

SEC Votes to Propose Proxy Statement Access for Shareholder Nominees

For more information regarding the proposed rules, please contact your regular Vorys attorney or one of the following:

Adam K. Brandt
akbrandt@vorys.com
614.464.6426

Michael A. Cline
macline@vorys.com
614.464.5416

Elizabeth T. Farrar
etfarrar@vorys.com
614.464.5607

James H. Gross
jhgross@vorys.com
614.464.6231

Jason L. Hodges
jlhodes@vorys.com
513.723.8590

Roger E. Lautzenhiser
relautzenhis@vorys.com
513.723.4091

Ronald (Rocky) A. Robins
rarobins@vorys.com
614.464.6223

John M. Saganich
jmsaganich@vorys.com
216.479.6120

J. Bret Treier
jbtreier@vorys.com
330.208.1015

On May 20, the Securities and Exchange Commission voted to propose new rules giving shareholders direct access to public company proxy statements to nominate a limited number of director candidates. A key issue surrounding the proposal is whether the rule ventures into an area of corporate law best reserved to the states, and whether the SEC has the authority to mandate proxy statement access through the proxy rules. Currently, Delaware permits proxy access and North Dakota mandates it, and a few companies have voluntarily adopted it. The SEC rules would require proxy access and would trump any state laws or charter or bylaw amendments that conflict with the rules. Although the proposed rules are not yet available and the details are unclear, the SEC has announced the main aspects.

Scope of Companies Affected. The proposed rules cover all companies subject to the SEC's proxy rules. This generally includes all Exchange Act reporting companies, other than foreign private issuers and debt-only registrants.

Shareholders Eligible to Submit Nominations. Not all shareholders can utilize the proxy access rules to make nominations. Eligibility is determined by satisfying minimum ownership requirements for at least one year, with the intent to hold the shares through the annual meeting in question. Nominating shareholders must certify they are not holding their shares for the purpose of changing control of the company or to gain more than minority representation on the board. The nominating shareholder must submit to both the SEC and the company a new SEC form that certifies the shareholder's compliance with these requirements.

Minimum Ownership Requirements. The required minimum ownership is tiered, depending on the size of the company: 1% for large accelerated filers (\$700 million or greater common equity market value), 3% for accelerated filers (less than \$700 million

but more than \$75 million in common equity market value) and 5% for non-accelerated filers (less than \$75 million in common equity market value). Shareholders would be permitted to aggregate their holdings to meet these thresholds.

Shareholder Nominee Qualifications. The nominee's candidacy or election may not violate applicable law. The nominee also must satisfy applicable stock exchange independence standards, and the nominating shareholder may not have any agreement with the company regarding the nomination.

Number of Permitted Nominees. A shareholder could nominate the greater of one nominee or a number of nominees totaling 25% of the board. It is currently unclear how this requirement works in the context of a staggered board. If the number of nominees from all shareholders exceeds the permitted number, priority will be given to shareholders who make their nominations first, without regard to amount of ownership.

Additional Required Information. Where there are shareholder nominees, the company would be required to include disclosure in its proxy statement similar to that currently required in contested elections. The nominating shareholder, and not the company, would be liable for any false or misleading statements in information provided to the company for inclusion in the proxy, unless the company knows or has reason to know that the information is false.

Amendment of Rule 14a-8. Currently, Rule 14a-8 permits companies to exclude shareholder proposals that relate to an election. The proposed rule would narrow this exclusion. Shareholder proposals by qualifying shareholders that would amend, or request an amendment to, a company's governing documents concerning the company's nomination procedures or other director nomination disclosure provisions (so long as they do not conflict with the proposed rules) would not be excludable.

This securities alert is for general information purposes and should not be regarded as legal advice.