

## CORPORATE LAW ALERT



Attorneys in SHB's Corporate Law Practice concentrate their practices in mergers and acquisitions, joint ventures, strategic alliances, securities matters, private equity and financing transactions, commercial finance and banking and the general representation of publicly held and private entities.

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Our banking and commercial law attorneys counsel local, national and international financial institutions and corporate borrowers on loan transactions and regulatory issues and are nationally recognized experts in various areas of commercial law.

If you have questions about the *Lyondell* decision, please contact

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### SEC PROPOSES INCREASED SHAREHOLDER PROXY ACCESS ... AGAIN

In an open Commission meeting held May 20, 2009, the SEC voted 3-2 to propose a new proxy access rule (new Exchange Act Rule 14a-11) and to amend existing Rule 14a-8(i)(8) to facilitate the rights of shareholders to nominate directors. This marks the third time in the past decade that the SEC has proposed allowing shareholders greater access to the nomination process.

Typically, public company directors nominate a slate of director candidates for election at the company's annual meeting. The company sends out its proxy materials to shareholders who then vote their shares, either in person at the meeting or more often by proxy, based on the information in the proxy materials. The only meaningful way shareholders can actually nominate their own candidates is by launching a proxy fight in which they mail out their own proxy materials and ballots—a costly process. The proposed new rule and rule amendments are designed to give shareholders more and easier access to the process.

#### New Rule 14a-11

Under the proposed rule, which would preempt any proxy access provisions set forth in state law or in a company's charter or bylaws, certain shareholders would be allowed to have their director nominees included in the company's proxy materials for consideration at the annual meeting. Such shareholders include those owning at least:

- 1 percent of the voting securities of a large accelerated filer (a company with worldwide market value of at least \$700 million);
- 3 percent of the voting securities of an accelerated filer (a company with worldwide market value of at least \$75 million but less than \$700 million); or
- 5 percent of the voting securities of a non-accelerated filer (a company with worldwide market value of less than \$75 million).

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Shareholders would also be allowed to aggregate their holdings to meet the applicable threshold, but would be required to have held their shares for at least one year. They would also be required to file a Schedule 14N reporting the percentage of securities beneficially owned, period of time held and intent to hold their shares through the annual meeting, and certifying that the nomination is not intended to result in a change of control of the company or result in more than a minority representation on the board of directors.

To take advantage of the proposed rule, shareholders would have to provide notice to the company and the SEC at least 120 days before the first anniversary of the date that the prior year's proxy materials were first released, unless the company has an advance notice provision in its bylaws that provides a different timeframe.

Under the proposed rule, shareholder nominees must be "independent" under state law and applicable exchange standards, and the nominating shareholder cannot have any agreement with the company regarding the nomination. There is no restriction, however, on shareholders nominating persons with whom they have a relationship, including themselves. Shareholders would be allowed to nominate the greater of one nominee or the number that equals 25 percent of the board.

### **Amended Exchange Act Rule 14a-8(i)(8)**

Another way in which the SEC is proposing greater shareholder access is by a proposed amendment to Rule 14a-8(i)(8). Currently, Rule 14a-8(i)(8) permits companies to exclude shareholder proposals that "relate to an election." Under the SEC's proposed amendment, this exclusion would be narrowed. Specifically, shareholder proposals by "qualifying shareholders" that would amend, or that request an amendment to, provisions of the company's governing documents regarding nomination procedures or other director nomination disclosure provisions would not be excludable.

Any shareholder meeting the current eligibility requirements of Rule 14a-8 would be considered a "qualifying shareholder" for purposes of Rule 14a-8(i)(8). Rule 14a-8 requires a shareholder proponent to have continually 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 before submitting the proposal.

### **60-Day Comment Period**

The SEC's proposals will be subject to a 60-day comment period, during which vigorous debate is likely. The current economic crisis is focusing attention more and more on the quality of corporate boards, and shareholders are becoming increasingly frustrated at their inability to control board composition. On the other hand, the business community has long opposed SEC efforts to give shareholders greater proxy access, arguing that doing so may give special interest groups far too much power to the detriment of other shareholders. ■