



CORPORATE ACCOUNTABILITY



REPORT

Reproduced with permission from Corporate Accountability Report, 8 CARE 979, 09/17/2010. Copyright © 2010 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Proxy Rules

Proactive Engagement With Large Investors Is Crucial In Light of New Proxy Access Rules

All public companies would be wise to be proactive in communicating with large shareholder groups, among a number of important actions they should take in light of the Securities and Exchange Commission's new rules on proxy access, attorneys participating in a Sept. 15 Foley & Lardner LLP webcast on the implications of the SEC's new proxy access rules said.

The SEC Aug. 25 approved rule amendments to facilitate the rights of shareholders under state law to nominate corporate directors (8 CARE 906, 8/27/10). The new amendments allow shareholders, individually or in a group, to have their director candidates included in corporate proxy materials if the shareholders continuously owned at least 3 percent of a public company's voting stock over the last three years.

"At the end of the day, good investor relations is key to not ending up in a situation where there will be a proxy access nominee," John K. Wilson, a corporate law partner at Foley & Lardner LLP in Milwaukee, Wis., said.

Meanwhile, a Sept. 13 Greenberg Traurig LLP alert said that companies should consider discussing with eligible shareholders their satisfaction with the company's corporate governance matters—especially executive compensation policies. "These conversations could be easily added to [the] company's existing investor relations discussions with these shareholders," it said.

Assessment of Shareholder Base Is Key. Companies need to know their large shareholders, and identify those who are most likely to submit proxy access nominees, and managers of those groups, Wilson said.

Organizations also need to examine whether or not they are likely to be a proxy access target, Wilson said. "Issues to consider include whether or not a company has had previous director withhold campaigns, share-

holder proposals, or proxy advisory groups voicing concern over the company's governance practices," he said.

The creation of response teams consisting of senior management, investor relations personnel, members of the board nominating committee, outside counsel, and proxy solicitors is highly advised, Wilson said. "Companies need to be ready, especially if, for example, a preliminary 14N filing is made to form a group," he said.

In order to submit nominees for inclusion in a company's proxy materials, the SEC requires nominating shareholders to file a Schedule 14N with the commission and provide a copy of the filing to the company. The filing must disclose information such as details on the nominating shareholder, including biographical information, and the amount and percentage of the company's voting securities owned by the nominating shareholder.

"Companies should also review their appropriate board size. This would depend on the organization's particular needs," Wilson said. "For example, a company with eight directors would have two proxy access nominees at a maximum, while a company with seven directors would have one nominee," he said.

Also, companies will want to update their proxy statement process timetables, Wilson said. "For example, companies will want to include the 30-day window period in which proxy access notices may be received," he said.

Companies Need to Initiate Communication. According to the Greenberg alert, companies should take the opportunity to use investor relations discussions to resolve possible disagreements related to the organization's corporate governance matters before they receive their 14a-11 or 14a-8 director nominations or shareholder proposals.

The SEC's new proxy access rules amend the Securities Exchange Act of 1934 to add Rule 14a-11, giving shareholders the right to include their nominees in a company's proxy statement along with nominees chosen by the board. As a result, companies are required to

include proposals that seek to establish proxy access in their proxy materials. The commission also adopted amendments to Rule 14a-8 under the 1934 Act that allows companies in certain situations to include shareholder proposals seeking to establish access procedures.

Companies need to review their advance notice bylaws to determine whether any amendments should be made to conform the bylaws to the proxy access rule requirements, including its notice provisions and information requirements, the alert said.

Furthermore, companies should consider revising confidentiality policies applicable to directors to address specifically the maintenance of all boardroom discussions, not just material nonpublic information, the alert said. Policies should address a clear chain of command as to who is entitled to make public statements on behalf of the company, it said.

“This may partially help alleviate the inevitable tension in the board room and associated effect on board communications that will arise if a Rule 14a-11 candidate that is opposed by the current board is elected,” the alert said.

Corporate Charters Should Be Reviewed. Companies should also consider reviewing their corporate governance and committee charters and related bylaws to determine whether any changes should be made to the shareholder nominations procedural and qualification standards, the alert said.

“Examples of possible amendments could include mandatory retirement ages and requirements that at least a certain percentage of [the] board have related industry experience or other desirable experience,” the alert said.

Also, looking forward, in light of the anticipated new Dodd-Frank Act mandated executive compensation clawback policies, companies should consider adopting such policies now, the alert said. Organizations could even consider amending existing policies to follow the anticipated rules more closely, it said.

BY TINA CHI

The Greenberg alert is available at <http://gtlaw.com/NewsEvents/Publications/Alerts?find=138604>.