



## Simpson Thacher Urges Caution with Respect to the SEC's New Proxy Access Proposal

August 17, 2009

### OVERVIEW

The Firm has today submitted comments to the Securities and Exchange Commission regarding its proposed proxy access rules. Proposed Rule 14a-11 would require a company to include in the company's proxy materials a shareholder's, or group of shareholders', nominees for director.<sup>1</sup> The SEC is also proposing to modify Rule 14a-8 to eliminate the provision that allows a company to exclude from its proxy statement a shareholder proposal relating to proxy access.

The Firm's comment letters consist of (i) a letter submitted on behalf of the Firm questioning whether the evidence to support proxy access is sufficiently compelling to justify such a groundbreaking change at this time<sup>2</sup> and (ii) a letter jointly prepared with six other law firms recommending that the SEC not adopt proposed Rule 14a-11 and comprehensively addressing implementation issues should that recommendation be rejected.<sup>3</sup>

### SIMPSON THACHER LETTER

The Firm's comment letter urges the Commission to be cautious in implementing proposed Rule 14a-11 given that significant governance changes since 2003 have addressed many of the concerns that led the SEC to consider proxy access in the first place. The SEC cites to evidence from 2003 with respect to a lack of board accountability, but since that time directors are substantially more likely to be removed or otherwise held accountable through proxy contests, "withhold" votes and shareholder engagement. Moreover, there is the risk that facilitating the opportunity to remove directors may lead to the kind of excesses that prompted the SEC to revisit proxy access in the wake of the financial crisis. Given that the most significant impediment to stockholder nominated directors is the fact that Rule 14a-8 is not available for proposals relating to proxy access, we contend that the most prudent approach would be for the SEC to amend Rule 14a-8 and defer consideration of proposed Rule 14a-11 at this time.

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<sup>1</sup> The proposal is summarized in our prior client memorandum, "The SEC's New Proxy Access Proposal: Thoughtful Reform to Promote Better Corporate Governance or Rushed Response to Political Pressure?" (June 26, 2009); see also, Proposed Rule: Facilitating Shareholder Director Nominations, Exchange Act Rel. No. 34-60089 (June 10, 2009), available at <http://www.sec.gov/rules/proposed/2009/33-9046.pdf>.

<sup>2</sup> See Comment Letter of Simpson Thacher & Bartlett LLP, dated as August 17, 2009 ([click here](#)).

<sup>3</sup> See Comment Letter of Cravath, Swaine & Moore LLP, Davis Polk & Wardwell LLP, Latham & Watkins, LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, Sullivan & Cromwell LLP and Wachtell, Lipton, Rosen & Katz, dated as August 17, 2009 ([click here](#)).

## JOINT LETTER

The joint letter recommends that the SEC should amend Rule 14a-8 to permit stockholders to include proxy access proposals in company proxy materials rather than adopt proposed Rule 14a-11. The joint letter also contends that the SEC can achieve its goal of removing impediments to proxy access in the proxy rules by amending Rule 14a-8 with far less complexity and disruption than a prescriptive “one-size-fits-all” proxy access rule. The joint letter, however, addresses various implementation issues if the SEC, despite the misgivings of commentators such as ourselves, adopts proposed Rule 14a-11.

In the joint letter, the undersigned firms urge the SEC to be cautious in implementing what all participants in this debate acknowledge will be one of the most significant rule changes in SEC history. The firms ask that this caution be reflected in the timing of the transition period, respect for private ordering, sensitivity to control issues (raised by nominating groups being able to nominate up to 25% of the board) and the need for adequate disclosure by nominating stockholders and their nominees. Specifically, the firms note that stockholders should be entitled to modify or opt-out entirely from the SEC’s proxy access regime and boards should be entitled to adopt or amend proxy access bylaws subject to stockholder ratification of board action. The other principal recommendations of the firms were as follows:

- the rule should not be effective for the 2010 proxy season;
- if a traditional proxy contest were commenced, the availability of proposed Rule 14a-11 should be suspended;
- the ownership thresholds to determine eligibility to use proposed Rule 14a-11 should be adjusted upwards to 5% for individual stockholders (from as low as 1% for large accelerated filers) and higher thresholds for groups of stockholders;
- the number of persons solicited for the purpose of forming a stockholder nomination group should be limited to 10 absent compliance with the existing proxy rules;
- the nominee’s candidacy and election should not violate the company’s governing documents or corporate governance guidelines;
- each nominating stockholder or stockholder group should be limited to one nominee;
- the notice period for submitting proxy access nominees should be a uniform specified period prior to the anniversary of the mailing of the prior year’s proxy statement and any proxy access rule should provide for a defined, reasonably short window period for stockholder nominations and not merely a deadline;
- in the event the number of eligible proxy access nominees exceeds the 25% limit, the determination of which nominees to include should be based on the size of the nominating stockholder’s holdings rather than a first-in system;

- short positions and derivatives should be disclosed, and the ownership requirements should require both voting and dispositive power on a continuous “net long” basis; and
- persons or groups beneficially owning in excess of 5% of a class of voting securities who act in connection with a nomination should not have a per se exemption from Schedule 13D.

Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, [www.simpsonthacher.com](http://www.simpsonthacher.com).

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