

Corporate Governance Commentary

Proxy Access Bulletin No. 1

May 2009

Senator Schumer's Shareholder Bill of Rights

A version of US Senator Charles Schumer's proposed bill on corporate governance, the "Shareholder Bill of Rights Act of 2009," has now been posted on the Internet. Click here for the text of the draft bill: [http://www.corpfinblog.com/uploads/file/bill-text-shareholders-bill-of-rights-act-of-2009\(2\).pdf](http://www.corpfinblog.com/uploads/file/bill-text-shareholders-bill-of-rights-act-of-2009(2).pdf). We note that Sen. Schumer has not yet made the bill public, and it is possible that the final version of the draft will differ from the version posted at the above link.

The draft bill directs the SEC to establish "proxy access" rules. In particular, the effect of the draft bill on proxy access is two-fold:

- First, it would resolve any doubts that the SEC lacks rule-making authority in this area.
- Second, it would make clear that the SEC proxy access rules must do more than merely *permit* shareholder proposals for proxy access under Rule 14a-8—substantive regulation is contemplated.

In the context of this broad grant of rule-making authority, many observers may be surprised that the draft bill explicitly limits the SEC's proxy access rules to shareholders (including groups) who have beneficially owned at least one percent of the voting shares of the issuer for at least two years. We expect that the two-year holding period will provoke debate.

One point to consider is the effect of the draft bill on state law. Pre-emption is a complex area, but we would assume the draft bill is intended to pre-empt state regulation of proxy access, at least to the extent inconsistent with the SEC's rules. In its current form, the draft bill is silent on this point.

The draft bill has several other key features:

- SEC-reporting companies must include in their annual meeting proxies a separate resolution for a non-binding shareholder vote on the compensation package for executives. They must also include a resolution in a merger proxy for a non-binding shareholder vote on "golden parachute" arrangements.
- The SEC must establish rules requiring listed companies to meet the following corporate governance standards:
 - *Independent Chair*: The company must have an independent chairperson of the board of directors (who shall not have previously served as an executive officer of the company).
 - *No Staggered Board*: Each member of the company's board must be subject to annual election by the shareholders.
 - *Majority and Plurality Voting; Holdovers*: In uncontested elections, directors must be elected by a majority of votes cast for each nominee. In contested elections, directors must be elected by a plurality. If a member of the board does not receive a majority vote in an uncontested election, the director must resign and the board must accept the resignation—directors will not be permitted to "hold over" under any circumstances.
 - *Risk Committee*: The company must have a risk committee, comprised entirely of independent directors, with responsibility for the company's risk management practices.

The draft bill is likely to be controversial as much because of its federalization of matters traditionally governed by state corporate law as for its actual content.

In order to assist our clients in monitoring proxy access developments, Latham & Watkins will publish two separate client communications: Proxy Access Bulletins and Proxy Access Commentaries.

- *Proxy Access Bulletins, as their title implies, will be brief updates on “breaking” events related to proxy access. Our goal is to distribute them within 24 hours of any material new developments. The Proxy Access Bulletins will be short, fact specific alerts intended to keep clients and friends up-to-date on a real time basis.*
- *Proxy Access Commentaries will be similar to our customary M&A Commentaries and our Corporate Governance Commentaries. They will focus on in-depth analysis of the relevant legal and practical issues of proxy access as it develops and, as appropriate, will suggest concrete actions we think companies should consider in response to proxy access developments.*

If you have any questions regarding this *Commentary*, please contact the Latham & Watkins LLP representatives listed below or the Latham attorney with whom you normally consult.

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