

# LEGAL UPDATE

October 2009 By: Michael T. Campoli

## SEC DELAYS VOTE ON PROXY ACCESS RULES AND GRANTS EXTENSION FOR COMPLIANCE WITH SECTION 404(B) OF THE SARBANES-OXLEY ACT

### PROXY ACCESS

The U.S. Securities and Exchange Commission (the “SEC”) recently indicated that it likely would not vote this year on the proxy access proposals that it issued in June 2009 in order to provide it with more time to review and consider the numerous comments and questions generated by the proposal.

Specifically, in an October 2, 2009 speech, SEC Commissioner Elisse B. Walter stated with respect to the proxy access proposal, “Although I can’t give you a definitive date, I expect we will likely move forward and consider an adopting release sometime in early 2010. This means of course that final rules are not likely to be in place at the beginning of next year’s ‘proxy season.’”

The SEC released its proxy access proposal – which is intended to facilitate the rights of shareholders to nominate candidates for election as a corporate director and have those nominees included in the company’s proxy materials – in June 2009. The 60-day comment period for the proposed rules has ended, with over 500 comments submitted.

Proposed Rule 14a-11 would allow eligible shareholders to include their nominees for director directly in a company’s annual proxy materials, and the proposed amendment to Rule 14a-8 would end the practice of allowing companies to exclude shareholder proposals pertaining to director elections from their annual proxy materials.

Although it appears that the SEC will not act on proxy access in time for the 2010 proxy season, the statements of Commissioner Walter and SEC Chairman Mary L. Shapiro indicate that the SEC remains committed to proxy access. As a result, public companies should expect to encounter proxy access for the 2011 proxy season.

For a more detailed discussion of the SEC’s proxy access proposal, please see our Legal Update dated May 26, 2009, titled “Proxy Access Proposal.”

### SARBANES-OXLEY SECTION 404(B) EXTENSION

On October 2, 2009, the SEC announced that small publicly reporting companies (in general, nonaccelerated filers with a public float of less than \$75 million) will be required to comply with Section 404(b) of the Sarbanes-Oxley Act of 2002 (“SOX”) beginning with their annual reports for fiscal years ending on or after June 15, 2010. Section 404(b) of SOX requires public companies to provide an attestation report from their independent registered public accounting firm on their internal control over financial reporting. The previous extension for smaller public companies to provide auditor attestation reports was set to expire for annual reports of companies with fiscal years ending on or after December 15, 2009. As a result of the extension, smaller public companies with fiscal years ending on December 31, 2009 will not be required to provide the attestation report until the filing of their annual report for the 2010 fiscal year.

Smaller public companies are already required to provide management’s report on the effectiveness of internal controls over financial reporting as required by Section 404(a) of SOX. Large accelerated filers and accelerated filers have been required to provide both a management report pursuant to Section 404(a) of SOX, and an auditor’s attestation report pursuant to Section 404(b) of SOX, for several years.

The SEC granted the extension so that its Office of Economic Analysis could complete a study of whether additional guidance provided to managers and auditors in 2007 was effective in reducing compliance costs. Because the study was published less than three months before the December 15, 2009 deadline, the SEC determined that additional time is appropriate and reasonable so that small public companies and their auditors can better plan for the required auditor attestation. The SEC indicated that no further extensions will be provided.

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*The foregoing is intended to summarize the current status of the SEC's proxy access proposal and the extension of the deadline for complying with Section 404(b) of the Sarbanes-Oxley Act, and does not constitute legal advice. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Michael Campoli at (212) 326-0468.*

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## ABOUT THE AUTHOR



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Mr. Campoli devotes his practice to counseling public and private companies on a broad range of corporate matters, including Securities and Exchange Commission and self-regulatory organization reporting and compliance, corporate formation and governance, mergers and acquisitions, public and private debt and equity financing transactions, and limited liability company and partnership counseling.

Mr. Campoli's work at Pryor Cashman has included:

- Representation of MDRNA, Inc. (NASDAQ: MRNA) as outside general counsel in connection with its equity financings, and SEC and NASDAQ reporting and compliance requirements
- Representation of Javelin Pharmaceuticals, Inc. (NYSE - Amex: JAV) as outside general counsel in connection with its equity financings, and SEC and NYSE - Amex reporting and compliance requirements
- Represented Briad Restaurant Group in its prevailing tender offer for Main Street Restaurant Group, Inc., the largest T.G.I. Friday's franchisee
- Represented Open Range Communications Inc. in connection with a \$380 million financing that consisted of the issuance of a \$270 million promissory note to the U.S. Department of Agriculture and preferred stock to private investors
- Represented The Kushner Companies in connection with its acquisition of the office building located at 666 Fifth Avenue, New York, New York
- Represented Implantable Vision, Inc. (OTCBB: IMVS) as outside general counsel in connection with SEC compliance and reporting matters
- Represented a privately-held alternative media company in connection with general corporate matters and its acquisition of a coffee sleeve advertising business
- Represented a private medical devices manufacturer in connection with equity and debt offerings for aggregate gross proceeds of up to \$4,000,000
- Represented a private life sciences company in connection with the issuance of \$15 million of convertible notes
- Represented a private television production company in connection with the issuance of \$3.5 million of equity securities