

SEC Enacts Amendments Facilitating Shareholder Nominations for Director

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On August 25, 2010, the Securities and Exchange Commission voted 3-2 (along party lines) to approve rules that will make it easier for shareholders to nominate directors of public companies. The rules generally become effective 60 days from publication in the Federal Register. Application of the rules will be deferred for 3 years for companies defined as “smaller reporting companies.” Highlights of the rules contained in the 451-page release include:

- A shareholder or shareholder group that:
- owns at least 3% of a company's shares entitled to vote on the election of directors at the annual meeting,
- has held such shares continuously for at least 3 years prior to such nomination, and
- will continue to hold such shares through the date of such annual meeting

may have its nominee(s) for no more than 25% of the board seats to be voted on at such annual meeting (or one director, whichever is greater) included on the company's proxy ballot sent to the shareholders;

- The nominating shareholder or shareholder group must hold both investment and voting power of such shares, either directly or indirectly through any person acting on its behalf;
- In certain circumstances, shares loaned to a third party can be included for purposes of meeting the 3% threshold, however, shares sold short or borrowed must be excluded from the amount required to meet the 3% threshold;
- The nominating shareholder or shareholder group must disclaim an intent to change control of the company or to obtain more than the number of seats that the company is required to include on its proxy ballot pursuant to this rule;
- The nominating shareholder or shareholder group must file a notice of intent on Schedule 14N that could include a supporting statement for the nominee(s) but must include
- information about the nominating shareholder or shareholder group relating to identity and ownership,

- a statement of intention to continue to hold the shares through the annual meeting date and its intention thereafter,
 - certifications of eligibility and of accuracy of the provided information,
 - biographical information regarding the nominee(s), and
 - a description of the relationships between the nominating shareholder or shareholder group, the nominee(s) and the company and its affiliates;
- The nominating shareholder or shareholder group must provide notice to a company of its intent to use this rule no earlier than 150 days prior to the anniversary of the mailing of the prior year's proxy statement and no later than 120 days prior to such date (which could make these rules inapplicable for 2011 annual meetings for certain companies);
 - The company will not be required to include any nominee whose candidacy, or election, would violate controlling state or federal law, or applicable standards of a national exchange except with respect to director independence requirements that rely on the subjective determination by the board, if such violation could be cured during the time period provided. The company must provide the SEC with notice of all nominees, including any potential substitute nominees, that it intends to exclude based on the enumerated disqualifications;
 - If there are multiple shareholders or shareholder groups seeking to utilize this rule, the shareholder or the shareholder group with the largest number of shares will be permitted to have its nominee(s) placed on the company's proxy ballot pursuant to this rule, not the "first to file" priority that was contained in the SEC's proposing release;
 - The rules apply to companies that are subject to the Exchange Act proxy rules, including investment companies and controlled companies, but will not apply to companies having debt securities as their only public securities;
 - Companies may not "opt out" of the rules and the rule applies regardless of whether a company is engaged in a proxy contest; and
 - Companies would generally no longer be able to exclude shareholder proposals seeking to establish less restrictive procedures regarding inclusion of shareholder nominees in its proxy materials.

There are sure to be further developments relating to this rulemaking by the SEC. While the recently enacted [Dodd Frank Wall Street Reform and Consumer Protection Act](#) included authority for the SEC to enact proxy access regulations, challenges may be forthcoming. An officer of the U.S. Chamber of Commerce's Center for Capital Markets announced that "The Chamber will carefully review the rule that was approved today and will continue to fight this flawed approach using every method available." We will monitor developments and provide any necessary updates.

Additional information

For additional information, please contact

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