

**THOMPSON
HINE**

June 2009

PUBLIC COMPANY UPDATE

SEC Proposes Controversial “Shareholder Access” Amendments to Proxy Rules

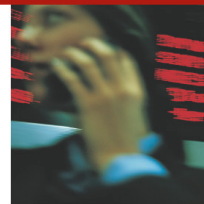
On May 20, the U.S. Securities and Exchange Commission (SEC) adopted (in a rare 3-2 vote) proposed amendments to the federal proxy rules under the Securities Exchange Act of 1934 (the “Exchange Act”) “to remove impediments to the exercise of shareholders’ rights to nominate and elect directors to company boards of directors.” You can find the text of the proposed amendments (posted on the SEC web site on June 10) at <http://www.sec.gov/rules/proposed/2009/33-9046.pdf>. Comments to the SEC on the proposed amendments are due on August 17, 2009.

The SEC has proposed versions of enhanced “shareholder access” before. As was the case with previous proposals, the current proposals are sure to provoke considerable debate in the public company and investor communities, as interested parties weigh the benefits and burdens of the proposals and contemplate a new world in which a company’s annual meeting proxy card could actually be required to include more nominees than there are board vacancies.

The SEC’s proposals would give shareholders two new ways to more fully exercise their rights to nominate directors. Under the proposal, shareholders meeting specified requirements would be able to have their director nominees included in the company proxy ballot that is sent to all voters. Additionally, unless otherwise in conflict with SEC rules or applicable state law, shareholders would be able to use the Rule 14a-8 shareholder proposal process to modify the company’s nomination procedures or disclosure about elections. The proposed rules relating to shareholder access would be included in a new Rule 14a-11 and the proposed rules relating to shareholder proposals would be included in an amendment to Rule 14a-8(i)(8).

The proposed rules are the first specific steps in realigning the shareholder-corporation relationship that the SEC has proposed in light of the ongoing economic crisis, but SEC Chairman Mary L. Schapiro and other commissioners in recent speeches and press releases have suggested a number of other areas that the SEC is currently examining for further rulemaking enhancements, including:

- Additional executive compensation disclosure focused on management of compensation-related risk and compensation policy with respect to lower-ranking but still highly paid employees (beneath the “named executive officer” level).
- Increased transparency of hedge funds, “dark pools,” credit-default swaps and other previously lightly (or non-) regulated investment or trading vehicles.
- More stringent controls on investment advisers who maintain custody of client assets.
- Harmonization of broker-dealer and investment adviser regulation.



NEW EXCHANGE ACT RULE 14A-11

Application of Proposed Rule

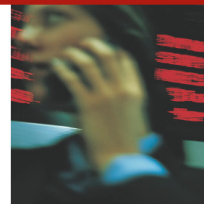
Proposed Rule 14a-11 would apply to all companies subject to the Exchange Act proxy rules (including investment companies registered under Section 8 of the Investment Company Act of 1940), other than companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act. As the rule is currently proposed, a company would be subject to Rule 14a-11 unless applicable state law or a company's governing documents prohibit shareholders from nominating candidates for the board of directors. Where a company's governing documents do prohibit nomination rights, shareholders could seek to eliminate the prohibition through a binding shareholder proposal under the proposed Rule 14a-8(i)(8).

Eligibility to Use Proposed Rule

Only holders of a significant, long-term interest in a company would be able to rely on proposed Rule 14a-11 to seek inclusion of their nominees in company proxy materials. The proposed rule would require that an eligible shareholder or group notify the company of the shareholder nominee(s) on a new form, Schedule 14N, which would include representations concerning the nominating shareholder's or group's eligibility to use Rule 14a-11, as well as disclosure about the nominating shareholder or group and the nominee(s). The shareholder would also file the Schedule 14N with the SEC.

The requirement for a company to include a shareholder nominee or nominees for director in the company's proxy materials and on its form of proxy is based on a minimum ownership threshold, which would be tiered according to company size. Assuming the other conditions of proposed Rule 14a-11 are met, companies would not be able to exclude a shareholder nominee or nominees if the nominating shareholder or group:

- Beneficially owns, as of the date of the shareholder notice on Schedule 14N, either individually or in the aggregate:
 - For "large accelerated filers" and registered investment companies with net assets of \$700 million or more, at least 1 percent of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders);
 - For "accelerated filers" and registered investment companies with net assets of \$75 million or more but less than \$700 million, at least 3 percent of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders); and
 - For "non-accelerated filers" and registered investment companies with net assets of less than \$75 million, at least 5 percent of the company's securities that are entitled to be voted



on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders);

- Has beneficially owned the securities continuously for at least one year as of the date of the shareholder notice on Schedule 14N; and
- Represents that the nominating shareholder or group intends to continue to own those securities through the date of the annual or special meeting.

Shareholders could join with other shareholders to exercise their rights under the proposed rule as a group, but the creation of a group for this purpose could obligate the group members to file Schedule 13D or 13G beneficial ownership reports with the SEC if their aggregate ownership exceeded 5 percent of a class of eligible voting securities.

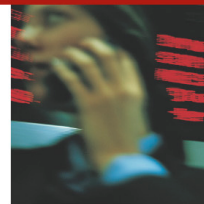
Shareholder Nominee Requirements

Under proposed Rule 14a-11, shareholder nominees themselves would need to meet the following requirements:

- The nominee's candidacy or, if elected, board membership may not violate controlling state law, federal law or rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors), if such violation could not be cured.
- The shareholder nominee must be in compliance with the generally applicable objective independence requirements of a national securities exchange or national securities association that set forth objective standards, but the nominee need not meet independence requirements that would require the board to make a subjective determination about the nominee's independence.
- Neither the nominee nor the nominating shareholder (or any member of the nominating shareholder group, if applicable) may have an agreement with the company regarding the nomination of the nominee.
- A nominating shareholder will not be deemed an "affiliate" of the company under the Securities Act of 1933 or the Exchange Act solely as a result of nominating a director or soliciting for the election of such a director nominee or against a company nominee pursuant to Rule 14a-11.

Maximum Number of Nominees to Be Included in Proxy Materials

As the SEC does not intend for proposed Rule 14a-11 to be available for any shareholder or group seeking to change the control of the issuer or to gain more than a limited number of seats on the board, a company would be required to include no more than one shareholder nominee or the number of nominees that represents 25 percent of the company's board of directors, whichever is greater. Proposed Rule 14a-11 does not specify how the maximum number of shareholder nominees is to be calculated in the context of a classified or staggered board, although that question is one of the matters on which the SEC requests comment.



Application of the Other Proxy Rules to Solicitations By the Nominating Shareholder or Group

As proposed, Rule 14a-11 would permit shareholders to aggregate their securities with other shareholders in order to meet the applicable minimum ownership threshold to nominate a director. Accordingly, it is anticipated that shareholders would, in many instances, engage in communications with other shareholders in an effort to form a nominating shareholder group that would be deemed solicitations under the proxy rules. As such, the proposal includes an exemption from the proxy rules for communications that are made in connection with proposed Rule 14a-11 that are both limited in content and filed with the SEC.

AMENDED EXCHANGE ACT RULE 14A-8(I)(8)

The proposed amendment to Rule 14a-8(i)(8) would enable shareholders, under certain circumstances, to require companies to include in company proxy materials proposals that would amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a-11. The shareholder proposal would have to meet the procedural requirements of Rule 14a-8 and not be subject to one of the substantive exclusions other than the election exclusion (*e.g.*, the proposal could be excluded if the shareholder proponent did not meet the ownership threshold under Rule 14a-8).

As proposed, except as discussed in the next paragraph, revised Rule 14a-8(i)(8) would not restrict the types of amendments that a shareholder could propose to a company's governing documents to address the company's provisions regarding nomination procedures or disclosures related to shareholder nominations, although any such proposals that conflict with proposed Rule 14a-11 or state law could be excluded.

The proposed amendment, under limited circumstances largely consistent with prior SEC staff interpretations, would allow companies to exclude from company proxy materials proposals related to particular elections and nominations for director. In general, these exclusion rights would limit a proponent's ability to use the Rule 14a-8 process to campaign against a particular director or nominee or to make an end-run around the proposed Rule 14a-11 process.

FOR MORE INFORMATION

Please contact **Thomas A. Aldrich, David A. Neuhardt, J. Shane Starkey** or any member of our **Corporate Transactions & Securities** practice group for more information.

If you do not wish to receive future communications by email, please reply to this email with "unsubscribe" in the subject line.

This advisory bulletin may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.

© 2009 THOMPSON HINE LLP. ALL RIGHTS RESERVED.