

LEGAL UPDATE

August 2011 By: Michael T. Campoli

ACCESS DENIED: U.S. COURT OF APPEALS INVALIDATES PROXY ACCESS RULE

On July 22, 2011, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit vacated Rule 14a-11 under the Securities Exchange Act of 1934. The Securities and Exchange Commission had adopted Rule 14a-11 in August 2010 in an effort to enable shareholders to nominate candidates for election to corporate boards using a company's own annual meeting proxy statement and form of proxy under specified conditions. Rule 14a-11 was scheduled to go into effect on November 15, 2010, but the SEC stayed the effectiveness of the rule after the Business Roundtable and the U.S. Chamber of Commerce petitioned the court for a review of the rule.

In its opinion, the court concluded that the SEC had acted "arbitrarily and capriciously," in violation of the Administrative Procedure Act, and stated that the SEC had failed "adequately to assess the economic effects" of Rule 14a-11. Specifically, the court stated that the SEC "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to 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 court did not address the First Amendment challenge raised by the plaintiffs.

The SEC responded to the decision with a statement from Meredith Cross, the Director of the Division of Corporation Finance, expressing disappointment with the decision, and stating that the agency is considering its options going forward. Ms. Cross further noted that the amendments to Rule 14a-8, which the SEC adopted at the same time as Rule 14a-11 and which would allow shareholders to

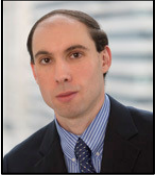
submit proposals for proxy access at public companies, are unaffected by the decision. The SEC had stayed the application of the Rule 14a-8 amendments pending the outcome of the challenge to Rule 14a-11.

It is unclear at this time whether the SEC will appeal the decision or propose a new proxy access rule designed to address the procedural deficiencies identified by the court. The SEC may also elect to simply move forward with its attempt to facilitate proxy access via private ordering by relying exclusively on Rule 14a-8, as amended. We anticipate that the SEC will clarify its position in the coming weeks. Regardless of the course the SEC determines to pursue, it is doubtful that proxy access will be implemented in time for the 2012 proxy season.

The foregoing is merely a discussion of the D.C. Circuit's opinion regarding Rule 14a-11. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Michael T. Campoli at 212-326-0468, mcampoli@pryorcashman.com.

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Michael Campoli is a member of Pryor Cashman's Corporate Group and China Practice. Michael devotes his practice to counseling public and private companies at all stages of their development on a broad range of corporate matters, including securities law compliance, corporate formation and governance, mergers and acquisitions, public and private debt and equity financing transactions, and limited liability company and partnership counseling.

Mr. Campoli's work at Pryor Cashman has included the representation of:

- Marina Biotech, Inc. (NASDAQ: MRNA) as outside general counsel in connection with its equity and debt financings, M&A initiatives and Securities Exchange Act reporting requirements
- Javelin Pharmaceuticals, Inc. (NYSE Amex: JAV) as outside general counsel in connection with its equity financings and Securities Exchange Act reporting requirements
- Henry Schein, Inc. (NASDAQ: HSIC) in connection with the acquisition of various private companies in the medical equipment and software industries
- Cowen and Company, LLC, Rodman & Renshaw, LLC and Global Hunter Securities, LLC in connection with various underwritten public offerings for domestic and foreign issuers
- Briad Restaurant Group in its prevailing tender offer for Main Street Restaurant Group, Inc., the largest T.G.I. Friday's franchisee
- The Kushner Companies in connection with its acquisition of the office building located at 666 Fifth Avenue, New York, New York
- A private telecommunications company in connection with the issuance of secured notes to the Rural Utilities Service of the U.S. Department of Agriculture and the concurrent placement of preferred stock to venture capital investors