

October 8, 2010

PROXY ACCESS LITIGATION AND NEXT STEPS

The following provides an update on the litigation challenging the “proxy access” rules adopted by the Securities and Exchange Commission (“SEC” or “Commission”), and also discusses steps companies should consider during the pendency of the litigation. Our client alert dated August 25, 2010, available [here](#), provided an overview of the proxy access rules.

Gibson, Dunn & Crutcher LLP is representing the plaintiffs, or “petitioners,” in the case, Business Roundtable and the U.S. Chamber of Commerce. The case is before the U.S. Court of Appeals for the District of Columbia Circuit.

Litigation Schedule

On Friday, October 8, 2010, the SEC and the petitioners jointly filed a proposed briefing schedule for the case before the Court of Appeals. In the filing, the SEC confirmed that it does not expect proxy access to be available for the 2011 proxy season, and instead seeks a court ruling by the summer of 2011, so that if the rules are upheld, they may be used in the 2012 proxy season. The motion stated that the stay “necessarily means that the Commission’s rule changes will not be available for use by shareholders during the 2010-2011 proxy season.” A copy of the motion is available [here](#).

In their joint motion, the parties proposed to the court that the case be briefed in November through February, with the petitioners’ brief due on November 30, 2010 and the SEC’s brief due on January 19, 2011. Oral argument would be expected in March or April under this schedule, with a decision by the summer. The schedule is subject to approval by the Court of Appeals.

As widely reported, on October 4, 2010, the SEC granted a stay on the effectiveness of its proxy access rule, Rule 14a-11, and related rule amendments. The SEC issued its stay in response to a motion filed by the petitioners with the SEC in connection with the petition they filed with the Court of Appeals seeking review of Rule 14a-11 and related rule amendments. The stay also applies to the amendment to the SEC’s shareholder proposal rule, Rule 14a-8, that was adopted contemporaneously with Rule 14a-11, as the Commission found that there is a potential for confusion if the Rule 14a-8 amendment were to become effective while Rule 14a-11 is stayed. The effectiveness of related rule amendments adopted in connection with Rule 14a-11 (*e.g.*, amendments to Form 8-K and Rule 14a-5) likewise are stayed.

Summary of Petitioners’ Arguments

The petitioners have challenged the rules on the grounds that they are arbitrary and capricious in violation of the Administrative Procedure Act, that the SEC failed to adequately assess the rules’ effects on efficiency, competition, and capital formation as required by the Securities Exchange Act of 1934 and the Investment Company Act of 1940, and that the rules infringe First and Fifth Amendment rights under the U.S. Constitution. A copy of the petition is available [here](#). In seeking a stay from the SEC, the petitioners argued that the SEC erred in appraising the costs the rules would pose, that the SEC failed to properly estimate the frequency with which proxy access will be

used, that the adopting release is arbitrary and capricious in its treatment of state law, that the rules fail to serve their stated goal of empowering shareholders, and that the SEC erred by covering investment companies under the rules. A copy of the motion requesting a stay is available [here](#). In ruling on the stay, the SEC stated it was not addressing the merits of the petitioners' challenge. The SEC order granting the stay is available [here](#).

Next Steps for Public Companies

Despite the stay of the proxy access rules, the 2011 proxy season is expected to be active. Say-on-pay and "say-on-frequency" will be required pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). In addition, this could be an active year for shareholder proposals, with shareholders already submitting proposals on familiar topics, such as the ability of shareholders to call special meetings and act by written consent, and on new topics, such as shareholder approval of political contributions and director stock ownership. Public companies should be preparing for the upcoming proxy season and consider the steps discussed below. Of course, companies should evaluate their individual circumstances before taking any action.

- *Reach Out to Shareholders.* Companies should consider engaging in constructive dialogue with their significant shareholders. There are various ways to do this, including having governance presentations at investor days or analyst presentations and/or contacting shareholders directly and asking for their views on the company's direction, corporate governance, executive compensation or other significant matters. In undertaking these initiatives, companies should recognize that the individuals that make proxy voting decisions at many institutional shareholders often are not the portfolio managers that executives know through analysts and earnings presentations, meaning it is important that proxy voting departments be considered when pursuing outreach and communication efforts.
- *Keep Directors Informed about Shareholder Views.* Board meeting agendas should include regular updates on shareholder communications and concerns raised by shareholders that could give rise to activism (e.g., shareholder proposals, "vote no" campaigns and proxy contests). Companies should routinely assess governance issues and developments, brief directors on how the company's practices compare to other companies, and ensure that directors are familiar with, endorse and can articulate appropriate reasons for the company's practices.
- *Research Your Shareholder Base.* Although companies may be familiar with shareholders owning more than five percent of the company's shares, increased shareholder activism makes it important for companies to learn more about those shareholders owning less than five percent of the company's shares. Proxy solicitors and other advisors can help companies to identify these smaller shareholders.
- *Enhance Director Qualification Disclosure.* This past proxy season was the first year that companies were required to provide disclosure of individual director experience, qualifications, attributes and skills. At some companies, director qualification disclosures were not as robust as they could be, often relying primarily on a re-wording

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or elaboration of the biographical information, and frequently using similar descriptions for multiple directors. Companies should review these disclosures with an eye towards enhancing them to provide more particularized discussions of each director's qualifications and the contributions that each brings to the board.

- *Be Prepared to Discuss Board Composition and Strengths.* Boards should evaluate the composition of the board to identify any issues that may be raised about individual directors or the entire board or its committees. In this regard, boards should consider whether there are concerns relating to their directors, such as independence, experience or attendance, that put directors at risk of becoming the subject of a "vote no" campaign or receiving a negative voting recommendation from Institutional Shareholder Services or other proxy advisory firms. In addition, the evaluation should consider whether the board's composition addresses the company's current and future business needs. This will help to shape the content of any discussions with shareholders concerned about the composition of the board.
- *Review Governance Documents.* Although proxy access will not be in place for the 2011 Spring proxy season, shareholder meetings are becoming more contentious and the threat of proxy contests remains. Thus, companies should review their bylaws, shareholder meeting procedures, corporate governance guidelines, committee charters and other board policies to see that they are up to date, address areas of shareholder concern, and reflect best governance practices appropriate for each company.



Gibson, Dunn & Crutcher lawyers are available to assist in addressing any questions you may have regarding these developments. If you have any questions, please contact the Gibson Dunn lawyer with whom you work or one of the Gibson Dunn lawyers listed below:

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