

LEGAL UPDATE

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SEC ADOPTS PROXY ACCESS RULES FOR PUBLIC COMPANIES

On August 25, 2010, the U.S. Securities and Exchange Commission (the “SEC”) adopted amendments to its proxy rules to allow significant, long-term shareholders to more easily exercise their rights to nominate and elect directors to company boards of directors. Under a new Rule 14a-11 of the Securities Exchange Act of 1934 (the “Exchange Act”), companies will be required to provide to shareholders in their proxy materials, under certain circumstances, information about, and the ability to vote for, a shareholder’s (or group of shareholders’) nominees for director. In addition, amendments to Rule 14a-8(i)(8) of the Exchange Act preclude companies from relying on Rule 14a-8(i)(8) to exclude from their proxy materials shareholder proposals by qualifying shareholders that seek to establish a procedure under a company’s governing documents for the inclusion of one or more shareholder director nominees in the company’s proxy materials.

The new rules and amendments are summarized below. A copy of the adopting release is available on the SEC’s web site at: <http://www.sec.gov/rules/final/2010/33-9136.pdf>.

TIMING AND APPLICABILITY

The new rules, which were first proposed by the SEC in June 2009, will go into effect 60 days after publication in the Federal Register, and will apply to a company’s 2011 annual meeting if the first anniversary of the mailing of the 2010 proxy materials occurs more than 120 days after effectiveness of the new rules. For example, if the rules became effective on November 1, 2010, proxy access would be applicable for the 2011 proxy season for public companies that mailed their proxy statements for 2010 annual meetings no earlier than March 1, 2010.

For smaller reporting companies (generally, those with market capitalization of less than \$75 million), the effectiveness of Rule 14a-11 is deferred for three years.

The new rules apply to all public companies and registered investment companies subject to the proxy rules, unless applicable state or foreign law or a company’s governing documents prohibit shareholders from nominating board candidates. The rules do not apply to foreign private issuers or to companies subject to SEC reporting solely because they have a class of debt securities registered under Section 12 of the Exchange Act. Companies are not permitted to opt-out of the applicability of the access rules.

NEW RULE 14A-11

Under new Rule 14a-11, companies will be required to include in their proxy materials, at the expense of the company, nominees for director that are submitted by shareholders (or groups of shareholders) that hold a significant, long-term interest in the company, have provided timely notice of their intent to include a nominee in the company’s proxy materials, and provide specified disclosure concerning themselves and their nominees.

Nominating Shareholder Requirements

To be eligible to nominate directors pursuant to Rule 14a-11, a nominating shareholder (or group of shareholders) must beneficially own at least 3% of the total voting power of the company’s securities that are entitled to vote on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) and have continually held such minimum amount of securities for at least three years as of the date of the filing of the Schedule

14N (discussed further below). In the case of a shareholder group, each member of the group must have held the amount of securities that are used to satisfy the ownership threshold continuously for at least three years prior to the filing of the Schedule 14N.

The nominating shareholder must continue to hold the required amount of securities used to satisfy the 3% ownership threshold through the date of the shareholder meeting. If a nominating shareholder (or member of a group) fails to continue to hold the requisite amount of securities as required by the rule, a company may exclude the nominee or nominees submitted by the nominating shareholder or group. For purposes of satisfying the ownership requirement of Rule 14a-11, nominating shareholders must hold both investment and voting power over the shares.

In addition, the nominating shareholder (including each member of a group) may not be holding any of the company's securities with the purpose, or with the effect, of changing control of the company or gaining seats on the board in excess of the maximum number of nominees it is permitted to nominate under Rule 14a-11, and may not have an agreement with the company regarding the nomination.

Further, a nominating shareholder or a member of a nominating shareholder group may not be a member of any other group with persons engaged in solicitations or other nominating activities in connection with the subject election of directors, may not separately conduct a solicitation in connection with the subject election of directors other than an exempt solicitation in relation to those nominees it has nominated pursuant to Rule 14a-11 or for or against the company's nominees, and may not act as a participant in another person's solicitation in connection with the subject election of directors.

A nominating shareholder or member of a nominating shareholder group will not be able to count toward the 3% threshold any securities that could be acquired, such as securities underlying options that are currently exercisable but have not yet been exercised. Borrowed shares and short positions are to be excluded in calculating the 3% threshold. Securities loaned to a third party can be included if recalled prior to the scheduled vote.

Number of Director Nominees

Under Rule 14a-11, companies will be required to include in their proxy materials the greater of one nominee or the number of nominees that represents up to 25% of the company's board of directors at each election. Where a company has a classified or staggered board, the 25% calculation is based on the total number of board seats. Incumbent directors elected as a result of being nominated by a shareholder pursuant to Rule 14a-11 and whose term will continue after the election to which the proxy materials relate count toward the maximum permitted number of shareholder nominees. However, where the company decides to nominate a director that was nominated by a shareholder during a previous year's election, such director will not count toward the maximum. Rule 14a-11 also provides that, if a company negotiates with a shareholder who has filed a Schedule 14N before beginning any discussions with the company about the nomination, then, if the company agrees to include the shareholder's nominees as company nominees, those nominees count toward the 25% maximum.

Priority of Nominees

If more than one shareholder or group of shareholders proposes qualifying director nominees, the company will be required to include in its proxy materials only the nominee or nominees of the shareholder or group with the highest voting power percentage.

If a nominating shareholder or group withdraws or is disqualified after the company provides notice to the nominating shareholder or group of the company's intent to include the nominee or nominees in its proxy materials, the company will be required to include in its proxy statement and form of proxy the nominee or nominees of the nominating shareholder or group with the next highest voting power percentage that is otherwise eligible to use the rule and that filed a timely notice in accordance with the rule, if any. This process would continue until the company included the maximum number of nominees it is required to include in its proxy materials or the company exhausts the list of eligible nominees.

If a nominee withdraws or is disqualified after the company provides notice to the nominating

shareholder or group of the company's intent to include the nominee in its proxy materials, the company will be required to include in its proxy materials any other eligible nominee submitted by that nominating shareholder or group. If that nominating shareholder or group did not include any other nominees in its notice filed on Schedule 14N, then the company will be required to include the nominee or nominees of the nominating shareholder or group with the next highest voting power percentage that is otherwise eligible to use the rule and that filed a timely notice in accordance with the rule, if any, until the maximum number of nominees is included in the company's proxy materials or the list of eligible nominees is exhausted.

Director Nominee Requirements

A company is not required to include a shareholder's director nominee in its proxy materials if the nominee's candidacy or, if elected, board membership would violate federal or state law or applicable stock exchange requirements (other than the rules regarding director independence). The nominees must also satisfy the objective director independence standards set forth in the national securities exchange listing standards that apply to the company, if any, but the rule does not extend to subjective independence standards. There is no requirement that the director be independent from or unaffiliated with the shareholder making the nomination.

Nomination Process

A nominating shareholder or group must provide to the company and file with the SEC a notice on a new Schedule 14N of its intent to require the company to include its nominees in the company's proxy materials (generally no earlier than 150 days or later than 120 days before the anniversary of the mailing of the proxy materials for the prior year's meeting) and to have information concerning such nominees included in the company's proxy materials. If the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder must provide notice a reasonable time before the company mails its proxy materials. In that case, the company will be required to disclose the date by which the shareholder must submit the

required notice in a Form 8-K filed pursuant to new Item 5.08 within four business days after the company determines the anticipated meeting date.

The Schedule 14N may include a statement of support for the nominee, which the company is required to include with its proxy materials so long as it is no more than 500 words in length per nominee. A company may exclude a statement of support if it exceeds 500 words and the company provides notice to the SEC of its intent to do so. The Schedule 14N must include the same information regarding the nominee and nominating shareholder (including all members of a nominating shareholder group) required to be provided in a traditional proxy contest, as well as certain additional information and representations relating to the access eligibility requirements of Rule 14a-11 and certifications regarding the shareholders' ownership of securities and intentions regarding control of the company. Much of this information will also be included in the company's proxy statement.

The nominating shareholder or group must file a final amendment to the Schedule 14N within ten days after the final results of the election have been announced by the company to disclose the nominating shareholder's or group's intention with regard to continued ownership of its shares.

Inclusion/Exclusion of Nominees

If a company determines to include the nominee in its proxy materials, the company must provide notice thereof to the nominating shareholder or group no later than 30 calendar days before the company files its definitive proxy materials with the SEC. The new rules also provide for a process that a company can follow if it determines that it can exclude a nominee submitted pursuant to Rule 14a-11. The required actions and deadlines for that process are outlined in the chart on [Exhibit A](#) to this Legal Update, which chart is also included in the adopting release.

Liability for Statements in Proxy

The nominating shareholder or group will be liable for any statement in the notice on Schedule 14N which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any

material fact necessary to make the statements therein not false or misleading, including when that information is subsequently included in the company's proxy statement. The company will not be responsible for this information.

AMENDMENTS TO RULE 14A-8(I)(8)

Currently, Rule 14a-8(i)(8) of the Exchange Act allows a company to exclude from its proxy statement a shareholder proposal that relates to a nomination or an election for membership on the company's board of directors or a procedure for such nomination or election. This provision currently permits the exclusion of a proposal that would result in an immediate election contest or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings.

The SEC is amending Rule 14a-8(i)(8) to provide that companies will no longer be able to rely on Rule 14a-8(i)(8) to exclude a proposal seeking to establish less restrictive proxy access procedures in a company's governing documents for the inclusion of one or more shareholder nominees for director in the company's proxy materials, provided that these proposals do not conflict with or limit Rule 14a-11 or are not otherwise excludable under Rule 14a-8.

Consistent with certain existing SEC interpretations under Rule 14a-8, companies may still exclude shareholder proposals that: (i) would disqualify a nominee who is standing for election; (ii) would remove a director from office before his or her term expired; (iii) questions the competence, business judgment or character of one or more nominees or directors; (iv) seeks to include a specific individual in the company's proxy materials for election to the board of directors; or (v) otherwise could affect the outcome of the upcoming election of directors.

No new disclosure requirements are triggered by the use of Rule 14a-8 for such proposals so long as the proponent does not make any director nomination. However, if the proponent makes a nomination after the proposal has been adopted, or pursuant to a separate right under state law or the company's governing documents to have a shareholder's director nominees included in the company's proxy statement, new Rule 14a-19 requires that the proponent file a shareholder notice

on Schedule 14N including disclosure similar to that required in an election contest. The company is required to include this disclosure in its proxy statement.

BENEFICIAL OWNERSHIP REPORTING

Under the new rules, a nominating shareholder or group will not lose eligibility to file abbreviated beneficial ownership reports as a passive investor pursuant to Schedule 13G solely as a result of making a nomination pursuant to Rule 14a-11, soliciting in connection with such nomination or having a nominee elected to the board. Beneficial ownership reporting requirements under Section 16 of the Exchange Act are unaltered.

NEW ITEM 5.08 OF FORM 8-K

The SEC added a new Item 5.08 of Form 8-K that requires the company to disclose the date by which a nominating shareholder must submit the Schedule 14N if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting. The Form 8-K must be filed within four business days after the company determines the date of the meeting.

The foregoing is intended to summarize the SEC's new proxy access rules for public companies, and does not constitute legal advice. Please contact the Pryor Cashman attorney with whom you work with any questions you may have. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Michael T. Campoli at (212) 326-0468.

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EXHIBIT A

Procedure if a Company Plans to Exclude a Rule 14a-11 Nominee

<u>Due Date</u>	<u>Action Required</u>
No earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting	Nominating shareholder or group must provide notice on Schedule 14N to the company and file the Schedule 14N with the SEC
No later than 14 calendar days after the close of the window period for submission of nominations	Company must notify the nominating shareholder or group (or its authorized representative) of any determination not to include the nominee or nominees
No later than 14 calendar days after the close of the window period for submission of nominations	Nominating shareholder or group must respond to the company's deficiency notice and, where applicable, cure any defects in the nomination
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the SEC	Company must provide notice of its intent to exclude the nominating shareholder's or group's nominee(s) and the basis for its determination to the SEC and, if desired, seek a no-action letter from the SEC staff with regard to its determination
No later than 14 calendar days after the nominating shareholder's or group's receipt of the company's notice to the SEC	Nominating shareholder or group may submit a response to the company's notice to the SEC
As soon as practicable	If requested by the company, SEC staff would, at its discretion, provide an informal statement of its views to the company and the nominating shareholder or group
Promptly following receipt of the SEC staff's informal statement of its views	Company must provide notice to the nominating shareholder or group stating whether it will include or exclude the nominee

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Michael Campoli devotes his practice to counseling public and private companies on a broad range of corporate matters, including securities law compliance, corporate formation and governance, mergers and acquisitions, public and private debt and equity financing transactions, and limited liability company and partnership counseling.

Mr. Campoli's work at Pryor Cashman has included the representation of:

- Marina Biotech, Inc. (NASDAQ: MRNA) as outside general counsel in connection with its equity and debt financings, M&A initiatives and compliance with Securities and Exchange Commission (SEC) reporting requirements
- Javelin Pharmaceuticals, Inc. (AMEX: JAV) as outside general counsel in connection with its equity financings and compliance with the reporting requirements of the SEC and other regulatory agencies
- Henry Schein, Inc. (NASDAQ: HSIC) in connection with the acquisition of various private companies in the medical equipment and software industries
- Briad Restaurant Group in its prevailing tender offer for Main Street Restaurant Group, Inc., the largest T.G.I. Friday's franchisee
- The Kushner Companies in connection with its acquisition of the office building located at 666 Fifth Avenue, New York, New York
- A private telecommunications company in connection with the issuance of a \$260 million secured note to the Rural Utilities Service of the U.S. Department of Agriculture and the concurrent placement of \$110 million of preferred stock to venture capital investors