

## Legal Alert

September 2011

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### Mandatory Proxy Access Is Dead

In July 2011, the US Court of Appeals for the District of Columbia Circuit overturned the SEC's proxy access rule. The SEC had until the end of business on September 6, 2011 to seek a rehearing of the decision, appeal the decision or take no action and allow the ruling to become final. Late in the day on September 6, SEC Chairman Mary Schapiro issued a statement that the SEC would not seek a rehearing of the decision nor appeal the decision to the US Supreme Court. The announcement ends, at least for the foreseeable future, the long and often contentious discussion concerning the SEC's mandating of the internal means by which a public company must permit shareholders some measure of access to the company's proxy statement for the purpose of nominating director candidates. Chairman Schapiro also signaled that the proxy access discussion was not completely dead, at least under her leadership, stating that "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."

When the SEC adopted the proxy rule, it is also approved a change to Rule 14a-8. Although the Rule 14a-8 amendments were not challenged in the proxy access case, the SEC voluntarily stayed the implementation of the proxy access rules and amendments to Rule 14a-8. The stayed amendments to Rule 14a-8(i)(8) govern whether a company can exclude from its proxy statement shareholder proposals calling for amendments to a company's governing documents to alter nomination procedures. As amended, proposals by qualifying shareholders that seek to establish a procedure in the company's governing documents for the inclusion of shareholder director nominees in company proxy materials would no longer be excludable under Rule 14a-8(i)(8). In her September 6 statements, Chairman Schapiro noted that the SEC's amendments to Rule 14a-8, were not affected by the court's decision on the proxy access rules, and that the SEC's stay would, by its terms, "expire without further Commission action when the court's decision is finalized, which is expected to be September 13." It is unclear whether the SEC might yet take action to prevent the Rule 14a-8 amendments from becoming effective. Because many large and powerful institutional shareholders supported the proxy access rules,<sup>1</sup> we think it is likely that these groups and activist shareholders, particularly unions and other activist groups, will be proponents of changes to company governing documents to facilitate the inclusion of shareholder director nominees under so-called "private ordering" schemes adopted on a company-by-company basis, rather than under SEC-mandated proxy access rules.

### Next Steps

Unless the SEC acts within the next few days to suspend or cancel the effectiveness of the amendments to Rule 14a-8(i)(8), it is unclear when the amendments would become effective – whether on September 13, 2011, the date on which the court of appeals mandate (i.e., final decision) is expected to issue, or some later date.<sup>2</sup> In any event, the amendments are likely to be effective for the 2012 proxy season. Shareholders seeking to propose amendments to company governance documents will be required to submit the proposals at least 120 days prior to the anniversary of the mailing date of the previous year’s proxy materials. This would mean, for example, that the private ordering amendments of Rule 14a-8 would be available at companies that mailed their proxy statements for their last annual meeting on or after January 21, 2011. However, for companies that mailed on January 21, 2011, the new rule would be available only for one day, September 13, 2011, the 120th day preceding the anniversary of the prior year’s proxy mailing date.

Companies should expect that the SEC will publish some guidance with respect to the applicability to the 2012 proxy season of the Rule 14a-8 amendment facilitating a shareholder vote on the inclusion in corporate bylaws of shareholder nomination procedures. Companies and their counsel will want to quickly consider how the company’s bylaws and other corporate governance documents, including the charter of the nominating committee, are adequate to deal with the receipt of one or more such shareholder proposals.

<sup>1</sup> In January 2011, Counsel of Institutional Investors, TIAA-CREF and 14 other funds filed a brief as amici curiae of the SEC with the Court of Appeals.

<sup>2</sup> In its order dated October 4, 2010 staying the effective and compliance dates of Rule 14a-11 and the amendments to Rule 14a-8(i)(8), the SEC stated that it would “publish a document in the Federal Register announcing the effective and compliance dates of the final rules following the resolution of the petition in Business Roundtable.”