
SEC to Require Stockholder Proxy Access

2010-08-25

As widely expected, earlier today, the Securities and Exchange Commission approved a proxy access rule by a 3-2 vote. The new rule will allow stockholders of a public company who meet specified eligibility criteria to require the company to include the stockholders' nominees for election to the company's board of directors in the company's proxy materials. The new proxy access rule will apply to all public companies, including registered investment companies, other than debt-only companies and foreign private issuers. The rule will not be implemented, however, for smaller reporting companies until 2013.

The SEC proposed the proxy access rule, by the same divided 3-2 margin, in May 2009—marking the third time in less than 10 years that the SEC had placed the question of proxy access on its agenda. In July 2010, the Dodd-Frank Act confirmed the SEC's authority to issue a proxy access rule, but left the details of the rule to the SEC's discretion.

Under new Rule 14a-11, to be eligible to take advantage of proxy access, stockholders will be required to:

- own, individually or in the aggregate with other stockholders acting together as a group, at least 3% of the company's voting stock (including shares lent to others, so long as the stockholder has the right to recall the shares and will do so if the nominee is included in the proxy, and excluding shares sold short);
- have held their shares continuously for at least three years at the time they give notice of the nomination;
- nominate persons who satisfy the objective independence standards of the stock exchange on which the company's shares are listed; and
- not have the intent of changing control of the company or gaining more seats on the board than the maximum provided for in Rule 14a-11.

The proxy access rules would limit the number of directors nominated by stockholders in this

manner to the greater of one director or 25% of the entire board of directors. In a change from the proposal, if the number of stockholders' nominees exceeds the number permitted to be nominated by Rule 14a-11, then preference will be given to the larger holder, not the first to nominate.

The SEC also approved amendments to Rule 14a-8 that will allow stockholders to propose additional procedures that provide greater access than new Rule 14a-11. They do not allow boards or stockholders to opt out of the minimum proxy access rights mandated by the SEC rule.

The new rules will take effect 60 days after their publication in the Federal Register. The deadline for submitting a Rule 14a-11 nominee will be 120 days before the anniversary of the mailing of the proxy statement for the company's prior annual meeting. Stockholders' ability to take advantage of Rule 14a-11 at a company's 2011 annual meeting will depend in part on when the adopting release is published and when the company mailed the proxy statement for its 2010 annual meeting. Thus, it appears that if the effective date of the new rules is more than 120 days prior to the anniversary of the mailing of the company's 2010 proxy materials, the company will be subject to the new rules at its 2011 annual meeting.

In her introductory remarks, SEC Chairman Mary L. Schapiro characterized the new rule as a "marked change to the status quo" and described proxy access for long-term significant stockholders as "a matter of fairness and accountability." Chairman Schapiro stated that the rules were the result of a compromise of competing views and noted that nominating a candidate for director did not guarantee the nominee's election to the board.

In explaining their votes against the new rules, Commissioners Kathleen L. Casey and Troy A. Paredes both offered sharp critiques of Rule 14a-11. Commissioners Casey and Paredes expressed concerns that the rule improperly displaced state corporate law and unwisely limited private ordering. Commissioner Casey also expressed concerns over what she felt was a "troubling trend" of undue SEC deference to institutional stockholders and predicted that the rule would not survive judicial scrutiny due to what she felt were its "arbitrary" thresholds and lack of convincing cost/benefit analysis.

The very existence of proxy access—let alone its actual use, the frequency of which will not be known for some time—has the potential to fundamentally alter the composition and workings of boards and the relationship between management, the board and stockholders. We intend to provide a fuller analysis of the new rules, and recommendations for steps public companies should consider in response to the new rules.

The foregoing description is based on comments made at this morning's SEC open meeting at which the rules were approved. It is subject to additional details and clarifications included in the 451-page [adopting release](#) that the SEC has already posted on its website.

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