

11. How Do the Other Exchange Act Proxy Rules Apply to Solicitations by the Nominating Security Holder or Nominating Security Holder Group?

a. Discussion

As proposed, Exchange Act Rule 14a-11 would permit security holders to form groups that would aggregate their securities in order to meet the minimum ownership threshold of more than 5% to nominate a director candidate under the rule. Accordingly, we anticipate that security holders would, in many instances, engage in communications with other security holders in an effort to form these nominating security holder groups that would be deemed solicitations under the proxy rules. In an effort to facilitate these types of communications, we are proposing a limited exemption from certain of the proxy rules that would enable security holders to communicate for the limited purpose of forming a nominating security holder group without filing and disseminating a proxy statement. To qualify for the exemption, security holders would have two options. The communications would be made either to a limited number of security holders or, in the alternative, to an unlimited number of security holders, provided that the communication is limited in content, as described below, and filed with the Commission.¹⁴¹

As proposed, Exchange Act Rules 14a-3 to 14a-6(o),¹⁴² 14a-8, 14a-10, and 14a-12 to 14a-15¹⁴³ would not apply to any solicitation by or on behalf of any security holder in connection with the formation of a nominating security holder group, provided that:

- The total number of persons solicited is not more than 30; or
- Each written communication includes no more than:
 - A statement of the security holder's intent to form a nominating security holder group in order to nominate a director under the proposed rule;
 - The percentage of securities that the security holder beneficially owns or the aggregate percentage owned by any group to which the security holder belongs; and
 - The means by which security holders may contact the soliciting party; and
 - Any soliciting material published, sent or given to security holders in accordance with this paragraph is filed with the Commission by the nominating security holder, under the company's Exchange Act file number, no later than the date the material is first published,

sent or given to security holders.¹⁴⁴ The soliciting material would be required to include a cover page in the form set forth in Exchange Act Schedule 14A, with the appropriate box on the cover page marked.

Both the nominating security holder or nominating security holder group and the company may wish to solicit in favor of their nominees for director by various means, including U.S. mail, electronic mail, and Web site postings. While the company ultimately would file a proxy statement and could therefore rely on the existing proxy rules to solicit outside the proxy statement,¹⁴⁵ security holders could be limited in their soliciting activities under the current proxy rules. Accordingly, we are proposing a new exemption to the proxy rules providing that solicitations by or on behalf of a nominating security holder or nominating security holder group in support of a nominee placed on the company's proxy card in accordance with the proposed rule, would not be subject to Exchange Act Rules 14a-3 to 14a-6(o), 14a-8, 14a-10, and 14a-12 to 14a-15, provided that:

- The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form or revocation, abstention, consent or authorization;
- Each written communication includes:
 - The identity of the nominating security holder or nominating security holder group and a description of his or her direct or indirect interests, by security holdings or otherwise;
 - A prominent legend in clear, plain language advising security holders that a security holder nominee is or will be included in the company's proxy statement and to read the company's proxy statement when it becomes available because it includes important information. The legend also must explain to security holders that they can find the proxy statement, other soliciting material and any other relevant documents, at no charge on the Commission's Web site; and
 - Any soliciting material published, sent or given to security holders in accordance with this paragraph must be filed by the nominating security holder

or nominating security holder group with the Commission, under the company's Exchange Act file number, no later than the date the material is first published, sent or given to security holders.¹⁴⁶ Three copies of the material would at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the company is listed and registered. The soliciting material would be required to include a cover page in the form set forth in Exchange Act Schedule 14A, with the appropriate box on the cover page marked.¹⁴⁷

b. Questions

K.1. What requirements should apply to soliciting activities conducted by a nominating security holder? In particular, what filing requirements and specific parameters should apply to any such solicitations? For example, we have proposed that certain solicitations by security holders seeking to form a nominating security holder group be limited to no more than 30 security holders. Is this limitation appropriate? If not, what limitation would be appropriate, if any (e.g., fewer than 10 security holders, 10 security holders, 20 security holders, 40 security holders, more than 40 security holders)? In addition, is the alternate, content-based limitation appropriate? If not, what limitations would be more appropriate?

K.2. Should communications in connection with a direct access security holder proposal, for example by security holders seeking to form a more than 1% group to submit a security holder proposal, be included in the exemption provided for communications between security holders seeking to form a nominating security holder group? Would such an exemption be necessary and/or appropriate? If so, what parameters should apply?

K.3. Should all soliciting materials be filed with the Commission on the date of first use? For example, as proposed, security holder communications that are limited to no more than 30 security holders would be filed with the Commission. Would such filing render the limitation unworkable in that the communication would be readily accessible to security holders on EDGAR?

K.4. We contemplate that solicitations in connection with elections involving Exchange Act Rule 14a-11 could involve electronic means. We have

¹⁴¹ See proposed Exchange Act Rule 14a-11(f)(1).

¹⁴² 17 CFR 240.14a-3—14a-6(o).

¹⁴³ 17 CFR 240.14a-10—14a-15.

¹⁴⁴ For a fund, the filing would be made under the subject company's Investment Company Act file number. See Section II.A.12., below.

¹⁴⁵ See Exchange Act Rule 14a-12.

¹⁴⁶ For a fund, the filing would be made under the subject company's Investment Company Act file number. See Section II.A.12., below.

¹⁴⁷ See proposed Exchange Act Rule 14a-11(f)(2).