

SEC Adopts Proxy Access Rules

On August 25, 2010, the SEC adopted Exchange Act Rule 14a-11 ("Rule 14a-11") granting shareholders the right to require, if certain conditions are met, the inclusion of the shareholders' nominees for director in a company's proxy materials. Rule 14a-11 will apply to all public companies, including investment companies and controlled companies, but excluding "debt-only" companies. While the new rule will become effective on or around November 1, 2010 (in time for the 2011 proxy season), the rule's application to "smaller reporting companies," generally defined as an issuer of securities with a public float of less than \$75 million, will be delayed for three years.

The following is a general summary of Rule 14a-11:

- No Opt-Out – Rule 14a-11 does not provide a company with the ability to opt-in or opt-out of the proxy-access rules. Unless applicable state law or a company's governing documents prohibit shareholders from nominating a candidate for election as a director, Rule 14a-11 requires companies to grant shareholders the right to nominate directors.
- Shareholder Eligibility – A nominating shareholder or shareholder group must (i) hold at least 3% of the company's voting securities, (ii) have held the securities for at least 3 years, and (iii) continue to hold such securities through the meeting at which the director vote is held.
- Nominee Eligibility – A nominating shareholder must represent that its potential nominee satisfies any independence requirements imposed by the national security exchange on which the company's securities are listed. If a company wants to challenge a shareholder nominee, it must notify the nominating shareholders as well as the SEC.
- Number of Nominees – Companies must include in their proxy materials the greater of one shareholder nominee or a number of nominees representing 25% of such company's board.
- Submission of Nominees – Nominating shareholders must submit the names of their nominees no earlier than 150 days and no later than 120 days prior to the anniversary date of the mailing of the prior year's proxy statement.
- Schedule 14N – In addition to Rule 14a-11, the SEC has also adopted a new Schedule 14N that shareholders must submit in order to properly nominate directors. Schedule 14N requires the inclusion of certain information about the nominating shareholders/nominees as well as certain representations by the nominating shareholders. If a company receives a properly submitted Schedule 14N, the company will be required to include (i) disclosure of such Schedule 14N information concerning the shareholders and their nominees in its proxy statement and (ii) the names of the shareholder nominees on its proxy card.

If you have any questions regarding how Rule 14a-11 will affect your company, please contact any member of [Miller & Martin's Securities Practice Group](#).

recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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