View this email as a webpage.


**August 2011** www.ssd.com

## Appeals Court Rebukes SEC, Strikes Down Proxy Access Rule

On July 22, 2011, the US Court of Appeals for the District of Columbia Circuit released its opinion in *Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission.* In its opinion, the circuit court struck down the SEC's "proxy access" rule contained in Rule 14a-11 promulgated under the Securities Exchange Act of 1934, as amended.

Rule 14a-11 provided that, subject to certain limitations and procedural requirements, stockholders could nominate individuals for election to a company's board of directors and, if all requirements were met, the company would be required to include such nominations, and a brief statement in support, in the company's proxy statement. As a result, stockholders wishing to nominate members of a company's board would no longer need to launch their own proxy solicitation.

In a stinging rebuke, the circuit court held that the SEC "acted arbitrarily and capriciously" in adopting Rule 14a-11, having "inconsistently and opportunistically framed the costs and benefits of the rule; failed to adequately quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."

The SEC had taken the position that the new rule would

Founded in 1890, Squire, Sanders & Dempsey has lawyers in 36 offices and 16 countries around the world and now includes the nearly 500 lawyers from leading UK legal practice Hammonds. With one of the strongest integrated global platforms and our longstanding "one-firm firm" philosophy, Squire Sanders provides seamless legal counsel worldwide.

### Contacts:

Abby E. Brown
+1.202.626.6792

Frank M. Placenti
+1.602.528.4004

Joseph P. Richardson
+1.602.528.4801

Fred A. Summer
+1.614.365.2743

Margaret J. Walrath
+1.703.720.7883

Squire Sanders emphasizes quality, efficiency and alignment with client goals as core standards. Our Partnering for Worldwide Value® initiative is focused on continuously improving our service delivery to maximize the value of our services to clients. Squire Sanders wholeheartedly endorses the Association of Corporate Counsel's Value Challenge® and encourages and manages development and

have "the potential of creating the benefit of improved board performance and enhanced shareholder value" while providing safeguards against excessive nominations that could be a drain on corporate resources. The circuit court, however, characterized the SEC's predictions as "mere speculation," noting additionally that the SEC had ignored numerous empirical studies presented during the comment period that called into question the predicted improvement to shareholder value.

Furthermore, the circuit court found that the SEC had inadequately considered the potential for institutional investors with special interests, particularly public pension funds and unions, to use the threat of dissident director nominations as a negotiation tactic in unrelated matters such as collective bargaining.

Beyond its findings that the SEC was arbitrary and capricious in its adoption of Rule 14a-11 as a whole, the circuit court separately held that the SEC did not adequately address whether the application of the Investment Company Act reduced the need for, and therefore the benefit of, proxy access provisions relating to investment companies, given the differences in the management structure of such companies and protections afforded to their investors as compared with other public companies.

In a public statement responding to the ruling, the SEC noted that the ruling does not affect its amendments to Rule 14a-8, which were adopted at the same time as Rule 14a-11 and which allow stockholders to submit for inclusion in a company's proxy statement proposals for amendments to the company's bylaws relating to the process for electing directors. The effectiveness of Rule 14a-8 has been stayed pending resolution of the litigation surrounding Rule 14a-11 since the SEC viewed the two provisions as "intertwined." If the SEC were to lift the stay on effectiveness of Rule 14a-8, stockholders could begin submitting proposals to allow for increased proxy access directly into companies' bylaws.

The SEC has not yet announced how it will respond to the ruling. It may appeal the decision or propose revised rules developed using methodologies that address procedural flaws identified by the circuit court. In light of the length of time that either response would entail, it is unlikely that this rule or any replacement rule will be in effect for the 2012 proxy season.

If you have any questions regarding this opinion or related issues, please contact your principal Squire Sanders lawyer or one of the lawyers listed in this alert.