

# PROXY UPDATE

September, 2011

## Proxy Access – Private Ordering, For Now

### Overview

It appears that federally mandated proxy access will not be in place for the 2012 proxy season, as the SEC announced last week that it is not going to seek a rehearing of a July ruling by the U.S. Court of Appeals in Washington, D.C. that vacated the proxy access rule, 14a-11. The SEC also indicated that it will not seek Supreme Court review. This does not mean, however, that proxy access is dead for the 2012 proxy season. While it will not be mandated on the federal level, shareholder activists and others will be able to seek proxy access at individual companies through shareholder proposals.

### No Further Legal Challenges

The Court of Appeals had issued the opinion in a case brought by the Business Roundtable and the Chamber of Commerce of the United States of America.

In its opinion the Court of Appeals noted: *We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again ... adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.*

While the SEC has decided not to pursue further legal challenges regarding proxy access, Chairman Mary Schapiro stated that she believes proxy access is important and that the SEC will continue to study the issue.

*"I firmly believe that providing a meaningful opportunity for shareholders to exercise their right to nominate directors at their companies is in the best interest of investors and our markets. It is a process that helps make boards more accountable for the risks undertaken by the companies they manage. I remain committed to finding a way to make it easier for shareholders to nominate candidates to corporate boards.*

*"At the same time, I want to be sure that we carefully consider and learn from the Court's objections as we determine the best path forward. I have asked the staff to continue reviewing the decision as well as the comments that we previously received from interested parties."*

### Stay Lifted on Amendments to 14a-8 Allowing for Proxy Access Shareholder Proposals

The SEC also lifted a stay on amendments to Rule 14a-8 that will allow for shareholder proposals on proxy access. These amendments were first approved by the SEC in 2010, but the rule changes were stayed pending the outcome of the litigation challenging 14a-11. The amended rules will allow shareholders to submit shareholder proposals calling for proxy access. It is likely that shareholder proposals will call for proxy access that is less

restrictive than it was under 14a-11. What is unclear at this point is how many proxy access shareholder proposals will be filed. A limiting factor could be that activists may be concerned that too many proxy access shareholder proposals provide fodder to those that oppose a federal rule on proxy access. The opponents of a federal rule could point to the number of proposals as proof that proxy access is occurring through private ordering, obviating the need for federal rules.

We will continue to monitor this situation and keep you posted regarding its potential impact on the 2012 proxy season.

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