

December 10, 2007

The SEC Publishes Shareholder Access Rules

The SEC has published final rules to codify in a revised Rule 14a-8(i)(8) its interpretation that companies may exclude from their proxy materials not only shareholder proposals that relate to an election to the board, but also those that relate to:

- nominations for election to the board; and
- procedures for nomination or election to the board that would result in an immediate or future election contest.

The SEC decided to take this action now, notwithstanding a forceful campaign by shareholder groups to delay such action, because of its strong desire to provide certainty to companies regarding its position on shareholder access proposals, end further litigation and confusion about such position and ensure that investors receive adequate disclosure in a contested election situation. The SEC feared that absent this rule change, opposition solicitations embedded in a company's own proxy statement pursuant to a shareholder access amendment could circumvent existing proxy disclosure requirements.

SEC Chairman Cox has indicated that this is a stop-gap measure only and that the SEC will take up the issue again next year. In the interim, news reports indicate that the American Federation of State, County and Municipal Employees (AFSCME) has already submitted two shareholder access proposals at J.P. Morgan and Bear Stearns in a seemingly direct challenge to the revised rule, and AFSCME representatives have indicated the group's willingness to litigate to force the inclusion of these proposals in the companies' proxy statements, if necessary. Thus, notwithstanding the SEC's desire to end litigation in this area, controversy may remain for the near future.

The SEC stresses that this change is to be construed narrowly and does not affect or address any of the SEC's other interpretations of the Rule 14a-8(i)(8) exclusion. In this regard, the adopting release states that excludable proposals include those that could have the effect of:

- disqualifying board nominees who are standing for election;
- removing a director from office before his or her term expired;
- questioning the competence or business judgment of one or more directors; or

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

1615 L Street, NW
Washington, DC 20036-5694
(202) 223-7300

Alder Castle, 10 Noble Street
London EC2V 7JU England
(44-20) 7367 1600

Fukoku Seimei Building 2nd Floor
2-2, Uchisawaicho 2-chome
Chiyoda-ku, Tokyo 100-001, Japan
(81-3) 3597-8101

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

12th Fl., Hong Kong Club Building
3A Chater Road, Central
Hong Kong
(852) 2536-9933

© 2007 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this advisory may be considered attorney advertising. Past representations are no guarantee of future outcomes.

- requiring companies to include shareholder nominees in the company's proxy materials or otherwise resulting in a solicitation on behalf of shareholder nominees in opposition to management-supported nominees.

The adopting release further states that non-excludable proposals include those that relate to:

- director qualifications or board structure (as long as the proposal will not remove current directors or disqualify current nominees);
- voting procedures (such as majority, plurality or cumulative voting);
- nominating procedures (other than those that would result in the inclusion of a shareholder nominee in company proxy materials); or
- reimbursement of shareholder expenses in contested elections.

The revised rule will be effective January 10, 2008. For a copy of the release, see <http://www.sec.gov/rules/final/2007/34-56914.pdf>.

At the same SEC meeting at which the foregoing shareholder access rule was adopted, the SEC also approved rules that would promote shareholder communications via online forums. Final rules in this area have not yet been published, but we will provide you with an update when such rules become available.

* * *

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 John C. Kennedy (212-373-3025), Kelley D. Parker (212-373-3136), David S. Huntington (212-373-3124) and Frances F. Mi (212-373-3185).