

September 2010

SECURITIES LAW ALERT PROXY REFORM

In August 2010, the Securities and Exchange Commission ("SEC") adopted new Rule 14a-11 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which requires a public company that is subject to the SEC's proxy rules to include in its proxy material a certain number of candidates for election to the Board of Directors who are nominated by qualifying shareholders in addition to management's nominees. Rule 14a-11 will apply only when applicable state law or a company's governing documents do not prohibit shareholders from nominating a candidate for election as a director. Smaller reporting companies will be given a three year phase-in period for the new rule. The effective date of Rule 14a-11 is November 15, 2010.

Shareholder Stock Ownership Requirements

To use Rule 14a-11, a nominating shareholder or group will be required to satisfy an ownership threshold of at least 3% of the voting power of the company's securities entitled to be voted at the meeting. Shareholders will be able to aggregate their shares to meet the threshold. The rule requires that a nominating shareholder or group must hold both investment and voting power, either directly or through any person acting on their behalf, of the securities. A nominating shareholder (or in the case of a group, each member of the group) will be required to have held the qualifying amount of securities continuously for at least three years as of the date the nominating shareholder or group submits notice of its intent to use Rule 14a-11 (on a new disclosure form filed with the SEC known as Schedule 14N). The nominating shareholder or members of the group must continue to own the qualifying amount of securities through the date of the meeting at which directors are elected and provide disclosure concerning their intent with regard to continued ownership of the securities after the election of directors. In addition, the nominating shareholder (or where there is a nominating shareholder group, any member of the nominating shareholder group) may not be holding the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a-11, and may not have a direct or indirect agreement with the company regarding the nomination of the nominee or nominees prior to filing the Schedule 14N.

Timing of Nominations

The nominating shareholder or group must provide notice to the company of its intent to use Rule 14a-11 no earlier than 150 days prior to the anniversary of the mailing of the prior year's proxy statement and no later than 120 days prior to this date. The nominating shareholder or group will be required to file on EDGAR and transmit to the company its notice on Schedule 14N on the same date.

Nominee Requirements

A company will not be required to include any nominee whose candidacy or, if elected, board membership would violate controlling state or federal or foreign law, or the applicable standards of a national securities exchange or national

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securities association, except with regard to director independence requirements that rely on a subjective determination by the board, and such violation could not be cured during the provided time period. The rule does not include any restrictions on the relationships between the nominee and the nominating shareholder or group.

Number of Permitted Nominees; Competing Nominees

A company will not be required to include more than one shareholder nominee, or a number of nominees that represents up to 25% of the company's board of directors, whichever is greater. Where there are multiple eligible nominating shareholders, the nominating shareholder or group with the highest percentage of the company's voting power would have its nominees included in the company's proxy materials, rather than the nominating shareholder or group that is first to submit a notice on Schedule 14N. When a company has a classified (staggered) board, the 25% calculation would still be based on the total number of board seats. Shareholder nominees of an eligible nominating shareholder or group with the highest qualifying voting power percentage that a company agrees to include as company nominees after the filing of the Schedule 14N would count toward the 25%.

Schedule 14N Requirements

The notice on Schedule 14N will be required to include:

Disclosure concerning:

- The amount and percentage of voting power of the company's securities entitled to be voted by the nominating shareholder or group and the length of ownership of those securities;
- Biographical and other information about the nominating shareholder or group and the shareholder nominee or nominees, similar to the disclosure currently required in a contested election;
- Whether or not the nominee or nominees satisfy the company's director qualifications, if any (as provided in the company's governing documents);
- Certifications that, after reasonable inquiry and based on the nominating shareholder's or group's knowledge, the:
 - Nominating shareholder (or where there is a nominating shareholder group, each member of the nominating shareholder group) is not holding any of the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a-11;
 - Nominating shareholder or group otherwise satisfies the requirements of Rule 14a-11, as applicable; and
 - Nominee or nominees satisfy the requirements of Rule 14a-11, as applicable;
- A statement that the nominating shareholder or group members will continue to hold the qualifying amount of securities through the date of the meeting and a statement with regard to the nominating shareholder's or group member's intended ownership of the securities following the election of directors (which may be contingent on the results of the election of directors); and
- A statement in support of each shareholder nominee, not to exceed 500 words per nominee (the statement would be at the option of the nominating shareholder or group).

Liability for Schedule 14N Information

The nominating shareholder or group will be liable for any statement in the notice on Schedule 14N which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact necessary to make the statements therein not false or misleading, including when

(Please see next page for more information.)

that information is subsequently included in the company's proxy statement. The company will not be responsible for any information provided by the nominating shareholder or group and included in the company's proxy statement.

Exclusion of Nominees

A company will not be required to include a nominee or nominees if the nominating shareholder or group or the nominee fails to satisfy the eligibility requirements of Rule 14a-11. A company that determines it may exclude a nominee or nominees must provide a notice to the SEC regarding its intent to exclude the nominee or nominees. The company also may submit a request for the SEC staff's informal view with respect to the company's determination that it may exclude the nominee or nominees. In addition, a company could exclude a nominating shareholder's or group's statement of support if the statement exceeds 500 words per nominee and could seek a no-action letter from the SEC staff with regard to this determination if it so desired. In the event that a nominating shareholder or group or nominee withdraws or is disqualified prior to the time the company commences printing the proxy materials, under certain circumstances companies will be required to include a substitute nominee if there are other eligible nominees. Therefore, companies seeking a no-action letter from the staff with respect to their decision to exclude any Rule 14a-11 nominee or nominees would need to seek a no-action letter on all nominees that they believe they can exclude at the outset.

We are available to provide counsel and guidance concerning similar Securities Law issues, as well as others not discussed in this Alert. Please contact any of the attorneys named below.

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