

**SHAREHOLDER OPPORTUNITIES TO CREATE VALUE
AT UNDERPERFORMING PORTFOLIO COMPANIES****Deadlines for 2010 Are Earlier Than Ever**

Although the spring proxy season has not yet arrived, it's not too early to start thinking about your portfolio companies' 2010 annual meetings. Most public companies have stringent advance notification requirements for director nominations and shareholder proposals, and many have deadlines for 2010 that are earlier than in prior years. Even if you don't anticipate nominating directors or making shareholder proposals, keeping these deadlines in mind may be advantageous to you.

Engaging Underperforming Portfolio Companies

Few hedge funds or institutional investors consider themselves "activist shareholders," and most have never considered the possibility of shareholder activism. But many investors at some point find themselves holding large positions in companies that significantly underperform their peers or potential, or that face unforeseen problems. Change may be necessary, and exit options may be unattractive or unavailable. If the boards and managements of those companies are unwilling to listen to shareholders, or if they themselves are the problem, some form of shareholder engagement may be in order. Steps that shareholders can take range from quiet discussions with boards and managements to more "activist" efforts such as public letter writing campaigns, nonbinding shareholder proposals, "vote no" campaigns, and solicitations to replace directors. Often, a combination or sequence of steps may be needed to produce tangible results.

Importance of the Annual Meeting

The approach of a company's annual meeting can provide a very useful context for dialog with its board or management, and greater leverage in case those discussions aren't productive. Although shareholders collectively own the companies in which they invest, they have no direct role in deciding corporate strategy or the way those companies execute their business plans. In fact, shareholders of public companies have only two ways to influence a company's business operations — convincing the board and management to act, or replacing directors. In some cases, only a credible threat that directors might be replaced will lead to a constructive dialog and outcome. In order to maintain that leverage, shareholders must meet the applicable deadlines.

While shareholders generally have the right to propose director candidates at a company's annual meeting, most public companies have adopted "advance notification" bylaw provisions that impose a series of procedural hurdles to shareholder nominations. These bylaws have traditionally required a detailed notice to the company of a shareholder's intention to nominate directors and a strict deadline, months in advance of the meeting, for submitting the notice. If a nomination notice is not submitted by the deadline, the nomination simply cannot be made.

Developments in Advance Notification Bylaws

In the past year, a trend toward more onerous advance notification bylaws has accelerated. Spurred on, in part, by high-profile solicitations where derivative securities have allegedly hidden voting power or facilitated “empty voting,” many companies have greatly expanded disclosure requirements under their bylaws. More significant from the perspective of interference with shareholder voting rights, companies have at the same time moved to adopt an array of impediments to shareholder nominations, including earlier notification deadlines, company-created questionnaires for nominees (which are only available from the company upon request and must be delivered by the notification deadline), and broad commitments to be signed by nominees.

As a result of these changes, a shareholder contemplating director nominations or seeking to maximize its leverage with management must understand at the earliest possible time how and when to meet the requirements of a company’s advance notification bylaw provisions. For a company that holds its annual meeting each year in the middle of March and has a deadline of 120 days prior to the first anniversary of the date of the preceding year’s proxy statement, the deadline may fall in late September or early October. The necessary preparations for meeting that deadline, including identifying director nominees and preparing the notice and related materials, particularly under recent bylaws that require information concerning a wide universe of persons “associated” with the shareholder and its nominees, could take a month or more, depending on circumstances.

The SEC’s “Proxy Access” Proposal

The Securities and Exchange Commission has proposed a series of “proxy access” rules and rule changes that collectively would allow qualifying shareholders to include in a company’s proxy statement a limited number of director nominees chosen by those shareholders.¹ As with several previous proxy access initiatives, the pending proposals have generated substantial controversy and comment. While there is a good chance that the proposals will be adopted in some form later this year, perhaps in November, and will apply to proxy statements issued after January 1, 2010, their adoption may come, as a practical matter, too late for companies with annual meetings early in the 2010 proxy season. For the rules to be useful at companies with later annual meetings, it will be necessary to plan in advance because actual or practical deadlines may come very shortly after the rules are adopted. However, even where the proposed proxy access rules may be available, limitations built into the proposed rules may in some circumstances render proxy access unavailable or suboptimal for encouraging or implementing change.²

¹ Our June 23, 2009 Client Memorandum, *SEC Proposes “Proxy Access” Rules to Facilitate Director Nominations by Shareholders*, available at <http://www.willkie.com/firm/pubs.aspx>, describes the proposed rules in detail.

² For a discussion of the proposed rules in the context of shareholder activism, see our June 30, 2009 Client Memorandum, *The SEC’s Proposed “Proxy Access” Rules: Boon to “Accidental” or “Reluctant” Activists?*, available at <http://www.willkie.com/firm/pubs.aspx>.

Steps to Take Now

In light of the approaching deadlines for many companies' 2010 annual meetings, shareholders should start now to consider the advantages of engaging boards and managements of underperforming portfolio companies for the purpose of enhancing shareholder value. Recent developments — including the increasing adoption of majority voting requirements and the elimination of broker discretionary voting in director elections — have broadened shareholders' options for influencing corporate decision-makers, and shareholders should therefore explore the full range of options available, the best approach for achieving their particular goals, and the relevant deadlines and timeframes associated with those options. In many cases, the annual meeting presents the only effective opportunity during the year for encouraging or implementing change at a company. But whether or not the optimal approach involves the nomination of directors, or an explicit or implied threat to do so, it is particularly important to begin the analysis now so that critical opportunities are not missed.

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If you have any questions or would like more information about the broad range of public and private techniques for influencing the companies in which you invest, please contact Michael A. Schwartz (212-728-8267, mschwartz@willkie.com) or the Willkie attorney with whom you regularly work.

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