

# Corporate Governance Commentary

## Proxy Access Bulletin No. 4

October 5, 2009

### Proxy Access Rules will not be in Effect for Upcoming Proxy Season

*Enhanced Director, Compensation and Board Risk Management Disclosure likely to be Implemented for 2010*

In separate statements on October 2, 2009, SEC Chairman Mary Schapiro and Commissioner Elise B. Walter stated that the SEC will not vote on its proxy access proposals until some point in early 2010. The SEC's delay in taking action means that final rules will not be in place for 2010 shareholder meetings at calendar year-end companies.

Prior to these statements, the SEC had stated its intention to vote on the proxy access proposals in November 2009. The SEC cited the large number of comment letters (in excess of 500) and the complex issues raised by commentators, including issues related to "workability" of the SEC's proxy access proposals, as reasons for the delay.

Although the SEC is working through the comment letters it has received, it appears that the issue of whether shareholders should be allowed to change their company's access rules to create more or less restrictive rules than those included in proposed Rule 14a-11, or opt out of shareholder proxy access altogether, is one of the more difficult to address. Chairman Schapiro's and Commissioner Walter's statements indicate that the SEC is contemplating some of these alternatives, and it appears that the SEC will address the workability issues and the other concerns raised by commentators, including those who believe state law is the appropriate source of regulation in this area.

The SEC's delay in approving final proxy access rules also suggests that the SEC may want to finalize changes to Rules 14a-8 and 14a-11 at the same time. Many believe that the SEC would have had time to implement, without judicial challenge, the change to Rule 14a-8 to permit shareholder proposals on proxy access for the coming proxy season. However, by waiting to approve changes to both Rules at the same time, the SEC could appear to be committing itself to some form of federal proxy access and to taking the additional time necessary to implement it.

Both companies and investors should benefit from the additional time that the SEC will now take to examine thoroughly the issues raised in the proxy access comment letters. Investors will have additional time to consider the types of proxy access proposals that they would like to submit to companies and the types of director candidates that they would like to nominate under a proxy access regime. Companies will have more time to educate their management teams and boards about proxy access, to consider the types of proxy access by-laws that would best suit their companies should they have the option to adopt such a by-law under the final SEC rules, and to continue to engage their investors constructively so as to minimize the chances of having to face a proxy access election. The company issues are addressed in more detail in our prior commentaries on proxy access [here](#) and [here](#).

The SEC also indicated that it intends to adopt final rules concerning compensation disclosure in time for the 2010 proxy season, including the impact of compensation policies on risk taking, and the board of directors' role in the risk management process. Those proposed rules can be found at <http://www.sec.gov/rules/proposed/2009/33-9052.pdf>.

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