

SECURITIES ALERT

SEC STAYS EFFECTIVENESS OF PROXY ACCESS RULES PENDING JUDICIAL REVIEW

October 6, 2010

On October 4, 2010, the Securities and Exchange Commission (SEC) announced it would delay the effectiveness of its recently adopted proxy access rules. Previously due to take effect on November 15, 2010, new Rule 14a-11 was designed to give large shareholders the ability to include their own board nominees in a company's proxy materials. A related amendment to Rule 14a-8 would have required companies to include in their proxy statements shareholder proposals to amend the company's governing documents to provide even more liberal procedures for proxy access.

The SEC granted the stay in response to a lawsuit challenging Rule 14a-11 that was filed by Business Roundtable and the U.S. Chamber of Commerce on September 29, 2010, in the United States Court of Appeals for the District of Columbia Circuit. In the petition, these business groups seek to overturn Rule 14a-11 arguing, among other things, that the rule is "arbitrary and capricious" in its treatment of state law and that the SEC failed to properly assess the costs of proxy access or the effects on "efficiency, competition and capital formation," as required by law. Concurrently, the petitioning parties filed a motion with the SEC requesting a stay of the rule's effectiveness and representing that they would join in a court motion seeking expedited review of their petition if the stay were granted.

Through a spokesperson, the SEC has vowed to defend the lawsuit "vigorously." In granting the stay, the SEC did not address the merits of the suit, but stated its desire to avoid "potentially unnecessary costs, regulatory uncertainty, and disruption that could occur" if the rule went into effect while under review. Surprisingly, the SEC went beyond the request of the opposing parties to delay the effectiveness of Rule 14a-11 and also included in its stay order the amended section of Rule 14a-8, noting that it "was designed to complement Rule 14a-11 and is intertwined, and there is potential for confusion if the amendment to Rule 14a-8 were to become effective while Rule 14a-11 is stayed."

In light of the stay, the proxy access rules likely will not be in effect for the bulk of the 2011 proxy season. Even under expedited review, the parties would have four weeks to file their briefs and responses. If argument must be heard, as is likely in this case, the process can take additional months. This probable timeline comports with an estimate by the SEC's spokesperson that the case should be resolved by late spring 2011. Absent the stay, the new provisions would have applied during the 2011 proxy season to companies that had mailed proxy materials for their previous annual meeting after March 13, 2010.

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