prod the resource-stretched SEC to prepare a revised access rule."

## Observations

While ISS has not formally published its position with respect to scoring companies that do not provide "shareholder friendly" access to the director nomination process, it has expressed its support for the SEC's proposals to amend Rule 14a-8. Based on this support, companies focused on ISS's scoring methodology may want to consider proactively adopting their own proxy access standard. Moreover, shareholder-access proposals may be more liberal than the Rule 14a-11 standards, which would have required eligible shareholders or groups to have held at least three percent of a company's voting power for at least three years. One possible management proposal may be to design a shareholder-access voting standard that more closely fits the needs of the company. By specifically tailoring its requirements, a company may be better able to manage its shareholder voting needs and expectations.<sup>4</sup>

Other companies may decide to observe the development of market practices and trends before taking action. In a system of private ordering, it could require several years for market practices to develop. Many companies and shareholders may determine that a combination of a strong, independent nominating committee, effective shareholder communication channels and majority voting provisions may make direct proxy access unnecessary.

## For Further Information

If you have any questions regarding the Rule 14a-8 amendments discussed in this *Alert*, including how they affect your company, please contact [Laurence Lese](#), [Richard Silfen](#), [David Kaufman](#), [Shelton Vaughan](#) or [Heather King](#); one of the [members](#) of the [Securities Law Practice Group](#); or the lawyer in the firm with whom you are regularly in contact.

## Notes

1. Pending the outcome of the litigation of *Business Roundtable and Chamber of Commerce v. Securities and Exchange Commission*, the SEC had stayed the effective date of Rule 14a-11 and at the same time stayed the effective date of the related amendments to Rule 14a-8. On September 6, 2011, the SEC announced that it would not seek rehearing of the decision of the U.S. Court of Appeals for the D.C. Circuit vacating Rule 14a-11. The SEC's stay of the effective date of the amendments to Rule 14a-8 and related rules automatically expired when the court decision was finalized, which occurred on September 14. On September 15, 2011, the SEC

issued a final rule providing notice of the effective date of the amendments to Rule 14a-8. The final rules will become effective on the date they are published in the *Federal Register*.

2. In order to be eligible to submit a proposal, a shareholder must have continuously held at least \$2,000 in market value, or 1 percent of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the shareholder submitted the proposal. In addition, the shareholder must continue to hold those securities through the date of the shareholders' meeting.
3. Under Rule 14a-8, a shareholder proposal must be received by the company not less than 120 calendar days in advance of the anniversary of the release date for the prior year's proxy materials. For calendar year companies, this deadline is typically in November or December. As a practical matter, this means that shareholders who are interested in submitting shareholder-access proposals need to decide relatively soon if they wish to submit such proposals under Rule 14a-8 for the 2012 proxy season.
4. The SEC also codified prior staff interpretations of Rule 14a-8(i)(8) that permit certain types of proposals to continue to be excluded from an issuer's proxy materials. Under amended Rule 14a-8(i)(8), companies will be permitted to exclude a shareholder proposal if it: (a) would disqualify a nominee standing for election; (b) would remove a director from office before the expiration of his or her term; (c) questions the competence, business judgment or character of a nominee or director; (d) seeks to include a specific individual in the company's proxy materials for election to the board of directors; or (e) otherwise could affect the outcome of the upcoming election of directors.

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