

WSGR ALERT

OCTOBER 2010

SEC STAYS EFFECTIVENESS OF PROXY ACCESS RULES PENDING LAWSUIT

On September 29, 2010, the Business Roundtable and the U.S. Chamber of Commerce challenged the legality of the proxy access rules recently adopted by the Securities and Exchange Commission (SEC). The petition, available at http://www.uschamber.com/sites/default/files/files/1009uscc_sec.pdf, argues that those rules are arbitrary, capricious, and otherwise not in accordance with law; do not promote efficiency, competition, and capital formation; exceed the SEC's authority; and are unconstitutional.

In connection with the petition, on October 4, 2010, the SEC stayed the effectiveness of its proxy access rules pending resolution of the legal challenge (please see <http://www.sec.gov/rules/other/2010/33-9149.pdf> for the order granting stay). The SEC reportedly intends to defend the legality of its rules, but its stay avoids potentially unnecessary costs, uncertainty, and disruption that could occur while the legal challenge is pending. Though the parties have asked the court to expedite review of this matter, an SEC spokesperson is reported to have indicated that it could take until late spring to resolve the legal challenge, effectively postponing the effect of proxy access for many companies until after next year's proxy season.

What You Should Do Now

Although proxy access now will be delayed, we continue to believe that proxy access ultimately will take effect. With proxy access nominations off the agenda for now, governance activists may increase their focus on say-on-pay and say-when-on-pay votes for 2011 annual meetings. Negative or close

votes on say-on-pay in turn will make companies more vulnerable to shareholder activist campaigns and, in 2012, to proxy access challenges. Therefore, although companies now will have additional time to prepare for proxy access, they should focus promptly on any issues arising from their compensation practices that could negatively impact say-on-pay and say-when-on-pay votes. Moreover, delayed implementation of proxy access should not deter companies from taking action to mitigate their risk for governance activism, including enhancing communication with shareholders and heightening awareness of potential "hot button" issues in the boardroom, as discussed in our previous WSGR Alerts, available at http://www.wsgr.com/publications/pdfsearch/wsgralert_dodd_frank2.pdf and http://www.wsgr.com/publications/pdfsearch/wsgralert_proxy_access.pdf. Cohesion and transparency in the boardroom, prompt action to address issues of performance or governance, regular evaluation of board composition and performance, and detailed knowledge of investors' perspectives and concerns regarding the company are more important now than ever.

We will continue to monitor matters related to proxy access, as well as the rulemaking required by the Dodd-Frank bill, and will provide additional information when available.

For any questions or more information on these or any related matters, please contact Warren de Wied, David Berger, Katharine Martin, Richard Cameron Blake, your regular Wilson Sonsini Goodrich & Rosati contact, or any member of the firm's corporate and securities practice.



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