



## SEC Will Not Appeal Proxy Access, but Shareholder Proposal Amendments Will Take Effect in 2012

**09.20.2011**

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On September 6, 2011, the Securities and Exchange Commission (SEC) announced that it would not seek a rehearing or U.S. Supreme Court review of the recent decision of the U.S. Court of Appeals for the D.C. Circuit that vacated Rule 14a-11, the controversial proxy access rule that would have permitted the inclusion of shareholder nominees in the company's proxy statement.<sup>[1]</sup>

In the announcement, SEC Chairman Mary Shapiro stated: "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." While reiterating her support for proxy access, she further noted: "I want to be sure that we carefully consider and learn from the Court's objections as we determine the best path forward." While proxy access may resurface in the future, the SEC likely will spend some time reviewing the D.C. Circuit Court's decision and comments previously received before restarting the rulemaking process.

Perhaps more important for the 2012 proxy season, the SEC's amendment to Rule 14a-8 became effective on September 14, 2011.<sup>[2]</sup> Prior to this amendment, Rule 14a-8 permitted companies to exclude from their proxy materials shareholder proposals that relate to nomination or election to a company's board of directors or procedures for such nomination or election. At the same time that the SEC adopted now-defunct Rule 14a-11, it also adopted an amendment to Rule 14a-8 to prohibit companies from excluding from proxy materials shareholder proposals that seek to establish procedures for nomination or election. The D.C. Circuit Court's decision did not address, and has no effect on, the Rule 14a-8 amendment. The SEC had imposed a voluntary stay on the effectiveness of the Rule 14a-8 amendment, which stay expired on September 14. Therefore, absent future action by the SEC, amended Rule 14a-8 will be effective for the 2012 proxy season.

As amended, Rule 14a-8 permits eligible shareholders to establish proxy access standards on a company-by-company basis, rather than the universal, mandatory approach that had been contemplated by Rule 14a-11. While companies can still exclude shareholder proposals to remove directors or include specific nominees for election in the company's proxy statement, shareholders now may submit for inclusion in a company's proxy materials a proposal to amend the company's governance documents to provide for proxy access or that requests the board of directors of the company to implement proxy access.

To be eligible to submit a shareholder proposal, a shareholder must have continuously held for one year at least \$2,000 in market value, or 1%, of the company's securities. Shareholder proposals must be submitted to the company no later than 120 days prior to the anniversary of the date on which the company's proxy statement for the prior year's annual

meeting was released to shareholders. For calendar year companies holding annual meetings in April or May 2012, most of these proposals will be due in November or December 2011.

It is unclear how many shareholders will take advantage of the Rule 14a-8 amendment in 2012. With proposals due in the next few months for most calendar year companies, activist shareholders need to respond relatively quickly to develop a template for proxy access proposals (e.g., eligibility requirements such as ownership thresholds and holding periods). As a result, it is possible that we may only see a small number of proposals in 2012, mostly in the case of larger companies or those with widely perceived governance issues, with more proposals coming in 2013 after shareholders have had the opportunity to evaluate and refine the form of these proposals. With the mechanism currently in place for the submission of proxy access proposals beginning in late 2011, however, companies should take action now to prepare themselves for the possibility of receiving these proposals.

[1] For more information regarding this decision, see our August 26, 2011 Alert, *Dodd-Frank Proxy Access Rule Vacated - Implications for 2012*, available at <http://www.williamsmullen.com/dodd-frank-proxy-access-rule-vacated-implications-for-2012-08-2011/>.

[2] SEC Release No. 33-9259.

*For more information about this topic, please contact the authors or any member of the Williams Mullen Securities & Corporate Governance team.*

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