

## Site Requirements

### "SEC Adopts "Proxy Access" Rule"

#### *Fulbright Briefing*

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On August 25, 2010, the Securities and Exchange Commission (SEC) adopted amendments to the federal proxy rules, including a new "proxy access" rule which will require public companies to include information in the company's proxy materials about, and enable shareholders to vote for, director candidates nominated by shareholders or groups of shareholders that meet specified stock ownership criteria. The SEC adopted the proxy access rule in response to ongoing concerns about whether public company boards of directors are sufficiently focused on shareholder interests, and the desire of some public company shareholders to use the director nomination process as a tool for increasing board accountability and influencing corporate policy. The SEC's authority to adopt the proxy access rule was confirmed in the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act.

The key provisions of the proxy access rule, to be codified as new Exchange Act Rule 14a-11, and related federal proxy rule amendments, are summarized below.

**Companies subject to the rule.** The proxy access rule will be applicable to all Exchange Act reporting companies, including investment companies and controlled companies, regardless of size, except for foreign private issuers, registered debt-only reporting companies and companies governed by charter documents or state or foreign corporation laws that prohibit shareholders from nominating directors. Smaller reporting companies will be required to comply with the rule after a three-year transition period. Public companies to which the proxy access rule applies may not opt out of compliance with the rule.

**Timing of implementation.** The proxy access rule will take effect 60 days from publication in the Federal Register, which is expected to occur in a few days. Accordingly, the rule will be effective for the 2011 proxy season (or the 2014 proxy season for smaller reporting companies).

**Shareholder eligibility criteria.** Shareholders or groups of shareholders will be eligible to nominate director candidates if they have continuously held at least 3% of the company's voting stock for at least three years before notifying the company of the intention to nominate a director candidate. For purposes of calculating the 3% voting stock threshold, borrowed stock or stock held short must be excluded, but stock loaned to others may be included if the shareholder commits to recall the stock if its nominee is included in the slate of director candidates. These ownership criteria apply regardless of the company's public float, and the nominating shareholders must maintain the 3% ownership level until completion of the election.

**Limits on number of shareholder nominees.** Shareholders may nominate up to 25% of a company's board, or one director, whichever number is higher. If the board is classified or staggered, the 25% limitation will apply to the entirety of the board and not only the class to be elected in the applicable year. If the company receives competing shareholder nominations that would exceed these limits, a first-come, first-served system would not apply; rather, the eligible nominees of the shareholders holding the highest percentage of voting stock would be included in the company's proxy materials. In addition, shareholders who propose a nominee must disclaim any intention of seeking a change of control of the company or a higher number of board seats than the proxy access rule permits.

**Director candidate eligibility.** A director candidate will be eligible for nomination if his or her candidacy or board participation would not violate applicable federal and state laws and stock exchange regulations (including the candidate's satisfaction of the objective independence standards of the national securities exchange on which the company's securities are listed), and no agreement exists between the company and the nominating shareholder regarding the candidate's nomination before the nominating shareholder notifies the company of the intent to nominate.

**Challenges by the company.** If the company believes that a nominating shareholder or shareholder group does not meet the ownership eligibility criteria or that a shareholder director nominee does not satisfy the director candidate eligibility requirements, the company may, by filing a no-action letter request with the SEC, seek to exclude the applicable director candidate from the slate of director nominees in its proxy materials.

**Nomination process.** Shareholders will be required to file a new form, Schedule 14N, on the SEC's

EDGAR system to furnish the company notice of their intention to nominate a director candidate. This notice must be furnished no earlier than 150 days, but no later than 120 days, before the anniversary of the distribution of the company's proxy materials for the preceding year. The company must adhere to this timetable even if its bylaws set forth different advance notice time periods.

**Schedule 14N content.** The nominating shareholder will be required to include disclosures and certifications in its Schedule 14N as to its shareholdings, intent to maintain the qualifying level of holdings through the election date and post-meeting plans with respect to continued shareholding. Nominating shareholders will also be required to include biographical information about themselves and their nominee and an analysis of whether their nominee satisfies the company's director qualification standards, and may elect to provide a candidate support statement of up to 500 words. Since the company will include information provided in Schedule 14N in its proxy statement, the nominating shareholder, and not the company, will be liable for any false or misleading statements or omissions that the nominating shareholder provides or neglects to provide to the company in the Schedule 14N and which are included in the proxy statement.

**Shareholder proposals regarding proxy access.** Exchange Act Rule 14a-8 will also be amended to enable shareholders who satisfy the existing Rule 14a-8 share ownership eligibility criteria to submit proxy access proposals, such as proposed bylaw amendments, for inclusion in the company's proxy statement. Any such proposal actually adopted would supplement, but not replace or weaken, the proxy access rights afforded under new Exchange Act Rule 14a-11.

**Facilitation of formation of shareholder groups.** The SEC also adopted amendments to the federal proxy rules which will enable shareholders who wish to form a nominating group that satisfies the proxy access rule's voting stock ownership requirements to communicate with each other without violating existing proxy solicitation rules.

*The SEC's final rule, "Facilitating Shareholder Director Nominations," is available at:*  
<http://www.sec.gov/rules/final/2010/33-9136.pdf>.

*Public companies should consider the effect that the SEC's new proxy rules may have on upcoming director elections in light of the nature of their shareholder bases, existing relations with shareholders, board composition, election provisions of their organizational documents and any applicable corporate law provisions of the company's state of incorporation.*