



SEC Signals that New Proxy Access Rules Will Likely Not be Effective for 2010 Proxy Season

October 2, 2009

The Securities and Exchange Commission indicated today that its proposed shakeup of the proxy rules is unlikely to be acted upon before the 2010 proxy season. There had been speculation that the proposal could be acted upon as early as November 9, although practitioners had been skeptical about that date being met. In a speech today, SEC Commissioner Elisse B. Walter made the following observations regarding the timing of SEC action: "Although I can't give you a definitive date, I expect we will likely move forward and consider an adopting release sometime in early 2010. This means of course that final rules are not likely to be in place at the beginning of next year's 'proxy season.'" Here is a link to the full text of Commissioner Walter's speech entitled "SEC Rulemaking – 'Advancing the Law' to Protect Investors": <http://www.sec.gov/news/speech/2009/spch100209ebw.htm>.

Proposed Rule 14a-11 would require public companies to facilitate election contests by allowing activist shareholders to use the company's annual proxy materials to solicit other shareholders. This contrasts with current practice under which activists must pay for the preparation and mailing of proxy materials to campaign for their nominees. The only major exception to the application of the rule would be for shareholders seeking to gain more than a limited number of seats on the board or change control of the company.

Commissioner Walter also commented on her thinking with respect to an "opt-out" provision. An opt-out provision would allow shareholders or a board to approve provisions that made the use of the Rule 14a-11 more difficult or even inapplicable. Commissioner Walter suggested that she would give "careful consideration" to whether shareholders should have such a right but indicated less receptivity to directors having an "unfettered choice" to adopt such changes.

There is no indication that the SEC is separately moving on another SEC proposal relating to director elections that would amend Rule 14a-8 to end the practice of allowing companies to exclude shareholder proposals pertaining to director elections from their annual proxy materials. This rule, which if adopted in lieu of mandatory proxy access under Rule 14a-11 as some have advocated, would facilitate proxy access by allowing each company's shareholders to decide whether they want proxy access and in what form.

We will issue additional Client Alerts as warranted by regulatory and legislative developments that may affect the 2010 proxy season.

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