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Research Spotlight

Potential Targets of Proxy Access

New York - September 17, 2010 [John Laide](#)

The debate is over. Companies are preparing for the reality of proxy access (new Exchange Act Rule 14a-11). In fact, last week Discovery Group I LLC disclosed plans to use proxy access to nominate two candidates for election to the board of directors of Tier Technologies, Inc. at the company's 2011 annual meeting. Discovery Group has a history of activism at the company, including winning two board seats in a proxy fight at the 2009 annual meeting.

The rules for the 2011 proxy season are in place. In order to utilize proxy access, a shareholder must have held three percent of the voting power of a company continuously for three years. Smaller reporting companies with a public float of less than \$75 million will have a three-year reprieve from the new rules. The rules allow shareholders to work together and aggregate positions in order to meet the three percent requirement. Numerous commentators have pointed out the "three and three" requirement will be difficult to achieve at most companies, especially large cap companies. That's not to say there aren't plenty of targets. According to data from FactSet Research Systems, there are 207 ownership positions at 197 companies with a market cap over \$75 million where a known activist currently meets the "three and three" threshold on their own without needing to work with other shareholders (when aggregating the "three and three" positions held by these activists, the number of potential targets increases exponentially). Among these companies are Dell Inc., YUM! Brands, Inc., Motorola, Inc., Biogen Idec Inc. and Chesapeake Energy Corporation. Of these 207 positions, 171 are held by investors who have waged at least one proxy fight in their history.

Activists That Have Waged At Least One Proxy Fight	
Number of Companies	3%/3 Year Requirement for Proxy Access Met
GAMCO Investors	64
Third Avenue Management LLC	30
Franklin Mutual Advisers LLC	16
D. E. Shaw & Co., Inc.	6
Icahn Associates Corp.	6
Nierenberg Investment Management Company, Inc.	4
Steel Partners LLC	4
BVF, Inc.	3

Wynnefield Capital Management LLC, ValueAct Capital Management LP, Third Point Management Co. LLC, Robotti & Co., Inc., Relational Investors LLC, Pennant Capital Management LLC, Newcastle Partners LP, Millennium Management LLC, Greenlight Capital, Inc., Dolphin Ltd. Partnership I LP, Discovery Group I LLC are next with two companies each.

Source: FactSet Research Systems Inc.

One interesting wrinkle affecting potential targets of proxy access in 2011 is the timing of the implementation of the rule, which is too late to apply to numerous companies for their 2011 annual meeting. Under the new 14a-11 rule, a proxy access nomination must be received by the company not less than 120 calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting (and not earlier than 150 days). This is the same advance notice required for 14a-8 shareholder proposals. The SEC is requiring that the new 14a-11 rules apply to any company if the window period for submitting nominees is open after November 15, the effective date of the new rule. If the window period closed before November 15, shareholders would not be permitted to utilize proxy access for the 2011 proxy season. According to FactSet SharkRepellent, this window period has closed for approximately 400 companies in the Russell 3000.

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