SEWARD & KISSEL LLP

Activist Investor Report

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This newsletter highlights selected key developments in US securities laws and regulations and other legal developments affecting activist shareholders of publicly traded companies. If you know of anyone who may be interested in receiving this newsletter, please notify Royce Akiva (akiva@sewkis.com).

SEC Adopts Amended Proxy Access Rules

On August 25, 2010, the United States Securities and Exchange Commission (the "SEC") adopted amendments to the federal proxy rules that, once effective, will require most public companies to include shareholders' director nominees in their annual proxy materials subject to certain restrictions and conditions. The new amendments were scheduled to become effective on November 15, 2010 and generally applicable to meetings during 2011 for companies whose 2010 proxy materials were mailed on or after March 15, 2010. However, on October 4, the SEC announced that it was delaying the effectiveness of the new rules pending resolution of a legal challenge brought in the US Court of Appeals for the D.C. Circuit by the Business Roundtable and the US Chamber of Commerce.

Subject Companies

Under new Rule 14a-11 of the federal proxy rules ("Rule 14a-11" or the "Rule"), any company that is required to file reports with the SEC under the Securities Exchange Act of 1934 (the "Exchange Act"), or any investment company registered under the Investment Company Act of 1940, will generally be required to include shareholder director nominees in the company's own proxy statement, subject to the satisfaction of certain eligibility and procedural requirements. Foreign private issuers, which are not subject to the federal proxy rules, and companies that file reports under the Exchange Act solely as a result of having a class of debt securities registered under the Exchange Act, will not be subject to the Rule. In addition, application of the Rule to smaller reporting companies, which include publicly listed companies having a public float of less than $75 million, will benefit from a three year grace period.

Companies subject to Rule 14a-11 are not able to "opt out" of the Rule or any of its provisions, whether by shareholder vote or otherwise. This includes situations where the company adopts provisions in its own governing documents providing for the inclusion of shareholder nominees in its proxy materials.

Shareholder Eligibility Requirements

In order to have a nominee included in a company's proxy materials under Rule 14a-11, a shareholder must meet certain eligibility requirements. These requirements include:

- *Ownership Threshold:* The shareholder or group of shareholders must beneficially own shares as of the date of the nomination on Schedule 14N, discussed below, representing at least 3% of voting power of the shares entitled to vote for the election of directors. The shareholder must hold both the power to vote and to dispose of the shares. Shares sold short or borrowed shares may not be used to satisfy the ownership requirements, although shares loaned to third parties may be counted, provided the shareholder has the right to recall the loaned shares and will recall them upon being notified that one or more of its nominees will be included in the company proxy materials.
- *Holding Period:* The shareholder must have owned the minimum required number of shares for at least three years

prior to the submission of Schedule 14N and represent that it will continue to own the shares through the meeting date. Although there is no requirement to continue to hold shares after the meeting date, the shareholder will be required to disclose its intent with respect to the ownership of the shares following the meeting. Shareholders are not prohibited from selling shares during the three year measurement period so long as the minimum ownership threshold is maintained, however, the shares held during the period will be reduced by the amount of shares that are the subject of a short position during the measurement period.

- *No Change of Control:* Shareholders relying on Rule 14a-11 will be required to certify that they have not held the shares for the purpose of causing a change of control of the company or to gain a number of seats on the board of directors in excess of the aggregate number of seats that may be held by persons nominated pursuant to Rule 14a-11, as discussed below. Such certification could not be made by a shareholder that is involved with, or whose director nominees are involved in, any other solicitation or nomination for directors of the company, including involvement in a solicitation for or against the company's own nominees.
- *Agreement with the Company:* The shareholder and each nominee of the shareholder must not have any agreement with the company regarding the nomination.

The shareholder eligibility requirements may be satisfied by a single shareholder or by a group of one or more shareholders. In connection with the adoption of Rule 14a-11, the SEC is adopting other changes to the federal proxy rules that will permit limited communications among shareholders regarding the formation of a group for the purpose of nominations under Rule 14a-11. The Rule does not alter beneficial ownership reporting requirements under Section 13 of the Exchange Act, and therefore any shareholder acting in concert with other shareholders for purposes of Rule 14a-11 who, together with other shareholders, beneficially owns more than 5% of the company's registered voting shares may be subject to a reporting obligation under Section 13.

Director Nominee Requirements

- *Number of Shareholder Nominees:* Rule 14a-11 will not require companies to accept a shareholder nominee where such nominees, if elected, would result in the company having more than 25% of the board (but in no event less than one director) elected as a result of shareholder nominees made pursuant to the Rule. For purposes of determining the number of directors nominated pursuant to Rule 14a-11, a director or directors elected pursuant to a nomination made under the Rule whose term extends beyond the current election, such as in the case of companies having classified boards with staggered terms, shall be included. Rule 14a-11 also provides that shareholder nominees submitted pursuant to the Rule but included in the company's proxy materials as a company nominee as the result of negotiations between the shareholder and the company will be counted toward the 25% threshold, provided that the discussions between the shareholder and the company did not commence before the submission of the Schedule 14N.
- *Shareholder Nominee Qualifications:* Each shareholder nominee must meet all federal and state law requirements applicable to the company's directors at the time of the nomination. In addition, each nominee must meet the requirements of any securities exchange on which the company is listed, including any "objective" independence standards of such exchange.
- *Priority of Shareholder Nominees:* In the event that the number of qualifying nominees made pursuant to Rule 14a-11 exceeds the maximum number of nominees the company is required to include in its proxy materials, the company shall include the nominee or nominees made by the shareholder with the highest percentage of voting power.

Nominating Procedures

Schedule 14N. Shareholders nominating directors under Rule 14a-11 will do so on Schedule 14N, which will be provided to the company and also must be concurrently filed with the SEC. A Schedule 14N must generally be filed in accordance with the company's notice deadlines for filing other

shareholder proposals at shareholder meetings, but in no event earlier than 150 nor later than 120 calendar days before the anniversary of the mailing date of the prior year's proxy materials. Information included on a Schedule 14N will be similar to that which would be included in a contested proxy solicitation about the nominating shareholder, their interest in the company and eligibility to use Rule 14a-11, relationships between the shareholder or nominee and the company as well as information about the director nominee or nominees. A nominating shareholder may also include a supporting statement in the Schedule 14A, not to exceed 500 words with respect to any one nominee, to be included in the company's proxy materials if the nominee is included.

Solicitation. Shareholders whose nominee is included in a company's proxy materials pursuant to Rule 14a-11 may solicit in support of their nominee in accordance with new Rule 14a-2(b)(8). Under Rule 14a-2(b)(8), communications in support of a shareholder's nominees would be required to disclose the shareholder's identity and interest in the company, a reference to the company's proxy materials including the director nominee, and must be filed as an amendment to the Schedule 14N with the SEC. In addition, the shareholder may not seek the power to act as a proxy for any other shareholder in connection with the election.

Shareholder Liability. A nominating shareholder shall be liable under the anti-fraud provisions of the federal securities laws for any false or misleading statement included in the Schedule 14N, whether such statement was ultimately included in the company's proxy materials or not. Similarly, except where the company knows or has reason to know that a statement is false or misleading, the company will generally not incur liability for statements made in a Schedule 14A and included in its proxy materials.

Company Response. Following the receipt of shareholder's nomination on Schedule 14N, a company shall notify the shareholder of its intend to include the shareholder nominee not less than 30 days before filing the company's proxy materials with the SEC. The company may also determine not to include the shareholder nominee in the event that it determines the requirements of Rule 14a-11 have not been met, if it receives nominees from shareholders representing a greater percentage of the voting power of the company or if the company believes that the Schedule 14N contains false or misleading information. In the event of a determination not to include a shareholder nominee, the company must notify the shareholder within 14 days after the end of the Schedule 14N submission period and the shareholder shall have the opportunity to respond. The company must also notify the SEC of its determination and reasoning for not including a shareholder nomination made under the Rule.

While Rule 14a-11 reflects a significant advancement of the SEC's recent efforts to expand proxy access to a wider range of shareholders, the long term impact of the Rule 14a-11 will be affected by many factors, including the willingness of shareholders to relinquish control of the solicitation process, including perhaps most importantly the number of directors that may be nominated, in exchange for access to the company's proxy materials and accompanying cost savings.

Changes to Beneficial Ownership Reporting

Potential changes to beneficial ownership reporting deadlines. Section 929R of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") enacted in July 2010 authorizes the SEC to reduce the amount of time shareholders will have to report beneficial ownership pursuant to Section 13 and 16 of the Exchange Act. Currently, under Section 13, shareholders of companies subject to the reporting obligations of the Exchange Act are required to report the ownership of more than 5% or more a company's class of registered equity securities on a Schedule 13D or a Schedule 13G generally within 10 days of crossing the 5% threshold.[1] Section 16 currently requires that a report on Form 4 be filed not later than 10 days after acquiring more than 10% of the company's outstanding shares or upon becoming a director or officer of the company. As of the date of this Newsletter, the SEC has not yet established a shorter time period.

Swaps and Beneficial Ownership. Section 766 of the Act also amends Section 13 of the Exchange Act to include certain security-based swaps in the determination of beneficial ownership of an equity security for reporting purposes under Section 13 and 16 of the Exchange Act. Included security-based swaps will be determined by the SEC based on whether the purchase or sale of the security-based swap provides incidents of ownership comparable to direct ownership of the security and it is necessary to deem the purchase or sale of the security-based swap as the acquisition of the underlying security to fulfill the purpose of Section 13.

[1] Section 13(d) allows certain institutional filers, including registered investment advisers that are passive investors, to file within 45 days after the end of the calendar year in which they crossed the 5% threshold.

These and other provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act are discussed in more detail in Seward & Kissel's memorandum to clients dated August 19, 2010 available on the Firm's website.

Poison Pill Upheld by Delaware Court

In *Yucaipa American Alliance Fund II, L.P. v. Riggio et al.,* 2010 WL 3170806 (Del. Ch. Aug. 11, 2010), the Delaware Court of Chancery issued an important decision rejecting a challenge to a stockholder rights plan, commonly referred to as a "poison pill," in connection with Ronald Burkle's recent contest for Barnes & Noble.

Barnes & Noble's board of directors adopted a poison pill following the acquisition of nearly 18% of the company's outstanding stock by Burkle and affiliated entities over a four day period in 2009. The Barnes & Noble pill, whose provisions are typical in corporate poison pills, is triggered by a shareholder's or group of shareholders' acquisition of more than 20% of the company's outstanding shares. However, the company's founding shareholder and 30% owner was permitted under the pill to retain his existing stake, but not permitted to acquire additional shares.

The Court considered the plaintiff's challenge under the standard first applied in its 1985 decision in *Unocal Corp. v. Mesa Petroleum Co*., which required a finding that in adopting the pill, the board's "actions were reasonable in relation to their legitimate objective, and did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way." In determining that this threshold had been met, the Court found that "the board had a reasonable basis to conclude that Burkle was potentially planning to acquire a controlling stake" in the company, either directly or as part of a shareholder group owning a controlling bloc, and that in such position he was likely to pursue fundamental strategy changes. In addition, the Court found that while effectively limiting the plaintiff's ownership interest to 20% could make a successful proxy contest more difficult than if he had been permitted to further increase his interest, it did not preclude such a contest.

The Court specifically rejected the plaintiff's argument that it should apply the "entire fairness" standard, generally applied to related party transactions, such as those between a company and its controlling shareholder, or the "compelling justification" standard, generally applied to the review of corporate actions having "the primary purpose of interfering with the effectiveness of a stockholder vote." Specifically, the court was not persuaded that the adoption of the pill by the Barnes & Noble board constituted a related party transaction merely because it exempted the founding shareholder from the same ownership limits applicable to other holders. In addition, the Court rejected the "compelling justification" standard, noting that the pill permitted any holder to acquire up to 20% of the company's outstanding shares, and did not prohibit a holder from conducting an effective proxy contest.

The Yucaipa decision is important in that it provides a clear indication of the Delaware Court's willingness to continue to give deference to a company's implementation of defensive anti-takeover measures provided that they are adopted in a manner consistent with the *Unocal* standard.

IF YOU HAVE ANY QUESTIONS OR COMMENTS ABOUT THIS REPORT, PLEASE FEEL FREE TO CONTACT GARY J. WOLFE (212-574-1223), ROBERT E. LUSTRIN (212-574-1420), EDWARD S. HORTON (212-574-1265) OR ANY OF THE OTHER PARTNERS, COUNSEL AND ASSOCIATES IN OUR CAPITAL MARKETS AND INVESTMENT MANAGEMENT GROUPS VIA EMAIL BY TYPING IN THE ATTORNEY'S LAST NAME FOLLOWED BY *@SEWKIS.COM*