AKIN GUMP
STRAUSS HAUER & FELD LLP

Securities Alert

D.C. Circuit Vacates Proxy Access Rule

July 25, 2011

On July 22, 2011, the U.S. Court of Appeals for the District of Columbia Circuit vacated the SEC's controversial proxy access rule, Rule 14a-11, which would have allowed shareholders to have their director nominees included in a company's proxy materials so long as the shareholders and their nominees satisfied certain conditions. The Court found that the SEC was arbitrary and capricious in promulgating Rule 14a-11 by failing to adequately consider the economic consequences of the rule and its effect on efficiency, competition and capital formation.

Rule 14a-11 was adopted in August 2010 and was scheduled to become effective on November 15, 2010. In response to a petition filed by the Business Roundtable and the U.S. Chamber of Commerce challenging the proxy access rule, the SEC stayed the effectiveness of Rule 14a-11 in October 2010 pending the outcome of the proceedings.

In its decision, the Court concluded that the SEC failed to justify the proxy access rule by inconsistently and opportunistically framing the costs and benefits of the rule, failing adequately to quantify certain costs or to explain why those costs could not be quantified, neglecting to support its predictive judgments, contradicting itself and failing to respond to substantial problems raised by commenters. Specifically, the Court criticized the SEC for, among other things—

- relying upon insufficient empirical data to conclude that the proxy access rule would improve board performance and increase shareholder value
- failing to sufficiently evaluate the costs that could be imposed on companies from special interest shareholders, particularly union and government pension funds
- inconsistently anticipating frequent use of the rule when estimating benefits, but assuming infrequent use when estimating costs
- applying the rule to investment companies and failing to adequately address (1) whether the regulatory requirements under the Investment Company Act reduce the need for, and the benefit from, proxy access for shareholders of investment companies and (2) the potential for greater costs on investment companies by disrupting their governance structure.

The SEC has stated that it is considering its options, but it has not indicated whether it will appeal the decision or try to address the concerns raised by the Court and modify the rule. In any event, it seems fairly certain that proxy access will not apply to the 2012 proxy season. However, Meredith Cross, Director of the SEC's Division of Corporation Finance, has stated that the Court's decision did not affect the SEC's amendment to Rule 14a-8, which was also stayed pending the Court's decision on Rule 14a-11. This raises the question of whether the SEC will lift the stay on the Rule 14a-8 amendment, thereby allowing shareholders to include proxy access bylaw amendments in company proxy statements in the upcoming proxy season.

CONTACT INFORMATION

If you have any questions concerning this alert, please contact —

Patrick J. Dooley
pdooley@akingump.com
212.872.1080
New York

J. Kenneth Menges Jr.
kmenges@akingump.com
214.969.2783
Dallas

Christine B. LaFollette
clafollette@akingump.com
713.220.5896
Houston

C.N. Franklin Reddick III
freddick@akingump.com
310.728.3204
Los Angeles