

WSGR ALERT

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COURT VACATES SEC'S PROXY ACCESS RULES

Today, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit unanimously vacated the SEC's proxy access rules. The rules, which are explained in this WSGR Alert¹, would have given public company shareholders the right, under certain circumstances, to require the company to include in its proxy statement and on its proxy card shareholder nominees for a portion of the seats on the board of directors. The SEC had stayed the effectiveness of the rules pending the court's decision in the case.

The court's decision, which is available online², held that the SEC:

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.

In so ruling, the court vacated the application of the rule both to publicly traded companies

and to investment companies. The court did not, however, reach the constitutional arguments that the petitioners had raised in opposition to the rules. This leaves open the possibility that the SEC could later re-adopt a form of proxy access, having more carefully considered the cost-benefit analysis. It is unclear what the SEC will do in response to the court's decision and given its already heavy regulatory workload in response to the Dodd-Frank Act and other initiatives.

The court's ruling echoes the calls of others who are asking the SEC and other regulators to be more careful in considering the practical effects of rulemaking. Last year, the NYSE Commission on Corporate Governance called for the SEC and other regulators to assess the impact of major corporate governance reforms on the promotion of sustainable, long-term corporate growth and profitability.³ Just this month, President Obama issued an executive order stating that "regulatory decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative)." If the SEC were to adopt proxy access again, we would expect it only to occur after more careful analysis of the costs, benefits, and effects of the change.

For any questions or for more information on these or related matters, please contact your

regular Wilson Sonsini Goodrich & Rosati contact or any member of the firm's corporate and securities or securities litigation practices.



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¹ Read the full WSGR Alert at http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert_proxy_access.htm.

² See the decision at [http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBE/\\$file/10-1305-1320103.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBE/$file/10-1305-1320103.pdf).

³ Wilson Sonsini Goodrich & Rosati chairman Larry Sonsini was the chair of the commission, and partner David J. Berger was chief counsel to the commission.