

## U.S. COURT OF APPEALS REJECTS SEC PROXY ACCESS RULE

July 28, 2011

Last week, in a ruling applauded by business groups, the U.S. Court of Appeals for the District of Columbia Circuit (the “Court”) issued an opinion rejecting and vacating the Securities and Exchange Commission’s landmark shareholder proxy access rule.<sup>1</sup> Rule 14a-11 under the Securities and Exchange Act of 1934, as amended (the “Exchange Act”), adopted in August 2010 by a bitterly divided 3-2 vote after years of controversy, was intended to facilitate the rights of shareholders to nominate directors of corporate boards.<sup>2</sup> However, in September 2010, the Business Roundtable and the Chamber of Commerce of the United States of America (the “Plaintiffs”) filed a petition for review with the Court challenging the rule, and in October 2010 the SEC agreed to stay the effectiveness of the rule pending the Court’s decision.<sup>3</sup> In its decision last week, the Court held that the SEC acted “arbitrarily and capriciously” and failed to adequately assess the economic effects of the new rule.

The SEC’s proxy access initiatives would have implemented Rule 14a-11, under which shareholders owning at least three percent of a company’s voting power for at least three years (and who meet other requirements) generally could have their nominees included in the company proxy materials that are sent to all voters. Additionally, under revised Exchange Act Rule 14a-8, shareholders would be able to use the shareholder proposal process to establish procedures to include shareholder director nominations in company proxy materials that may be even more shareholder-friendly than those required by the new SEC rules. The proxy access rules were slated to become effective November 15, 2010 and would have applied to many companies’ 2011 annual meetings.

The Plaintiffs challenged Rule 14a-11 before the Court, arguing that the SEC failed adequately to consider the rule’s effect upon efficiency, competition and capital formation, including, among other things, the costs companies would have incurred in opposing shareholder nominees and the consequences of union and state pension funds using the rule. In a strongly-worded opinion, the Court agreed with the Plaintiffs and stated that in adopting Rule 14a-11 the SEC “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.”

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<sup>1</sup> Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission (D.C. Cir. July 22, 2011), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/\\$file/10-1305-1320103.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/$file/10-1305-1320103.pdf).

<sup>2</sup> The SEC proxy access press release, including a link to the 451-page adopting release, is available at <http://www.sec.gov/news/press/2010/2010-155.htm> (August 25, 2010). Our client alert discussing the SEC’s proxy access rules may be found at <http://www.wcsr.com/resources/pdfs/cs090910.pdf>.

<sup>3</sup> The SEC’s order is available at <http://www.sec.gov/rules/other/2010/33-9149.pdf> (October 4, 2010), and the Plaintiffs’ petition to the Court is available at [http://www.uschamber.com/sites/default/files/files/1009uscc\\_sec.pdf](http://www.uschamber.com/sites/default/files/files/1009uscc_sec.pdf). See also our client alert discussing the SEC stay, available at <http://www.wcsr.com/resources/pdfs/cs100510.pdf>.

In response to the Court's decision, Meredith Cross, Director of the SEC's Division of Corporation Finance, issued a statement that the SEC is "disappointed by today's decision striking down a rule that made it easier for shareholders to nominate a candidate to a company's board of directors" and that the SEC is considering its options going forward. She also noted that the changes to Rule 14a-8 are unaffected by the Court's decision.<sup>4</sup> Although the future of proxy access remains uncertain, at a minimum, it is unlikely that any new rules would be effective in time for the 2012 proxy season.

We will continue to monitor any future SEC actions in the proxy access arena. If you have any questions regarding the Court's decision, please contact Meredith Burbank (<http://www.wcsr.com/MeredithBurbank>), the principal drafter of this client alert, or you may contact the Womble Carlyle attorney with whom you usually work or one of our Corporate and Securities attorneys at the following link: <http://www.wcsr.com/profSearch?team=corporateandsecurities>.

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<sup>4</sup> Notably, however, the changes to rule 14a-8 are still subject to the stay described above, which would need to be lifted in order to become effective.