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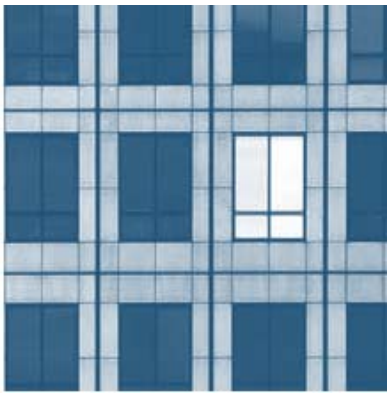
On the Subject



White Collar & Securities

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After the enactment of the Dodd-Frank financial reform bill confirmed its authority to do so, the SEC moved quickly and has adopted proxy access rules—though the debate on this issue is far from over.

SEC Adopts Controversial Proxy Access Rules

After nearly a decade of consideration and controversy, the U.S. Securities and Exchange Commission (SEC) adopted new proxy access rules on August 25, 2010. In pertinent part, the rules require public companies to include shareholder nominees for directors, from long-standing and large shareholders, in the companies' proxy materials. The SEC moved quickly following the enactment of the Dodd-Frank financial reform bill, which confirmed the SEC's authority to adopt proxy access rules—an issue of long-standing debate. In a 3-2 vote, with both Republican commissioners voting against the rules, the SEC adopted new Exchange Act Rule 14a-11 and amended Exchange Act Rule 14a-8(i)(8), the so-called "election exclusion" rule.

Under new Exchange Act Rule 14a-11, the SEC adopted a 3 percent / 3-year threshold. A shareholder will be eligible to have its director nominees included in a company's proxy materials if the shareholder owns at least three percent of the total voting power of the company's securities that are entitled to be voted on the election of directors at the annual meeting and has held its shares for at least three years. Shareholders will be able to aggregate holdings and form a nominating group in order to meet the 3 percent threshold. Shareholders will not be eligible to use the rule if they are holding securities for the purpose of changing control of the company.

Shareholder nominees will be required to satisfy objective independence standards of applicable national securities exchanges and national securities associations. A shareholder will be able to include one nominee or a number of nominees who represent up to 25 percent of the company's board of directors, whichever is greater. The nominating shareholder will be required to file disclosures with the SEC that include the voting power of the securities owned by the nominating shareholder, the length of ownership, biographical information about the nominee(s) and a description of the nature and extent of the relationships between the nominating shareholder and nominee(s) and the company. The disclosures will require several certifications relating to the eligibility and the accuracy of the information provided, and the nominating shareholder or group will be liable for any false or misleading statements it makes about the nomination.

In addition, under amended Exchange Act Rule 14a-8(i)(8), a company's shareholders may opt to adopt, through either a management recommendation or shareholder's proposal, access rules that provide for greater access, but they cannot limit the proxy access provided by the new rule or provide no proxy access at all).

The new rules will become effective 60 days after their publication in the Federal Register. However, application of the new proxy access rules to smaller reporting companies, as defined by SEC rules, will be deferred for three years.

The proxy access debate has been heated and long-standing. Proponents have argued that proxy access will increase board accountability and transparency. Critics have argued that proxy access improperly treads on an area traditionally under—and best left to—state corporate law, empowers large shareholders with specific, self-serving agendas to the detriment of other shareholders, and unnecessarily increases the costs and burdens on public companies to the detriment of shareholder value.

The more than 600 comments received by the SEC on the proposed rules and the strong criticism of the final rules in the public statements made by the two dissenting Republican commissioners reflect the intensity of the debate. While as a practical matter, proxy access may be limited because relatively few shareholders hold 3 percent of a company's securities for three years, it is likely that the new SEC proxy access rules will be challenged in the courts. Additionally, SEC Chairman Mary Schapiro stated that the commission will closely monitor how the

rules are implemented, and will make prompt changes if practice demonstrates the need to do so. Therefore, the debate over proxy access is far from over.

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