



Corporate Advisory

August 30, 2010

Proxy Access for Director Elections

As part of its meeting held on August 25, 2010, the Securities and Exchange Commission adopted changes to the federal proxy rules to expand the rights of shareholders to nominate directors on corporate boards. Under the new rules, shareholders who otherwise are provided the opportunity to nominate directors at a shareholder meeting would be able to have their nominees included in the proxy ballot that is sent to all voters. Shareholders also now have the ability to use shareholder proposals to modify the company's nomination procedures or disclosure about elections, so long as those proposals do not conflict with state law or Commission rules.

Shareholder Nominations

The Securities and Exchange Commission adopted Exchange Act Rule 14a-11 ("Rule 14a-11"), which allows eligible shareholders of most Exchange Act reporting companies to include in a company's proxy materials the greater of one nominee for director or a number of nominees that represents up to 25 percent of a company's board of directors, unless the shareholders are otherwise prohibited by applicable state law or foreign law or a company's governing documents. To be eligible, shareholders must have owned at least three percent (3%) of a company's shares continuously for at least the prior three years and will be required to continue to own at least the required amount of securities through the date of the meeting at which directors are elected. Shareholders may aggregate holdings to meet the ownership threshold. Shareholders will not be eligible to use the rule if they are 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 nominees a company is required to include under Rule 14a-11.

Rule 14a-11 applies to all Exchange Act reporting companies, except companies whose only public securities are debt securities or companies that meet the definition of "foreign private issuer." "Smaller reporting companies" are subject to Rule 14a-11 over a three-year phase-in period.

A shareholder's proposed nominee(s) may not violate applicable laws and regulations and must satisfy objective independence standards of the applicable national securities exchange or national securities association. Neither the nominating shareholder nor the nominee may have a direct or indirect

CONTACTS

If you have questions or need assistance complying with these requirements, please contact any of the McKenna Long & Aldridge LLP attorneys or public policy advisors with whom you regularly work. You may also contact:

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agreement with the company regarding the nomination of the nominee. In addition, a nominating shareholder would be required to file with the SEC and submit to the company a new Schedule 14N, which will be publicly available on the EDGAR system. The Schedule 14N would require disclosure of the amount and percentage of the voting power of the securities owned by the nominating shareholder, the length of ownership, and a statement that the nominating shareholder intends to continue to hold the securities through the date of the meeting. The Schedule 14N also will identify the nominee or nominees, include biographical information about the nominee(s), and include a description of the nature and extent of the relationships between the nominating shareholder and nominee(s) 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 can also include a statement of support for its nominee in the Schedule 14N.

Shareholder Proposals Relating to Elections

Under current rules, companies may exclude shareholder proposals that "relate to an election." The current SEC position is that this "election exclusion" applies to proposals that would amend, or that request an amendment to, provisions of a company's governing documents concerning the company's director nomination procedures or other director nomination disclosure provisions. Under the new rule changes, the "election exclusion" has been narrowed, specifically allowing such proposals. As adopted, companies will be permitted to exclude a shareholder proposal pursuant to Rule 14a-8(i)(8) if it:

- would disqualify a nominee who is standing for election;
- would remove a director from office before his or her term expired;
- questions the competence, business judgment, or character of one or more nominees or directors;
- seeks to include a specific individual in the company's proxy materials for election to the board of directors (only a stockholder satisfying the size and length of holdings standards of 14a-11 could do so and then only by proceeding under 14a-11); or
- otherwise could affect the outcome of the upcoming election of directors.

The current eligibility provisions regarding shareholder proposals (that the shareholder proponent have continuously held at least \$2,000 in market value (or 1 percent, whichever is less) of the company's securities entitled to be voted on the proposal at the meeting, for a period of one year prior to submitting the proposal) continue to apply.

To the extent that shareholders are successful in adopting amendments to a company's governing documents to establish procedures for the inclusion of one or more shareholder nominees for director in the company's proxy materials, such provision would be an additional avenue for shareholders to submit nominees for inclusion in company proxy materials, not a substitute for, or restriction on, Rule 14a-11.

Generally, the new rules will be effective 60 days after publication in the Federal Register. For Rule 14a-8 and Rule 14a-11, shareholders must submit proposals or nominees, respectively, no later than 120 days before the anniversary date of the mailing of the company's proxy statement in the prior year. Shareholders will be able to submit proposals or nominees for inclusion in the next year's proxy statement if the 120 day deadline falls on or after the effective date of the rules. For example, if the rules become effective on Nov. 1, 2010, Rule 14a-8 and Rule 14a-11 generally would be available at companies that mailed their proxy statement for their last annual meeting no earlier than March 1, 2010.

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