

PUBLICATION

SEC Proposes Proxy Access Amendments to Proxy Rules

June 3, 2009

On May 20, 2009, the Securities and Exchange Commission (SEC) voted to publish certain proposed amendments to the proxy rules, known as proxy access rules, that would enable shareholders to nominate candidates for a company's board of directors and have their nominees included in the proxy materials that the company distributes to its shareholders.

Under current SEC rules, a shareholder must conduct an expensive proxy contest and distribute its own proxy card in order to nominate candidates to the board. The SEC's proposed amendments, summarized below, would make it easier for shareholders to nominate corporate directors.

The SEC previously proposed proxy access rules in 2003 and 2007, each of which resulted in no change to the shareholder nomination process. In light of the current economy, however, the SEC voted 3-2 to propose proxy access rules a third time. The SEC decided to reconsider proxy access rules as a result of concerns that corporate boards are not being held accountable to shareholders for making decisions that may not be in the best interests of shareholders in this current economic climate. Advocates of proxy access rules argue that proxy access will lead corporate boards to be more accountable to shareholders by giving shareholders a say in the nomination process. Opponents argue that proxy access rules will lead to a divided, ineffective board and will give too much influence to activist shareholders who may not act in the best interest of all shareholders.

The key provisions of the SEC's proposed proxy access rules are summarized below:

- Applicability: The proposed proxy access rules would apply to all '34 Act reporting companies, including investment companies, other than debt-only issuers.
- Eligible Shareholders: The nominating shareholders must meet minimum ownership requirements, which vary depending on the size of the company:
 - Shareholders of a large accelerated filer or a registered investment company with net assets of \$700 million or more must own at least 1% of the voting securities;
 - Shareholders of an accelerated filer or a registered investment company with net assets of at least \$75 million but less than \$700 million must own at least 3% of the voting securities; and
 - Shareholders of a non-accelerated filer or a registered investment company with net assets of less than \$75 million must own at least 5% of the voting securities.
- Nominee Requirements:
 - The shareholder's nominee must satisfy the independence requirements of the applicable national securities exchange or association; and
 - The nominating shareholder cannot have any agreement with the company regarding the proposed nominee's nomination to the board.
- New Schedule 14N: The nominating shareholder must file a new Schedule 14N with the SEC and submit Schedule 14N to the company, which would require disclosure of the nominating shareholder's beneficial ownership percentage and a certification that the nominating shareholder is

not intending to change the control of the company and that his or her election will not result in more than a minority representation on the board.

- Maximum board representation: Shareholders of a company may nominate the greater of one nominee or the number of nominees which equals no more than 25% of the board of directors each year. If the number of shareholder nominees submitted to the company in a given year exceeds the maximum number of shareholder nominees, the company need only include the nominations received first in time.
- Amendments to Rule 14a-8(i)(8): The proposed rules would amend Rule 14a-8(i)(8) to narrow the exclusion for shareholder proposals that relate to an election or nomination, allowing shareholders to propose amendments to a company's governing documents regarding the company's nomination procedures and nomination disclosure provisions.

The full text of the proposed rules has not yet been published. Public comments are due 60 days after the proposed rules are published in the Federal Register.

If you would like to receive more information regarding this matter, please contact your Baker Donelson attorney.