

## **Amendments to SEC Rule 14a-8 Allowing Shareholder Proposals for Proxy Access Regimes to Come into Effect**

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On September 6, 2011, the Securities and Exchange Commission confirmed that it would not seek rehearing or Supreme Court review of the decision by the U.S. Court of Appeals in Washington, D.C. partially vacating the SEC's proxy access rules. (Click [here](#) for our blog reporting on the D.C. Circuit's decision.) Chairman Mary L. Schapiro issued a statement indicating her continuing interest in "finding a way to make it easier for shareholders to nominate candidates to corporate boards" but suggesting no immediate SEC plans to propose new proxy access rules.

Incumbent boards, management teams and their lawyers should not celebrate too soon. While the SEC will not challenge the Court's decision vacating SEC rules that would have given shareholders access to nominating directors, the SEC did not take action to modify the amendments to Rule 14a-8 that will, upon final certification of the D.C. Circuit's opinion, go into effect and permit shareholder proposals relating to proxy access regimes. Accordingly, public companies may face shareholder proposals relating to proxy access regimes beginning with the 2012 proxy season.

### **What are the amendments to Rule 14a-8 and why is this an issue now?**

As we noted when reporting on the D.C. Circuit decision, the SEC adopted amendments to Rule 14a-8 at the same time it adopted Rule 14a-11 for proxy access. The Rule 14a-8 amendments removed the "election exclusion" in Rule 14a-8(i)(8) that allowed companies to exclude proposals that relate to a nomination or an election to the board of directors, and the SEC substituted it with narrower exclusion designed to permit proposals for company-specific proxy access regimes.<sup>[1]</sup> The SEC voluntarily stayed the Rule 14a-8 amendments at the same time it stayed Rule 14a-11 to await the Court's decision on Rule 14a-11. The stay order for the Rule 14a-8 amendments will expire without further SEC action upon finalization of the Court's decision, which is expected to occur on September 13, 2011.

We expect that activist shareholders will use the Rule 14a-8 process to encourage or require (through binding amendments to bylaws) companies to include director candidates nominated by stockholders in the company's proxy materials.

ISS's 2011 proxy voting guidelines provide that ISS will vote case-by-case on shareholder proposals asking for open or proxy access, taking into account

- The ownership threshold proposed in the resolution;
- The proponent's rationale for the proposal at the targeted company in terms of board and director conduct.

This guideline was non-operational for the 2011 proxy season, as proxy access proposals were prohibited under the election exclusion. It is not clear whether ISS will modify this guideline for the 2012 proxy season.

## What should you do now?

We recommend that nominating/governance committees and boards begin preparing for the possibility of shareholder proposals on proxy access. We believe such preparation would include:

- assessing the probability of receiving proposals
- assessing the possible forms of such proposals (e.g., non-binding recommendations or binding bylaw amendments, general requests to develop a proxy access procedure or specific proposals with details such as ownership threshold and duration, timing requirements, etc.)
- formulating potential Board responses to such proposals if received (e.g., general and company-specific arguments for opposition and negotiation strategies with proponents)
- assessing the probability of majority support for such proposals (which will be difficult given the limited history of proxy access proposals)
- developing contingency plans should these proposals start gaining momentum and support (e.g., what parameters of a privately-ordered proxy access regime might best address the company's unique corporate governance environment and concerns).

[1] The election exclusion was amended in 2007 to address an opinion of the U.S. Court of Appeals for the Second Circuit that held that AIG could not rely on Rule 14a-8(i)(8) to exclude a proxy access proposal. That opinion was contrary to the SEC Staff's interpretation of the election exclusion, and the 2007 amendment codified the Staff's interpretation.

The SEC contemplated that company-specific regimes, whether or not related to stockholder proposals, could only be more permissive than the mandatory rules of Rule 14a-11. Because Rule 14a-11 did not go into effect, shareholder proposals may propose regimes that are more or less

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