

**SEC ISSUES STAY OF SHAREHOLDER PROXY ACCESS RULES  
PENDING JUDICIAL REVIEW**

**October 5, 2010**

Yesterday, the Securities and Exchange Commission (the “SEC”) agreed to stay the effectiveness of its recently adopted shareholder proxy access rules pending judicial review of a claim challenging the validity of the new rules.<sup>1</sup> The SEC’s action came in response to a petition for review filed on September 29, 2010 in the U.S. Court of Appeals for the District of Columbia Circuit by the Business Roundtable and the Chamber of Commerce of the United States of America.<sup>2</sup> In their petition, the plaintiffs asked the court to hold the SEC’s proxy access rules unlawful under the Securities Exchange Act of 1934, as amended, and other laws, alleging that the rules are, among other things, “arbitrary and capricious.”

These recent developments mark yet another chapter in the on going proxy access debate. Just over a month ago, following years of controversy, the SEC in a bitterly divided 3-2 vote adopted the new proxy access rules, which enhance the ability of shareholders to nominate directors of corporate boards.<sup>3</sup> Under new Exchange Act Rule 14a-11, shareholders owning at least three percent of the company’s voting power for at least three years (and who meet other requirements) generally would be able to 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.

In yesterday’s order, the SEC agreed to stay implementation of both Rule 14a-11 and the amendment to Rule 14a-8 pending judicial review, but did not address the merits of the claims of the Business Roundtable and the Chamber of Commerce. Both the SEC and the business organizations have indicated that they will seek expedited review of the petition.

The new proxy access rules were slated to become effective November 15, 2010 (although the effective date for smaller reporting companies would be delayed three years), and would apply to companies that mailed proxy materials for their last annual meeting after March 13, 2010.

However, these recent developments call into question whether the proxy access rules will be effective for the bulk of the 2011 proxy season (at least for spring 2011 proxy materials), since at this point it

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<sup>1</sup> The SEC’s order may be found at: <http://www.sec.gov/rules/other/2010/33-9149.pdf> (October 4, 2010).

<sup>2</sup> The petition filed by the Business Roundtable and the Chamber of Commerce and related materials may be found at: [http://www.uschamber.com/sites/default/files/files/1009uscc\\_sec.pdf](http://www.uschamber.com/sites/default/files/files/1009uscc_sec.pdf).

<sup>3</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 new proxy access rules may be found at <http://www.wcsr.com/resources/pdfs/cs090910.pdf>.

is difficult to predict how long an expedited review may take and, of course, how the court may ultimately rule regarding the validity of the proxy access rules. Nonetheless, we recommend that public companies stay the course by continuing to evaluate the potential impact of the new proxy access rules on their director election process. Potential actions include analyzing the company's shareholder base to determine the likelihood of shareholder nominees, reviewing nomination criteria and procedures and considering whether amendments to the company's advance notice bylaws, director qualification bylaws, corporate governance guidelines and/or nominating committee charter are necessary, and identifying proxy advisory firm(s) that may assist with a potential proxy fight.

We will continue to monitor these and other developments in the proxy access area. If you have questions concerning this alert, please contact Jane Jeffries Jones (<http://www.wcsr.com/lawyers/janejeffries-jones>), the principal drafter of this 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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