



One Minute Memo[®]

SEC Announces it Will Not Appeal D.C. Circuit Court's Decision to Vacate SEC Proxy Access Rules

In August 2010, the Securities and Exchange Commission (the "Commission"), by a 3-2 vote, adopted new Rule 14a-11 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). As adopted, Rule 14a-11 would have allowed stockholders who owned at least 3% of the voting capital stock of a company and who had held such shares for at least three years to nominate board candidates for inclusion in the company's proxy statement at the company's expense. The Commission also adopted amendments to Rule 14a-8 to allow proxy access shareholder proposals. The Commission postponed the effective date of the new rules pending the outcome of a lawsuit filed in October 2010 by the U.S. Chamber of Commerce (the "Chamber") that challenged the new rules.

On July 22, 2011, The U.S. Court of Appeals for the D.C. Circuit vacated Rule 14a-11 on procedural grounds not reaching the constitutional questions of federal versus state regulation raised by the Chamber in its pleadings. The Court ruled that the Commission acted arbitrarily and capriciously in failing to assess the economic effects of a new rule as required by the Administrative Procedure Act of 1946 (the "APA").

The D.C. Circuit Court's ruling to vacate Rule 14a-11 was the third time in recent years that the Court has vacated a Commission rule on the basis that it failed to meet its obligations under the APA. In 2010, the Court previously struck down the Commission's rules to regulate fixed indexed annuities under the Investment Company Act of 1940. In 2006, the Court vacated the Commission's Rule 151A governance rules establishing board independence criteria for certain investment funds.

On September 7, 2011, the Commission Chairman Mary L. Schapiro announced that the Commission will not appeal the D.C. Circuit Court's decision and, while the staff will continue consider and review proxy access, they will do so carefully to try and determine the best path forward. Based on these statements, it is unlikely that the Commission will revisit mandatory proxy access in the near future.

However, because the Commission's amendments to Rule 14a-8 were not challenged nor subject to the D.C. Circuit Court's ruling, the stay postponing the effectiveness of the Rule 14a-8 amendments will expire on September 13, 2011. The unavailability of mandatory shareholder proxy access in 2012 coupled with the Rule 14a-8 amendments may result in an increased number of traditional director challenges via proxy fights, "no vote" campaigns, proxy access bylaw proposals, or a combination of more than one of these tactics. We continue to believe proxy access bylaw proposals are the most likely for of challenges that will develop for the 2012 proxy season.

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