

ClientAlert

July 26, 2011

U.S. Court of Appeals Strikes Down SEC Proxy Access Rule

On July 22, 2011, the United States Court of Appeals for the District of Columbia vacated Rule 14a-11, the Securities and Exchange Commission's rule on proxy access rights adopted in August 2010. For a more complete discussion of the proxy access rules, please see our previous Client Alert titled [SEC Adopts Rule Amendments Facilitating Shareholder Proxy Access to Nominate Directors](#). Rule 14a-11 and related proxy rule amendments were intended to facilitate shareholder access to a company's proxy materials for the nomination of directors. In particular, Rule 14a-11 would have given shareholders who owned at least 3% of a public company's voting stock for at least three years the right to include their director nominees in the company's proxy materials. Rule 14a-11 was challenged by the Business Roundtable and the U.S. Chamber of Commerce and the SEC stayed the effectiveness of the rule and related proxy rules in October 2010, pending the review of the Court of Appeals.

The Court, applying the Administrative Procedure Act, held that the SEC had "acted arbitrarily and capriciously for having failed once again – as it did most recently in *American Equity Investment Life Insurance Company* ... and before that in *Chamber of Commerce* ... – adequately to assess the economic effects of a new rule" by failing to adequately analyze the costs and benefits of Rule 14a-11.

While the SEC is considering its options going forward and may choose to re-propose Rule 14a-11, the timing of any re-proposal is uncertain, particularly given the number of new rules mandated by the Dodd-Frank Act on the SEC's agenda that have yet to be implemented. In a brief statement in response to the decision, the Director of the SEC's Division of Corporation Finance also noted that the decision did not affect the amendments to Rule 14a-8, which would allow shareholders to submit proposals providing for proxy access. However, it is unclear whether the SEC would allow the Rule 14a-8 and related amendments to become effective until it determines what to do with Rule 14a-11 in light of the decision.

A complete copy of the Court's decision can be found [here](#).

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