



SEC Adopts Proxy Access

August 25, 2010

The Securities and Exchange Commission today adopted new “proxy access” rules requiring public companies to include director candidates nominated by shareholders in the company’s annual meeting proxy materials.¹ This contrasts with the current practice under which shareholders must pay for the preparation and mailing of materials to campaign for their own nominees. The new rules were adopted by a 3-to-2 vote along party lines.

The new Rule 14a-11 would only be available to shareholders, or groups of shareholders, that meet a number of requirements, including the following:

- A nominating shareholder or group must certify that it is not seeking to change control of the company or to gain a number of seats representing more than the greater of one director or 25% of the company’s directors.²
- An ownership threshold (as calculated under the new rules) of at least 3% of the voting power of the company’s securities must be satisfied, although groups are permitted to aggregate their shares to reach this threshold.
- Such shares must have been held by the nominating shareholder or shareholders for at least three years, and nominating shareholders must represent that they intend to hold at least the required amount of shares until the date of the annual meeting.

The SEC proposed this rule in May 2009, prompting hundreds of comments from companies, shareholders, law firms, academics, and other interested parties. Many of these comments raised concerns about numerous aspects of the proposal and suggested various changes. One notable suggestion would have permitted shareholders to limit the applicability of proxy access to suit the individual circumstances of each company or even to opt-out entirely. The SEC rejected any ability to “opt-out” and, as previously proposed, only permits modifications that expand proxy access (*e.g.*, shareholders may propose changes to a company’s governing documents to provide for a lower ownership percentage or a shorter holding period).

¹ Simpson Thacher has previously addressed proxy access in four client memoranda focusing on the SEC’s proposal: [SEC Signals that New Proxy Access Rules Will Likely Not Be Effective for 2010 Proxy Season](#) (October 2, 2009); [Simpson Thacher Urges Caution with Respect to the SEC’s New Proxy Access Proposal](#) (August 17, 2009); [The SEC’s New Proxy Access Proposal: Thoughtful Reform to Promote Better Corporate Governance or Rushed Response to Political Pressure?](#) (June 26, 2009); and [SEC Re-Proposes Proxy Access](#) (May 20, 2009).

² The SEC also clarified that, in the case of classified or “staggered” boards, the 25% calculation is still based on the total number of board seats.

The key differences between the proposed rule and the adopted rule include:

- The SEC adopted a three-year holding period requirement in response to many commenters who argued that the proposed one-year holding period was too short.
- The SEC adopted a 3% ownership threshold for all companies included in the rule, rather than the tiered ownership thresholds (ranging from 1% to 5%) in the previously proposed rules. Various business groups and other commenters had argued for thresholds of 5% or higher.
- If more than one shareholder or shareholder group submits qualifying director nominees, the company will be required to include in its proxy materials the nominee or nominees of the shareholder or group with the greatest voting power percentage, rather than the proposed “first in” standard.

The new rules will generally be effective 60 days after their publication in the Federal Register. Given that under the new rules shareholders must submit nominees no later than 120 days before the anniversary date of the mailing of the company’s proxy statement in the prior year, shareholders will only be able to submit nominees for inclusion in the company’s 2011 annual meeting proxy statement if the 120 day deadline falls on or after the effective date of the new rules. For example, if the new rules become effective on November 1, 2010, proxy access would generally be available at companies that mailed their last annual meeting proxy statement no earlier than March 1, 2010.

The rules adopt a one-size-fits-all approach and, accordingly, companies will need to consider the rules in the context of their particular circumstances, including state or other jurisdiction of incorporation, capital structure, board composition, shareholder base and company governing documents. We would be pleased to assist you in preparing for these new proxy access rules, or the other regulatory changes adopted by the SEC today.

The Firm expects to issue another more detailed memorandum discussing Rule 14a-11 and the other proxy rule changes shortly.

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UNITED STATES

New York

425 Lexington Avenue
New York, NY 10017-3954
+1-212-455-2000

Los Angeles

1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto

2550 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.

1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London

CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing

3119 China World Office 1
1 Jianguomenwai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong

ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo

Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo

Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000