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PUBLIC COMPANY UPDATE

Proxy Access: Initial Considerations for Public Companies

On August 25, the SEC adopted final “proxy access” rules for the inclusion of director candidates nominated by shareholders in company proxy statements. The rules enable any shareholder or group of shareholders that has collectively owned at least 3 percent of a company’s voting stock for at least three years to include their board candidates in the company’s proxy statement and on the company’s proxy card. The rules also permit shareholders to submit proposals that add or enhance shareholder access provisions in a company’s bylaws for inclusion in a company’s proxy materials under Rule 14a-8.

The rules are expected to become effective in early November 2010. Below is an overview of issues that public companies should consider in preparing for the 2011 proxy season.

DELAYED EFFECTIVENESS FOR SMALLER REPORTING COMPANIES

Smaller reporting companies will have a three-year reprieve from new Rule 14a-11 (nominations by shareholders), but should immediately be prepared to address Rule 14a-8 amendments (shareholder proxy access proposals).

TIMING OF NOMINATIONS

Under the new rules, shareholders must submit their director nominations for inclusion in a company’s proxy statement no earlier than 150 days, and no later than 120 days, prior to the anniversary of the mailing date of its prior year’s proxy materials. If this window closes before the new rules become effective, a company will not be required to accept shareholder nominations for the next proxy season. For many companies, however, this window period could be open soon—if not immediately—after the new rules become effective in November. Some companies will therefore need to be prepared to receive shareholder nominations as early as this November.

MINIMUM DIRECTOR QUALIFICATIONS

Nominating shareholders will be required to disclose in their Schedule 14N whether their nominees meet the minimum director qualifications included in the company’s articles or bylaws. Although the failure to satisfy the director qualification requirements will not be a basis for excluding a shareholder nominee, reference to a company’s minimum director qualifications will be an important disclosure, particularly for a company opposing a director nomination. Companies should examine their governance guidelines, charters and nomination policies and consider expanding their director qualification requirements. Companies should also consider including their minimum director qualifications in a stand-alone document posted on their website. Companies



may also want to evaluate whether their director qualification requirements should be included in their bylaws, which would require nominating shareholders to address these qualifications in their Schedule 14N filings.

ADVANCE NOTICE PROVISIONS—TIMING REQUIREMENTS

Companies should consider aligning the notice period in the advance notice provisions contained in their bylaws with the notice period under the proxy access rules. This will enable a company to consider all shareholder nominations, and have access to all relevant information, at the same time.

ADVANCE NOTICE PROVISIONS—SUBSTANTIVE PROVISIONS

Companies should review and strengthen advance notice provisions in their bylaws, including updating these provisions to address all recent developments. Although the proxy access rules do not permit companies to impose any additional restrictions on shareholder nominations made under Rule 14a-11, advance notice provisions will apply to shareholder nominations made outside of Rule 14a-11 (e.g., in a proxy contest where a shareholder mails out its own proxy materials). Companies should also revise their advance notice provisions to avoid conflicts with Rule 14a-11 (e.g., eliminating statements that the advance notice provisions provide the sole avenue for shareholders to nominate directors).

BOARD VACANCIES

Companies should ensure that their boards do not have any vacant seats. If a director has recently resigned or a company otherwise has board vacancies, the board should immediately fill these vacancies or reduce the size of the board. An empty seat will be counted in calculating the 25 percent of a board's seats that may be filled by shareholders under the new rules. In addition, in soliciting shareholder support for board nominees, the board's case may often be stronger for an incumbent director than a new board nominee.

INVESTOR RELATIONS CHANGES

Companies should consider their investor relations activities and review their shareholder bases, and should consider reaching out to their largest shareholders before the new rules take effect. Note, however, that if a company commences discussions with a shareholder regarding including the shareholder's nominee in the company's proxy statement before the shareholder files a Schedule 14N, the shareholder's nominee cannot be counted against the limit of nominees who can be appointed by shareholders pursuant to the new rules.



NEW PROXY STATEMENT DISCLOSURE

All proxy statements will need to disclose the relevant dates for the submission of shareholder nominations of directors for inclusion in the company's proxy statement for the company's next annual meeting, as required by amended Rule 14a-4.

NEW FORM 8-K REQUIREMENT

Companies that intend to hold an annual meeting at a different time than last year should note the SEC's new Form 8-K requirement. If the date of the company's annual meeting is changed by more than 30 calendar days from the date of the prior year's meeting, the company must file a Form 8-K disclosing the date by which shareholders must submit director nominations for inclusion in the company's proxy materials, which must be at least a reasonable time before the mailing of the company's proxy materials. Companies should add this new Form 8-K filing requirement to their annual meeting checklists.

FOR MORE INFORMATION

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