



## Dodd-Frank Proxy Access Rule Vacated - Implications for 2012

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The U.S. Court of Appeals for the D.C. Circuit recently vacated Securities and Exchange Commission (SEC) Rule 14a-11, which is the SEC's controversial proxy access rule that would have permitted the inclusion of shareholder nominees in the Company's proxy statement. The case, *Business Roundtable v. SEC*, No. 10-1305 (D.C. Cir. July 22, 2011), was brought by the Business Roundtable and the Chamber of Commerce of the United States and alleged, among other things, that the SEC acted arbitrarily and capriciously in adopting the rule in violation of the Administrative Procedure Act. The court of appeals agreed, determining that the SEC had failed to adequately consider the economic consequences of the rule and its effect on efficiency, competition and capital formation.

The court's decision casts substantial uncertainty over the future of proxy access and raises questions regarding shareholder proposals for the 2012 proxy season. In particular, the court's decision may have several important implications for public companies for the 2012 proxy season and beyond:

- **Shareholder proposals under amended Rule 14a-8** At the same time that the SEC adopted Rule 14a-11, it adopted an amendment to Rule 14a-8 to prohibit companies from excluding from their proxy materials shareholder proposals that seek to establish procedures for the nomination of directors by shareholders. Prior to this amendment, Rule 14a-8 permitted companies to exclude such shareholder proposals from their proxy materials. Although the SEC has imposed a stay on the effectiveness of the Rule 14a-8 amendment, there is nothing to prevent the SEC from lifting the stay at any time, including in time for the 2012 proxy season. The *Business Roundtable* decision did not address, and has no affect on, the Rule 14a-8 amendment. SEC officials have indicated that the SEC might lift the stay, but have given no indication as to when this could happen.

If the SEC lifts the stay and the Rule 14a-8 amendment becomes effective, shareholders would be permitted to include proposals in companies' proxy statements to amend companies' governing documents to provide enhanced access by shareholders to director nominations. Because most shareholder proposals must be submitted in November or December for calendar year companies holding annual meetings in April or May, the SEC would need to lift the stay, and shareholders

would need to respond, relatively quickly in order for shareholder proposals to be made in time for the 2012 proxy season. Nevertheless, companies should be prepared to receive proposals from activist shareholders seeking greater access to director nomination procedures in the event the SEC lifts the stay.

- **Restarting the rulemaking process.** The SEC would have to start a new rulemaking process if it wishes to re-adopt Rule 14a-11 or some other proxy access rule. This alternative would require the SEC to cure the deficiencies in economic analysis cited by the court of appeals by conducting additional analysis. The SEC then would need to re-propose the proxy access rule, allow interested parties to submit comments, and approve the proposal following the comment period. Because of the substantial work and time involved in re-proposing the proxy access rule, this is unlikely to happen in time for the 2012 proxy season.
- **Appeal the courts' decision.** Alternatively, the SEC could request that the entire court of appeals review the petition en banc or appeal the decision to the U.S. Supreme Court. These alternatives also would be time consuming and, even if the SEC was successful, would not affect the 2012 proxy season.

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