

## **SEC Delays Proxy Access Rule's Effectiveness Pending Judicial Review**

On October 4, 2010, the Securities and Exchange Commission ("SEC" or "Commission") issued an order agreeing to stay, pending the outcome of litigation challenging the SEC's rulemaking process, the effectiveness of its newly adopted proxy access rules ("new proxy access rules") (including new Rules 14a-11 and 14a-18, new Schedule 14N, and related amendments to Rule 14a-2, among others), as well as associated amendments to Rule 14a-8.<sup>1</sup> The new proxy access rules were adopted in August 2010 by a 3-2 vote, were to take effect on November 15, 2010 and would have been in effect for the 2011 proxy season. The new proxy access rules would require public companies to include in their proxy materials (1) director nominees of "significant, long-term shareholders" (owning at least 3% of the company's shares continuously for at least the prior three years) pursuant to new Rule 14a-11 and (2) shareholder proposals to amend the company's governing documents to establish different criteria for proxy access nominations pursuant to the amendments to Rule 14a-8.<sup>2</sup>

The delay comes in response to a petition (the "petition") filed by the Business Roundtable and the U.S. Chamber of Commerce on September 29, 2010, pursuant to which they seek review of the new proxy access rules' validity in the U.S. Court of Appeals for the District of Columbia Circuit.<sup>3</sup> The Chamber of Commerce and the Business Roundtable requested that the effectiveness of the new proxy access rules be delayed until the U.S. Court of Appeals had a chance to rule on the petition.

The petition asks the U.S. Court of Appeals to find the SEC rulemaking unlawful on several bases, including that Rule 14a-11 is arbitrary and capricious, violates the Administrative Procedure Act, and violates company rights under the First and Fifth Amendments of the United States Constitution. Although the petition did not challenge related amendments to Rule 14a-8, the shareholder proposal rule, the SEC also stayed the effectiveness of the changes to that rule because of the "potential for confusion if the amendment to Rule 14a-8 were to become effective while Rule 14a-11 is stayed."<sup>4</sup>

The SEC and the Business Roundtable and Chamber of Commerce will seek expedited review by the U.S. Court of Appeals, but it is unlikely that the new proxy access rules will be in effect for the 2011 proxy season.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com); or Lindsay Flora at 212.701.3429 or [lflora@cahill.com](mailto:lflora@cahill.com).

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<sup>1</sup> The SEC's order granting the stay is available at <http://www.sec.gov/rules/other/2010/33-9149.pdf>.

<sup>2</sup> For a more detailed discussion of the proxy access rules, see *SEC Adopts New Rules Strengthening Shareholders' Ability to Nominate Members of the Board of Directors* (September 3, 2010), available at <http://www.cahill.com/news/memoranda/100232> and *SEC Proposes Rule Amendments to Facilitate the Rights of Shareholders to Nominate Directors* (May 22, 2010) available at <http://www.cahill.com/news/memoranda/000169>.

<sup>3</sup> *Business Roundtable, et al. v. SEC*, No. 10-1305 (D.C. Cir., filed Sept. 29, 2010).

<sup>4</sup> According to the SEC's order: "Without addressing the merits of petitioners' challenge to the rules, the Commission has determined to exercise its discretion to stay Rule 14a-11 and related amendments to the Commission's rules, including the amendment to Rule 14a-8, pending resolution of petitioners' petition for review by the Court of Appeals."