

**PRACTICAL IMPLICATIONS OF “PROXY ACCESS”
FOR MUTUAL FUNDS**

On August 25, 2010, the Securities and Exchange Commission adopted “proxy access” rules, effective November 15, 2010, that apply to registered open-end and closed-end investment companies as well as to other companies subject to the SEC’s proxy rules under the Securities Exchange Act of 1934. The rules allow eligible shareholders and shareholder groups to include in a company’s proxy materials both director nominees and shareholder proposals to amend the company’s governing documents regarding nomination procedures.¹ Unlike closed-end funds, open-end funds (mutual funds) typically do not hold annual meetings of shareholders. Mutual funds should be aware of the new obligations imposed on them when they call a meeting for the election of directors.

Director Nominations

New Exchange Act Rule 14a-11 requires companies to include in their proxy materials for the election of directors a limited number of director nominees presented by eligible shareholders or shareholder groups. Eligible shareholders or groups are those that do not have a control intent and that beneficially own at least 3% of the company’s voting securities, have owned such securities for at least three continuous years and represent that they intend to continue to own such securities through the date of the shareholder meeting. A company is required to include no more than the greater of one shareholder nominee or the number of shareholder nominees that represents 25% of the entire board of directors.

To include a director nomination in a company’s proxy materials, an eligible shareholder or group must provide notice to the company and file such notice with the SEC on new Schedule 14N. The notice is due no earlier than 150 days, and no later than 120 days, before the anniversary of the company’s mailing of its proxy materials for the prior year’s annual meeting. However, if the company did not hold an annual meeting the prior year or if the date of the meeting has changed by more than 30 days from the prior year, then the nominating shareholder or group must provide notice a reasonable time before the company mails its proxy materials. A “reasonable time” by which notice is due must be determined by a company, including a mutual fund, and, as discussed below, disclosed in a filing on Form 8-K.

¹ This memorandum provides only a limited overview of the new proxy access rules. For a more detailed summary and explanation of the proxy access rules, see *SEC Adopts “Proxy Access” Rules to Facilitate Director Nominations by Shareholders* (Aug. 26, 2010), available at http://www.willkie.com/files/tbl_s29Publications/FileUpload5686/3481/SEC-Adopts-Proxy-Access-Rules.pdf.

Similar to Exchange Act Rule 14a-8, which governs shareholder proposals other than director nominations, new Rule 14a-11 establishes a timeline for a company to seek exclusion of a shareholder nomination from its proxy materials. The exclusion procedure contemplates that the company will seek no-action relief from the SEC's staff, and generally requires no-action requests to be submitted at least 80 calendar days in advance of the date the company intends to mail its definitive proxy materials. For mutual funds that do not hold annual meetings and may not provide as much advance notice of elections as companies that do, Rule 14a-11 may present a choice between giving greater advance notice of an election than the fund is accustomed to providing or forgoing the possibility of excluding a shareholder nomination from the fund's proxy materials.

Form 8-K Disclosure Requirements

The requirement to file a report on Form 8-K is new for mutual funds. Under new Item 5.08, a registered investment company, assuming that it did not hold an annual meeting during the prior year (or that the date of the meeting has changed by more than 30 days from the prior year), must file a Form 8-K within four business days of determining the anticipated date of an annual or special meeting of shareholders at which directors are to be elected. The Form 8-K must disclose the deadline for submitting director nominations to be included in the company's proxy materials, which, as stated above, must be a "reasonable time" before the mailing of the proxy materials for the meeting.

In addition, if mutual funds are part of a series company, the Form 8-K filing must also disclose the total number of the company's shares that are outstanding and entitled to vote for the election of directors (or, if votes are to be cast on a basis other than one vote per share, the total number of votes entitled to be voted and the basis for allocating such votes). The number of shares or votes to be disclosed is to be based on the shares outstanding as of the end of the most recently completed calendar quarter.

Shareholder Proposals Relating to the Election Process

Another significant change brought about by the SEC's proxy access rules is an amendment to Rule 14a-8 under which companies will no longer be allowed to exclude from their proxy materials proposals by qualifying shareholders that would amend, or request amendment of, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations. Among other things, this change may allow shareholders eligible to use Rule 14a-8 to seek implementation of proxy access rules with fewer or different limitations than those adopted by the SEC, although any amendment of a company's governing documents effected by shareholders under the rule can only be effective as to director elections subsequent to the meeting at which the amendment is adopted.

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If you have any questions regarding the impact of the SEC's proxy access and disclosure rules, please contact Margery Neale (212-728-8297, mneale@willkie.com), Michael A. Schwartz (212-728-8267, mschwartz@willkie.com) or the Willkie attorney with whom you regularly work.

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September 29, 2010

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