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SEC Delays Until 2010 Proposed Amendments Facilitating Shareholder Nominations of Directors

The U.S. Securities and Exchange Commission (the "SEC") recently said that it will delay until 2010 its vote on amendments, proposed earlier this year, to facilitate shareholders' rights to nominate directors.¹ As a result, it is unlikely any of the proposed amendments will apply during the beginning of the 2010 proxy season.

Two-Pronged Approach

The proposed amendments would provide a two-pronged approach to increasing shareholders' access to public companies' proxy materials. The first prong, proposed Rule 14a-11, would allow shareholders of a company subject to the SEC's proxy rules to include a short slate of director nominees in the proxy materials prepared by the company.² To take advantage of Rule 14a-11, shareholders would be required to hold, for at least one year, a minimum percentage of the company's outstanding stock, ranging from one percent of the largest companies to at least five percent of smaller companies. This requirement could be satisfied by a group of shareholders acting in concert.

The second prong is found in proposed amendments to Rule 14a-8, which currently allows a company to exclude from the company's proxy materials shareholder proposals related to the nomination or election of directors or a procedure for the nomination or election of directors. The proposed amendment would prevent exclusion based solely on the grounds that the proposal requests an amendment to the company's governing documents regarding director nomination.

Delayed SEC Vote

Although it was widely believed that the SEC might act on the proposed amendments as early as November of this year, SEC Chairman Mary Schapiro recently commented that "it is my hope to finalize the rules early in the new year."³ Given the significant impact of the proposed amendments and the time required to prepare and distribute proxy materials, it is unlikely that rules enacted in 2010 will apply to the beginning of the 2010 proxy season. SEC Commissioner Elisse B. Walter has remarked, "Although I can't give you a definite date, I expect we will likely move forward and consider an adopting release sometime in early 2010. This means of course that final rules are not likely to be in place at the beginning of next year's proxy season."⁴

There are several reasons for the SEC's delaying until next year its adoption of the proposed rules. First, the SEC received over 500 comment letters in response to the proposed amendments. Chairman Schapiro indicated that

¹ For additional information on the proposed amendments see *SEC Proposes Rule Amendments to Facilitate Rights of Shareholders to Nominate Directors*, available at http://www.haynesboone.com/sec_proposes_rule_amendments_to_facilitate/.

² If adopted as originally proposed, Rule 14a-11 would apply except to the extent applicable state law or a company's governing documents provide otherwise.

³ *SEC won't issue shareholder access rules this year*, by Marcy Gordon, available at <http://www.businessweek.com/ap/financialnews/D9B389580.htm>.

⁴ *SEC Rulemaking—"Advancing the Law" to Protect Investors*, Address at the 48th Annual Corporate Counsel Institute by Commissioner Elisse B. Walter (Oct. 2, 2009), available at <http://www.sec.gov/news/speech/2009/spch100209ebw.htm>.

the SEC wants to ensure its rules are fair and accurate, which will require more time than the SEC may have originally assumed.

In addition, waiting until after the busiest portion of the 2010 proxy season will provide time for both companies and the SEC to prepare to implement the final rules. Many advocates have argued in favor of such a delay to allow companies an opportunity to deal with other issues in the upcoming proxy season, such as SEC proposed changes to executive compensation and risk disclosures and an amendment to New York Stock Exchange Rule 452 on broker non-votes.⁵

Finally, the SEC may be delaying action on the proposed amendments in anticipation of litigation—by the U.S. Chamber of Commerce and others—over the authority of the SEC to amend the proxy rules as proposed.⁶ Although the SEC has authority to create rules and regulations pertaining to the solicitation of proxies, some have suggested that the proposed amendments, particularly Rule 14a-11, create a substantive right and conflict with corporate rights under state law. Legislation proposed by U.S. Senator Charles Schumer (D-NY) would give the SEC authority to enact the proposed amendments.⁷ If enacted, a federal statute supporting the proposed proxy rule amendments could add to the complexity of litigation about federal preemption of state corporation laws.

Likelihood of Increased Proxy Access

Regardless of the reason for the delay in voting on the proposed rules, some form of increased shareholder proxy access seems inevitable. The SEC proposed greater access in 2003 and 2007, and increased proxy access has support in Congress. It remains to be seen whether mandatory proxy access will result from the current proxy reform, but Chairman Schapiro has remarked that she is “committed to bringing final rules before the [commissioners] regarding the ability of shareholders to nominate directors.”

⁵ For additional information on proposed changes to executive compensation and risk disclosures see *SEC Proposes Rule Amendments to Executive Compensation and Corporate Governance Disclosure*, available at <http://www.haynesboone.com/sec-proposes-rule-amendments-to-executive-compensation-and-corporate-governance-disclosure-08-07-2009/>; for additional information on the recent amendment to New York Stock Exchange Rule 452 see *SEC Approves NYSE Amendments to Eliminate Broker Discretionary Voting in Uncontested Director Elections*, available at http://www.haynesboone.com/sec_approves_nyse_amendments/.

⁶ *SEC to Delay Proxy-Access Rule, Giving Banks Reprieve (Update 1)*, by Jesse Westbrook, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=a2ZCxme0W84Y>.

⁷ Shareholder Bill of Rights Act of 2009, available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.1074>.

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