

SECURITIES ALERT

SEC UNVEILS PROPOSAL TO GIVE SHAREHOLDERS PROXY ACCESS

At its open meeting on May 20, 2009, the Securities and Exchange Commission (SEC) unveiled a proposal that would allow shareholders to have their director nominees included in company proxy materials. Under the proposal, a shareholder (or group of shareholders) who owns at least 1 percent of the stock of a company that is a large accelerated filer (or 3 percent and 5 percent for smaller companies) and who has held the shares for at least one year can use management's proxy materials for the nomination of up to 25 percent of the company's board of directors, provided the shareholder is not seeking a change of control of the company. The controversial proposal passed by a 3-2 vote of the commissioners, who voted along party lines. If adopted, the proposal will dramatically change the landscape for the election of directors of public companies.

The SEC has not yet published the proposal, which will be subject to a 60-day comment period after its publication in the *Federal Register*. We summarize below the key features of the proposal as announced at the May 20 open meeting. We will provide a more detailed analysis of the proposal and its implications for public companies after the proposal's publication.

REQUIREMENTS FOR PROXY ACCESS

Under the proposal, shareholders must satisfy several requirements in order to have their director candidates included in the company's proxy materials:

Share Ownership

The SEC's proposal will give shareholders access to include their director nominees in company proxy materials based on a sliding scale of stock ownership in relation to the size of the company. For all companies, the

shareholder must have held the shares for at least one year, and shareholders will be able to aggregate their holdings in order to meet the threshold requirements.

Type of Company	Percentage of Stock That Must Be Owned At Least One Year
Large Accelerated Filer ¹	1 percent
Accelerated Filer ²	3 percent
Non-accelerated Filer	5 percent

Number of Nominees

A shareholder (or group of shareholders) who meets the stock ownership requirement would be eligible to nominate at least one director but no more than 25 percent of a board's total number of directors. A company will not be required to include in its proxy materials shareholder director nominees representing more than 25 percent of its directors. If the company receives more shareholder director nominees than it is required to include, the nominees to be included would be those put forward by the nominating shareholder or group that first provides timely notice to the company.

Shareholder Intent

Shareholders seeking to include their director nominees in the company's proxy materials must certify that they are not seeking a change of control of the company or more than minority representation on the board of directors.

Nominee Requirements

Only shareholder nominees who satisfy the objective independence standards of the national securities exchange on which the company's shares are traded will be eligible for inclusion in company proxy materials. Also, a nominating shareholder cannot have any direct or indirect agreement with the company regarding the nomination of the nominees.

¹ A large accelerated filer is an issuer that had an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of \$700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter, has been subject to the requirements of Section 13(a) or 15(d) of the Securities Exchange Act for at least 12 months and has filed at least one annual report with the SEC.

² An accelerated filer is an issuer that otherwise meets the requirements for a large accelerated filer except that its public float is \$75 million or more but less than \$700 million, and it is not eligible to file reports as a smaller reporting company.

Disclosure and Filing Requirements

A nominating shareholder will be required to file with the SEC and provide to the company a new Schedule 14N that, among other things, will require disclosure of the amount and percentage of securities owned by the nominating shareholder, the length of ownership and the intent to continue to hold the securities through the date of the meeting, as well as information regarding the shareholder director nominees. The Schedule 14N must be filed at least 120 days before the anniversary of the date of release of the prior year's proxy materials (or the deadline set forth in the company's advance notice bylaws).

The company's proxy materials will include information concerning the nominating shareholder and its nominees that is similar to the disclosure currently required in contested elections. A nominating shareholder will be liable for any false or misleading statements in information provided to the company that is included in the company's proxy statement, and the company will not be liable for such information unless it knows or has reason to know the information is false.

NEW PROXY SOLICITATION EXEMPTIONS

The SEC's proposal includes new exemptions from the proxy solicitation rules for solicitations made by shareholders that are seeking to form a nominating shareholder group and for solicitations by a nominating shareholder or group in support of a shareholder director nominee. In addition, the rules related to Schedule 13G would be amended to clarify that a beneficial owner who acquires or holds a company's securities in connection with a nomination under the procedure would not lose Schedule 13G eligibility solely as a result of making a nomination, soliciting in favor of a nominee or having a nominee elected to the board under the proposed new rules.

CHANGES TO SHAREHOLDER PROPOSAL RULE

Rule 14a-8 currently allows companies to omit from their proxy materials shareholder proposals to amend the company's bylaws regarding director election matters. The SEC proposes to amend this rule to require companies to include any shareholder proposals concerning proposals to amend, or requests to amend, a company's governing documents concerning director nomination procedures or other director nomination disclosure provisions that do not conflict with the SEC's rules. Only shareholders who meet the eligibility requirements of Rule 14a-8 (which require that the shareholder own at least \$2,000 in market value or 1 percent, whichever is less, of the company's shares for at least one year) could submit such proposals.

Presumably, the amendment to Rule 14a-8 will facilitate shareholder proposals to allow proxy access on terms that are less stringent than the SEC requirements, as well as shareholder proposals

to amend bylaw provisions relating to procedural or disclosure requirements in election contests where the shareholder is using its own proxy materials and not seeking to have its nominees included in management's proxy materials.

CONCLUSION

As discussed above, the proposal will be subject to a 60-day comment period after its publication in the *Federal Register*. The proposal is likely to garner a significant number of comments. Several business groups have already denounced the proposal and questioned the SEC's ability to preempt state law in this area, while certain institutional investor groups have applauded the proposal as long overdue.

CONTACT INFORMATION

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