

Legal Alert

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Joseph P. Richardson
jrichardson@gblaw.com
602-256-4452

SEC Stays Proxy Access Rules

In October, 2010, the Securities and Exchange Commission (the SEC) unexpectedly granted a stay delaying the effectiveness of newly adopted Rule 14a-11 and associated amendments, including the amendment to Rule 14a-8. The order granting the stay was issued in response to a petition filed with the United States District Court of Appeals for the District of Columbia Circuit by the Business Roundtable and the US Chamber of Commerce challenging the recent changes to the SEC's proxy and related rules. The stay will remain in effect pending resolution of the lawsuit. The SEC and the petitioners have agreed to seek an expedited review with the Court of Appeals.

In its order, the SEC stated that the stay, among other things, "avoids potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rules were to become effective during the pendency of a challenge to their validity." Although the petitioners did not seek a stay of the amendment to Rule 14a-8 adopted contemporaneously with Rule 14a-11, the SEC found that it was "what justice requires" to stay such amendment to Rule 14a-8 with the stay of Rule 14a-11 in order to avoid potential confusion.

The order granting the stay is available on the SEC website.

Timing Issues

The new proxy rules were due to become effective on November 15, 2010 and to apply to the upcoming proxy season for companies that mailed their 2010 proxy statements on or after March 13, 2011. The order means the proxy access rules will not be effective November 15, 2010. Although the parties to the lawsuit plan to seek resolution as quickly as possible, it is difficult to accurately predict when such resolution may occur. A spokesman for the SEC has stated the agency expects the legal challenge will be resolved by "late spring," which would effectively delay proxy access until 2012 for calendar year-end filers.

What to Do Now

The SEC's order does not address the merits of the petitioners' challenge to the proxy access rules, and there is little doubt the SEC will vigorously defend the rules in court. Therefore, companies should continue to prepare for their next annual meeting with the proxy access rules in mind. (See our September 2010 Corporate Alert for our recommendations on planning for your next annual meeting.) However, companies may consider delaying implementation of certain actions in response to the proxy access rules until the timing of the effectiveness of such rules is known.