

Alert

SEC Staff Permits Separate Dissident Shareholders to ‘Round Out’ Short Slate of Nominees with Nominees from Unrelated Dissident Slate

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In response to no-action requests by Eastbourne Capital Management LLC (“ECM”) and certain entities affiliated with Carl Icahn (the “Icahn Funds”) (collectively, the “Dissident Shareholders”), the staff in the Division of Corporate Finance of the SEC (the “Commission Staff”) granted no-action relief under the “short slate rule”¹ permitting the Dissident Shareholders to not only solicit votes for their own nominees, but also to seek authority to vote for nominees of an unrelated dissident. The Commission Staff strictly conditioned this relief on the Dissident Shareholder’s representations that they have not, and would not, agree to act or act as a “group” as determined under Section 13(d)(3) and in Regulation 13D-G. The Commission Staff’s response also indicates that, to exercise this right, the dissident may not actively recommend the election of each other’s nominees, but may only state their intention to vote for each other’s nominees, except to the extent otherwise stated in the Dissident Shareholder’s respective proxy cards.

Overview of the “Short Slate Rule”

On March 30, 2009, ECM and the Icahn Funds each sent similar no-action requests for relief concerning the proviso contained in Rule 14a-4(d), better known as the “short slate rule,” in connection with the solicitation of proxies to vote in the election of directors at the 2009 annual stockholder meeting of Amylin Pharmaceuticals Inc. (“Amylin”). The short slate rule, an amendment to the “bona fide nominee rule”² in 14a-4(d)(1) contained in the proviso to Rule 14a-4(d), was adopted by the SEC in 1992. It allows a dissident that nominates a slate of directors which, if elected, would constitute a minority of the board, to simultaneously seek authority to vote for nominees named in management’s proxy statement (without obtaining such nominees’ consent) so long as, among other requirements, (i) the soliciting shareholder seeks authority to vote in the aggregate for the full number of director positions being filled in the election, (ii) the soliciting shareholder represents that it will vote for all of the registrant nominees other than those it discloses it will not vote for, (iii) the soliciting shareholder provides shareholders with the opportunity to withhold authority with respect to any other registrant nominees, and (iv) both the proxy card and proxy statement disclose that there is no assurance that management’s nominees, if elected, will serve with any of the dissident’s nominees.³ The rule was created to address an unintended consequence of the “bona fide nominee rule” which was effectively to force shareholders to choose between voting for the management slate in order to exercise their full voting rights and voting for a less than full complement of directors.⁴ Under the short slate rule, soliciting parties can identify the registrant’s

¹ 17 CFR 240.14a-4(d).

² 17 CFR 240.14a-4(d)(1).

³ 17 CFR 240.14a-4(d).

⁴ As incumbent directors rarely, if ever, consent to being named as nominees of the dissident’s proxy statement, this meant that the dissident running a short slate of directors could not offer shareholders the opportunity to vote for a combination of dissident nominees and incumbent directors (denying the shareholder the ability to vote for a full slate of directors, as many critics may have wished).

nominees they *will not* vote for and can indicate that they will vote for the rest of the registrant's slate, but the soliciting party *cannot* include the registrant's nominees on its proxy statement and form of proxy.⁵

Amylin Proxy Contest

The Dissident Shareholders are preparing to separately run their own proxy contests at the Amylin 2009 annual stockholder meeting. As a result, there are expected to be three separate slates of nominees—two shareholder sponsored minority slates (each nominating five directors) and the management slate—seeking election to the twelve seats on Amylin's Board. In their no-action requests, ECM and the Icahn Funds sought authority to solicit proxies for each other's nominees as well as certain of the management nominees named in Amylin's proxy statement,⁶ while still availing themselves of the short slate rule. Both no-action letters argued that applying the proposed rule would actually further the intention of the Commission Staff to "eliminate unnecessary impediments" to short slate elections and ameliorate "the difficulty experienced by shareholders in gaining a voice in determining the composition of the board of directors" especially those seeking minority representation.⁷

As mentioned above, the Commission Staff granted relief under 14a-4(d), permitting the Dissident Shareholders to solicit votes for their own nominees, but also to seek authority to vote for nominees of an unrelated dissident as well as for the nominees in management's proxy statement.

Conclusion

The Commission Staff's grant of relief to ECM and the Icahn Funds will further enable soliciting stockholders who are seeking to elect a short slate to "round out" their slate with candidates from the full selection of nominees, even those proposed by another dissident. This new interpretation will allow activists to pursue their goal of achieving better shareholder representation, will allow shareholders to vote for the directors of their choice, and will keep management slates from gaining an advantage when there are multiple dissident slates nominated by unrelated shareholders. Going forward, this scenario may become more common in the activist community. However, activist investors must be careful not to run afoul of the Commission Staff's response by acting as a group or otherwise engaging in any activities that would be deemed to cause the formation of a "group" as determined under Section 13(d)(3) and in Regulation 13D-G.

Authored by David E. Rosewater and Stephen Moskowitz.

If you have any questions concerning this Alert, please contact:

Robert Goldstein	+1 212.756.2519	robert.goldstein@srz.com
Peter J. Halasz	+1 212.756.2238	peter.halasz@srz.com
Eleazer N. Klein	+1 212.756.2376	eleazer.klein@srz.com
Michael R. Littenberg	+1 212.756.2524	michael.littenberg@srz.com
Robert B. Loper	+1 212.756.2138	robert.loper@srz.com
Benjamin M. Polk	+1 212.756.2476	benjamin.polk@srz.com
John M. Pollack	+1 212.756.2372	john.pollack@srz.com
Richard A. Presutti	+1 212.756.2063	richard.presutti@srz.com
David E. Rosewater	+1 212.756.2208	david.rosewater@srz.com
Marc Weingarten	+1 212.756.2280	marc.weingarten@srz.com
André Weiss	+1 212.756.2431	andre.weiss@srz.com

⁵ See Release No. 31, 236 (Oct. 16, 1992).

⁶ In compliance with Rule 14a-4(d), the proxy card and related disclosure would indicate that both ECM and the Icahn Funds intend to use the proxy to vote for all of the management nominees other than those specified by both entities respectively and would also indicate that ECM and the Icahn Funds intend to use the proxy card to vote for all of each other's nominees other than those specified. The ECM no-action letter also stated that it would confine itself to seeking authority to vote for non-ECM nominees and would not affirmatively solicit (in its proxy materials or otherwise) support of the election of any nominees other than the ECM nominees.

⁷ ECM No-action request letter, p. 5, dated March 30, 2009, citing FR 29564, p.21, 57 FR 48279, p.25.

New York

919 Third Avenue
New York, NY 10022
+1 212.756.2000
+1 212.593.5955 fax

Washington, DC

1152 Fifteenth Street, NW, Suite 850
Washington, DC 20005
+1 202.729.7470
+1 202.730.4520 fax

London

Heathcoat House
20 Savile Row, London W1S 3PR
+44 (0) 20 7081 8000
+44 (0) 20 7081 8010 fax

www.srz.com

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