# Public Company Alert

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## SEC Eliminates Broker Discretionary Voting in Director Elections

*By Lori Goldman and Eric Schoenborn*

The Securities and Exchange Commission recently approved the New York Stock Exchange's (NYSE) proposal to eliminate broker discretionary voting for uncontested director elections. This was implemented by amendments to NYSE Rule 452 and Section 402.08 of the NYSE Listed Company Manual.

This amendment will apply to all meetings held on or after Jan. 1, 2010, with the exception of meetings that were originally scheduled to be held in 2009 but were adjourned to Jan. 1, 2010 or later. Because most large brokerage firms are NYSE member organizations, this amendment affects not only NYSE–listed companies, but also companies listed on other national securities exchanges such as NASDAQ and NYSE Amex.

A broker that is a member of the NYSE and that is the record owner of shares held in street name on behalf of a beneficial owner may vote those shares on "routine" matters if the beneficial owner has not provided voting instructions at least 10 days before a meeting and certain other conditions are met.[1] The NYSE rules list a number of nonroutine matters upon which brokers cannot cast a vote without instructions from the beneficial owner. Before this amendment, only contested elections were considered nonroutine. With this amendment, the election of directors (contested and uncontested) will now be considered nonroutine and will require brokers to vote only upon specific instruction from the beneficial owner.

### Effects of the Rule Change

This rule change could have a material impact on annual meetings and director elections. For instance, companies that previously could rely on broker discretionary votes to obtain a quorum may find it challenging to reach a quorum unless they include a routine matter on the ballot. Including a routine matter on the ballot (such as the ratification of auditors) will likely resolve the issue because the corporate law of many states provides that a quorum, once established for a meeting, is valid for all matters voted upon at such meeting. However, if there are no routine matters on the agenda, companies may have difficulty achieving a quorum for the election of directors unless they spend significantly more money and effort on proxy solicitation, such as retaining a proxy solicitor, which can be expensive.

In addition, this rule change could have a negative impact on companies that have


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adopted a majority voting standard for director elections. Without being able to include broker discretionary votes, it will be more difficult to obtain the necessary majority vote to elect the directors. This is particularly true if the company is targeted by a “vote no” or “withhold” campaign by institutional shareholders or others.

These problems may occur because many shareholders do not currently realize that their failure to instruct their broker may have a negative impact on the election of directors. Accordingly, companies may need to educate their shareholders to correct this misconception. Lastly, the negative impact could be disproportionate for smaller companies that have smaller proportions of institutional shareholders and are not able to easily contact and convince their retail shareholders to vote in uncontested elections.

**Practical Considerations**

Due to these potential difficulties in obtaining the necessary votes for director elections, additional time should be allotted during the proxy solicitation process. Companies may consider distributing proxy materials further in advance of the meeting date than past practice warrants in order to allow additional time to obtain a quorum. Whenever a company intends to revise its proxy distribution timetables, however, it is important to check any advance notice provisions in the bylaws to take into account deadlines for shareholder nominations and other business. ■

[1] These other conditions include (i) the action under consideration is not being contested, (ii) the action is adequately disclosed to shareholders and (iii) the action is not seeking authorization for a merger, consolidation or any other matter which may affect substantially the rights or privileges of such stock.

For further information regarding this subject, please contact Eric Schoenborn (856.321.2413 or eschoenborn@stradley.com) or Lori Buchanan Goldman (215.564.8707 or lgoldman@stradley.com).

# Delaware Adopts Proxy Access Amendments

*By Frances Gauthier*

The Delaware General Assembly recently approved various amendments to the General Corporation Law of the State of Delaware (the DGCL); they became effective on Aug. 1, 2009. Among the amendments are two new sections dealing with proxies: §112, which is entitled “Access to Proxy Solicitation Materials” and §113, which is entitled “Proxy Expense Reimbursement.” Both of these sections authorize, but do not require, corporations to adopt bylaw provisions intended to facilitate director nominations by stockholders. Although Delaware corporations could actually adopt such bylaw provisions prior to the adoption of these new sections, the new sections clarify the validity and flexibility of bylaw provisions establishing both proxy access and rights to reimbursement of proxy solicitation expenses.

Specifically, §112 permits a corporation, either through its stockholders or its board of directors, to adopt bylaw provisions that require the corporation to include in its proxy materials stockholder nominees for election as directors, conditioned on (1) minimum levels or duration of stock ownership by the nominating stockholder, (2) submission of certain background information concerning the stockholder and the stockholder’s nominee(s), (3) restrictions on the number or proportion of directors nominated by stockholders, (4) restrictions on acquisitions of shares of the corporation by the stockholder and the stockholder’s nominee(s), (5) a requirement that the nominating stockholder indemnify the corporation for losses arising from any false or misleading information submitted by the stockholder, or (6) any other lawful condition set forth in such bylaw provisions.

Meanwhile, § 113 permits a corporation to adopt bylaw provisions that require the corporation to reimburse a stockholder for expenses incurred by the stockholder in


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connection with the stockholder's separate solicitation of proxies (i.e., shareholder prepares own proxy statement) for the election of directors, conditioned on (1) the number or proportion of persons nominated by the stockholder seeking reimbursement, (2) whether the stockholder has previously requested reimbursement, (3) the proportion of votes cast for the nominee(s) proposed by the stockholder, (4) the amount spent by the corporation in soliciting proxies for the election, (5) limitations related to the election of directors by cumulative voting, or (6) any other lawful condition set forth in such bylaw provisions. ■

For further information regarding these amendments, please contact Frances Gauthier (302.576.5864 or fgauthier@stradley.com).

# SEC Proposes Rule Amendments to Facilitate Rights of Shareholders to Nominate Directors

*By Eric Schoenborn*

The Securities and Exchange Commission (SEC) proposed a new rule (Rule 14a-11) that relates to proxy access for shareholders. See Release No. 34-60089. Under the SEC proposal, shareholders who otherwise are provided the opportunity to nominate directors at a shareholder meeting would be able to have their nominees included in the company's proxy ballot that is sent to all voters. In addition, shareholders would also have the ability to use shareholder proposals to modify the company's nomination procedures or disclosure about elections, so long as those proposals do not conflict with state law or SEC rules. A brief summary of some of the key features of these proposals are set forth below.

**Getting Nominees Included in the Company's Proxy Materials:**

Under proposed Exchange Act Rule 14a-11, certain shareholders would be able to include their nominees for director in the company's proxy materials unless the shareholders are otherwise prohibited (either by applicable state law or the company's charter/bylaws) from nominating a candidate for election as a director. The proposed rule would apply to all Exchange Act reporting companies, other than debt-only companies. Shareholders would generally be eligible to have their nominee included in the company's proxy materials if:

- They own at least 1 percent of the voting securities of a "large accelerated filer" (a company with a worldwide public float of $700 million or more).
- They own at least 3 percent of the voting securities of an "accelerated filer" (a company with a worldwide public float of $75 million or more but less than $700 million).
- They own at least 5 percent of the voting securities of a non-accelerated filer (a company with a worldwide public float of less than $75 million).

There are other requirements regarding the amount of time the shares have to be held and the necessary passive investment intent of the shareholder. In addition, the rule would also have

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certain requirements related to the nominees, such as not violating applicable laws and satisfying objective independence standards of the applicable securities exchange. Also, the proposal provides that nominations can be made for no more than one shareholder nominee, or a number of nominees that represents up to 25 percent of the company's board of directors, whichever is greater.

**Allowing Shareholder Proposals:**

Under a proposed amendment to Exchange Act Rule 14a-8(i)(8), shareholders could require companies, under certain circumstances, to include proposals in their proxy materials that would amend, or request an amendment to, the company's governing documents to address the company's nomination procedures or other director nomination disclosure provisions that do not conflict with the SEC's rules. The current eligibility provisions of Rule 14a-8 would continue to apply. Accordingly, a shareholder proponent must have continuously held at least $2,000 in market value (or 1 percent, whichever is less) of the company's securities entitled to be voted on the proposal at the meeting, for a period of one year prior to submitting the proposal. If adopted, this could result in proposals to adopt provisions similar to Sections 112 or 113 of the DGCL as described above.

Please be aware that this is merely a proposal at this point, and a final rule may not be adopted or may be adopted with different provisions than provided in the proposal described above. Nevertheless, companies should begin to consider the potential impact of this proposal on their corporate governance.

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