



LEGAL ALERT

SEC Adopts New Rules Providing Proxy Access for Shareholders in 2011 Annual Meeting Proxies

September 16, 2010

On August 25, 2010, the SEC adopted proxy access rules requiring public companies to include director nominations from qualified shareholders or shareholder groups in a company's annual meeting proxy materials. In addition to reading the summary of the proxy access requirements below, you may wish to consider taking the following actions:

1. Review and revise your bylaws regarding director nominations to be consistent with the new rules on proxy access;
2. Review and revise your director nomination procedures in the Nominating and Corporate Governance Committee charter and Corporate Governance Guidelines; and
3. Revise your annual meeting timetables to take into account that eligible shareholders may invoke the proxy access rules.

When do the proxy access rules take effect?

The proxy access rules generally will apply to all annual shareholder meetings for public companies beginning in 2012 and will apply to most annual shareholder meetings held in 2011. If the anniversary of the mailing date of the 2010 annual meeting occurs during mid-March or later, the company will be subject to the proxy access rules for its 2011 annual meeting. The precise date will be determined upon publication of the rule in the Federal Register which has yet to occur.

The proxy access rules do not take effect for smaller reporting companies (generally those with a public float of less than \$75 million) until three years after the effective date of the rule.

What shareholders may nominate a director under the proxy access rules?

Shareholders or shareholder groups who hold at least three percent of a company's voting power and have continuously held the required amount of securities for at least three years may submit notice to a company that it intends to nominate a director under the proxy access rules. The nominating shareholders also must file the notice with the SEC. The nominating shareholders must certify as to ownership and continue to hold the requisite shares through the date of the shareholders' meeting. Furthermore, the nominating shareholders may not use the proxy access rules with a purpose to effect a change in control of a company or as part of an effort to gain a number of seats that exceed the limitations under the proxy rules.

However, shareholders may still use proxy contest rules, which remain unchanged, to effect a change in control or elect other directors.

Is there a nomination deadline?

Yes. Qualified shareholders or shareholder groups must provide notice to the company of the nomination and file the notice with the SEC no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting.

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For example, if a company's mailing date for the prior year was March 1, then the company must receive notice, and the notice must be filed with the SEC, between October 2 and November 1 for the nomination to be timely for the upcoming annual meeting of shareholders.

How many nominees may shareholders submit under the proxy access rules?

The maximum number of proxy access nominees that a company is required to include in its proxy materials is the greater of one nominee or 25% of the total board seats rounded down to the nearest whole number. For companies with staggered boards, the 25% calculation is still based on total board seats.

Companies must include nominees from multiple shareholders or shareholder groups to the extent the total nominations do not exceed the limit under the proxy access rules. If more than one shareholder or shareholder group submits nominations which together exceed the maximum limit under the proxy rules, priority is given to the shareholder or shareholder group with the highest voting power.

What are the eligibility requirements for proxy access director nominees?

Nominees are eligible so long as their nomination or board membership would not violate federal or state law or applicable national securities exchange requirements. A nominee also must meet the criteria of an independent director under the applicable national securities exchange requirements. The nominee need not be independent from the nominating shareholder or shareholder group.

What is included in the notice?

The notice must include disclosures relating to the nominating shareholder's or shareholder group's interest in the company, length of ownership, and eligibility under the proxy rules. The notice also would include disclosure about the nominating shareholder or shareholder group and the nominee for director, as well as disclosure regarding the nature and extent of relationships between the nominating shareholder or shareholder group and nominee or nominees and the company. The disclosure provided by the nominating shareholder or shareholder group would be similar to the disclosure currently required in a contested election and would be included by the company in its proxy materials.

The nominating shareholder or shareholder group may include in the company's proxy statement a statement of support of their nominees which may not exceed 500 words.

To what extent is a company liable for statements made by nominating shareholders or shareholder groups that are included in the company's proxy statement?

Companies will not be responsible for the accuracy of the information provided by the nominating shareholder or shareholder groups that is included in the company's proxy statement. The nominating shareholder or shareholder group, as well as the proxy access nominees, will be subject to federal securities laws for materially misleading statements or omissions made in filings related to the proxy access nominations. Companies will be liable to the extent such information is incorporated by reference into other filings made by the company.

May a company exclude a shareholder proposal that relates to the election of directors?

Generally no. The new rules no longer permit exclusion of shareholder proposals seeking to make proxy access more available to shareholders, such as lowering required ownership levels or shortening required holding periods. However, companies may exclude proposals that seek to:

1. Disqualify a nominee standing for election;
2. Remove a director prior to the expiration of his or her term;
3. Question the competence, business judgment, or character of a nominee or director;
4. Include a specific individual in the company's proxy materials for election to the board of directors; or
5. Otherwise affect the outcome of the upcoming election.

The following page contains the required response timeline that should be followed if your company receives a nomination under the new proxy access rules. If you have questions regarding these rules or your company's corporate governance programs, please contact any of the following by phone at 717-731-1700 or by email:

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Timing Requirements Should a Company Receive a Director Nomination Under the New Proxy Access Rules

Due Date	Action Required
No earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting.	Nominating shareholder or shareholder group must provide notice on Schedule 14N to the company and file the Schedule 14N with the SEC.
No later than 14 calendar days after the close of the window period for submission of nominations.	Company must notify the nominating shareholder or shareholder group (or its authorized representative) of any determination not to include the nominee or nominees.
No later than 14 calendar days after the nominating shareholder's or shareholder group's receipt of the company's deficiency notice.	Nominating shareholder or shareholder group must respond to the company's deficiency notice and, where applicable, cure any defects in the nomination
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the SEC.	Company must provide notice of its intent to exclude the nominating shareholder's or shareholder group's nominee or nominees and the basis for its determination to the SEC and, if desired, seek a no-action letter from the staff with regard to its determination.
No later than 14 calendar days after the nominating shareholder's or shareholder group's receipt of the company's notice to the SEC.	Nominating shareholder or shareholder group may submit a response to the company's notice to the SEC staff.
As soon as practicable.	If requested by the company, SEC staff would, at its discretion, provide an informal statement of its views to the company and the nominating shareholder or shareholder group.
Promptly following receipt of the staff's informal statement of its views.	Company must provide notice to the nominating shareholder or shareholder group stating whether it will include or exclude the nominee.