



SEC Adopts Controversial New Proxy Access Rules

By John W. Titus and Laura Washburn



BRADLEY ARANT
BOULT CUMMINGS
LLP

On Wednesday, August 25, 2010, the SEC finally adopted new proxy access rules that have sparked intense commentary in the last few years. The recently enacted Dodd-Frank Wall Street Reform Bill provides express authority for the SEC to adopt proxy access rules (therefore removing questions about the SEC's ability to do so), and the Commission acted quickly. The final 3-2 vote, with the two Republican members of the Commission opposing the new rules, illustrates the controversial nature of the action. The rules were the latest iteration of draft rules most recently proposed in May 2009. Approximately 600 comment letters were received during the comment period. As more fully discussed below, the new rules guarantee that long-term holders of more than 3% of a public company's stock will have the right to nominate their own board members and have those nominees included in the proxy materials that are circulated by the company.

Current Practice. Currently, the existing board, or a nominating committee of the board, typically selects a slate of nominees (often the current board members themselves) to be presented to the shareholders for approval at a shareholders meeting. The company prepares and circulates, at company expense, proxy materials relating to that slate of nominees. While most companies state that their boards or nominating committees will consider potential nominees proposed by shareholders, many companies have adopted bylaw provisions making it very difficult for shareholders to guarantee that their nominees are submitted to a vote of the shareholders. In recent years, activist shareholder groups have advocated that guaranteed access to the company's proxy process to submit shareholder-proposed nominees would make boards of directors more accountable to the shareholders.

The New Rules. The new rules provide access to the proxy process in the following manner:

- **Minimum Share Holding Requirement.** In order to have the right to include a nominee in the company's proxy materials, a shareholder must have held both investment and voting control over at least 3% of the

company's stock for at least three consecutive years.

- **Description of Nominee.** A qualifying shareholder is entitled to include a description (up to 500 words) of the nominee in the proxy materials being prepared and sent out by the company. The qualifying shareholder must disclose any relationship with the proposed nominee.
- **Number of Nominees.** Qualifying shareholders, as a group, are only entitled to nominate a maximum number of directors equal to 25% of the entire board. In the case of a staggered or classified board, the 25% calculation would be based on the total number of board seats, not merely the portion of board seats coming up for election at an individual annual meeting. In the event a greater number of nominees is properly proposed by qualifying shareholders, priority is given to the nominees proposed by the largest qualifying shareholders.
- **Schedule 14N.** Qualifying shareholders propose nominees through a new form (Schedule 14N) that must be filed no earlier than 150 days and no later than 120 days prior to the anniversary date of the mailing of the prior year's proxy materials.
- **Disclosures Regarding Change of Control.** Qualifying shareholders must disclose their intent to hold at least 3% of the securities through the shareholders meeting and must disclose that they have no intent to change control of the company.
- **Qualifications of Nominees.** Nominees proposed by qualifying shareholders must satisfy any regulatory or exchange mandated objective eligibility requirements, but are not required to satisfy company-imposed eligibility requirements.
- **Effective Date.** The new rules take effect 60 days after publication in the Federal Register and, as a result, will apply to the upcoming 2011 proxy season. There is a delayed effective date (three years after adoption) for smaller reporting issuers.

continued on page 2

What to Do Now? While the full effect of the new rules remains to be seen, we are recommending that public companies take the following actions in the short term in response to the new rules:

- Increase your attention to investor relations. The best defense is a good offense, and good relations with your shareholder base goes a long ways to promote confidence in the company and avoid shareholder proposed nominees.
- Take a hard look at your overall corporate governance program. Is it robust and up to date?
- Examine your shareholder nominee bylaws and procedures. It is likely that revisions may be necessary to bring them in line with the new regulatory regime.
- Review your nominating committee charter for any necessary changes.

- The 2010 proxy season was the first in which boards and nominating committees were required to disclose the factors they considered in selecting specific nominees. The right of qualifying shareholders to access the company's proxy process with their own nominees will cause more intense review of the factors considered by boards and nominating committees.
- Consider the optimal size of your board in light of the ability of qualifying shareholders to nominate up to 25% of the entire board.

If you have any questions about the new proxy access rules or what your company may need to do in response those rules, please contact one of the Bradley Arant Boulton Cummings attorneys in our Public Companies Practice Team.

Bradley Arant Boulton Cummings LLP Office Locations:

ALABAMA

One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

200 Clinton Avenue West, Suite 900
Huntsville, AL 35801
(256) 517-5100

The Alabama Center for Commerce
401 Adams Avenue, Suite 780
Montgomery, AL 36104
(334) 956-7700

MISSISSIPPI

188 E. Capitol Street, Suite 400
Jackson, MS 39201
(601) 948-8000

NORTH CAROLINA

100 North Tryon Street, Suite 2690
Charlotte, NC 28202
(704) 332-8842

TENNESSEE

1600 Division Street, Suite 700
Nashville, TN 37203
(615) 244-2582

WASHINGTON, DC

1133 Connecticut Avenue NW,
12th Floor
Washington, DC 20036
(202) 393-7150

Authors

John W. Titus
(615) 252-2341
jtitus@babbc.com

Laura P. Washburn
(205) 521-8370
lwashburn@babbc.com

Related Attorneys

Jeffrey S. Buschmann
(615) 252-2388
jbuschmann@babbc.com

John K. Molen
(205) 521-8238
jmolen@babbc.com

J. Andrew Robison
(205) 521-8596
arobison@babbc.com

Paul S. Ware
(205) 521-8624
pware@babbc.com

www.babbc.com

To unsubscribe from this newsletter, email Jerry Young jyoung@babbc.com

This newsletter is a periodic publication of Bradley Arant Boulton Cummings LLP and should not be construed as legal advice or legal opinions on any specific facts or circumstances. The contents are intended for general information only, and you are urged to consult your own lawyer or other tax advisor concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our practice group.

The Alabama State Bar requires the following disclosure: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

©2010 Bradley Arant Boulton Cummings LLP

ALABAMA | DISTRICT OF COLUMBIA | MISSISSIPPI | NORTH CAROLINA | TENNESSEE

