

Examining Hewlett-Packard's Proposed Proxy Access Rights

January 15, 2013 | Client Update | 3-minute read

HP's preliminary proxy statement filed recently included a company proposal to allow any shareholder, or no more than 20 in number, who hold 3% or more of HP shares continuously for 3 years to nominate candidates to the company's board. This threshold tracks the previously adopted SEC proxy access rules. However, HP limits the number of candidates to 20% of the board, or the closest whole number below 20%, while the SEC rules had allowed for 25% and a minimum of one director. Currently, HP has 11 directors so the company's proposal would permit 2 nominees.

Also similar to the SEC rules, if HP decides to include a shareholder nominee on the company proxy card as a company nominee, the company can count that nominee toward the 20% cap. However, the HP proposal indicates that this quota is considered fulfilled even if the nominee later withdraws from the ballot. If the number of submissions for access candidates exceed the 20% limit, the order of priority follows the SEC rules, with each group of shareholders being allowed to nominate 1 candidate and those who hold more shares being given preference.

Some of the information requirements are somewhat more stringent than the SEC rules, as access candidates under HP's proposal must not only represent that they do not intend to cause a change of control, but because HP permits cumulative voting, the nominating shareholders may not cumulate their votes in favor of their nominee. Unlike the SEC rules, a shareholder nominee must complete a D&O questionnaire, comply with all policies and guidelines applicable to all directors, and meet not only the independent director listing standards of the NYSE and SEC but also any additional independence standards imposed, and disclosed, by the company on all its independent directors.

Director qualifications under HP's proposal forbid as a nominee anyone who was an officer or director of a competitor within the past 3 years, serves as a director on more than a specified number of other public company boards or is a named subject of a pending criminal proceeding or has been convicted of a criminal proceeding in the last 10 years. In addition, again going beyond the SEC rules, an access candidate who did not receive at least 25% of the votes cast cannot be nominated again for two subsequent annual meetings, and no such nominee is required to be included if shareholders had already made a director nomination through the company's advanced notice bylaws.

While the SEC rules prohibited nominating shareholders from making or causing the company to make in the proxy statement false and misleading statements, HP's proposal requires the nominating shareholders to assume all liability stemming from any legal or regulatory violation arising out of such shareholders' information that is provided to the company or from the shareholders' communications with other HP shareholders.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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