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Client Alert

November 2015

SEC Issues New Proxy Rule Guidance in M&A Context

On October 27, 2015, the Securities and Exchange Commission issued new guidance regarding matters that must be submitted to a separate vote of shareholders of a target company seeking approval of a merger or acquisition.

The new interpretations concern the SEC's proxy "unbundling" rules. Rule 14a-4(a)(3) under the Securities Exchange Act of 1934 requires a proxy card to "identify clearly and impartially each separate matter intended to be acted upon" at a shareholders meeting. In addition, Rule 14a-4(b)(1) mandates that shareholders be "afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to, each separate matter" to be voted upon by shareholders.

The SEC's new guidance relates to a merger or acquisition in which shareholders of a target company are to receive stock of the acquiror. Often, the merger agreement may require amendments to the organizational documents (*e.g.*, the certificate of incorporation) of the acquiror to facilitate the transaction. The question is, in addition to the required target shareholder approval of the acquisition, must the target shareholders separately approve any such amendments to the acquiror's organizational documents?

The SEC concludes that, if an amendment to the acquiror's organizational documents would require the approval of the acquiror's shareholders under state law, the rules of a national securities exchange, or the acquiror's organizational documents, then the *target company* must present any such amendment as a separate proposal on its proxy card. The SEC's rationale is that the amendment "would effect a material change to the equity security that target shareholders are receiving in the transaction." In addition, the SEC's views would not change if the parties instead formed a new acquisition vehicle that issued equity securities to the target's shareholders in the transaction.

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According to the SEC, only "material" matters must be unbundled and presented as separate proposals for target shareholder approval. Examples of these provisions include "governance- and control-related provisions, such as classified or staggered boards, limitations on the removal of directors, supermajority voting provisions, delaying the annual meeting for more than a year, eliminating the ability to act by written consent, or changes in minimum quorum requirements." Technical amendments such as name changes or restatements of charters would be considered immaterial and would not require separate shareholder approval.

The SEC also clarified that parties to an acquisition may condition completion of the transaction on shareholder approval of any separate proposals that are presented for a vote. However, any such condition must be clearly disclosed on the proxy card.

Please contact the Olshan attorney with whom you regularly work or the attorney listed below if you have any questions regarding the SEC's interpretations of its proxy unbundling rules in connection with a merger or acquisition.

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