

SEC Adopts Final “Proxy Access” Rules

On Wednesday, August 25th, the Securities and Exchange Commission, by a vote of 3-2, adopted rules that will permit long-term significant shareholders to use a company’s proxy materials to nominate their own candidates to serve on the company’s board of directors. While the SEC’s action brings to a close the long and, at times, bitter debate over the propriety of allowing shareholders to select board nominees, the highly controversial nature of so-called “proxy access” almost certainly ensures that, in the months ahead, the scope and operation of the new rules will be tested and probed by both supporters and opponents.

The key features of the new rules are as follows:

- “Proxy access” will be limited to shareholders, or groups of shareholders, who own – and have owned continuously for at least the prior three years – at least 3% of the company’s voting securities
- To ensure “access” is limited to shareholders that have a genuine commitment to the company, shareholders will not be permitted to borrow shares of stock to achieve the required ownership threshold
- The total number of nominees available to all qualifying shareholders in a given election will be one or 25% of the board, whichever number is greater
- Shareholders will not be able to use the new rules if they hold their stock with the intent of changing control of the company or gaining more seats on the board than is permitted under the new requirements
- Nominating shareholders will be subject to certain procedural and other requirements, including specific disclosure requirements about their director-nominees

- A company’s shareholders may opt to adopt “proxy access” rules that provide for greater access, but they cannot limit the availability of the new rules
- Application of the new rules to smaller reporting companies, that is, companies with a common equity public float of less than \$75 million, will be deferred for three years – until the fall of 2013

The new rules will become effective 60 days after publication in the Federal Register, which will likely occur next week. Consequently, the new rules should be effective by the beginning of November.

While it is evident that the SEC has worked hard to develop a set of rules that take into consideration the concerns of both companies and investors, the deeply controversial nature of this subject almost ensures that implementation will be long and contentious. We intend to monitor compliance in the months ahead and will keep you apprised of significant developments as they happen.

Need Assistance?

Compensia has had significant experience in helping companies ensure that their executive compensation programs satisfy operational and disclosure requirements. If you have any questions on the subjects addressed in this Thoughtful Pay Alert or would like assistance in assessing their likely impact on your executive compensation plans and arrangements, please feel free to contact us. ■

SEC Adopts Final “Proxy Access” Rules (continued)

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