



September 2011 Vol. 94

## LATEST UPDATES ON PROXY ACCESS

In a [statement](#) released September 6, 2011, the Securities and Exchange Commission (the “SEC”) announced that it would not seek a rehearing or appeal of the decision issued by the U.S. Court of Appeals in July 2011, which vacated one section of the proxy access rules adopted by the SEC on August 25, 2010.

The case was brought by Business Roundtable and the U.S. Chamber of Commerce, who sought to overturn Rule 14a-11. As adopted, Rule 14a-11 would permit shareholders holding more than three percent of shares for at least three years to be able to have their director nominee(s) included in the company’s proxy materials.

The D.C. Circuit court struck down Rule 14a-11, citing a lack of sufficient empirical data showing whether this rule would be beneficial when compared with its costs. The court also stated that the SEC had failed to properly consider the costs that could be imposed upon companies by shareholders representing special interest groups. Finding reason to overturn on these grounds alone, the court never considered some of the other arguments alleged by the plaintiffs, including that Rule 14a-11 violated the First Amendment of the United States Constitution.

While this may be a significant victory for those who oppose proxy access, this does not mean that the SEC is taking proxy access off the table for good. In the SEC statement, Chairman Mary L. Schapiro stated, “I firmly believe that providing a meaningful opportunity for shareholders to exercise their right to nominate directors at their companies is in the best interest of investors and our markets...I remain committed to finding a way to make it easier for shareholders to nominate candidates to corporate boards.” Schapiro also noted that her staff will continue to review the decision and the court’s objections to “determine the best path forward.”

This statement by the SEC also does not mean that shareholders will cease in their attempts to include their director nominees in proxy materials. It should be noted that during the litigation over Rule 14a-11, the SEC voluntarily postponed the implementation of an amendment to Rule 14a-8. The amendment bars companies from excluding shareholder proposals that seek to establish procedures for nominations of directors by shareholders. This rule went into effect today, September 13, 2011. Activist shareholders may seek to circumvent the court ruling against Rule 14a-11 by using shareholder proposals to affect proxy access for shareholder nominees one company at a time. This could be an even worse outcome for companies, as the terms of new bylaw provisions may be less favorable than the conditions stipulated in Rule 14a-11. The shareholder proposals advocating proxy access could impose lower ownership thresholds than did the original SEC proposal.

In conclusion, companies should be glad that the SEC has decided not to move forward with Rule 14a-11 in its current form. However, the fight over proxy access is not dead, and companies must be prepared to deal with shareholder proposals in the months ahead.

The full text of the SEC release adopting the amendment to Rule 14a-8 can be found [here](#).

—[Scott D. Chenevert](#) and [Charles E. Reeves, Jr.](#)



September 2011 Vol. 94

Remember that these legal principles may change and vary widely in their application to specific *factual circumstances*. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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