

PUBLICATION

14a-8 Amendments Bring Change to the 2012 Proxy Season

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Background

On September 6, 2011, Securities and Exchange Commission (SEC) chairman Mary L. Schapiro announced that the SEC would not seek a rehearing or Supreme Court review of a recent decision by the United States Court of Appeals for the D.C. Circuit to vacate SEC Rule 14a-11, which was recently enacted by the SEC as a way to ensure more proxy access rights for shareholders of companies. Rule 14a-11 required that public companies provide shareholders with proxy access for shareholder proposed director nominations, mandating companies to include one or more director candidates in their proxy materials if certain requirements were satisfied. Immediately after its implementation, Rule 14a-11 was challenged by the U.S. Chamber of Commerce, and the SEC voluntarily stayed implementation of the Rule, as well as other proxy access rules and rule amendments unrelated to the litigation, while the Rule 14a-11 litigation was pending. (For more information on the Rule 14a-11 litigation, [click here](#).)

Amendments to SEC Rule 14a-8, which allow shareholders to propose procedures for proxy access in a company's proxy statement (the Amendments), were among those rules that were stayed, but were not part of the litigation. As a result of the stay, the Amendments had no effect on companies during the most recent proxy season. However, when the Court of Appeals decision became final on September 14, 2011, the stay on the Amendments was automatically lifted and the SEC announced that the Amendments would become effective upon publication in the Federal Register.

The 14a-8 Amendments

Prior to the Amendments, Rule 14a-8 allowed a company to exclude from its proxy statement any proposal that related to the nomination of or the procedure for nominating directors. The Amendments remove that broad restriction and replace it with a narrower exclusion. The Amendments now allow a company to exclude a proposal regarding director elections only if the proposal:

- would disqualify a nominee who is standing for election;
- would remove a director from office before his or her term expired;
- questions the competence, business judgment, or character of one or more nominees or directors;
- seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
- otherwise could affect the outcome of the upcoming election of directors.

Under the Amendments, shareholders who meet the eligibility requirements of Rule 14a-8 (namely, those shareholders who have owned, for at least one year, at least \$2,000 in market value, or 1%, of the company's securities entitled to vote on the proposal) may submit a conforming proposal. A shareholder who meets those basic requirements will be able to submit his or her proxy access proposal for inclusion in the company's proxy materials. The Amendments therefore provide for the possibility of company-by-company proxy access standards, rather than the uniform access rules proposed in the vacated Rule 14a-11.

Impact of the Amendments

Rule 14a-8 requires that proposals be submitted not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. For many public companies, the deadline will fall somewhere between November 2011 and January 2012. Thus, the potential immediate impact of the Amendments becoming effective is that the 2012 proxy season may have companies seeing a flurry of shareholder proposals. Several shareholder advocacy groups have advocated use of the new rules; however, shareholders may choose to use the Amendments slowly and observe how companies react to the Amendments before taking any action.

What Should Companies Do?

First and foremost, companies should be aware that activist shareholders may use the Amendments to submit proxy access proposals starting in the 2012 proxy season. Most companies should be able to watch the landscape develop before having to respond to proposals. However, companies should begin to consider what response they will have in the case that they do receive a proposal.

Companies that believe they may be the target of a proxy access proposal should consider several things. First, the company should analyze the likely success of the proposal. The company can do this by assessing its shareholder base and voting history to determine how likely a proposal is to gain approval. Second, the company should consider preempting a shareholder proposal by instituting a proxy access mechanism of its own. The company may be successful in excluding a shareholder proposal by implementing its own proxy access rule and then arguing that it may exclude the shareholder proposal because per Rule 14a-8(i)(10) the company has already substantially implemented the shareholder's proposal. Third, the company should be aware of other procedural (although likely unsuccessful) or substantive ways to block the proposal. This may include the shareholder eligibility or procedural requirements, as well as the proposal conflicting with state law or being vague or misleading.

It is unclear when and how many companies will be affected by the Amendments. Nonetheless, the 14a-8 Amendments are assured to change the landscape of proxy access and companies need to consider how they will respond.

If you have questions about the Amendments or any other SEC rules, please contact your Baker Donelson attorney.