

August 25, 2010

## SEC Approves Final Proxy Access Rules

At today's open meeting, the Securities and Exchange Commission, in a 3-2 vote split along party lines, approved final rules that create, among other things, a federally mandated procedure to allow shareholders access to a company's proxy materials for the purpose of nominating a short-slate of directors for election in opposition to the nominees proposed by the board. Proxy access was originally proposed by the SEC in 2003, then repropoed in 2007 and 2009, and has now been adopted under explicit authority granted to the SEC by the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act. We set forth below some of the key provisions of the final rules that were highlighted at the open meeting.

- *3% ownership threshold.* Among the most significant changes to the final rules from the proposed rules is to the ownership requirements that shareholders must meet in order to gain proxy access. While the proposed rules had a stepped ownership requirement of 1%, 3% or 5% depending on whether the company was a large accelerated, accelerated or non-accelerated filer, respectively, the final rules have a flat requirement that any shareholder or group of shareholders who wishes to use these proxy access procedures must beneficially own at least 3% of the voting power of the shares entitled to vote on the election of directors, regardless of the size of the issuer. The final rules also include guidance on how to calculate ownership for the purposes of meeting the 3% threshold, and specify, for example, that borrowed stock and stock that is sold short may not be counted towards these requirements. Stock that is owned by the shareholder, but that has been loaned to others, may be counted if such loaned stock can and will be recalled upon notification that the shareholder's nominees will be included in the company's proxy materials.
- *Three-year holding period.* Nominating shareholders must continuously own the requisite shares for at least three years as of the date that they provide a notice of nomination to the company. The proposing release had provided for a one-year holding period.
- *No control intent; short slates only.* The final rules contain the proposed rules' prohibitions against the use of these proxy access procedures by shareholders who have acquired or hold their shares for the purpose or with the effect of changing control of the company or gaining more than a limited number of board seats. The final rules limit the number of shareholder nominees to be included in a company's proxy materials to the greater of one nominee or up to 25% of its board membership. Shareholder nominations will be accepted by the company starting with the nominees of the largest shareholders first, instead of on a "first come, first served" basis as had been proposed.
- *Nominee qualifications.* The eligibility requirements for shareholder nominees are being adopted largely as proposed (e.g., the nominees' candidacy and board membership must not violate state or federal law, they must satisfy the objective criteria for independence

set forth by the applicable stock exchange and there must be no relationship or agreement between the nominees or the nominating shareholders and the company regarding the nomination of the nominees). The final rules add a requirement for the nominating shareholders to state whether, to the best of their knowledge, their nominees meet any director qualifications set forth in the company's governing documents.

- *No opting-out.* As was proposed, while companies may adopt more expansive proxy access procedures, they may not "opt-out" of the SEC's procedures by adopting any more restrictive or conflicting procedures.
- *Effective dates and companies affected.* The final rules will be effective 60 days after their publication in the Federal Register, and they specify that shareholders must submit a notice of nomination no later than 120 days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting. Thus, as was noted at the open meeting, if the rules are effective on November 1, 2010, then they will apply to companies with a proxy mailing date of no earlier than March 1, 2011. Smaller reporting companies with less than \$75 million in market capitalization will not have to comply with these requirements for three years. Because foreign private issuers are not subject to the SEC's proxy rules, these rules would not apply to them. Further, these procedures would not apply to companies subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act.

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For a copy of the final rules, see <http://sec.gov/rules/final/2010/33-9136.pdf> . We will provide a more detailed description of the final rules in a separate memorandum. This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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