JONES DAY

JUNE 2009

SEC PROPOSES NEW RULES FACILITATING SHAREHOLDER NOMINATIONS OF DIRECTORS

On June 10, 2009, the SEC proposed rules that would expand the rights of shareholders to nominate and elect persons to serve on public company boards of directors.[1] Under the proposed new Rule 14a-11 of the Securities Exchange Act of 1934 (the "Exchange Act"), companies would be required, under certain circumstances, to include shareholder nominees for director in the proxy materials that the company distributes to its shareholders in connection with an annual meeting (or special meeting in lieu of an annual meeting). Shareholders also would have the ability to use the shareholder proposal procedure under Exchange Act Rule 14a-8 to modify the company's nomination procedures or disclosures about elections through a bylaw amendment, so long as such proposal does not conflict with state law or SEC rules. The proposal, announced by the SEC on May 20, 2009, is the third proposal issued by the SEC in the last several years dealing with direct access by shareholders to the proxy materials.[2]

DIRECT ACCESS TO PROXY MATERIALS

Under proposed Rule 14a-11, certain shareholders may include their nominee(s) for election to the board of directors in the company's proxy materials unless the shareholders are otherwise prohibited—either by state law or a company's charter or bylaws—from nominating a candidate for election as a director. The proposed rule would apply to all Exchange Act reporting companies that have a class of equity securities subject to the proxy rules, including investment companies.

Shareholder Eligibility Tests. A shareholder would be eligible to have its nominee(s) included in the company's proxy materials if the shareholder meets five eligibility tests.

1. **Minimum Ownership.** The shareholder must beneficially own the following minimum amount of voting securities[3]:

- At least **1 percent** of the voting securities of a "large accelerated filer" (a company with a worldwide market value[4] of **$700 million or more**) or of a registered investment company with net assets of $700 million or more.

- At least **3 percent** of the voting securities of an "accelerated filer" (a company with a worldwide market value of **$75 million or more but less than $700 million**) or of a registered investment company with net assets of $75 million or more but less than $700 million.

- At least **5 percent** of the voting securities of a non-accelerated filer (a company with a worldwide market value of **less than $75 million**) or of a registered investment company with net assets of less than $75 million.

2. **Minimum Holding Period.** The shareholder must have held its shares for at least one year prior to the date notice is given to the company of the intent to submit nominees for inclusion in the proxy materials.[5]

3. **Declaration of Intent.** The shareholder must make a statement on a Schedule 14N (a) declaring its intent to continue to own its shares through the date of the annual meeting at which directors are to be elected and (b) concerning its intent with regard to continued ownership after the election.

4. **Certification.** A shareholder must certify that it is not holding the company's stock for the purpose of changing control of the company or to gain more than a limited number of seats on the board of directors.

5. **Absence of Agreement.** The shareholder must not have a relationship or agreement with the company regarding the nomination of its nominee(s) to serve on the company's board of directors.

Shareholder Nominee Requirements. In addition, each shareholder nominee must satisfy two requirements to be included in the company's proxy materials:

1. **No Violation of Law.** The nominee's candidacy or, if elected, board membership, must not violate applicable state or federal law (*e.g.,* Clayton Act restrictions on interlocking directorates) or the rules of the applicable national securities exchange or national securities association (excluding requirements related to the independence of directors).[6]

2. **Independence.** The nominating shareholder or group must represent that the nominee satisfies the objective independence criteria of the applicable national securities exchange or national securities association that apply to directors generally. More specific independence standards applicable to audit committees or listings standards that require the application of any subjective criteria would not be the subject of any representation. While an issuer could not object to a nominee on the basis of a lack of independence, a company could exclude a shareholder nominee based on a false or misleading statement regarding the nominee(s)' satisfaction of the listing independence standards.

Limit on Number of Board Nominees. Shareholders, in the aggregate, may not nominate more than the greater of (a) one nominee or (b) a number of nominees that represents up to 25 percent of the number of seats on a company's board of directors. For example, if an annually elected board is comprised of twelve members, three shareholder nominees could be included in the proxy materials. If a company has a director currently serving on the board who was elected as a shareholder nominee pursuant to proposed Rule 14a-11, and that director's term extends past the date of the election, he or she will "count" toward the 25 percent threshold. In addition, if 25 percent does not result in a whole number, the maximum number of shareholder nominees for director will be rounded down to the closest whole number less than 25 percent. The SEC has solicited comments on how the amendments would impact staggered boards, and whether the maximum number of shareholder nominees should be based on the number of directors to be elected rather than the overall board. Regardless of the method that it finally adopts, the SEC has indicated that these limitations are intended to prevent shareholders from using the proposed rule as a means to effect a change in control.

If a company receives more shareholder nominees than it is required to include in its proxy materials, the company would be required to include in its proxy materials the nominee or nominees of the first nominating shareholder or group from which it receives timely notice of intent to nominate a director pursuant to the rule.

If a nominee, a nominating shareholder, or any member of a shareholder group has any agreement with the company or any affiliate of the company regarding the nomination of a candidate for election to the board of directors, that nominee or any nominee of such nominating shareholder or group would not be included in calculating the number of shareholder nominees required to be included in the proxy materials under the proposed rule.

New Schedule 14N—Shareholder and Nominee Disclosures. Pursuant to proposed rules, a nominating shareholder or group would be required to file with the SEC and submit to the company a Schedule 14N.[7] Schedule 14N is a proposed form that would require disclosure of (a) facts supporting the shareholder's eligibility to nominate a director and (b) information related to the nominating shareholder or group. As proposed and absent rulemaking by the SEC expanding beneficial ownership reporting on Schedule 13D/G, the rule would not require a nominating shareholder to disclose economic interests in the nature of derivative securities that the shareholder holds in the issuer. If the rule is adopted as proposed, it is unclear whether separate bylaw requirements that such disclosures be made as a precondition to making a director nomination would be valid under the new rule if the shareholder otherwise complies with Schedule 14N's disclosure requirements.

The information required to be disclosed in the Schedule 14N would include, among other things, the following:

1. Statement from the nominee that he or she consents to being named in the company's proxy statement and, if elected, will serve on the company's board;

2. Description of the nominee's biographical information and interests of the nominee;

3. Disclosure identifying the nominee and nominating shareholder's participation in transactions with the company, involvement in certain legal proceedings, and any arrangements related to the nominee's selection as a nominee;[8]

4. Disclosure of any website address at which the nominating shareholder or group may publish soliciting materials; and

5. Information regarding the aggregate number and percentage of the securities entitled to be voted, including the amount beneficially owned and the number of shares over which the nominating shareholder or each member of the group holds.

The disclosure requirements regarding the nominating standard detailed above are similar to the disclosure currently required in a contested election.[9] The nominating shareholder or group would be liable for any false or misleading statements in the information provided to the company for inclusion in the company's proxy materials. Similarly, the company would not be responsible for information provided by the shareholder, unless it knew or had reason to know the information was false.

Timing of Nominations. Under the proposed rules, nominations would need to be submitted to the company, and the Schedule 14N would have to be filed with the SEC, on the same time schedule as currently required by Rule 14a-8 proposals (the date set by the company's advance notice provision or, in the absence of such a provision, 120 days before the anniversary of the date that the company mailed the prior year's proxy materials).

Exclusion of Nominees. Proposed Rule 14a-11 imposes affirmative notice requirements on companies that receive notice of a shareholder nomination on Schedule 14N. First, if a company determines that it will include a Rule 14a-11 nominee in its proxy materials, it must provide the nominating shareholder or group with notice of such fact not later than 30 calendar days before the company files its definitive proxy statement with the SEC. Second, if a company determines that it is not required to include a nominee in its proxy materials,[10] the company and the proponent must follow the procedure for exclusion included in proposed Rule 14a-11(f),[11] set forth below:

Due Date	Action Required
Promptly after the company's receipt of the nominating shareholder's or group's notice on Schedule 14N.	Company must make an affirmative determination whether it is permitted to exclude a nominee.
Within 14 calendar days after the company's receipt of the notice on Schedule 14N.	Company must notify the nominating shareholder or group of any determination not to include the nominee or nominees.
Within 14 calendar days after the nominating shareholder's or group's receipt of the company's deficiency notice.	Nominating shareholder must respond to the company's deficiency notice.
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the SEC.	Company must provide notice to the SEC of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the SEC.
Within 14 calendar days of the nominating shareholder's or group's receipt of the company's notice to the SEC.	Nominating shareholder or group may submit a response to the company's notice to the SEC.
As soon as practicable following receipt of nominating shareholder's or group's response.	SEC would, at its discretion, provide an informal statement of its views to the company and the nominating shareholder or group.

If the deficiency relates to the composition of either the nominating shareholder group or the nominee identified in the notice, the nominating shareholder or group may not cure the deficiency or amend the notice. If the nominating shareholder or group inadvertently nominated a number of nominees that exceeds the maximum number required to be included, the shareholder may specify which nominee(s) are to be included.

COMMENT PERIOD

The proposed rules are subject to an open comment period through August 17, 2009. Given that these new rules will significantly alter corporate governance procedures, companies may want to consider submitting comments to the SEC expressing their views on the proposed rules, responding to specific questions raised in the proposing release or suggesting changes.

EXEMPTIONS FOR SOLICITATIONS BY NOMINATING SHAREHOLDERS

To facilitate solicitations by nominating shareholders, the proposed rules would exempt from regulation under the proxy rules solicitations by shareholders to form nominating shareholder groups or to support the election of shareholder nominees. The proposed rules also would clarify that a shareholder who is Schedule 13G eligible would not lose such eligibility solely as a result of making a nomination, soliciting in favor of a nominee, or having a nominee elected to the board under the proposed rules.

SHAREHOLDERS PROPOSALS UNDER RULE 14A-8

Currently, Exchange Act Rule 14a-8(i)(8) permits companies to exclude shareholder proposals that "relate to an election." Under proposed amended Rule 14a-8(i)(8), this so-called "election exclusion" would be narrowed, in effect permitting the inclusion of shareholder proposals regarding elections in the proxy materials. Specifically, shareholder proposals by eligible shareholders that would amend, or request an amendment to, provisions of a company's governing documents concerning the company's nomination procedures or other director nomination disclosure provisions, and are consistent with proposed Rule 14a-11 and state law, could not be excluded.

The current eligibility provisions of Rule 14a-8 would continue to apply. Those provisions require that a shareholder proponent 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.

FEDERAL LEGISLATION DEVELOPMENTS

Congress also is considering related proxy access legislation.[12] On May 19, 2009, Senator Charles Schumer proposed the "Shareholder Bill of Rights Act of 2009." Subsequently, on June 12, 2009, Representative Gary Peters introduced a similar, but more expansive bill, the "Shareholder Empowerment Act of 2009." These bills seek to strengthen shareholders' oversight and influence over companies. Each of the bills grants the SEC expanded authority to adopt rules expanding shareholders' rights to nominate candidates to a company's board. Additionally, the bills address many of the reforms that activist shareholders have sought over the years, including mandatory, nonbinding say-on-pay voting, annual election of all directors, implementation of majority voting in uncontested elections, and separation of the chairperson of the board of directors position from the chief executive officer.[13] If either bill is enacted, certain corporate governance matters—traditionally the exclusive province of state corporate law—would become subject to additional federal regulatory oversight.

STATE LAW DEVELOPMENTS

On April 10, 2009, Delaware passed new legislation permitting, but not requiring, Delaware companies to adopt bylaws that would provide for shareholder access to company proxy materials for the purpose of proposing director nominees pursuant to the procedures and conditions set forth in such bylaws, and for the reimbursement of expenses incurred by the nominating shareholder in soliciting proxies.[14] Such bylaws can be adopted either by the company's board of directors or by the shareholders. Bylaws adopted under new Section 112 of the Delaware General Corporation Law (the "DGCL"), which becomes effective August 1, 2009, may include procedures and conditions under which a company soliciting proxies for the election of director nominees would also be required to include in its proxy materials nominees submitted by shareholders. In addition, the Committee on Corporate Laws of the Section of Business Law of the American Bar Association, which is responsible for the Model Business Corporation Act, is actively considering amending the Model Business Corporation Act to include similar enabling provisions.

These state law amendments may impede the recent trend of shareholder proposals aimed at reincorporating companies in North Dakota. The North Dakota Publicly Traded Corporations Act includes shareholder-friendly regulations, such as mandatory annual director elections, a prohibition on employees serving as chairman of the board, minimal notice requirements for shareholder access to proxy materials, and majority voting. Since the DGCL and other state amendments provide for greater shareholder access, these reincorporation proposals are less likely to gain significant support from shareholders.[15]

POTENTIAL IMPLICATIONS AND ACTION ITEMS

The SEC's initiative, recent shareholder proposals seeking direct access bylaws, proposed federal legislation, and the recent changes to Delaware law described above are part of a larger ongoing debate on corporate governance issues.[16] Political changes, coupled with the passage of federal legislation regulating executive pay practices for recipients of Troubled Asset Relief Program (TARP) funds, have raised new concerns over the ability of directors to oversee executive compensation practices and risk management. In a move toward giving shareholders a greater voice in this oversight process, the new rules would increase the frequency of proxy contests, pitting management nominees against shareholder representatives in Board elections.

If the SEC's proposal or the proposed federal legislation is approved, companies and their boards of directors should assess how likely their shareholders are to seek direct access to proxy solicitation materials. Accordingly, public companies should consider the potential implications of the new rules and other action items described below:

Director Nomination Procedures and Qualifications. Most public companies have established procedures for the nomination of directors and the qualifications required of those nominees. These procedures and qualifications are set out in a company's bylaws, corporate governance guidelines (and related director qualification criteria), and certain committee charters, all of which should be reviewed in light of the proposed rules. In particular:

- Advance notice bylaws should be reviewed to confirm that they are not inconsistent with proposals or nominations made pursuant to Rules 14a-8 and 14a-11, and are otherwise designed to provide adequate notice (with respect to both timing and content) with respect to director nominations. Importantly, most advance notice bylaws governing director nominations require notice of such nominations no later than 60 days in advance of the anniversary of the previous year's annual meeting. Since Rule 14a-18's default rule would generally require notice earlier (120 days prior to the mailing date of the prior year's proxy statement), issuers should consider amending their advance notice bylaws to require notice by Rule 14a-18's default date.

- The publicized method (contained in the company's proxy statement) used by shareholders seeking to propose director nominees to the company's nominating or corporate governance committee will need to be revised to accommodate the requirements applicable to a shareholder utilizing proposed Rule 14a-11 or a direct access bylaw to have a nominee included directly on the proxy ballot.

- Criteria for director selection contained in a company's corporate governance guidelines, board committee charters, and bylaws should be reviewed to clarify that they would not apply to a proposed Rule 14a-11 or bylaw shareholder nominee.[17]

- Governance documents and most recent board actions relating to the size of the board should be reviewed to confirm that the company has no vacancies on the board that could be filled through a shareholder nomination.

Vote Standard for Election of Directors. If a company has a non-plurality voting standard that applies to the election of directors—such as a majority vote standard—it should be reviewed to determine what effect the inclusion of a proposed Rule 14a-11 or bylaw nominee in the company's proxy materials would have on the shareholder vote. In particular, the definition of a "contested election" may have different meanings in different contexts. As a result, a company should analyze the circumstances under which the election becomes contested and a plurality vote standard would apply. If the plurality vote standard would not be triggered based on the language of proposed Rule 14a-11, companies should consider modifying their majority vote standard to clarify that where the number of nominees exceeds director vacancies, a plurality vote standard will apply.

Concerns Related to Shareholder Nominees. Boards, led by their corporate governance committees, will need to assess the expected likelihood of a shareholder director nominee. Companies with activist shareholders will be particularly subject to shareholder nominees. Corporate governance committees should assess whether the effect of the rule could facilitate the election of "special interest" (*e.g.*, public pension fund or union representatives) directors to their board, or hinder the election of certain company-supported directors with specific skill sets. In particular:

- The company should assess whether its shareholders are "activist" shareholders, whether and which shareholders may be inclined to act as a group (and if so, with whom), what positions shareholders have articulated, and what the company's relationship with such shareholders has been over time. Depending on the results of this assessment, boards may decide to open a dialogue with shareholders who are likely to propose nominations for inclusion on the proxy so as to avoid an impairment of the board's ability to function effectively.

- Companies should review their shareholder list to identify which shareholders or groups of shareholders would have the requisite share ownership (as of the measurement date set forth in the rule) that would enable them to present nominations for inclusion in the proxy materials. An analysis of the company's shareholder profile should include a review of the type of shareholder, size of holdings, turnover pattern, and length of holdings.

- In addition, the company should revisit how the board's performance has been rated and corporate governance assessments, such as RiskMetrics' corporate governance quotient.

State Law Interplay. Companies incorporated outside of Delaware should analyze the corporation law in their jurisdictions of incorporation governing shareholders' ability to include director nominations in the company's proxy materials to assess whether there is a conflict between state law and the proposed SEC rules. Companies should also monitor any state law changes that may impact proxy access procedures. Enabling statutes are intended to grant companies and shareholders flexibility under state law to adopt a proxy access bylaw tailored specifically to each company's and its shareholders' needs, including a shareholder proposed bylaw contemplated by the amendments to Rule 14a-8. However, the SEC has indicated that, as proposed, a company may not effectively opt out of proposed Rule 14a-11 by adopting alternate or more restrictive bylaw requirements for inclusion of a shareholder nominee in the proxy materials.

Effect on the Corporate Governance Committee Processes. If properly employed by a shareholder, proposed Rule 14a-11 would allow shareholders to bypass the board's corporate governance committee, and the board itself, to include shareholder nominees in the proxy materials. As a result, the corporate governance committee and the board will have little opportunity to consider whether the nominees are suitable to serve under pre-established criteria (including the company's own categorical independence criteria). The board will also not have the opportunity to determine whether a nominee fills any needs of the board in regard to prior business experience, financial expertise (required for Audit Committee membership), special technical expertise, diversity, or other factors that assure the effectiveness of a board and its committees. However, the corporate governance committee should be responsible for reviewing any proposed Rule 14a-11 or bylaw nominee to determine whether such nominee meets the director eligibility standards of the rule or bylaw.[18] Although not a bar to a proposed Rule 14a-11 or bylaw nomination, counsel should also assess and review with the corporate governance committee whether any shareholder nominee would qualify (a) for audit and compensation committee membership, and (b) as "independent" under the company's own categorical independence standards. The applicable committee charter(s) should be revised to reflect the possible need for these committee processes.

Determining Eligibility of Rule 14a-11 or Bylaw Proponents and Nominees. If a company receives a proposed Rule 14a-11 or bylaw nomination, it will need to obtain documentary support to confirm a shareholder's eligibility to propose a nominee and whether the nomination complies with applicable rules and laws. Each shareholder nominee must also be reviewed under the rule's criteria to determine eligibility to serve on the board. Companies should make sure appropriate procedures are in place to promptly review and respond to proposed Rule 14a-11 nominations within the specified timeline described above. Companies should check their internal controls to monitor any nomination notices they receive in order to promptly determine whether a shareholder proponent or proposed Rule 14a-11 or bylaw nominee may be excluded under proposed Rule 14a-11(f). See "Effect on Corporate Governance Committee Processes," above.

Rule 452 Interplay. Contested elections are considered "non-routine" events under NYSE Rule 452, which would forbid broker-dealers from voting shares held in street name for director candidates. Under Rule 452, a "contested election" is defined as a matter that is the subject of a counter-solicitation, or is part of a proposal made by a shareholder that is being opposed by management. If a proposed Rule 14a-11 or bylaw nominee is included in a company's proxy materials, discretionary voting by broker-dealers may not apply to such election. If the proposed changes to Rule 452 are adopted as currently proposed,[19] it is not clear whether *any* director election would be considered routine. The SEC has specifically solicited comments on the interplay between proposed Rule 14a-11 and Rule 452.

Monitoring Investment Intention of Shareholder Proponents. To be eligible to submit a nominee for inclusion on the company's proxy ballot, a shareholder must certify it is not holding the company's stock with the intention of changing control of the company. However, the company should continue to review and analyze the conduct and share ownership of any proponent shareholder (including Schedule 13D and 13G filings) to determine whether the certification remains accurate.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Mark E. Betzen
1.214.969.3704
mbetzen@jonesday.com

Thomas C. Daniels
1.216.586.7017
tcdaniels@jonesday.com

Charles T. Haag
1.214.969.5148
chaag@jonesday.com

Christopher J. Hewitt
1.216.586.7254
cjhewitt@jonesday.com

Elizabeth C. Kitslaar
1.312.269.4114
ekitslaar@jonesday.com

Joel T. May
1.312.269.4307
jtmay@jonesday.com

Robert A. Profusek
1.212.326.3800
raprofusek@jonesday.com

Lizanne Thomas
1.404.581.8411
lthomas@jonesday.com

ENDNOTES

1. Securities Release Nos. 33-9046; 34-60089, June 10, 2009, "Facilitating Shareholders Director Nominations," available at http://www.sec.gov/rules/proposed/2009/33-9046.pdf. Chairman Schapiro's speech regarding announcement of the proposed rule is available at http://www.sec.gov/news/speech/2009/spch052009mls.htm. Commissioner Walter's speech is available at http://www.sec.gov/news/speech/2009/spch052009ebw.htm. Commissioner Aguilar's speech is available at http://www.sec.gov/news/speech/2009/spch052009laa.htm. Commissioner Paredes' speech is available at http://www.sec.gov/news/speech/2009/spch052009tap.htm. Commissioner Casey's speech is available at http://www.sec.gov/news/speech/2009/spch-052009klc.htm.
2. In 2003, the SEC proposed rules that would have required companies to include in their proxy materials director candidates nominated by shareholders if (1) at least one of the company's nominees for the board received "withhold" votes from more than 35 percent of the votes cast at the company's annual meeting or (2) if a shareholder proposal requesting that a company become subject to the proxy access rule was submitted by holders at least 1% of the company's voting securities and received more than 50% of the votes cast. Upon the occurrence of either event, holders of more than 5 percent of a company's shares would have been able to include up to three director nominees in the company's proxy materials. The 2003 proposals were never adopted. See Release No. 34-48626 (October 14, 2003) available at http://www.sec.gov/rules/proposed/34-48626.htm. For more information related to the 2003 proposals please see Jones Day Memorandum dated December 15, 2003, available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S1389. In 2007, the SEC proposed two amendments to Rule 14a-8(i)(8), the first of which stated that proxy access shareholder proposals were excludable from company proxy materials, and the second of which would have permitted persons holding at least 5 percent of a company's voting securities for at least one year to propose a binding proxy access bylaw. Only the first proposal was adopted. See Release No. 34-56160 (July 27, 2007) available at http://www.sec.gov/rules/proposed/2007/34-56160.pdf. For more information related to the 2007 proposals, please see Jones Day Memorandum dated December 15, 2003, available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S4791.
3. Shareholders would be able to form nominating shareholder groups and aggregate their holdings to meet applicable thresholds.

4. "Worldwide market value" means aggregate worldwide market value of voting and nonvoting common equity held by nonaffiliates as set forth in Exchange Act Rule 12b-2.

5. The one-year holding requirement would apply only to the securities of the shareholder or each member of the shareholder group that are used for purposes of determining the ownership threshold.

6. The SEC has excluded independence standards because compliance can depend on the overall make-up of the company's board.

7. Proposed Rule 14a-18 applies to nominations submitted pursuant to proposed Rule 14a-11. Proposed Rule 14a-19 applies to nominations submitted pursuant to applicable state law or the company's governing documents. Proposed Rules 14a-18 and 14a-19 also include the disclosure requirements for a shareholder nomination for inclusion in the proxy materials made pursuant to procedures established pursuant to state law or by the company's governing documents.

8. A shareholder's status as an affiliate raises numerous practical concerns. The SEC clarified that a nominating shareholder will not be deemed an affiliate of the company solely by virtue of the nomination of a director or the solicitation for the election of such a director; nor will the shareholder be deemed an affiliate as a result of having nominated a director who is elected if no agreement or relationship exists between the director and the nominating shareholder. The SEC did not provide a definition of "relationship" for purposes of the proposed rule.

9. *See* Rule 14a-12(c) of the Exchange Act, together with Items 4 and 5 of Schedule 14A promulgated under the Exchange Act.

10. A company may exclude a proposed Rule 14a-11 nominee from its proxy materials if it determines that either (1) proposed Rule 14a-11 does not apply to the company, (2) the nominating shareholder or group has not complied with the requirements of the proposed rule, (3) the nominee does not meet the requirements of the proposed rule, (4) any representation in the notice is false or misleading in any material respect, or (5) the company has received more nominees than it is required to include under proposed Rule 14a-11.

11. All materials submitted to the SEC pursuant to Rule 14a-11(f) would be publicly available upon submission.

12. For Senator Schumer's proposed bill see S. 1074, 111th Cong. (1st Sess. 2009) and is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1074is.txt.pdf. For Congressman Peters' proposed bill see H.R. 2861 111th Cong. (1st Sess. 2009) , which is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2861ih.txt.pdf.

13. The bills include other various corporate governance reforms intended to increase executives' attention to long-term shareholder return and improved risk-assessment.

14. Del. Code Tit. 8 § 112 [Effective Aug. 1, 2009].

15. The majority of North Dakota reincorporation proposals failed during the 2009 proxy season. The proxy statements of Continental Airlines, Southwest Airlines, AIG, Pep Boys, and Staples, among others, have included shareholder proposals related to reincorporation in North Dakota.

16. On the same day that the SEC issued the proxy access proposing release, Treasury Secretary Timothy Geithner issued two fact sheets entitled "Providing Compensation Committees with New Independence" and "Ensuring Investors Have a 'Say on Pay,'" which highlight legislation that the Treasury Department is sponsoring in Congress. The fact sheets outline various SEC initiatives that will be authorized by the proposed legislation, which include:

    - rules requiring compensation committee members meet independence standards similar to audit committee members under the Sarbanes-Oxley Act of 2002;
    - rules giving compensation committees authority over compensation consultants, legal counsel, and other tools ensuring independence;
    - standards for compensation consultants and outside counsel; and
    - rules requiring nonbinding say-on-pay votes.

17. If the company did not hold an annual meeting the previous year, or if the date of the current year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's annual meeting, the company must disclose pursuant to Item 5.07 of Form 8-K the date by which a shareholder or shareholder group must submit the notice required under proposed Rule 14a-11, which date shall be a reasonable time prior to the date the registrant mails its proxy materials for the meeting.

18. Under Rule 14a-11(f)(1), companies are required to determine whether any of the events permitting exclusion of a shareholder nominee has occurred.

19. Securities Release No. 34-59464, February 26, 2009, "Notice of Filing of Proposed Rule Change, as modified by Amendment No. 4, to Amend NYSE Rule 452 and Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting for the Election of Directors and Codify Two Previously Published Interpretations That Do Not Permit Broker Discretionary Votes for Material Amendments to Investment Advisory Contracts," available at http://www.sec.gov/rules/sro/nyse/2009/34-59464.pdf.