

Milbank

June 22, 2009

Corporate Governance Group

Client Alert

BEIJING FRANKFURT HONG KONG LONDON LOS ANGELES MUNICH NEW YORK SINGAPORE TOKYO WASHINGTON, DC

SEC PROPOSES LONG-AWAITED PROXY ACCESS RULES

New Rules Would Give Shareholders Access to Company Proxy Statements to Nominate Director Candidates or Make Related Proposals

Background

In a release published on June 10, 2009 (the “Release”),¹ the Securities and Exchange Commission (the “SEC”) proposed amendments to the federal proxy rules designed to provide eligible shareholders with access to company proxy materials for the purpose of nominating candidates for election to the board of directors. This proposal delivers on a statement made by SEC Chairman Mary J. Shapiro earlier this year that increasing proxy access would be an important part of her agenda. In fact, this marks the third time in the past six years that the SEC has proposed amendments to the proxy rules relating to the director nomination process.²

In its 250-page Release, the SEC attributes the present need for proxy access to the “loss of investor confidence” and “serious concerns about the accountability and responsiveness of some ... boards of directors to the interests of shareholders” that have arisen from “one of the most serious economic crises of the past century.” Accordingly, and to remedy perceived shortcomings in the director nomination process – currently, shareholders seeking to nominate alternative director candidates must file

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Corporate Governance Group, whose names and contact information are provided at the end of this alert.

In addition, if you would like copies of our other Client Alerts, please visit our website at www.milbank.com and choose the “Client Alerts & Newsletters” link under “Newsroom/Events.”

This Client Alert is a source of general information for clients and friends of Milbank, Tweed, Hadley & McCloy LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel. © 2009 Milbank, Tweed, Hadley & McCloy LLP. All rights reserved. Attorney Advertising, prior results do not guarantee a similar outcome.

¹ See Release No. 33-9046 entitled “Facilitating Shareholder Director Nominations”, which is available on the SEC’s website at <http://www.sec.gov/rules/proposed/2009/33-9046.pdf>.

² For further discussion of the earlier proposals, see our Client Alerts entitled “SEC Proposes Rules Enabling Shareholders to Include Nominees in Company Proxy Materials” (dated October 24, 2003) and “SEC Amends Proxy Rules to Permit Exclusion of Shareholder Proposals Seeking Access to Company Proxy Materials for Director Nominations” (dated December 13, 2007).

and disseminate their own proxy materials at their own expense – the SEC has offered two main proposals: (i) new Rule 14a-11, providing for mandatory access to company proxy statements and cards for “significant” and “long-term” shareholders to nominate a limited number of director candidates, and (ii) amendments to Rule 14a-8, exempting from the “election exclusion” shareholder proposals regarding director nomination procedures or disclosures related to shareholder nominations.

The SEC views the proposed amendments as consistent with its “mission” of “investor protection,” based on its belief that “investors are best protected when they can exercise rights they have as shareholders, without unnecessary obstacles imposed by the federal proxy rules.” In fact, the SEC characterizes the purpose of the proposed amendments as an effort “to improve the corporate proxy process so that it functions, as nearly as possible, as a replacement for an actual in-person meeting of shareholders.” And, perhaps, in anticipation of criticisms that the SEC may be usurping “the traditional role of the states in regulating corporate governance,” the Release notes that “[t]hese proposed amendments are intended to remove impediments so shareholders may more effectively exercise their rights under state law to nominate and elect directors at meetings of shareholders.”

The Release contains an extensive array of questions on which the public is asked to comment. In light of these questions, as well as the heated discussions that accompanied the earlier proposals and the criticism that has already been leveled against the new proposal, it would not be surprising if any final rules differ, perhaps significantly, from the proposed amendments. The public comment period on the proposed amendments is set to expire on August 17, 2009.

Proposal #1: New Rule 14a-11

If adopted, proposed Rule 14a-11 would provide holders of “a significant, long-term interest in a company” with the right, under certain circumstances, to include their nominees for election as directors in the company’s proxy materials.³ Notably, the new rule would *not* be available to shareholders who seek to change control of a board or gain more than a limited number of seats. Rather, in those instances, the procedures currently available under Rule 14a-12(c) for waging a proxy contest would continue to apply.

Requirements Applicable to Nominating Shareholders and Their Nominees

<i>Eligibility Requirements for Nominating Shareholders</i>	<p><u>Minimum Beneficial Ownership Threshold:</u></p> <ul style="list-style-type: none"> • At least 1% of voting securities of <i>large accelerated filers</i> (net assets of \$700 million or more) • At least 3% of voting securities of <i>accelerated filers</i> (net assets between \$75 million and \$700 million) • At least 5% of voting securities of <i>non-accelerated filers</i> (net assets of less than \$75 million)
--	---

³ The new rule would apply to all eligible companies “unless state law or a company’s governing documents prohibits shareholders from nominating directors.” According to the Release, the SEC is “not aware of any law in any state ... that prohibits shareholders from nominating directors.” In anticipation of the SEC adopting a proxy access rule, Delaware adopted amendments to its General Corporation Law, effective August 1, 2009, that are intended to create a mechanism for companies to include stockholder nominated directors in their proxy materials. See our Client Alert entitled “Proposed Amendments to the Delaware General Corporation Law Create Flexibility for Corporations Who Desire (or Become Required) to Permit Stockholder Proxy Access” (dated March 12, 2009).

	<p><u>Duration of Ownership Threshold:</u></p> <ul style="list-style-type: none"> • Continuous ownership (if applicable, by <i>each</i> group member) of the requisite amount of securities for at least 1 year • Demonstrated intent to continue to own such securities until the applicable annual or special meeting <p><u>Aggregation:</u></p> <ul style="list-style-type: none"> • To meet eligibility requirements, shareholders would be entitled to aggregate their holdings.
<i>Independence Requirements for Nominees</i>	Nominees must satisfy the “objective” independence requirements of the national securities exchange on which company’s shares are traded. ⁴ This independence requirement would <i>not</i> be applicable to non-listed companies.
<i>Notice Requirements for Nominating Shareholders</i>	<p><u>New Schedule 14N:</u> Provide notice to the company and the SEC on Schedule 14N of intent to require inclusion of nominee(s) in proxy materials (and promptly amend for any material change).⁵</p> <p><u>Deadline for Notice:</u> By the date specified in the company’s advance notice bylaw provision or, if no such provision, no later than 120 calendar days before the date that the company mailed its proxy materials⁶ for the prior year’s annual meeting.⁷</p> <p><u>Schedule 14N Disclosures:</u>⁸</p> <ul style="list-style-type: none"> • Name and address of nominating shareholder(s) • Amount and % of voting securities beneficially owned • Shareholder representations (see below) • Statement from the nominee consenting to being named in the proxy statement and to serving on the board if elected • Statement (i) that nominating shareholder(s) intend to continue to own requisite shares through the date of the applicable shareholder meeting and (ii) regarding nominating shareholder(s) intent with respect to continued ownership after the election • Certification that, to the knowledge of nominating shareholder(s), securities are not held for purpose or with effect of (i) changing control of issuer or (ii) gaining more than a limited number of board seats

⁴ Any rule requiring a “subjective determination,” and more rigorous standards applicable to audit committee members or imposed in a company’s governing documents or otherwise, would *not* have to be satisfied.

⁵ Also, a final amendment would be required, within 10 days following announcement of the election results, disclosing the intention of the nominating shareholder or group with respect to continued ownership of their shares.

⁶ Proposed Rule 14a-11 does not impose an absolute date prior to which a shareholder may not submit proposals to the company, as is typical in advance notice bylaw provisions. Thus, it is unclear whether such a provision would impact the ability of shareholders to propose nominees under Rule 14a-11.

⁷ If the company did not hold an annual meeting during the prior year or if the date of the meeting has changed by more than 30 calendar days, the company would be required to file a Form 8-K in which it sets forth a “reasonable time before the company mails its proxy materials” for nominations to be submitted. The Form 8-K would be due “within four business days after the company determines the anticipated meeting date.”

⁸ These disclosure requirements are set forth in proposed Rule 14a-18.

	<ul style="list-style-type: none"> • Various disclosures about the nominating shareholder(s) and the nominees consistent with disclosures currently required under the proxy rules in a contested election • Disclosure of any website address to be used by the nominating shareholder(s) for publication of soliciting materials in support of their nominee(s) • If desired, a statement in support of the nominee(s), not to exceed 500 words⁹
<i>Nominating Shareholder Representations</i>	<p>Nominating shareholders (including, if applicable, <i>each</i> member of nominating shareholder group) must include in Schedule 14N the following representations:¹⁰</p> <ul style="list-style-type: none"> • <u>Compliance with Law</u>: That, to the knowledge of the nominating shareholder(s), nominee’s nomination or, if elected, service on board would not violate state law, federal law or applicable listing standards (other than independence requirements) • <u>Eligibility</u>: That the minimum share ownership and duration of share ownership requirements (including intent to continue to own shares through the meeting date) are satisfied • <u>Nominee Independence</u>: That, to the knowledge of the nominating shareholder(s), nominee satisfies applicable “objective” securities exchange independence requirements • <u>Relationships with Company</u>: No relationships or agreements exist between (i) nominee and the company (or its management) and (ii) nominating shareholder(s) and the company (or its management)¹¹

Requirements Applicable to Companies

<i>Subject Companies</i>	All companies subject to the SEC’s proxy rules (except debt-only issuers).
<i>Number of Directors</i>	Company would be required to include no more than a number of shareholder nominees representing up to 25% of the board. ¹²
<i>“First-In” Method</i>	In the event of more shareholder nominees than are required for inclusion, the “first-in” method would require the company to include those nominees of the first nominating shareholder(s) or group(s) to give timely notice.
<i>Company Voting Guidelines and Recommendations</i>	Company would be permitted, on its proxy card, to identify any shareholder nominees as such and to include a recommendation as to how shareholders should vote (for, against or withhold). However, when a shareholder nominee is included on its proxy card, the company would no longer be permitted to provide shareholders with the option of voting for all company nominees as a group; rather, each nominee would be voted on separately.

⁹ Counted as currently provided in Rule 14a-8 for other shareholder proposals.

¹⁰ These required representations are set forth in proposed Rule 14a-18.

¹¹ By contrast, there are no proposed limitations on the relationships that may exist between a nominating shareholder or group and their nominee or nominees.

¹² In calculating this maximum amount, any shareholder-nominated director elected at a previous meeting whose term extends beyond the meeting in question would be counted. Also, if 25% of the board is not a whole number, the maximum number of shareholder nominees will be the closest whole number below 25%.

<p><i>Company Exclusion of Shareholder Nominees</i></p>	<p>Company would not be required to include a shareholder nominee if:</p> <ul style="list-style-type: none"> • Nominating shareholder or group does not satisfy the eligibility requirements of Rule 14a-11; • Any information required in the Schedule 14N notice either is omitted or is false or misleading in any material respect, including information as to whether nominee satisfies the applicable “objective” securities exchange independence requirements; or • Company has received more nominees than required to include and nominating shareholder(s) was not “first-in”.
<p><i>Notification Requirements</i></p>	<ul style="list-style-type: none"> • Company must notify nominating shareholder(s) within <i>14 calendar days</i> of any objections, who in turn would have <i>14 calendar days</i> to respond with corrections, <i>provided</i> that neither the composition of a shareholder group nor a shareholder nominee may be changed • Additionally, no later than <i>80 calendar days</i> before filing its definitive proxy materials, company must notify SEC (with a copy to nominating shareholder(s)) if it determines that it <i>may</i> exclude any nominee • Disputes may (but are not required to) be resolved by the SEC • A notice of company’s final decision to include or exclude any nominee must be given to nominating shareholder(s) no later than <i>30 calendar days</i> before filing its definitive proxy materials • If company impermissibly excludes any nominee, proposed Rule 14a-11(f)(14) would provide that the company will be in violation of Rule 14a-11

Other Key Aspects of Proposal

<p><i>No Preliminary Proxy Materials</i></p>	<p>Rule 14a-6 is proposed to be amended to provide that company will <i>not</i> be required to file preliminary proxy materials solely because of the inclusion of shareholder nominees pursuant to Rule 14a-11.</p>
<p><i>“Affiliate” Safe Harbor</i></p>	<p>Nominating shareholder(s) will <i>not</i> be deemed an “affiliate” of the company for purposes of the federal securities laws solely as a result of nominating a director (whether or not elected) or soliciting proxies for election of any shareholder nominee.</p>
<p><i>Proposed Exemptions for Communications and Solicitations</i></p>	<ul style="list-style-type: none"> • For <i>written</i> communications made in connection with the formation of a nominating shareholder group that are limited in content and filed with the SEC • For solicitations in support of a shareholder nominee where proxies are <i>not</i> solicited by the nominating shareholder(s) and, in the case of written communications, certain required information is included and filed with the SEC
<p><i>Exchange Act Section 16</i></p>	<p>Current Section 16 principles continue to be applicable for determining whether nominating group members are 10% owners subject to Section 16 reporting and short-swing trading liability.</p>

Proposal #2: Amendment to Rule 14a-8

As amended in 2007, Rule 14a-8(i)(8) (a/k/a, the “election exclusion”) permits a company to exclude from proxy materials any shareholder proposal relating to the nomination or election of board members.¹³ The proposed amendment to Rule 14a-8(i)(8) would reverse the 2007 amendments, thus enabling shareholders to require the inclusion in company proxy materials of proposals to amend (or to request an amendment of) the company’s governing documents regarding nomination procedures or disclosures related to shareholder nominations, so long as the proposal does not conflict with proposed Rule 14a-11.¹⁴ The other Rule 14a-8 exclusions, and existing staff interpretations, would continue to be available to companies to disqualify certain election-related shareholder proposals, including any that would seek to disqualify a particular nominee, remove a particular director mid-term or question the “competence, business judgment or character” of any particular nominee or director.

Related Proposed Amendments

Schedule 13D and 13G

The SEC also has proposed a new exception to its beneficial ownership reporting rules for 5% shareholders that would permit reporting on Schedule 13G – rather than the more detailed Schedule 13D – for shareholders or groups who engage in activities in connection with a nomination under new Rule 14a-11. However, this new exception would not apply to nominating shareholders or groups that submit a nomination pursuant to an applicable state law provision or a company’s governing documents.

Rules 14a-9 and 14a-11(e)

The proposed amendments also would provide that a nominating shareholder or group relying on Rule 14a-11, rather than the company, would be liable for any materially false or misleading information provided by the nominating shareholder or group for inclusion in company proxy materials (except where the company knows or has reason to know that information is false or misleading). Also, such information would not automatically be incorporated by reference into company’s other SEC filings that incorporate the proxy statement generally.

¹³ This rule was amended following *AFSCME v. AIG*, 462 F.3d 121 (2nd Cir. 2006). See our Client Alert entitled “SEC Amends Proxy Rules to Permit Exclusion of Shareholder Proposals Seeking Access to Company Proxy Materials for Director Nominations” (dated December 13, 2007).

¹⁴ Currently, Rule 14a-8 requires that a shareholder making a proposal for inclusion in the proxy materials must have continuously held at least \$2,000 in market value, or 1%, of the company’s voting securities for a period of one year prior to submitting the proposal. The proposed amendments do not change this requirement.

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Corporate Governance Group, whose names and contact information are provided below.

Beijing

Units 05-06, 15th Floor, Tower 2
China Central Place, 79 Jianguo Road, Chaoyang District
Beijing 100025, China

Anthony Root +86-10-5969-2777 aroot@milbank.com
Edward Sun +86-10-5969-2772 esun@milbank.com

Frankfurt

Taunusanlage 15
60325 Frankfurt am Main, Germany

Norbert Rieger +49-69-71914-3453 nrieger@milbank.com

Hong Kong

3007 Alexandra House, 18 Chater Road
Central, Hong Kong

Anthony Root +852-2971-4842 aroot@milbank.com
Joshua Zimmerman +852-2971-4811 jzimmerman@milbank.com

London

10 Gresham Street
London EC2V 7JD, England

Stuart Harray +44-20-7615-3083 sharray@milbank.com
Thomas Siebens +44-20-7615-3034 tsiebens@milbank.com

Los Angeles

601 South Figueroa Street
Los Angeles, CA 90017

Ken Baronsky +1-213-892-4333 kbaronsky@milbank.com
Neil Wertlieb +1-213-892-4410 nwertlieb@milbank.com

Munich

Maximilianstrasse 15 (Maximilianhoefer)
80539 Munich, Germany

Peter Nussbaum +49-89-25559-3636 pnussbaum@milbank.com

New York

One Chase Manhattan Plaza
New York, NY 10005

Scott Edelman +1-212-530-5149 sedelman@milbank.com
Roland Hlawaty +1-212-530-5735 rhlawaty@milbank.com
Thomas Janson +1-212-530-5921 tjanson@milbank.com
Robert Reder +1-212-530-5680 rreder@milbank.com
Alan Stone +1-212-530-5285 astone@milbank.com
Douglas Tanner +1-212-530-5505 dtanner@milbank.com

Singapore

30 Raffles Place, #14-00 Chevron House
Singapore 048622

David Zemans +65-6428-2555 dzemans@milbank.com
Naomi Ishikawa +65-6428-2525 nishikawa@milbank.com

Tokyo

21F Midtown Tower, 9-7-1 Akasaka, Minato-ku
Tokyo 107-6221 Japan

Darrel Holstein +813-5410-2841 dholstein@milbank.com
Bradley Edmister +813-5410-2843 edmister@milbank.com

Washington, DC

International Square Building, 1850 K Street
Washington, DC 20006

Glenn Gerstell +202-835-7585 gerstell@milbank.com