

## SEC Re-Opens Door to Shareholder Proposals for Proxy Access

In August 2010, the Securities and Exchange Commission (the "SEC") adopted new rules (i) giving shareholders the right, in situations where they are permitted to nominate directors under state law and company governing documents, to require a company to include in its proxy statement such shareholders' nominees for director (new Rule 14a-11), and (ii) giving shareholders the right to require a company to include in its proxy statement shareholder proposals to establish broader, more flexible proxy access procedures and rights (amended Rule 14a-8). The SEC stated that it had adopted the rules in order "to facilitate the effective exercise of shareholders' traditional state law rights to nominate and elect directors to company boards of directors," and to "potentially improve overall board and company performance" and "result in more informed voting decisions in director elections." The new rules were slated to become effective in November 2010. See our September 2010 update titled, "SEC Adopts Proxy Access Rules," which can be found at [www.burnslev.com/apps/uploads/publications/Securities\\_Update\\_SEC\\_Proxy\\_System\\_Sep2010.pdf](http://www.burnslev.com/apps/uploads/publications/Securities_Update_SEC_Proxy_System_Sep2010.pdf).

In September 2010, prior to new rule 14a-11 becoming effective, the Business Roundtable and the U.S. Chamber of Commerce filed a petition with the Washington D.C. Circuit Court of Appeals challenging the new rule. In July 2011, the Court vacated Rule 14a-11, determining that the SEC had been arbitrary and capricious in adopting the new rule and had failed to address the economic effects of the new rule. At that time, the SEC voluntarily stayed for an indefinite period both Rule 14a-11 and amended Rule 14a-8.

In September 2011, the SEC announced that it would not appeal the Court's decision with respect to Rule 14a-11. Furthermore, SEC Chair Mary Schapiro issued a statement clarifying that the SEC

would not attempt to rewrite the proxy access rules anytime in the near future.

On September 15, 2011, however, following the SEC's decision not to appeal the Court's decision vacating Rule 14a-11, the SEC issued a release that eliminated the stay on the Rule 14a-8 amendments, such that the amendments became effective.

Amended Rule 14a-8 became effective as of September 20, 2011. Under the old rule 14a-8, companies could exclude from their proxy materials shareholder proposals that related to a Director nomination or election. However, as of September 20, 2011, a company can no longer automatically exclude shareholder proposals that seek to establish a procedure in the company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. Nevertheless, there are still legally permissible reasons for companies to exclude such proposals.

Rule 14a-8 (i)(8), as noted in our September 2010 update, specifically permits exclusion of a proposal if:

- It would disqualify a nominee who is currently standing for election;
- It would remove a director from office before his or her term expired;
- It questions the competence, business judgment or character of one or more nominees or directors;
- It seeks to include a specific individual in the company's proxy materials for election to the Board of Directors; or
- It otherwise could affect the outcome of the current election of directors.

In addition, a company can exclude a proxy access proposal if:

- The shareholder proposal fails to satisfy the eligibility and procedural requirements of Rule 14a-8, which

specifies minimum share-holding periods, share-holding amounts and deadlines for shareholders who want to make proposals;

- The proposal would cause the company to violate applicable state, federal or foreign law;
- The proposal or supporting statement is contrary to SEC proxy rules; or
- The company has already substantially implemented the proposal.

Those companies faced with such proposals might want to consider a review of their legal alternatives. Those alternatives include:

- Excluding the shareholder proposal if a legal basis exists for exclusion;
- Negotiating with the proponent for withdrawal of the proposal;
- Drafting an alternative proxy access proposal that might garner a favorable recommendation from the Board; or
- Amending the governing documents to enable proxy access pursuant to conditions and procedures found acceptable to the Board.

### *Explanatory Notes:*

*This update is intended to call your attention to rule changes of possible interest and relevance to you, but it is not intended to constitute a legal opinion or definitive summary of all changes that could be material to you.*

*Please contact a member of the Securities Law Group at Burns & Levinson if you have any questions about these rule changes or want to learn more about our expertise in this area.*

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In the securities compliance area, we advise our clients on corporate governance/Sarbanes-Oxley and SEC and stock exchange reporting and compliance. Specifically, we assist our clients in fulfilling their ongoing SEC and stock exchange reporting obligations, managing sensitive disclosure issues internally and with industry analysts, preparing proxy statements and handling stockholder meetings, structuring employee benefit plans and executive compensation packages under the SEC's "short-swing profit" reporting and liability rules, effecting re-sales of securities in the public trading markets under

the SEC's Rule 144, and advising boards of directors and board committees concerning the requirements and restrictions imposed on their actions by the securities laws and corporate governance laws such as Sarbanes-Oxley. We have served as special securities counsel to the Boards and Audit Committees of publicly traded companies looking for opinions or advice of counsel other than their regular outside counsel.

We have counseled clients both domestic and international, from emerging growth companies to large public companies, and are positioned to provide clients with timely, expert, efficient and cost effective advice that they need to meet their business objectives. We take a practical and proactive approach to the rapidly changing securities disclosure and corporate governance laws, providing our clients with timely updates, identifying specific situations in which the new laws will impact particular clients either operationally or structurally, and working with clients to implement the changes that are either required or advisable to comply with the new regulatory schemes and investor sentiment.

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