

## NEW YORK

1285 Avenue of the Americas  
New York, NY 10019-6064  
+1 212 373 3000

## WASHINGTON, D.C.

2001 K Street NW  
Washington, DC 20006-1047  
+1 202 223 7300

## LONDON

Alder Castle, 10 Noble Street  
London EC2V 7JU  
United Kingdom  
+44 20 7367 1600

## TOKYO

Fukoku Seimei Building, 2nd Floor  
2-2, Uchisaiwaicho 2-chome  
Chiyoda-ku, Tokyo 100-0011  
Japan  
+81 3 3597 8101

## BEIJING

Unit 3601, Fortune Plaza Office  
Tower A  
No. 7 Dong Sanhuan Zhonglu  
Chao Yang District, Beijing 100020  
People's Republic of China  
+86 10 5828 6300

## HONG KONG

12th FL, Hong Kong Club Building  
3A Chater Road  
Central Hong Kong  
+852 2846 0300

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## SEC Publishes Proxy Access Proposal

In June, the SEC published its proposal that would permit proxy access for shareholders. These proposed rules would (i) create a federally mandated procedure to allow the inclusion of shareholder nominees in company proxy materials, (ii) account for differing proxy access procedures established by state law or a company's governing documents while imposing certain uniform disclosure and procedural requirements with respect to such procedures and (iii) narrow the current election exclusion under Rule 14a-8(i)(8) so as to facilitate shareholder proposals relating to proxy access. The proposed rules would apply to U.S. listed companies that are subject to the SEC's proxy rules. Because non-U.S. companies are generally not subject to the SEC's proxy rules, these rules would not apply to them.

The release does not include a proposed effectiveness date, and the SEC has requested comment on what the appropriate transition should be. The full proposing release is available at <http://sec.gov/rules/proposed/2009/33-9046.pdf>. The deadline for submitting comments is August 17, 2009

### The SEC's Proposed Proxy Access Procedures

#### *Eligibility Requirements for Nominating Shareholders*

The proposed amendments would create a new Rule 14a-11 that would allow a shareholder or group of shareholders to nominate directors via company proxy materials if they beneficially own:

- for large accelerated filers, at least 1% of the shares entitled to vote on the election of directors;
- for accelerated filers, at least 3% of such shares; and
- for non-accelerated filers, at least 5% of such shares.

Nominating shareholders must have owned the requisite shares continuously for at least one year as of the date they provide their notice of nomination to the company and must intend to hold such shares through the date of the subject election of directors. While nominating shareholders must disclose their intent with respect to continued ownership of their shares after the election, the proposed rules currently do not include any ownership requirements past the date of the shareholder nominees' election to the board. We note that the one-year holding

requirement is less onerous than holding periods that have been suggested in other contexts. For example, Senator Schumer's Shareholder Bill of Rights Act of 2009 would impose a two-year holding period if its proxy access provisions are enacted.

Importantly, shareholders using proposed Rule 14a-11 must not have acquired or hold their shares for the purpose or with the effect of changing control of the company or to gain more than a limited number of board seats. Shareholders seeking such a change-in-control or a majority of board seats or greater may continue to use existing SEC procedures for such election contests.

### ***Eligibility Requirements for Shareholder Nominees***

Shareholder nominees must meet the following qualifications:

- their candidacy and board membership, if elected, must not violate state or federal law, the company's governing documents or applicable stock exchange rules;
- they must satisfy the objective criteria for independence set forth by applicable stock exchange rules. Shareholder nominees would not have to meet any independence standard that requires a subjective determination by the board or any additional standards of independence that apply to audit committee members. Also, the proposing release states that shareholder nominees would not have to meet any additional independence or other requirements established by the company's nominating committee or board, which presumably could include the optional categorical standards of independence that many boards have established pursuant to New York Stock Exchange rules; and
- there must be no relationship or agreement between the nominees or the nominating shareholders and the company regarding the nomination of the nominees. However, the proposed rules clarify that unsuccessful negotiations between the nominees or nominating shareholders and the company's nominating committee or board to have the nominees included in the company's proxy materials as management nominees or negotiations that are limited to whether the company must include the nominees in the company's proxy materials would not be considered an agreement for the purposes of this requirement. There are no restrictions on the relationships between shareholder nominees and the nominating shareholders.

### ***Advance Notice Requirements; New Schedule 14N***

Nominating shareholders would be required to provide advance notice on new Schedule 14N to the company of their intent to require the inclusion of their nominees in the company's proxy materials. The Schedule 14N must be provided to the company by the date set forth in the company's advance notice bylaws. Notwithstanding this seeming deference to a company's advance notice process, the proposing release states that a company may not opt out of Rule 14a-11 by adopting more restrictive eligibility standards or mandating more extensive disclosure requirements than those under Rule 14a-11. Pursuant to this guidance, many second-generation advance notice bylaws that companies have adopted and that require extensive disclosure with respect to the nominating shareholders' derivative positions in the company and

the shareholder nominees' qualifications to serve on the board may potentially conflict with Rule 14a-11.

In the case of a company that does not have an advance notice bylaw, nominating shareholders must submit the Schedule 14N by no later than 120 days before the anniversary of the date the company mailed its proxy materials for the prior year's annual meeting. 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 from the prior year, the company must set a deadline for the submission of the Schedule 14N that is a reasonable time before the company mails its proxy materials. Such date must be disclosed under a new Item 5.07 on Form 8-K within four business days after the determination of such date by the company.

Nominating shareholders must also file the Schedule 14N with the SEC on the date that it is sent to the company and must update the Schedule for any material changes, which according to the proposing release, would include the withdrawal of a nominating shareholder or nominee. Nominating shareholders would also be required to file a final amendment to the Schedule 14N within 10 calendar days of the announcement of the final results of the election and state their intention with regard to continued ownership of their shares.

Schedule 14N would require, among other things, representations that the nominating shareholders and nominees meet the eligibility requirements discussed above (including a certification that, to the best of the nominating shareholders' knowledge, their shares are not held for the purpose or with the effect of changing control of the company or to gain more than a limited number of board seats), information similar to that currently required for election contests under SEC rules, information regarding certain relationships (such as agreements or litigation) between the nominating shareholders and nominees and the company or its affiliate and the nominating shareholders' statement in support of their nominees (which is not to exceed 500 words). For more detail on the disclosure required by Schedule 14N, see Exhibit A.

### ***Company Requirements***

If the nominating shareholders and shareholder nominees meet the foregoing requirements, a company would have to include the nominees on its proxy card and certain other disclosures in its Schedule 14A, unless state law or the company's governing documents prohibit shareholders from nominating candidates for election to the board. The option of voting for or withholding authority to vote for nominees as a group would not be available if shareholder nominees are included on the company proxy card, and shareholders would instead have to vote for each nominee separately. However, the company could continue to solicit discretionary authority to vote shareholders' shares for the company's nominees.

Notwithstanding the inclusion of the shareholder nominees in the company's proxy materials, the nominating shareholders could continue to use written materials outside of the company proxy statement to seek support for their nominees or to oppose the company's nominees. Proposed amendments to Rule 14a-2 would exempt such materials from the proxy solicitation requirements so long as shareholders do not seek proxy power or otherwise request a form of revocation, abstention, consent or authorization. In addition, each written communication must:

- include the identity of each nominating shareholder and a description of his or her direct or indirect interests, by security holdings or otherwise;
- include a prominent legend in clear, plain language advising shareholders that a shareholder nominee is or may be included in the company's proxy statement and to read that proxy statement when it becomes available because it includes important information (or, if the proxy statement is already available, advising shareholders of that fact and encouraging them to read the proxy statement because it includes important information). The legend also must explain to shareholders that they can find the proxy statement and other relevant documents at no charge on the SEC website; and
- be filed with the SEC under cover of Schedule 14A by the soliciting shareholders no later than the date the material is first published, sent or given to shareholders, with copies being sent to the applicable stock exchange and the company.

*Limitations on the Number of Shareholder Nominees.* In keeping with the SEC's goal of preventing the proxy access procedure from being too disruptive or otherwise being used to effect changes-in-control, each company would only be required to include the greater of one shareholder nominee or a number of nominees equal to 25% of its board membership (rounded down if such 25% number is not a whole number). Directors who were previously elected pursuant to Rule 14a-11 but otherwise not up for election (e.g., in a staggered board) would count towards this allotment. However, directors who are elected pursuant to an agreement between the nominees or nominating shareholders and the company or any affiliate of the company would not be included in this allotment. Thus, as currently proposed, the amendments could result in a company's having more than 25% of its board comprised of shareholder representatives, e.g., if the company voluntarily agreed to nominate and elect one or more shareholder representatives to the board pursuant to an investment arrangement or settlement of a proxy contest. The proposed rules do not address how these limits would apply to companies with a floating number of directors, although the SEC seeks comment on this issue.

Shareholder nominations would be accepted on a "first-come, first-served" basis according to when a shareholder provides its notice of nomination to the company. The proposal does not specify how to determine such first-come status, for example, if shareholder nominations are received by the company in the same mail delivery. Shareholders submitting a number of nominees greater than that permitted by Rule 14a-11 would be permitted to choose which of their shareholder nominees would continue in the process.

*Including Shareholder Nominees.* If a company determines to include a shareholder nominee in its proxy materials pursuant to Rule 14a-11, it must so notify the nominating shareholders no later than 30 calendar days before the company files its definitive proxy materials with the SEC. The company must then include the nominees' names on its proxy card and certain disclosure related to the nominating shareholders and nominees in its proxy statement (under new Item 7(e) of Schedule 14A) as set forth in more detail in Exhibit A. New Rule 14a-11 states that the company would not be responsible for any information provided by the nominating shareholders, unless the company knows or has reason to know that the information is false or misleading. Further, Rule 14a-9 would be amended to impose upon the nominating shareholders liability for false or misleading information that they provide to the company for inclusion in its proxy

materials. No nominating shareholder information will be deemed incorporated by reference into any of the company's filings, unless the company specifies otherwise. Companies would continue to be able to file their proxy materials with the SEC in definitive form on the same basis as they currently do, notwithstanding the inclusion of shareholder nominees.

*Excluding Shareholder Nominees.* Rule 14a-11 states that a company may exclude shareholder nominees if it determines that:

- applicable state law or its governing documents prohibit such shareholder nominations or the election of shareholder nominees;
- the nominees' candidacy or, if elected, board membership would violate applicable state or federal law, its governing documents or the rules of the applicable stock exchange (other than the rules regarding director independence);
- the nominating shareholders have not satisfied Rule 14a-11's eligibility requirements;
- there is information missing from the Schedule 14N or a representation or certification required to be included in the Schedule is false or misleading in any material respect; or
- the number of nominees required to be included in the company's proxy materials exceeds the maximum number allowable by Rule 14a-11.

If a company determines that it may exclude a shareholder nominee, the proposed amendments provide a process for the company and the nominating shareholder to resolve the issue, with related deadlines, as follows:

| Deadline   | Action  |
|--|---|
| Within 14 calendar days after the company receives the nominating shareholders' Schedule 14N | The company must notify the nominating shareholders of its decision to exclude a nominee (including an explanation of the basis for such exclusion).  |
| Within 14 calendar days after receipt of the company's notice of exclusion                   | The nominating shareholders must respond and correct any deficiencies identified in the company's notice, if it wishes to continue in the Rule 14a-11 process. The composition of the nominating shareholder group and the shareholder nominees may not be changed to correct a deficiency. This effectively means that the only curable deficiencies relate to the addition of information missing from, and the correction of false or misleading information in, the Schedule 14N, and amending the number of shareholder nominees so that |

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|  | it does not exceed the number permitted by Rule 14a-11.   |
| No later than 80 calendar days before the filing of definitive proxy materials with the SEC, unless the company shows good cause for missing this deadline | <p>If the company still determines to exclude a shareholder nominee, the company must provide notice of the basis for its determination to the SEC and provide a copy of such notice to the nominating shareholders. This notice must include the following information:</p> <ul style="list-style-type: none"> <li>• identification of the nominating shareholders;</li> <li>• names of the nominees;</li> <li>• an explanation of the company's basis for excluding the nominees; and</li> <li>• a supporting opinion of counsel when the basis for exclusion relies on a matter of state law.</li> </ul> |
| Within 14 calendar days after the company's notice to the SEC  | The nominating shareholders may submit a response to the company's notice to the SEC and also send a copy to the company.   |
| No later than 30 calendar days before it files its definitive proxy materials  | The company shall provide the nominating shareholders with notice of whether it will include or exclude the shareholder nominees.   |

The SEC Staff may, at its discretion, provide an informal statement of its views on the dispute by issuing a no-action letter to the company and the nominating shareholders.

#### ***Other Related Changes***

To facilitate the use of Rule 14a-11, the SEC has also proposed the following related amendments:

- Rule 14a-2 would be amended such that solicitations by shareholders seeking to form a shareholder nomination group would not be considered a solicitation for purposes of the SEC's proxy rules if each written communication includes no more than the following information:
  - a statement of each soliciting shareholders' intent to form a nominating shareholder group to nominate a director under Rule 14a-11;

- identification of, and a brief statement regarding, the potential nominees or, where no nominees have been identified, the characteristics of the nominees that the shareholders intend to nominate;
- the percentage of securities that the soliciting shareholders beneficially own; and
- the means by which shareholders may contact the soliciting shareholders.

Any such soliciting material must be filed with the SEC under cover of Schedule 14A by the soliciting shareholders no later than the date that the material is first published, sent or given to shareholders, with copies being sent to the applicable stock exchange and the company.

As discussed above, solicitations in favor of shareholder nominees or in opposition of the company's nominees would also be exempt from the SEC's proxy solicitation requirements subject to certain conditions.

- Rule 13d-1 would be amended so that a beneficial owner who acquires or holds shares in connection with Rule 14a-11 procedures would not lose Schedule 13G eligibility solely as a result of making a nomination, soliciting in favor of a nominee or having a nominee elected to the board pursuant to such rule. This exception would expire upon the election of the applicable director nominee to the board
- Rule 14a-11 states that a nominating shareholder will not be deemed an "affiliate" of the company for Securities Act and Exchange Act purposes solely as a result of nominating a candidate for director or soliciting for the election of such nominee or against a company nominee pursuant to Rule 14a-11. Where a shareholder nominee is elected, and the nominating shareholders do not have an agreement or relationship with that director (other than relating to the director's nomination pursuant to Rule 14a-11, solicitation for the election of the shareholder nominee or against a company nominee or the election of the shareholder director nominee), the nominating shareholders will not be deemed an affiliate solely by virtue of having nominated that director.

Because the SEC could not anticipate all of the types of proxy access procedures that might be adopted under state law or by companies outside Rule 14a-11 and determine whether the clarifications and relief discussed above appropriately should apply to such potentially diverse procedures, none of these provisions will be available for shareholder nominations made pursuant to state law or a company's governing documents.

#### **Shareholder Nominations Made Pursuant to Proxy Access Procedures Established Pursuant to State Law or by a Company's Governing Documents**

The proposal also establishes certain procedural and disclosure requirements with respect to the inclusion in company proxy materials of shareholder nominations made pursuant to a process specified either by state law or by the company's governing documents. Under new Rule 14a-19, nominating shareholders would also have to provide notice to the company on Schedule 14N

by the same deadlines as required pursuant to Rule 14a-11. However, less information is required on Schedule 14N and subsequently under new Item 7(f) of Schedule 14A than pursuant to the Rule 14a-11 proxy access procedure because not all of the Rule 14a-11 required disclosures will be applicable to the state or company procedures. For more detail on the disclosures required for these shareholder nominations, see Exhibit A. As with the Rule 14a-11 procedure, companies would not be liable for any information provided by nominating shareholders, unless the company knows or has reason to know that the information is false or misleading. Such information would also not be deemed incorporated by reference into any of the company's filings, unless the company specifies otherwise.

### **Shareholder Proposals Related to Proxy Access Procedures**

As a corollary to the proxy access procedures discussed above, the proposal would narrow Rule 14a-8(i)(8)'s election exclusion to permit the inclusion of shareholder proposals to amend a company's governing documents to provide for proxy access, if such proposals are not otherwise excludable under Rule 14a-8. Rule 14a-8(i)(8) would be revised to allow the exclusion of only those shareholder proposals that:

- would disqualify a nominee who is standing for election;
- would remove a director from office before his or her term expired;
- questions the competence, business judgment or character of one or more nominees or directors;
- nominates a specific individual for election to the board, other than pursuant to Rule 14a-11, applicable state law or the company's governing documents; or
- otherwise could affect the outcome of the upcoming election of directors.

This provision would not restrict the types of proxy access amendments that a shareholder could propose, including whether such proposal must be binding or non-binding. However, the proposing release notes that any shareholder proposals that conflict with Rule 14a-11 would be excludable, such as those that would purport to prevent shareholders who otherwise meet Rule 14a-11 eligibility requirements from having their nominees included in the company's proxy materials or a provision that would affirmatively excuse nominating shareholders or their nominees from liability under Rule 14a-9.

\* \* \*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning the issues addressed in this memorandum may be directed to Mark S. Bergman (011-44-20-7367-1601), Raphael M. Russo (212-373-3309) or Frances F. Mi (212-373-3185).

**SUMMARY OF SELECTED KEY DISCLOSURE ITEMS REQUIRED  
BY NEW SCHEDULE 14N AND AMENDED SCHEDULE 14A**

| Disclosure Item  | For Shareholder Nominations Pursuant to Rule 14a-11 |   | For Shareholder Nominations Pursuant to State Law or Company Procedures |   |
|--|---|---|---|---|
|  | Shareholder Notice on Schedule 14N                  | Company Proxy Statement on Schedule 14A (New Item 7(e)) | Shareholder Notice on Schedule 14N                                      | Company Proxy Statement on Schedule 14A (New Item 7(f)) |
| A statement of ownership from the nominating shareholders if they are the registered holders of the shares qualifying them for use of Rule 14a-11, or otherwise, a written statement from the record holder of the nominating shareholders' shares verifying that, at the time of submitting the shareholder notice to the company on Schedule 14N, the nominating shareholders continuously held the securities being used to satisfy Rule 14a-11's ownership thresholds for a period of at least one year. If the nominating shareholders have filed a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, the nominating shareholders may attach a copy of that filing or incorporate it by reference | Required.   | Not required.   | Not required.   | Not required.   |
| A statement that the nominating shareholders intend to continue to own the requisite shares through the date of the meeting of shareholders, and a statement regarding the nominating shareholders' intent with respect to continued ownership after the election  | Required.   | Required.   | Not required.   | Not required.   |

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| A representation that, to the knowledge of the nominating shareholders, the nominees' candidacy or, if elected, board membership would not violate state or federal law or applicable stock exchange rules (other than the rules regarding director independence)   | Required. | Not required. | Not required. | Not required. |
| A representation that the nominating shareholders satisfy the eligibility conditions set forth in Rule 14a-11   | Required. | Not required. | Not required. | Not required. |
| A representation that the nominees meet the objective criteria for independence of the applicable stock exchange. Nominees would not have to meet any additional standards of independence that apply to audit committee members. Also, the proposing release states that shareholders would not have to represent that their nominees meet any additional independence or other requirements of the company's nominating committee or board, e.g., the optional categorical standards of independence established by a board pursuant to New York Stock Exchange rules | Required. | Not required. | Not required. | Not required. |
| A representation that neither the nominees nor any nominating shareholder has an agreement with the company regarding the nomination of the nominees. Unsuccessful negotiations between the nominating committee to have the nominees included in the company's proxy materials as management nominees or negotiations that are limited to whether the company is required to include the nominees in the company's proxy materials would not be considered an agreement for purposes of this requirement   | Required. | Not required. | Not required. | Not required. |
| A statement from each nominee that the nominee consents to be named in the company's proxy materials and, if elected, to serve on the company's board   | Required. | Required.     | Required.     | Required.     |

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| Disclosure about the nominee as would be required for proxy contests by Items 4(b) (Information regarding persons making the solicitation), 5(b) (Information regarding the interests of participants and other persons in the matters to be acted on), 7(a), (b) and (c) (Information regarding the background and qualifications of the shareholder nominee and certain relationships between the shareholder nominee and the company as required by Instruction 4 of Item 103 and Items 401, 404(a) and (b), 405 and 407(a), (d)(4) and (d)(5) of Regulation S-K) of Schedule 14A  | Required. | Required. | Required. | Required. |
| Disclosure about the nominating shareholders as would be required in contested elections in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A <sup>1</sup>   | Required. | Required. | Required. | Required. |
| Disclosure about whether the nominating shareholders have been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S-K unless this disclosure has already been provided in response to Items 4(b) and 5(b) of Schedule 14A referenced above <sup>1</sup>   | Required. | Required. | Required. | Required. |
| Information regarding the nature and extent of the relationships between the nominating shareholders and the nominees and the company or any affiliate of the company, including: <ul style="list-style-type: none"> <li>Any direct or indirect material interest in any contract or agreement between a nominating shareholder or nominee and the company or its affiliate (including any employment, collective bargaining or consulting agreement);</li> <li>Any material pending or threatened litigation in which a nominating shareholder or nominee is a party or a</li> </ul> | Required. | Required. | Required. | Required. |

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| <p>material participant, involving the company or any of its officers, directors or affiliates; and</p> <ul style="list-style-type: none"> <li>Any other material relationship between a nominating shareholder or the nominee and the company or any affiliate of the company not otherwise disclosed, including employment relationships and consulting arrangements</li> </ul> |           |               |               |               |
| The website address on which the nominating shareholders may publish soliciting materials, if any   | Required. | Required.     | Required.     | Required.     |
| A statement in support of the shareholder nominees, which may not exceed 500 words, if the nominating shareholders elect to have such statement included in the company's proxy materials   | Required. | Required.     | Not required. | Not required. |
| A certification that, to the best of the nominating shareholders' knowledge, they are not holding securities of the company for the purpose of or with the effect of changing control of the company or to gain more than a limited number of seats on the board  | Required. | Not required. | Required.     | Not required. |

<sup>1</sup> Where the nominating shareholder is a general or limited partnership, syndicate or other group, this information must be given with respect to each partner of the general partnership; each partner who is, or functions as, a general partner of the limited partnership; each member of the syndicate or group and each person controlling the partner or member. If the nominating shareholder is a corporation or if a person referred to in the foregoing sentence is a corporation, this information must be given with respect to each executive officer and director of the corporation; each person controlling the corporation and each executive officer and director of any corporation or other person ultimately in control of the corporation.