



SEC PROXY ACCESS RULE VACATED

On July 22, 2011, the U.S. Court of Appeals for the D.C. Circuit, in a 3-0 [opinion](#), vacated Rule 14a-11, the proxy access rule adopted by the U.S. Securities and Exchange Commission (“SEC”) in August 2010. The rule would have required public companies to permit any shareholder or group of shareholders owning at least three percent of the company’s voting stock for at least three years to include director nominees in the company’s proxy materials. In response to a petition filed by the Business Roundtable and the U.S. Chamber of Commerce challenging the proxy access rule, the SEC [stayed the effectiveness](#) of Rule 14a-11 in October 2010 pending the outcome of the proceedings.

The court found that, in adopting the rule, the SEC violated the Administrative Procedure Act by failing to adequately consider the rule’s effect on efficiency, competition, and capital formation. The court vacated the rule as an “arbitrary and capricious” exercise of the SEC’s authority and reprimanded the SEC for failing “adequately to assess the economic effects” of the rule. In particular, the court criticized the SEC’s (1) analysis of the likely costs associated with, and the frequency of, proxy contests utilizing the access rule, (2) reliance upon “insufficient empirical data” to support a conclusion that proxy access would improve board performance and increase shareholder value, and (3) failure to address the costs that could be imposed on companies from the use of the rule by shareholders representing special interests, particularly unions and government pension funds, to pursue self-interested objectives rather than maximizing shareholder value.

The SEC could seek a rehearing of the case in front of all nine of the judges of the D.C. Court of Appeals, appeal the ruling to the United States Supreme Court, revise and re-propose the rule to address the inadequacies identified in the court’s decision, or abandon the proxy access rule altogether. It would be extremely difficult for the SEC to present a revised rule addressing the court’s concerns in time for proxy access to be in place for the 2012 proxy season. Note, however, that the court’s decision did not affect the SEC’s amendment to Rule 14a-8, which was also stayed pending the court’s decision on Rule 14a-11. The amendment to Rule 14a-8 bars companies from excluding shareholder proposals that seek to establish procedures for nominations of directors by shareholders. The SEC will likely lift the stay on these amendments, but it has not made clear whether it will lift the stay before the 2012 proxy season or whether it expects to modify those rules before the stay is lifted.

—[Monique A. Cenac](#) and [Raechelle M. Munna](#)



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:

Curtis R. Hearn

Jones Walker
201 St. Charles Avenue
New Orleans, LA 70170-5100
504.582.8308 *tel*
504.589.8308 *fax*
chearn@joneswalker.com

Corporate & Securities Attorneys

Allison C. Bell
Robert B. Bieck, Jr.
William R. Bishop
John C. Blackman, IV
Adam G. Brimer
Christopher M. Capitelli
Robert L. Carothers, Jr.
Robert R. Casey
Monique A. Cenac
Scott D. Chenevert
Alexandra L. Clark
Christopher P. Couch
Edward B. Crosland

Tracy P. Curtis
Allen E. Frederic, III
Asher J. Friend
John W. Gant, Jr.
Kristin S. Gardner
Neely Sharp Griffith
Carl C. Hanemann
Curtis R. Hearn
Adelaida M. Hernandez
William H. Hines
Karen B. Johns
Sanford B. Kaynor, Jr.
Charles W. Lane, III

Andrew R. Lee
George A. LeMaistre, Jr.
Nathan R. List
Brooke L. Longon
Raechelle M. Munna
Katharine F. Musso
Kenneth J. Najder
Hugh C. Nickson, III
H. Gary Pannell
R. Joseph Parkey, Jr.
Jeffrey T. Powell
Rudolph R. Ramelli
James Rebarchak

Charles E. Reeves, Jr.
Peter J. Rivas
Dionne M. Rousseau
Amy G. Scafidel
Britton H. Seal
Jack H. Shannon
Kelly C. Simoneaux
Ronald A. Snider
Hope M. Spencer
Michael D. Waters
V. Walker Wells
Richard P. Wolfe
Paul O. Woodall, Jr.

This newsletter should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your own situation and any specific legal questions you may have.

To subscribe to other E*Bulletins, visit <http://www.joneswalker.com/ecomunications.html>.