

SEC Will Not Appeal Proxy Access Decision

Legal Update

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By Securities Group

On September 6, 2011, the Securities and Exchange Commission (SEC) confirmed that it will not seek a rehearing of the decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that vacated an SEC rule, commonly known as the “proxy access” rule, that would have enabled certain shareholders of public companies to propose director nominees for inclusion in their company’s proxy materials. The SEC also confirmed that it will not seek Supreme Court review of the decision.

The proxy access rule would have allowed any shareholder or group of shareholders with a significant, long-term investment interest in the company to nominate a limited number of directors without incurring the expense of a proxy contest. In its July 2011 decision, the D.C. Circuit found that the SEC acted “arbitrarily and capriciously” in adopting the rule without appropriately quantifying the benefits of the rule and the cost to companies required to comply with the rule. SEC Chairman Mary L. Schapiro noted that she is still committed to finding a way to make it easier for shareholders to nominate candidates to corporate boards, and she has asked the SEC staff to continue reviewing the D.C. Circuit’s decision and comments from interested parties as the SEC determines a path forward.

The D.C. Circuit decision did not alter accompanying changes to SEC Rule 14a-8 that would allow shareholders to require a company to include in its proxy statement a proposal to amend the company’s bylaws to provide for proxy access on the terms provided by the shareholder proposal. Such a proposal would need to be approved by a vote of the shareholders and would allow for proxy access at the following annual meeting. The implementation of that rule was stayed by the SEC pending resolution of the case before the D.C. Circuit. Unless the SEC takes further action to delay implementation of the amendments to Rule 14a-8, the stay of the rule amendments is expected to expire on September 13, 2011. The SEC will thereafter publish a notice of the effective date of the amendments to Rule 14a-8.