

September 20, 2011

SEC Amendments to Facilitate Shareholder Director Nominations Effective

On September 20, 2011, the SEC's amendments to Rule 14a-8, which require companies to include in their proxy materials shareholder proposals regarding proxy access procedures for inclusion of shareholder director nominees in the company's proxy materials, became effective. This follows the finalization of the order by the U.S. Court of Appeals for the District of Columbia to vacate Rule 14a-11, which would have required companies to include shareholders' director nominees in a company's proxy materials in certain circumstances. Pending the court's review of the challenge to Rule 14a-11, the SEC had previously ordered a voluntary stay of the effectiveness of the Rule 14a-8 amendments.

Rule 14a-8 Amendments

Prior to the effectiveness of the amendments, Rule 14a-8(i)(8) permitted companies to exclude from its proxy materials shareholder proposals relating to director nominations or elections. Revised Rule 14a-8(i)(8) narrows this "election exclusion" right and allows for shareholder proposals to amend a company's governing documents concerning shareholder nominations. The shareholder proposal must not be otherwise excludable under Rule 14a-8 and must not conflict with applicable state law or SEC rules. Thus, although the SEC's mandated proxy access rules under Rule 14a-11 have been vacated by the court, shareholders may still seek to obtain proxy access by proposing their own mechanism for proxy access under revised Rule 14a-8, which could be more or less restrictive than the specified conditions contained in now vacated Rule 14a-11.

Revised Rule 14a-8(i)(8) also codifies prior SEC staff interpretations and clarifies that a company may only exclude a shareholder proposal that otherwise qualifies under Rule 14a-8 if such proposal:

- 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.

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Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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