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## SEC Adopts Rule Amendments Facilitating Shareholder Proxy Access to Nominate Directors

On August 25, 2010, the Securities and Exchange Commission adopted proxy rule amendments that generally require Exchange Act reporting companies to include in the company's proxy materials:

- a shareholder's (or group of shareholders') director nominees; and
- a shareholder proposal to expand proxy access beyond the amended SEC rules, such as a lower stock ownership threshold, shorter holding period or more shareholder nominees,

in each case subject to certain conditions summarized below.

The rules will be effective 60 days after their publication in the Federal Register. Proxy access will apply for a company's 2011 proxy materials if the first anniversary of the mailing of the 2010 proxy materials occurs after 120 days of effectiveness. The example given by the SEC is that if the rules are effective on November 1, 2010 then shareholders have a proxy access right for the 2011 proxy materials if the company mailed its 2010 proxy materials on or after March 1, 2010. There is a three-year delayed effectiveness for "smaller reporting companies" (generally, reporting companies that have a public float of less than \$75 million).

The rules generally apply to all Exchange Act reporting companies (including certain registered investment companies), except for foreign private issuers or for companies solely because they have a class of debt registered under the Exchange Act. These new rules are authorized under the recently enacted Dodd-Frank Act and are substantially similar to rules previously proposed by the SEC in June 2009.

### Exchange Act Rule 14a-11

New Rule 14a-11 permits a shareholder or several shareholders acting together to include their director nominees in the company's proxy materials unless otherwise prohibited by state law<sup>1</sup>. A company may not opt out of Rule 14a-11 by amending its governing documents to be more restrictive than the rule.

#### *Shareholder Eligibility Requirements*

To use Rule 14a-11, a nominating shareholder or shareholder group must:

- Meet an ownership threshold, either individually or in the aggregate, of at least 3% of the voting power of the company's securities as of the date of the shareholder notice on Schedule 14N (discussed below).

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<sup>1</sup> In its adopting release, the SEC notes that they are not aware of any state law that currently prohibits shareholders from nominating directors.

- In calculating the ownership percentage, a nominating shareholder or shareholder group may, under certain conditions, include securities loaned to a third party but may not include borrowed shares or securities that have been sold short.
- Hold both the power to dispose of and vote the securities (either directly or through any person acting on their behalf).
- Have held the minimum amount of securities used to satisfy the 3% ownership threshold continuously for at least three years as of the date of the Schedule 14N and continue to own the securities through the date of the annual meeting.
- Represent their intent to continue to own the securities after the annual meeting.
- Not acquire or hold the securities for the purpose or with the effect of changing control of the company or to gain more than the number of directors permitted by the Rule.
- Not have any agreement with the company regarding the nomination prior to filing its Schedule 14N.
- Provide to the company and file with the SEC a notice on new Schedule 14N.

#### *Shareholder Nominee Requirements*

- A company may exclude a shareholder nominee from its proxy materials if the nominee's candidacy or subsequent election would violate applicable law or the nominee would not meet the objective independence requirements of the applicable national securities exchange or national securities association.
- Shareholders are permitted to nominate in the aggregate a number of nominees that represents up to 25% of the entire board (at least one nominee in any event).
  - Where a company has a staggered board and a current director (or directors) previously elected as a shareholder nominee pursuant to Rule 14a-11 will continue to serve as a director beyond the upcoming director elections, that director(s) will count towards the 25% limit.
  - A shareholder nominee of an eligible nominating shareholder or group that a company negotiates to include as a company nominee after the filing of the Schedule 14N would also count towards the 25% limit.
- Where more than one shareholder or group would be eligible to have its nominees included in the company's proxy materials, the company would be required to include the nominee(s) of the shareholder or group with the highest percentage of the company's voting power.
- The shareholder nominee (in addition to the nominating shareholder or shareholder group as described above) should not have any agreements with the company regarding the nomination of the nominee.
  - This is intended to prevent the use of Rule 14a-11 by the company or its management through a "surrogate" shareholder (*i.e.*, to block usage of the rule by another nominating shareholder).

- Unsuccessful negotiations with the company to have the nominee included on the company's proxy card as a management nominee, or negotiations that are limited to whether the company is required to include the shareholder nominee on the company's proxy card in accordance with Rule 14a-11, would not be considered an agreement with the company for purposes of the rule.

#### *Schedule 14N Requirements*

- The nominating shareholder or group must provide a notice on the new Schedule 14N to the company of its intent to have the company include that shareholder's or group's nominee or nominees in the company's proxy materials.
- The Schedule 14N must be provided to the company and filed concurrently with the SEC in most cases no earlier than 150 days and no later than 120 days prior to the anniversary of the mailing of the prior year's proxy statement.
- The Schedule 14N must include specified information to confirm the shareholder and nominee eligibility requirements under the rule are satisfied and provide information concerning the nominee required for the proxy statement. The Schedule 14N may also include any statement not in excess of 500 words in support of any shareholder nominee in the company's proxy statement.
- The Schedule 14N must be amended promptly for any material changes.
- The nominating shareholder or group will be liable for any false or misleading statement in the Schedule 14N or any other related communication, including information included in the company's proxy statement.
  - The company will not be responsible for any information provided by the nominating shareholder or group.

#### *Excluding Shareholder Nominees*

A company may exclude a shareholder nominee from its proxy materials if:

- Rule 14a-11 is not applicable to the company;
- The nominating shareholder or group or nominee fail to satisfy the eligibility requirements of Rule 14a-11; or
- The company has received more nominees than it is required to include by Rule 14a-11.

*Timing of Process*

The chart below summarizes the process and time deadlines under Rule 14a-11, as set forth in the adopting release.

<b>Due Date</b>	<b>Action Required</b>
No earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting	Nominating shareholder or group must provide notice on Schedule 14N to the company and file the Schedule 14N with the SEC
No later than 14 calendar days after the close of the period for submission of nominations	Company must notify the nominating shareholder or group (or its authorized representative) of any deficiencies and of its determination not to include the nominee or nominees
No later than 14 calendar days after the nominating shareholder's or group's receipt of the company's deficiency notice	Nominating shareholder or group must respond to the company's deficiency notice and, where applicable, cure any defects in the nomination
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the SEC	Company must provide notice of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the SEC and, if desired, seek a no-action letter from the SEC staff with regard to its determination
No later than 14 calendar days after the nominating shareholder's or group's receipt of the company's notice to the SEC	Nominating shareholder or group may submit a response to the company's notice to the SEC staff
As soon as practicable	SEC staff would, at its discretion, provide the requested no-action letter to the company and the nominating shareholder or group
Promptly following receipt of the SEC staff's no-action letter	Company must provide notice to the nominating shareholder or group stating whether it will include or exclude the nominee

*Shareholder Communications*

The SEC also adopted two new exemptions from the proxy solicitation rules that, under certain circumstances, will enable shareholders to communicate with other shareholders to form a nominating group and that will enable shareholders to engage in written and oral solicitations in support of the shareholder nominee(s).

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

The SEC amended Rule 14a-8(i)(8) to narrow the "election exclusion" right and thus facilitate shareholder proposals to amend a company's governing documents concerning shareholder nominations. A shareholder proposal must not be otherwise excludable under Rule 14a-8 and must not conflict with applicable state law or SEC rules, including new Rule 14a-11. For example, revised Rule 14a-8(i)(8) would allow a shareholder to propose amendments that establish procedures for nominating directors that require a less restrictive ownership threshold, holding period, or other qualifications or representations than those proposed in Rule 14a-11.

Revised Rule 14a-8 (i)(8) only permits a company to exclude a shareholder proposal that otherwise qualifies under Rule 14a-8 if it:

- Would disqualify a nominee who is standing for election;
- Would remove a director from office before his or her term expired;
- Questions the competence, business judgment, or character of one or more nominees or directors;
- Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
- Could otherwise affect the outcome of the upcoming election of directors.

A complete copy of the final rules is contained in SEC Release No. 33-9136 and can be found at [www.sec.gov/rules/final/2010/33-9136.pdf](http://www.sec.gov/rules/final/2010/33-9136.pdf).

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