

SEC Votes to Propose Rules to Permit Shareholders to Nominate Directors in a Proxy Statement

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Client Advisory

June 8, 2009 by Steven J. Glusband, Guy P. Lander, G. Christina Gray-Trefry and Christopher Young

On May 20, 2009, the U.S. Securities and Exchange Commission (the "Commission") voted to publish proposed amendments to certain federal proxy rules under the Securities Exchange Act of 1934 (the "Exchange Act"). Such proposed amendments contemplate facilitating the rights of shareholders to nominate corporate directors. Under the proposal, certain eligible shareholders would be entitled to have their nominees included in the company proxy ballot sent to all voters.

The text of the proposed amendments has not yet been published, and this summary is based on information provided at the Commission's open meeting and its press release regarding the proposed amendments.^[1]

Proposed Rule 14a-11

Under proposed Rule 14a-11, eligible shareholders would be entitled to nominate directors in a company's proxy materials, provided the shareholders are not prohibited from doing so by applicable state law or the company's organizational documents. Only shareholders meeting certain eligibility requirements may include their nominee or nominees in company proxy materials. Shareholders are eligible to do so only if:

- they own at least 1% of the voting securities of a "large accelerated filer" (a company with a worldwide market value of \$700 million or more) or of a registered investment company with net assets of \$700 million or more.
- they own at least 3% of the voting securities of an "accelerated filer" (a company with a worldwide market value of \$75 million or more but less than \$700 million), or of a registered investment company with net assets of \$75 million or more but less than \$700 million.
- they own at least 5% of the voting securities of a "non-accelerated filer" (a company with a worldwide market value of less than \$75 million) or of a registered investment company with net assets of less than \$75 million.

Shareholders would be permitted to aggregate their holdings to meet these applicable thresholds, but would be required to have held their shares for at least one year.

Any shareholder seeking to include a nominee or nominees in its company proxy materials would be required to file with the Commission and submit to the company a new Schedule 14N. On the Schedule 14N, the nominating shareholder would disclose the amount and percentage of securities owned and the length of ownership, as well as certify an intent to continue to own such shares through the board's annual meeting at

which directors are elected. The nominating shareholder would also be required to certify on the Schedule 14N that shareholdings is not for the purpose of changing control of the company or gaining more than a minority representation on the board of directors.

No more than one nominee, or a group of nominees representing up to 25% of the company's board of directors, whichever is greater, may be nominated by a single particular shareholder in a company's proxy materials.

Shareholder nominees must meet the objective independence standards of the applicable national securities exchange or association, and a nominating shareholder may not have any direct or indirect agreement with its company regarding the nomination of a shareholder nominee.

Proposed Amendments to Exchange Act Rule 14a-8(i)(8)

The Commission also proposes to amend Rule 14a-8(i)(8), which currently permits companies to exclude shareholder proposals relating to elections. The proposed amendments to the rule would narrow the "election exclusion." Under the proposed rule, certain eligible shareholders would now be entitled to amend, or request amendment to, provisions of a company's governing documents concerning the company's nomination procedures.

Proxy access shareholder proposals would be subject to the same eligibility requirements as set forth under the current Rule 14a-8. Such provisions require that a shareholder proponent have continuously held at least \$2,000 in market value, or 1%, whichever is less, of the company's securities entitled to be voted on the proposal at the meeting, for a period of one year prior to submitting the proposal.

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Endnote

[1] The Commission's press release, "SEC Votes to Propose Rule Amendments to Facilitate Shareholder to Nominate Directors," dated May 20, 2009, is available at: <http://www.sec.gov/news/press/2009/2009-116.htm>.

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