

D&O, GRC and Accountant Update
News, Analysis and Resource Links
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In this issue:

1. An article of interest, The Full Spectrum of Risk Attitude, [Click Here](#).
2. The new SEC proxy access rules. The following are links to the new proxy access rules adopted by the SEC this week, [Press Release](#), [Text 451 Pages](#), [Chairman's Remarks](#).

As you might be aware, on August 25, 2010 the SEC adopted new proxy access rules. Quite a few sources have already summarized or written about the rules—a brief summary of the rules is also provided below. Equally interesting however is the question, so . . . where will the new rules take us, assuming that the rules survive possible legal challenges? Of course, we don't know; however, there are many different possible scenarios and a wide range of possibilities in between. It is possible that shareholders will seldom utilize the new rules, or it is possible that some shareholders will utilize the new rules occasionally, or it is possible that shareholders will utilize the new rules regularly at companies in circumstances where something is perceived to have gone wrong, or it is possible that shareholders will seek to utilize the new rules regularly and proactively to attempt to influence corporate conduct and course of action as a matter of standard practice. It is reasonable to assume that the new rules might at least be utilized at companies where it is perceived that something significant has gone wrong in areas relating to strategy; risk management or liability exposure; accounting, fraud, internal controls or investor misrepresentations; executive compensation; executive selection and retention; or the board member nomination process. As a result, I expect that the new rules will significantly impact board and director conduct particularly with respect to active inquiry, investigation/evaluation and due diligence; director and committee member qualifications; and documentation of director actions, prudence and the exercise of business judgment.

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Briefly summarizing, the new rules allow certain shareholders to require that a company include the shareholder's or shareholders' nominee or nominees for the board in the company's proxy materials. The rules allow a shareholder or group of shareholders who have owned at least 3 percent of the company's voting stock continually for at least 3 years to have access to the company's proxy materials to nominate one board candidate or 25 percent of the board, whichever is greater. The rules become effective 60 days after publication in the Federal Register. However, the effective date is further deferred for three years for smaller reporting companies. The SEC has indicated that it will monitor how the rules operate in practice, and retain the authority to change the rules if necessary. A no-action letter process will exist to allow a company to obtain advice about the inclusion of a proposed nominee in the company's proxy materials. And the rules require that shareholders wishing to nominate a board member must notify the company of the intent to use the new nominating rules no earlier than 150 days prior and no later than 120 days prior to the anniversary of the mailing of the prior year's proxy statement. Of course, the new rules only allow certain shareholders to nominate one or more people for board membership—it remains to be seen whether the shareholders will approve people who are nominated through this process, although obviously corporation and shareholder nomination of competing people for board positions will create an interesting dynamic.

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