

Legal Alert: Securities and Exchange Commission Adopts Proxy Access

August 27, 2010

The Securities and Exchange Commission this week adopted final "Facilitating Shareholder Director Nominations" rules which will require companies to provide certain shareholders or groups of shareholders the opportunity to nominate candidates for boards of directors and include information in the company's proxy materials about, and the ability to vote for, their nominees. While smaller reporting companies will not have to comply until 2014, almost all other public companies are subject to these new rules for their 2011 annual meetings. Because companies may not amend governing documents to opt out of proxy access, restrict the level of proxy access available to shareholders or establish any proxy access eligibility requirements more restrictive than those established by the SEC, we expect these new rules to have a significant impact on companies faced with shareholders having activist or special interests. We do advise, however, that issuers revisit their current bylaws and conform any director nomination provisions to these final rules.

Eligibility Requirements

Nominating shareholders or groups must hold, for at least three years, 3% of the voting power of the company's securities in order to receive proxy access. Nominating shareholders and groups may not hold any of the company's securities with the purpose or effect of changing control of the company. Shareholder nominees also must meet the objective independence standards of any applicable national securities exchange. Subjective determinations and criteria that apply only to audit or other committees as well as company stated independence standards do not need to be satisfied. While the rules do not restrict relationships between a nominating shareholder or group and its nominees, neither the nominee nor the nominating shareholder may have an agreement with the company regarding the nomination.

Maximum Number of Shareholder Nominees

The maximum number of shareholder nominees that a company is required to include in its proxy materials is the greater of one director or 25% of the entire board. In the case of a classified board, this maximum number will be based on the total number of board seats, not on the number of seats up for election. If a company's board already includes a director or directors nominated by shareholders through the proxy access process, then this maximum number will include such already-seated shareholder-nominated director(s). If the number of shareholder nominees exceeds a company's maximum number, preference will be given to the nominating shareholder or group that holds the greatest number of the company's securities. If this largest nominating shareholder nominates less than the company's maximum number of shareholder nominees, the nominee(s) of the next largest shareholder must be included in the company's proxy materials.

Schedule 14N

Shareholders and groups seeking to submit nominations pursuant to the new rules must file with the SEC, and provide notice to the company on, Schedule 14N which requires certain disclosures and certifications. The Schedule 14N must be filed and submitted no earlier than 150 calendar days and no later than 120 calendar days before the date the company mailed its proxy materials for the prior year's annual meeting. A company receiving a notice on Schedule 14N that meets all of the proxy access requirements must include disclosure about the nominating shareholder or group and the shareholder nominee(s) in its proxy materials and include the name of the nominee(s) on its proxy card. While a company may not exclude a nominee or statement in support on the basis that it contains materially false or misleading statements, the nominating shareholder or group will have liability for any such information.

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New Limitation on Companies' Ability to Exclude Election-Related Shareholder Proposals

The final rule also limits companies' ability to exclude shareholder proposals relating to (1) the nomination or election of directors or (2) any procedures or disclosures related to such nomination or election, including those required by the company's governing documents. A company must include such a proposal in its proxy materials if the shareholder submitting the proposal satisfies the existing eligibility requirements for shareholder proposals and the proposal itself meets the procedural and substantive requirements.

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