brownrudnick

ALERT

www.brownrudnick.com

SEC ADOPTS PROXY ACCESS RULES

New regime will impact public companies, shareholders and activist investors.

On August 25, 2010, the SEC adopted new rules that require companies to include the director nominees of significant, long-term shareholders in company proxy materials, alongside the nominees of management. These new "proxy access" rules will impact public companies, shareholders and activist investors. Qualified shareholders can now avail themselves of company proxy statements to nominate and elect directors, rather than having to launch expensive proxy fights in which they mail their own ballots.

We note below some of the key provisions of the new rules. The adopting release can be found at www.sec.gov/rules/final/2010/33-9136.pdf.

Under the new rules, shareholders will be eligible to have their nominee(s) included in company proxy materials if:

- They own at least 3 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

- They have held their securities for at least 3 years, and continue to own at least the required amount of securities through the date of the meeting at which directors are elected.

Shareholders will be able to aggregate holdings with other shareholders to meet the 3 percent threshold. Shareholders cannot borrow stock to achieve the threshold, although stock that they own, but have lent to others, may be counted under certain circumstances.

BR brownrudnick

The 3 percent threshold differs from the proposed rule, in that there is no sliding scale based on a company's size. Where there are multiple eligible nominating shareholders, the nominating shareholder or group with the highest percentage of the company's voting power would have its nominees included in the company's proxy materials, rather than the nominating shareholder or group that is first to submit notice, as had been proposed.

Shareholders will not be able to use the new rules if they hold their stock with the intent of changing control of the company or gaining more seats on the board than is permitted under this new process.

A shareholder will be able to include no more than one nominee under the new process, or 25 percent of the board, whichever is greater. The nominee(s) must satisfy the applicable stock exchange's independence standards.

The nominating shareholder will be required to file a new Schedule 14N with the SEC. This filing will be public and will require, among other things:

- disclosure of the amount and percentage of the voting power of the securities owned by the nominating shareholder;
- the length of ownership; and
- a statement that the nominating shareholder intends to continue to hold the securities through the date of the meeting.

The Schedule 14N will also include detailed information about the nominee(s), including biographical information and a description of the nature of the relationship between the nominating shareholder, the company and the nominee.

The new rules apply to all Exchange Act reporting companies, including investment companies, other than companies whose only public securities are debt securities. Companies may not "opt out" of the new rules. Application of the new access rules to the smallest public companies — those that are defined as "smaller reporting companies" under SEC rules — will be deferred for 3 years.

Generally, the new rules will become effective 60 days after their publication in the Federal Register. Shareholders must submit nominees no later than 120 days before the anniversary date of the mailing of the company's proxy statement in the prior year. Shareholders will be able to submit nominees for inclusion in the next year's proxy statement if the 120 day deadline falls on or after the effective date of the rules. For example, if the rules become effective on November 1, 2010, Rule 14a-11 generally would be available at companies that mailed their proxy statement for their last annual meeting no earlier than March 1, 2010.

It should be noted that the SEC's adoption of these changes follows several years of intense debate regarding proxy access, capped by the recent enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which provided the SEC with authority to adopt proxy access rules. The rules were adopted by a 3-2 Commission vote and may be subject to challenge in the future.

New York
Seven Times Square
New York, NY 10036
+1.212.209.4800
+1.212.209.4801 [fax]

Boston
One Financial Center
Boston, MA 02111
+1.617.856.8200
+1.617.856.8201 [fax]

Washington, DC
601 Thirteenth Street NW,
Suite 600
Washington, DC 20005
+1.202.536.1700
+1.202.536.1701 [fax]

Hartford
185 Asylum Street
Hartford, CT 06103
+1.860.509.6500
+1.860.509.6501 [fax]

Providence
121 South Main Street
Providence, RI 02903
+1.401.276.2600
+1.401.276.2601 [fax]

London
8 Clifford Street
London, W1S 2LQ
United Kingdom
+44.20.7851.6000
+44.20.7851.6100 [fax]

Dublin
Alexandra House
The Sweepstakes
Ballsbridge, Dublin 4
Ireland
+353.1.664.1738
+353.1.664.1838 [fax]

www.brownrudnick.com

BROWN RUDNICK is an international law firm with offices in the United States and Europe. Our 200 attorneys provide assistance across key areas of the law, including corporate, finance, intellectual property, tax, government law and strategies, bankruptcy and restructuring, government contracts, climate and energy, real estate, and complex litigation and arbitration.

For further information on this topic, please contact your Brown Rudnick attorney or one of the following attorneys:

James E. Bedar
+1.617.856.8167
jbedar@brownrudnick.com

Jessica H. Collins
+1.617.856.8358
jcollins@brownrudnick.com

Philip J. Flink
+1.617.856.8555
pflink@brownrudnick.com

Timothy C. Maguire
+1.617.856.8377
tmaguire@brownrudnick.com

***Shelly Shaw** contributed to this Alert.*

BROWNRUDNICK