

Proxy Solicitation Process

The Commission has proposed amendments to the following proxy rules governing the proxy solicitation process:

- Exchange Act Rule 14a-2(b)(1)
- Exchange Act Rule 14a-2(b)(1)(ix)
- Exchange Act Rule 14a-4(d)(4)
- Exchange Act Rule 14a-4(e)
- Exchange Act Rule 14a-12(a)(1)(i)

Amendments to Clarify Existing Exemptions from the Proxy Solicitation Rules

Exchange Act Rule 14a-2(b)(1)

The current rule: Existing Exchange Act Rule 14a-2(b)(1) exempts certain solicitations of a company's shareholders from the federal proxy rules governing disclosure, filing and other specified requirements¹ as long as the person making the solicitation does not seek, on its own or another's behalf, the power to act as proxy for the shareholder and does not furnish or request from the shareholder a *form of revocation*, abstention, consent or authorization.

The staff of the Division of Corporation Finance has informally advised on a number of occasions since the Commission adopted this exemption in 1992 that a "form of revocation" for purposes of the exemption does not include an unmarked copy of management's proxy card that the soliciting shareholder requests be returned directly to management. However, the U.S. Court of Appeals for the Second Circuit came to a contrary conclusion in 2004 when it determined that a duplicate of management's proxy card relating to a proposal to authorize a proposed merger was a form of revocation under Rule 14a-2(b)(1) when included in a mailing opposing the proposed merger.²

Proposed amendment of the rule: The amendment now proposed by the Commission would codify the staff's informal position, and effectively overturn the Second Circuit decision, by adding an express instruction to Rule 14a-2(b)(1) that a "form of revocation" does not include an unmarked copy of management's proxy card that the soliciting shareholder requests be returned directly to management. The proposed amendment would eliminate uncertainty that has existed since the Commission's initial adoption of the exemption in 1992 and would create yet another

¹ Generally, if the conditions of Exchange Act Rule 14a-2(b)(1) are met, the person making the solicitation would be exempt from the requirement to file with the Commission and furnish to the shareholders solicited a proxy statement and annual report (if it relates to an annual meeting), as well as the related requirements governing the content of such materials and the process for providing them to shareholders. The specific proxy rules that would not apply to the person making the solicitation are Exchange Act Rules 14a-3 to 14a-6 (other than paragraphs 14a-6(g)), 14a-8 and 14a-10 to 14a-15.

² See Mony Group, Inc. v. Highfields Capital Mgmt. L.P., 368 F. 3d 138 (May 13, 2004).

weapon in the arsenal for investor activists. If the proposed amendment is adopted, these activists would have clear authority, including as part of a “just vote no” campaign, to mail a duplicate unmarked copy of management’s proxy card to shareholders, request that shareholders vote against the board’s recommendation on one or more specified proposals and ask that shareholders return their completed proxy cards directly to management — all “without having to incur the costs and efforts of conducting a fully-regulated proxy solicitation.” In combination with the recent amendment of NYSE Rule 452 to eliminate broker discretionary voting in director elections, the proposed amendment could have a significant impact on the number of “just vote no” campaigns during next year’s proxy season and increase the likelihood of their success.

Comment request: The following items are among those listed in the Commission’s request for comment on this proposal:

- Whether providing an unmarked copy of management’s proxy card and asking that it be returned directly to management should be treated as a form of revocation and whether it should make a difference if the proxy card is returned directly to the soliciting party instead of management.
- Whether a soliciting person providing an unmarked copy of management’s proxy card should be required to file a Notice of Exempt Solicitation even if the person does not meet the thresholds for filing the notice under Exchange Act Rule 14a-6(g) or should otherwise be required to provide to the shareholders solicited and file with the Commission certain information about itself.
- Whether the proposed amendment raises concerns under state law.

Exchange Act Rule 14a-2(b)(1)(ix)

The current rule: Pursuant to Exchange Act Rule 14a-2(b)(1)(ix), the exemption described above in Rule 14a-2(b)(1) is not available to a “person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all holders of the same class of securities, other than a benefit arising from the person’s employment with the registrant.”

Proposed amendment of the rule: In response to confusion about the intended scope of this exception, the Commission has proposed to amend Rule 14a-2(b)(1)(ix) to clarify that the Rule 14a-2(b)(1) exemption would be unavailable even if the soliciting person is not a shareholder and even if the benefit received from a successful solicitation is not related to or derived from ownership of the company’s securities.

Comment request: The Commission has requested comment on the following items related to this proposal:

- Whether the proposed amendment clearly specifies when the Rule 14a-2(b)(1) exemption would be unavailable and whether additional detail is necessary to understand when the

exemption would be unavailable.

- Whether the proposed amendment would inappropriately narrow or broaden the scope of the Rule 14a-1(b)(1) exemption and, if so, how.

Amendment of “Short Slate” Rule in Exchange Act Rule 14a-4(d)(4)

The current rule: Exchange Act Rule 14a-4(d)(4) is an exception to the *bona fide* nominee rule³ that permits a person soliciting support for nominees who, if elected, would constitute a minority of the board of directors to round out its “short slate” of director nominees with nominees named in the company’s proxy statement. As currently written, Rule 14a-4(d)(4) does not permit a soliciting person to round out its short slate with persons other than the nominees named in the company’s proxy statement. However, in March 2009, the staff of the Division of Corporation Finance granted identical no-action letters to each of Icahn Associates Corp. and Eastbourne Capital, L.L.C. that permitted Icahn and Eastbourne to round out their short slates of director nominees for election to the board of directors of Amylin Pharmaceuticals, Inc. by using nominees named in either Amylin’s proxy statement or in the other non-management shareholder’s proxy statement.

Proposed amendment of the rule: The Commission now proposes to amend Rule 14a-4(d)(4) to codify this no-action position and expressly permit a non-management soliciting person to round out its short slate by seeking authority to vote for nominees named in the company’s *or* any other persons’ proxy statements.

The expanded exception proposed by the Commission would be available to a non-management person seeking to round out its short slate using nominees named in the proxy statement of another non-management person only if:

- the non-management person or its proxy solicitor does not actively recommend nominees for election in addition to those whom the non-management person expressly solicits supports;
- the non-management person represents in its proxy statement that it has not agreed and will not agree to act, directly or indirectly, as a group or otherwise engage in any activities that would be deemed to cause the formation of a group for purposes of Section 13(d) and Regulation 13D-G with the other non-management person; and
- the non-management person represents in its proxy statement that it is not a participant (as defined in Instruction 3(a)(vi) of Item 4 of Schedule 14A) in the other non-management person’s solicitation.

As proposed, the conditions above that require that specified representations be included in the soliciting person’s proxy statement would not apply if the soliciting person rounds out its short slate by seeking authority to vote for nominees named in the company’s proxy statement (even if

³ The *bona fide* nominee rule is found in Exchange Act Rule 14a-4(d)(1) and provides that a proxy cannot confer authority to vote for the election of any person to office if that person has not consented to being named in the soliciting person’s proxy statement and to serve if elected.

the company includes non-management nominees in its proxy statement, which it may be required to do if the Commission's pending proxy access rules are approved).

Permitting a soliciting person to round out its short slate by seeking authority to vote for nominees named in another non-management person's proxy statement would significantly increase the usefulness of short slates as a means for shareholders to influence the composition of the boards of directors of public companies. If adopted, the proposed amendment would also have the following potential effects:

- side-by-side short slates could result in a change of control, as the combined slates could result in a majority of the company's incumbent directors not being re-elected — companies should consider whether they need to revise their poison pill or default change of control provisions to contemplate this possibility; and
- the proposed amendment contemplates the use of side-by-side proxy cards — it is unclear whether a later-dated proxy card would continue to control in a situation where the proxy cards do not conflict.

Comment request: The following items are among those listed in the Commission's request for comment on this proposal:

- Whether other conditions or limitations on the availability of the proposed amendment should be imposed (*e.g.*, limiting the ability to seek authority to vote for nominees of other non-management persons only if those persons are seeking minority representation on the board or requiring that a soliciting person use its proxy authority to vote for at least a specified number of the company's nominees or at least the number of management nominees that would constitute a majority).
- The concerns, if any, about the possible effects of a change in a majority of the board that could result if a soliciting person is permitted to round out its short slate with other persons' nominees, including the triggering of takeover defensive measures, such as poison pills, and other change in control provisions, such as those found in loan agreements, leases and employment agreements and the issues, if any, under the standards of any national securities exchange or national securities association to which the company is subject.
- Whether the proposed amendment would encourage shareholders to run more short slates.
- Because it is possible that non-management nominees could be named in the company's proxy statement (*e.g.*, if the Commission adopts its pending rule proposals relating to proxy access), whether the soliciting person also should be required to provide representations about its group and participant status if the nominees named in the company's proxy statement that the soliciting person uses to round out its short slate are non-management nominees.

Amendment of Exchange Act Rule 14a-4(e) to Provide that Conditions for Voting Shares Must be Objectively Determinable

The current rule: Exchange Act Rule 14a-4(e) currently requires that the proxy statement or form of proxy used in connection with the solicitation of proxies must indicate that, *subject to reasonable specified conditions*, the shares represented by the proxy will be voted.

Proposed amendment of the rule: The Commission now proposes to amend Rule 14a-4(e) in order to clarify that the reasonable specified conditions that would permit a proxy holder not to vote the shares represented by the proxy must be *objectively determinable*.

Under this standard, the Commission has indicated that a condition providing that shares represented by a proxy would be voted only if a third party had filed, within a specified number of days prior to the meeting for which the proxy was solicited, a Schedule TO for a tender offer for over half of the company's securities would be considered to be objectively determinable and therefore permissible. However, a condition that would give a proxy holder discretion not to vote shares represented by a proxy if he or she determined that it was not advisable to vote the shares would not be considered to be objectively determinable and therefore not permissible.

Comment request: The following item is among those listed in the Commission's request for comment on this proposal:

- Whether specifying that reasonable specified conditions must be objectively determinable has any harmful effect on proxy solicitation practices.

Amendment of Exchange Act Rule 14a-12(a)(1)(i) to Require Disclosure of Participant Information on a Current Basis

The current rule: Exchange Act Rule 14a-12(a)(1)(i) currently requires that any solicitation of shareholders prior to furnishing them with a proxy statement must include information about the identity of the participants in the solicitation and a description of their direct or indirect interests or a legend advising shareholders where such information can be obtained. Companies and other soliciting persons often attempt to satisfy the legend requirement by referring shareholders to a document that has not yet been filed (for example, by indicating that the participant information will be included in the definitive proxy statement when it is filed with the Commission).

Proposed amendment of the rule: In response to concerns that the required participant information too often is not available to shareholders when the soliciting person uses the soliciting material, the Commission has proposed to amend Rule 14a-12(a)(1)(i) to clarify that the required participant information must be filed under cover of Schedule 14A as part of a proxy statement or other soliciting material no later than the time the first soliciting communication is made.

If the proposed amendment to Rule 14a-12(a)(1)(i) is adopted, soliciting parties will still be permitted to use a legend to refer to the location of the required participant information in lieu of including it directly in all soliciting materials provided prior to furnishing shareholders with a

proxy statement. However, soliciting persons will now be required to provide that participant information under cover of a separate Schedule 14A filed with the Commission prior to or concurrent with distribution of the soliciting material.

Comment request: The following item is among those listed in the Commission's request for comment on this proposal:

- Whether the requirement to have participant information on file no later than when the written material containing the legend is first provided to shareholders creates practical difficulties for the soliciting persons.