

CORPORATE AND SECURITIES LAW

ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

D.C. Circuit Court of Appeals Vacates SEC's Proxy Access Rules

July 22, 2011

In a unanimous three-judge decision, the United States Court of Appeals for the D.C. Circuit earlier today vacated Rule 14a-11, the proxy access rule adopted by the Securities and Exchange Commission (SEC) in August 2010 under which shareholders would have been able to require public companies to include shareholder nominees in a company's proxy statement under certain circumstances. The decision was in response to a lawsuit filed by the Business Roundtable and Chamber of Commerce challenging the validity of this federally-mandated proxy access rule. The SEC had previously stayed the effectiveness of Rule 14a-11, as well as revised Rule 14a-8 (which would allow shareholders to request that companies include in their proxy statements proposed bylaw amendments that would provide for more permissive shareholder proxy access than mandated by Rule 14a-11), in October 2010 pending the resolution of this lawsuit.

The D.C. Circuit Court of Appeals ruled that the Commission acted arbitrarily and capriciously in violation of the Administrative Procedure Act when adopting these federal proxy access rules. The Court agreed with the petitioners' argument that the Commission neglected both to quantify the costs companies would incur in opposing shareholder nominees, as well as to substantiate the rules' predicted benefits. The Court also ruled that the Commission failed to appropriately consider the consequences of unions and state pension funds using the rule.

The decision, although not unexpected, represents a significant blow to the SEC. It is unclear whether the Commission will appeal the ruling to the U.S. Supreme Court, and an SEC spokesman indicated today that, "We are reviewing the decision and considering our options."

The decision eliminates the possibility that Rule 14a-11 will be in effect for the 2012 proxy season. Significantly, however, the lawsuit did not challenge revised Rule 14a-8, even though Rule 14a-8 was subject to the SEC stay. Therefore, a potential outcome for the 2012 proxy season is that the SEC adopts a revised version of Rule 14a-8 allowing shareholders to include proxy access bylaw amendments in companies' proxy statement in advance of this proxy season. This private ordering proxy access mechanism may ultimately have a greater impact on director elections than Rule 14a-11 would have had, as the eligibility thresholds in the final proxy access rules (particularly the requirement that eligible shareholders have held their shares for three years) would have significantly limited the ability of shareholders to utilize Rule 14a-11. In contrast, the eligibility requirements for shareholders to utilize Rule 14a-8 (which

generally requires a shareholder to have held shares with a value of at least \$2,000 for at least one year) are more easily met.

We will be consulting with our friends and clients regarding these developments. The D.C. Circuit Court of Appeals decision vacating Rule 14a-11 can be found [here](#).

Bass, Berry & Sims PLC's Shareholder Activism Subgroup monitors and advises on developments in the area of proxy contests, activist campaigns, takeover defenses and shareholder communications. If you have any questions regarding the issues addressed in this Corporate and Securities Law Alert or would like us to discuss these developments in greater detail with you, please feel free to contact your regular contacts in our Corporate and Securities Group or any of the attorneys in our Shareholder Activism Subgroup listed below.

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