

Corporate and Securities Update:

SEC Update—SEC Proposed Rules Would Make It Easier For Stockholders to Nominate Board Members; Compensation Disclosure Changes On The Way

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The SEC announced that it will propose amendments to the proxy rules to facilitate the ability of stockholders to propose nominees for election to a board of directors. In addition, the SEC has signaled in a speech to Congress that it will be proposing significant changes to the current compensation disclosure rules.

STOCKHOLDER NOMINATIONS

Under the proposed rules, eligible stockholders would be permitted to nominate at least one person, and up to 25% of the board seats, for election to the board of directors.

Eligibility:

Proposing stockholders would need to own at least:

- 1 percent of the voting securities of a large accelerated filer;
- 3 percent of the voting securities of an accelerated filer; or
- 5 percent of the voting securities of a non-accelerated filer.¹

Proposing stockholders would be required to have held their shares for at least one year.

Proposing stockholders would be required to sign a statement declaring their intent to continue to own their shares through the date of the annual meeting at which directors are to be elected. They would also be required to certify that they are not holding their stock for the purpose of changing control of the company, or to gain more than minority representation on the board of directors.

Number of Nominees

Eligible stockholders would be permitted to nominate at least one person, and no more than 25% of the board of directors. The SEC did not discuss how a classified board structure would be affected.

Qualifications of Nominees

Nominees would need to be “independent” as defined under the rules of the exchange on which the company’s stock is listed. In addition, there could not be any direct or indirect agreement with the company for the nomination of the nominee.

Inclusion of Nominees in Company Proxy Materials and Other Filings

The SEC is proposing to permit stockholders to include their nominees in the company’s proxy statement. Stockholders would be required to file a separate schedule that would include disclosure regarding their eligibility and the certifications of the nominating stockholders.

Changes to Rule 14a-8 Regarding Elections

Currently, Rule 14a-8(i)(8) permits companies to exclude stockholder proposals from a proxy if the proposal “relates to an election.” The SEC proposes to narrow this exclusion in order to allow more stockholder proposals regarding elections. Proposals that seek to amend provisions of a company’s governing documents concerning the company’s nomination procedures or other director nomination disclosure provisions would no longer be excludable. The current Rule 14a-8 eligibility requirements would continue to apply.

¹ The SEC noted that stockholders would be able to aggregate holdings to meet applicable thresholds.

CHANGES IN COMPENSATION DISCLOSURE

In a speech to Congress by SEC Chair Mary Shapiro, she stated that the SEC is considering proposing additional compensation-related disclosures in the following areas:

- why a board of directors has chosen its particular leadership structure so that stockholders can better evaluate board performance;
- how compensation structures and practices drive an executive's risk-taking;
- how a company — and the company's board in particular — manages risks, both generally and in the context of compensation;
- a company's overall compensation approach, in addition to the current "named executive officers;" and
- compensation consultant conflicts of interests.

WHEN WILL THESE PROPOSED CHANGES TAKE EFFECT?

The text of the proposed rules for stockholder nominations has not been published. The proposed rules would be subject to a 90-day comment period, and could change significantly before final rules on this subject are enacted. It appears that the compensation-related proposals are still in the early stages. We will continue to provide updates on these topics.

For additional information, please contact:

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