

## **ALTMAN GROUP SURVEY ON PROXY ACCESS ISSUES**

In November 2009, The Altman Group published a study of 500+ letters that were submitted to the SEC following the release of the Commission's proposing release on "Facilitating Shareholder Director Nominations."<sup>1</sup> One of our conclusions from that study was that the sample base of letters submitted by companies and investors likely to be affected by the proposed rule was too small to draw effective policy judgments on selected issues, "in particular with regard to eligibility and threshold criteria." When the SEC reopened the comment period in December,<sup>2</sup> The Altman Group stepped up to offer companies, investors, and others an opportunity to participate in a short online survey on selected proxy access issues. Questions selected for the survey included a mix of fundamental choices and topics related to eligibility and threshold criteria. The survey results presented here are based on responses received from December 18, 2009 through January 13, 2010.

The target base for this online survey was reached primarily through e-mailed requests, publicity generated by various newsletters that are widely read by proxy and corporate governance professionals, as well as communications distributed by The NASDAQ OMX Group, Inc. Indeed, the largest segment of survey responses came from directors and executives of NASDAQ-listed companies. Participants came from 22 NASDAQ-listed companies (nearly twice the number of NASDAQ-listed companies that have so far submitted letters to the SEC on "Facilitating Shareholder Director Nominations" [File: S7-10-09]) and 13 NYSE-listed companies.

Nearly the entire base of survey participants was comprised of corporate directors, senior executives of listed companies, corporate governance and proxy specialists at investment management institutions, and other corporate governance experts (from service providers and academia). We did not accept online survey responses from persons who did not disclose to us their individual names, titles, and company names. The number of eligible responses was thus narrowed down to a total of 47. Some 70% of the eligible responses came from persons involved with companies/firms that have not submitted letters to the SEC on the proposed rule (File: S7-10-09). In the near future, we plan to release a supplemental table, which will be made available on The Altman Group's web site (along with this document), identifying survey participants who have authorized us to disclose their participation in the survey.

The average market capitalization of public companies from which directors or executives participated in the survey was \$26.1B. While 4 companies represented in the survey had market capitalizations above \$100B, 8 companies had market capitalizations between \$5B and \$100B, and another 8 companies had market capitalizations between \$1B and \$5B. Sixteen small-cap companies (with market capitalizations below \$1B) were also represented in the survey.

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<sup>1</sup> *Proxy Access: A Study of 500+ Letters Submitted to the SEC on 'Facilitating Shareholder Director Nominations.'* The Altman Group Special Report, November 20, 2009. Copies of this report are available at <http://www.altmangroup.com/pdf/ProxyAccessAltmanGroupRpt.pdf>. See also "SEC: Facilitating Shareholder Director Nominations" [Release Nos. 33-9046; 34-60089; IC- 28765; File No. S7-10-09, and in the *Federal Register*, Vol. 74, No. 116].

<sup>2</sup> <http://www.sec.gov/rules/proposed/2009/33-9086.pdf>

## **OVERVIEW OF SURVEY RESULTS**

One of the most interesting findings from the survey related to forecasts by participants for the “% of all companies listed on U.S. exchanges” that would be expected to face “a shareholder director nomination under PR 14a-11 in 2011” if the proposed rule is adopted in time for next year’s proxy season. The average forecast was 15.02% (median forecast = 10.00%). The results reflect expectations that the proposed rule will impact hundreds of publicly-traded companies each year and present a far more significant burden on corporate boards than has been suggested by some advocates of proposed rule 14a-11.

While the consensus views of survey participants from public companies were largely consistent with those found in comments from companies submitted to the SEC on the proposed rule, the survey also presented an opportunity to gain greater insight into what companies see as preferred eligibility and threshold criteria. First, it came as little surprise to see that 94.45% of participants from public companies opposed adoption of proposed rule 14a-11. There was also no surprise to find an overwhelming and broad-based consensus (95.74% of all survey responses) supporting elimination of the “first in” rule (in cases of multiple PR14a-11 nominations) in favor of giving priority to nominations by the shareowners (individual or group) holding the largest number of shares. Some 86.11% of survey participants from public companies also indicated that a company should be exempted from Proposed Rule 14a-11 if it has a bylaw governing direct proxy access. Some 83.33% of the same segment of survey participants indicated that a company’s nominating committee should retain a power under PR 14a-11 to unilaterally exclude shareholder director nominees that the committee determines to be unqualified. When presented with a range of alternative limits on the number of shareholder director nominees using PR14a-11 for a single annual/special meeting, the largest number of participants from public companies (47.22%) favored having a limit of one PR14a-11 nominee per annual/special meeting.

Survey participants from public companies also strongly favored the following (showing % of responses from this segment in favor):

- Requiring all shareholder director nominees under Proposed Rule 14a-11 to meet the same independence and other standards as are required, by company bylaws and regulatory requirements, of all other directors at a company (100.0%);
- Allowing companies to have the flexibility to design “user friendly” proxy cards and notices, including a single vote option for the company’s nominees as a group (100.0%);
- Prohibiting the simultaneous use of PR14a-11 nominations by any shareholder (or group of shareholders) conducting a traditional proxy contest at the same annual or special meeting (94.44%); and,
- Excluding all shareholder director nominations advanced under Proposed Rule 14a-11 in the event of a traditional proxy contest at the same annual or special meeting (80.55%).

There were some surprises regarding opinions on eligibility and threshold criteria. Where our analysis of letters from companies to the SEC found that the most common recommended requirement for length of ownership for shareholders to be eligible to nominate directors was 2 years (and 48.94% of all survey responses favored 2 years), survey participants from public companies narrowly favored a period of 3 years (41.66% vs. 38.88% in favor of a 2 year period). Decision-makers at small-cap companies (those with market capitalizations of under \$1B) also showed a slight bias (vs. participants from larger-cap companies) in favor of higher ownership thresholds for shareholders to be eligible to nominate a director under Proposed Rule 14a-11. While 50% of all participants from public companies favored an ownership threshold of 5% of

shares outstanding (O/S) for a shareholder to be eligible to nominate a director under PR14a-11, some 38.88% favored a 10% threshold. In contrast, some 44% of participants from companies having market capitalizations of under \$1B favored an ownership threshold of 10% of O/S.

Survey participants from public companies supported resubmission standards both for shareholders (if a director nominated by the shareholder under PR14a-11 fails to get elected [77.78% in favor] or all nominees of the shareholder fail to meet a minimum threshold of total votes cast [88.86% in favor]) and nominees (who fail to get a % threshold of votes [83.33% in favor]). Opinion among participants from companies was divided over how long a potential exclusion from submitting future PR14a-11 nominations should last for the shareholder if a nominated director fails to get elected (exclusion of 1 year [16.67% in favor], 2 years [22.22% in favor], 3 years [22.22% in favor], and 5 years [16.67% in favor]). Participants from companies favored an exclusion from future nominations for shareholders who see all director nominations under PR14a-11 fail to secure a minimum % of total votes (where the most common responses favored minimum thresholds of 25% of total votes cast [38.88%] or 35% of total votes cast [27.77%]). As for PR14a-11 shareholder director nominees (question 16), the most commonly supported periods of ineligibility for resubmission were 2 years [by 25.00% of participants from public companies] and 3 years [by 27.77% of participants from public companies]. The most commonly supported thresholds of % of total votes cast - below which shareholder director nominees would become ineligible for resubmission - were 35% [by 38.89% of survey participants from public companies] and 25% of total votes cast [supported by 25.00% of survey participants from public companies].

The survey also asked participants for their views on the potential inclusion of “triggering events” that would have to occur before shareholders could nominate directors under proposed rule 14a-11. Some 27.65% of respondents opposed the inclusion of triggering events (with opposition coming primarily from survey participants who were not from listed companies). Some 46.80% of all survey participants supported the following potential triggering events: a “company does not act on a shareholder proposal that receives a majority of votes cast”; and “at least one director failed at a prior meeting to secure support from at least 50% of votes cast” (note: another participant wrote in favoring a triggering event based on “at least 2 directors failing to receive 50% of votes cast”). Few participants (only 17.02%) supported the concept of a triggering event based on withhold votes for a director of at least 35% of total votes cast. A write-in suggestion raised the concept of a triggering event based on a nominee failing to get a majority vote, but who “remains in office.” Curiously, two of the write-in responses on this topic focused on a triggering event standard based on declining firm value and stock prices over the preceding 3-5 years.

On a final note, we would like to extend our deepest thanks to all who participated in this survey. We would also like to thank the Securities and Exchange Commission for seeking out additional opinions and research on issues raised by the proposed rule (“Facilitating Shareholder Director Nominations”).

## **SURVEY RESULTS**

**Question 1: After time to study the SEC's proposed rules on proxy access, how strongly do you now favor adoption by the SEC of a rule that would allow eligible shareholders to have direct "proxy access" (proposed rule 14a-11).**

	<u>All Responses</u>	<u>Companies Only</u>
Strongly Support (Adopting PR 14a-11)	12.76%	0.00%
Indifferent	6.38%	5.55%
Opposed	53.19%	61.12%
Opposed (Strongly)	27.65%	33.33%

**Question 2: Do you believe that the SEC's proposed direct proxy access rule will deter some U.S. private companies from going public and some foreign companies from listing on U.S. exchanges?**

	<u>All Responses</u>	<u>Companies Only</u>
YES	80.85%	83.33%
NO	19.15%	16.67%

**Question 3: Should the holding period requirement for shareholders nominating a director under PR 14a-11 be...?**

	<u>All Responses</u>	<u>Companies Only</u>
1 YEAR	19.14%	19.44%
2 YEARS	48.94%	38.88%
3 YEARS	31.91%	41.66%

**Question 4: What is the optimal ownership threshold for a shareholder to be eligible to nominate a director under Proposed Rule 14a-11? O/S=Outstanding Shares**

	<u>All Responses</u>	<u>Companies Only</u>
1% of O/S	6.38%	2.77%
2% of O/S	0.00%	0.00%
3% of O/S	6.38%	5.55%
4% of O/S	0.00%	0.00%
5% of O/S	48.93%	50.00%
7% of O/S	4.21%	2.77%
10% of O/S	36.17%	38.88%

**Question 5: If direct proxy access (Proposed Rule 14a-11) is adopted in time for the 2011 proxy season, what % of all companies listed on U.S. exchanges would you expect to see facing a shareholder director nomination under PR 14a-11 in 2011?**

	<u>All Responses</u>	<u>Companies Only</u>
Average Forecast:	15.02%	16.81%
Median Forecast:	10.00%	10.00%
Average Forecast (excluding top 5/bottom 5)	11.81%	13.07%

**Question 6: Should a company's nominating committee retain a power under PR 14a-11 to unilaterally exclude shareholder director nominees that the committee determines to be unqualified?**

	<u>All Responses</u>	<u>Companies Only</u>
YES	74.47%	83.33%
NO	25.53%	16.67%

**Question 7: Should a company be exempted from Proposed Rule 14a-11 if it has a bylaw governing direct proxy access?**

	<u>All Responses</u>	<u>Companies Only</u>
YES	74.47%	86.11%
NO	25.53%	13.89%

**Question 8: In the event that multiple nominations under PR 14a-11 are received by a company, should priority go to the "first in" or the shareowner (individual or group) holding the largest number of shares?**

	<u>All Responses</u>	<u>Companies Only</u>
FIRST IN	4.25%	5.56%
LARGEST SHAREOWNER	95.74%	94.44%

**Question 9: If use of Proposed Rule 14a-11 is made contingent upon specific “triggering events,” what “triggering events” would you favor? (select all that apply)**

	(% of All Responses Favoring)
Oppose inclusion of triggering events in PR 14a-11	27.65%
Company does not act on a shareholder proposal that receives a majority of votes cast	46.80%
At least one director failed at a prior meeting to secure support from at least 50% of votes cast	46.80%
At least one director had withhold votes at the prior meeting of at least 35% of total votes cast	17.02%

**OTHERS (WRITE IN)**

“At least three years of descending stock value and greater than some pertinent index of comparable companies.”

“Decline in the value of the firm over a five-year period.”

“Nominee fails to get majority vote but remains in office.”

“At least 2 directors failing to receive 50% of votes cast.”

**Question 10: What should be the maximum number of shareholder director nominees using PR 14a-11 that a company would be required to include in their proxy materials for each annual/special meeting? SELECT ONLY ONE OPTION**

	<u>All Responses</u>	<u>Companies Only</u>
ONE	42.55%	47.22%
TWO	8.51%	8.33%
THREE	2.12%	2.77%
5% of Total # of Co. Directors	6.38%	5.55%
10% of Total # of Co. Directors	19.14%	16.66%
15% of Total # of Co. Directors	6.38%	5.55%
20% of Total # of Co. Directors	6.38%	5.55%
25% of Total # of Co. Directors	8.51%	8.33%

**Question 11: Should there be a prohibition against the simultaneous use of nominations under Proposed Rule 14a-11 by any shareholder (or group of shareholders) conducting a traditional proxy contest at the same annual or special meeting?**

	<u>All Responses</u>	<u>Companies Only</u>
YES	85.10%	94.44%
NO	14.90%	5.56%

**Question 12: Should all shareholder director nominations advanced under Proposed Rule 14a-11 be excluded in the event of a traditional proxy contest at the same annual or special meeting?**

	<u>All Responses</u>	<u>Companies Only</u>
YES	76.60%	80.55%
NO	23.40%	19.45%

**Question 13: Should shareholder director nominees under Proposed Rule 14a-11 be required to meet the same independence and other standards as are required, by company bylaws and regulatory requirements, of all other directors at a company?**

	<u>All Responses</u>	<u>Companies Only</u>
YES	95.74%	100.0%
NO	4.26%	0.0%

**Question 14: Should SHAREHOLDERS, including all members of a GROUP, nominating a director under PR 14a-11, and who then fails to get elected, be excluded from resubmissions under PR 14a-11 for subsequent meetings of the same company, and if so, for how long?**

	<u>All Responses</u>	<u>Companies Only</u>
NO	27.65%	22.22%
YES, 1 YEAR	14.89%	16.67%
YES, 2 YEARS	17.03%	22.22%
YES, 3 YEARS	23.40%	22.22%
YES, 5 YEARS	17.03%	16.67%

**Question 15: Should SHAREHOLDERS, including all members of a GROUP, be excluded from resubmissions at a specific company under PR 14a-11 for a defined period of time if all nominees for a specific meeting fail to obtain the following MINIMUM % of total votes?**

	<u>All Responses</u>	<u>Companies Only</u>
15% of Total Votes Cast	6.38%	8.33%
25% of Total Votes Cast	34.04%	38.88%
30% of Total Votes Cast	8.52%	5.55%
35% of Total Votes Cast	23.40%	27.77%
40% of Total Votes Cast	8.52%	8.33%
Oppose this Resubmission Standard	19.14%	11.11%

**Question 16: Should 14a-11 shareholder director NOMINEES who fail to get a % threshold of votes be ineligible for resubmission for subsequent meetings, and if so, for how long?**

	<u>All Responses</u>	<u>Companies Only</u>
NO	21.28%	16.67%
YES, 1 YEAR	14.89%	16.67%
YES, 2 YEARS	19.14%	25.00%
YES, 3 YEARS	29.78%	27.77%
YES, 5 YEARS	14.89%	13.89%

**Question 17: What is the preferred MINIMUM % votes required for a 14a-11 shareholder director NOMINEE to remain eligible for resubmissions for subsequent meetings?**

	<u>All Responses</u>	<u>Companies Only</u>
20% of Total Votes Cast	4.25%	5.55%
25% of Total Votes Cast	23.40%	25.00%
30% of Total Votes Cast	17.03%	13.89%
35% of Total Votes Cast	31.92%	38.89%
Do Not Favor Any Resubmission Thresholds For Nominees	23.40%	16.67%

**Question 18: Should a company have the flexibility to design “user friendly” proxy cards and notices, including a single vote option for the company’s nominees as a group?**

	<u>All Responses</u>	<u>Companies Only</u>
YES	87.23%	100.0%
NO	12.76%	0.0%