

LEGAL UPDATES

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SEC's Stay Delays Implementation of Proxy Access

On October 4, 2010, the Securities and Exchange Commission (SEC) agreed to stay the effectiveness of its newly adopted 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. The stay was requested in a motion filed by the Business Roundtable and the U.S. Chamber of Commerce, pending resolution of a petition for review simultaneously filed by them with the U.S. Court of Appeals for the D.C. Circuit. In requesting the stay, they also agreed to join with the SEC in a motion seeking expedited review of their petition by the D.C. Circuit Court of Appeals.

The petition for review alleges that the SEC failed to adequately assess the rules' impact on "efficiency, competition, and capital formation" as required by existing securities laws. In particular, they argued that the SEC did not give sufficient weight to the costs that would be incurred by companies for election contests likely to result from the rules, nor to the underlying motives and intensity of labor unions and other special-interest shareholders. Petitioners argued that such shareholders would be the most likely users of proxy access, and would use it to pursue agendas contrary to the best interests of public companies and their shareholders at large. They also asserted that the rules violate the First Amendment and would constitute a taking of corporate property, because they would force companies to fund and disseminate election-related speech that is opposed by the board of directors. The merits of these claims will be reviewed by the D.C. Circuit.

The petitioners did not seek a stay of the SEC's related amendments to Rule 14a-8, addressing the circumstances under which public companies could be required to include in their proxy materials proposals seeking charter or bylaw amendments concerning the director nomination process. However, the SEC

determined that the amendments to Rule 14a-8 also should be stayed to avoid potential confusion, because their structure was “intertwined” with and “designed to compliment” Rule 14a-11.

What This Means to You

The SEC's new proxy access rules were scheduled to go into effect on November 15, 2010. See our previous alert for additional discussion on the proxy access rules. However, the SEC's stay, coupled with the public statement by an SEC spokesperson that the SEC expects the legal issues raised in the petition to be resolved by “late spring,” indicates the rule is unlikely to take effect during the 2011 proxy season, effectively delaying implementation of proxy access for at least one year for most companies.

In the meantime, we recommend that companies continue to consider and prepare for the potential impact of the new proxy access rules, as recommended in our prior article, but refrain from making any changes to their disclosure controls and procedures, advance notice bylaws or other governing documents until this legal challenge is resolved and we receive additional guidance from the SEC.

Contact Info

If you have questions about this or any other Securities & Corporate Governance legal matter, please contact your Husch Blackwell attorney.

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