
SECURITIES LAW UPDATE August 25, 2010

SEC APPROVES DIRECTOR NOMINATIONS BY SHAREHOLDERS

Capping years of effort and spurred by the adoption of the Dodd-Franks Act in July 2010, a sharply divided SEC today narrowly adopted rules providing that shareholders have the right to nominate directors to the Board of Directors of public companies. In a rare public display of a disagreement, the Commission voted in favor of the new rules on a 3-2 vote, along party lines, with the two Republican commissioners mounting an unusual and spirited public dissent.

The right, centers around new Rule 14a-11, applies to all companies subject to the Proxy Rules and registered investment companies. The new Rule will apply to Annual Meetings starting in 2011, other than for smaller reporting companies, for whom implementation is delayed three years.

Under the new Rule, one or more shareholders who have held at least 3% of the voting power of a company's securities continuously for at least three years may nominate the greater of one director or 25% of the directors up for election at an annual meeting.

A nominating shareholder (or group) must file a Notice of Intent to Nominate on new Form 14N, providing information about the identity of the nominating shareholder (or group), the director-nominee(s) and certain other technical information. A company's right to challenge or exclude shareholder-nominated directors is virtually eliminated; nonetheless, if a company believes that a shareholder-nominated director is properly excludable from the company's proxy materials, it can formally notify the SEC and defend its position. The SEC will provide expedited no action advice on such disputes, much in the way that the SEC currently handles shareholder proposals and challenges thereto.

The final Rule does provide some relief from the original SEC proposal. The SEC had initially proposed a 1% threshold and one-year holding period for larger companies, which has been increased to 3% and three years as adopted today. On the other hand, the SEC proposal had required a 5% threshold for smaller reporting companies and this has been decreased to the same 3% threshold, although implementation of new Rule 14a-11 for smaller reporting companies has been delayed for three years.

Despite the seemingly straightforward nature of the new Rule, areas where questions may arise include:

- How to calculate nominee limits for companies with classified boards, where less than the full board is elected in any given year;
- Advance notice requirements for nominating shareholders (or groups) to file a Form 14N and start the formal process of nominating directors;
- Shareholder director-nominees who do not meet a company's previously disclosed minimum qualification standards for directors;
- The possible impact on filing obligations on Schedule 13D or 13G for shareholder groups that are formed for the purpose of meeting the 3% threshold to nominate a director;
- The possible impact on Section 16 obligations (Forms 3 and 4, and the prohibition on short-swing profits) for shareholder groups that are formed for the purpose of meeting the 3% threshold to nominate a director;
- Possible early implantation of the new Rule for companies whose fiscal years end before December 31, 2010; and
- Amendments to a company's bylaws providing for shareholder nominations under state corporate law

If you have questions regarding the rights and obligations of reporting companies or nominating shareholders (or groups), practice tips or specific fact patterns, please contact:

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