

A Roundtable On The SEC's New Proxy Access Rules

The SEC has adopted new proxy access rules giving shareholders limited rights to require most public companies to include their director candidates in the companies' proxy materials. How will investors make use of this new power for proxy season 2011? The Foley & Lardner law firm convened a September roundtable of its top attorneys, along with noted proxy experts, to discuss the implications.

Q: How common will it be for there to be proxy access nominees?

Seth Hamot, Roark Rearden & Hamot Capital Management, LLC: I think this is going to be used a lot and I think it's going to be used a lot soon. It's going to be slowed down a little bit by litigation to clarify some of the rules, specifically the ones regarding communication with other shareholders.

Steven Shapiro, Taylor Capital Growth, Inc.: [Nominees] who may not have surfaced before as directors are going to have to disclose a lot of information about themselves that they hadn't had to disclose before. They're likely to be challenged, perhaps unfairly, in a very public forum. The ultimate victory is for them to serve as a minority board member in a board that would be antagonistic to them. In addition, and if you think this through, what's to say that the best directors on that board won't basically say, "Look, if this is going to happen, I'm out of here," leaving the company with fewer qualified directors.

Q: How are pension funds and institutional investors planning to use the proxy access rules?

Gail Hanson, State of Wisconsin Investment Board: We would use them sparingly and only after an effort to engage management. For example, in instances where directors have received the majority of withhold votes and yet continue to serve, that might be a situation where an alternative candidate, through proxy access, would be "set up against one of the directors."

Q: Will shareholders gear up in a hurry to use proxy access?

Phillip Goldberg, Foley & Lardner LLP: Within a week or two of the proxy access rules coming out, there was a 13D filed on a Nasdaq company, indicating that once the rule becomes effective, they intend to proceed under

14a-11. I thought that was a pretty quick trigger pulled on the new rule. What we've seen in the last several years is shareholders owning significant positions in companies whose stock performance has either stagnated or underperformed relative to their peer group, and [proxy access] is going to be a less costly way for them to release some value through activism.

Q: Are there disadvantages to using the new 14a-11 access vs. a full-blown proxy contest?

Patrick Quick, Foley & Lardner LLP: If a shareholder is using this [14a-11] process, they don't have access to voting information the company would have access to, information that the company would be not obligated to share with the sponsor. So the typical proxy contest approach gives the shareholder a little bit more control.

Richard Grubaugh, D.F. King & Co., Inc.: I don't see any hedge fund or activist that has waged proxy contests in the past to be using this [14a-11 proxy access rule] in the future. It doesn't give the dissident the same tools and ammo that they would like as part of their arsenal.

Q: What types of people might be proposed as access nominees?

Hanson: First and foremost, if we put somebody on the ballot we want them to be electable. Just being on a ballot doesn't get us to the goal line. CalPERS and CalSTRS are leading an effort to develop a list of qualified, diverse candidates, which is their priority, and so I think you'll see some of those candidates come forward.

Q: If a proxy access nominee attracts support, will there be a corresponding effort to oppose a particular management nominee?

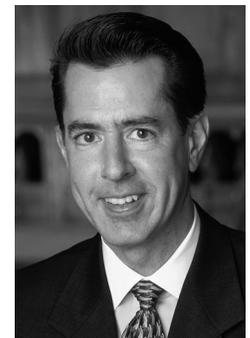
Hamot: This fits into the framework of a typical short-slate effort that has to target specific directors. As in all proxy contests, you have a question of leadership and so the dissident actually has to indicate for the less interested shareholder which management nominee should not be voted.

Goldberg: While it will get personal, it may very well still protect some directors. I think a Glass Lewis or an ISS is less likely to agree to shoot the chairman or the head of the audit committee whose seat[s] are up. If [dissident shareholders] take the position that a specific director must go, they may lose the endorsement by the advisory firm. ■



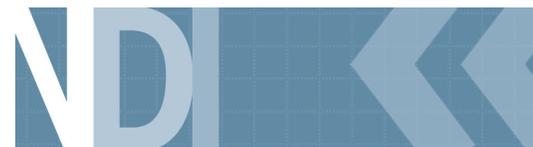
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