

## Rule 14a-8 Amendments Permitting Shareholder Proxy Access Proposals are Now Effective

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On September 20, 2011, the SEC's amendments to Rule 14a-8 became effective upon publication in the Federal Register. The amendments will require companies to include in their proxy materials, under certain circumstances, shareholder proposals that seek to establish a procedure for the inclusion of one or more director nominees in the company's proxy materials.

The amendments were originally adopted in August 2010 in conjunction with the adoption of Rule 14a-11, the SEC's universal proxy access rules. The amendments were subsequently stayed by the SEC in October 2010 during litigation over Rule 14a-11. In July 2011, the U.S. Court of Appeals for the D.C. Circuit vacated Rule 14a-11, holding that the SEC violated the Administrative Procedure Act when adopting the universal proxy access rules. The lawsuit did not, however, challenge the amendments to Rule 14a-8, and the stay was lifted following conclusion of the litigation.

Prior to the amendments, Rule 14a-8(i)(8) permitted companies to exclude from their proxy materials shareholder proposals relating to director nominations or elections. Following the amendments, companies will no longer be able to rely on Rule 14a-8(i)(8) to exclude shareholder proposals seeking to establish a procedure in a company's governing documents for the inclusion of one or more shareholder nominees for director in the company's proxy materials.

The amendments codify various SEC staff interpretations by permitting companies to exclude a shareholder proposal that:

- would disqualify a nominee who is standing for election;
- would remove a director before his or her term has 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 upcoming election of directors.

Shareholders seeking to introduce a proxy access proposal must meet the procedural requirements of Rule 14a-8, including the requirement that the shareholder has continuously held for at least one year the lesser of \$2,000 or 1% of the company's voting securities.

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Rule 14a-8 requires that a proposal be received by the company not less than 120 days before the first anniversary of the mailing date of the previous year's proxy materials (or, if the meeting date has changed by more than 30 days, within a reasonable time before a company begins printing proxy materials). For most calendar-year companies, the deadline for the 2012 proxy season will fall between November 2011 and January 2012, meaning that eligible shareholders will have time to submit proxy access proposals for the upcoming proxy season.

It is too early to predict whether proxy access proposals under Rule 14a-8 will become popular tools of activist or institutional shareholders. Now that the SEC's universal proxy access rules have been vacated, shareholders may attempt to implement proxy access procedures through bylaw amendments more aggressively than might otherwise have been the case. The amendments to Rule 14a-8 may actually have a greater impact on director elections because (1) the shareholder eligibility requirements are more easily met under Rule 14a-8 than under Rule 14a-11 and (2) proposals submitted under Rule 14a-8 may have lower proxy access thresholds (*i.e.*, less stringent ownership, notice and filing requirements) than those imposed by Rule 14a-11.

Given the uncertainty associated with the amendments, companies should prepare for the possibility that they will receive proxy access proposals as early as the upcoming proxy season. Action items that companies may want to consider include:

- reviewing their bylaws to ensure that they establish effective procedures for shareholder nominations of directors;
- educating nominating committees and other board members about the possibility of shareholder proxy access proposals;
- engaging with shareholders to identify and address any concerns related to director nominations, director performance and other governance matters;
- discussing whether they should proactively implement their own proxy access mechanism that contains higher thresholds or other restrictions than those likely to be proposed by activists;
- assessing their shareholder base and investor relations strategies and any recommendations of proxy advisory firms to judge the prospects for a proposal's success; and
- preparing a strategy for defeating a proposal in the event they are unable to exclude the proposal or convince the proponent to withdraw the proposal.

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