



# Corporate Governance Group Client Alert

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## EFFECTIVE DATE OF PROXY ACCESS RULES DELAYED

### *SEC Acts in the Face of a Federal Court Challenge to the New Rules*

As discussed in a previous Client Alert,<sup>1</sup> on August 25, 2010, the Securities and Exchange Commission (the "SEC") adopted changes to the federal proxy rules aimed at providing eligible shareholders with access to company proxy materials for the purpose of nominating candidates for election to the board of directors.<sup>2</sup> The new rules were facilitated by the recent passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Wall Street Reform Act"), which provides the SEC with a broad legislative mandate to adopt proxy access rules.<sup>3</sup>

The new rules initially were scheduled to become effective on November 15, 2010 and to be operative for most companies in connection with the 2011 proxy season.<sup>4</sup> Notably, however, two of the five SEC Commissioners dissented from adoption of the new rules, leading many experts to predict that litigation challenging the new rules would ensue, even though the Wall Street Reform Act called upon the SEC to adopt proxy access rules.

It was not surprising, then, that on September 29, 2010, the U.S. Chamber of Commerce and the Business Roundtable filed a lawsuit in federal court seeking to overturn the proxy access rules and asking the SEC to delay their effectiveness. The lawsuit labels the new rules as "arbitrary and capricious" and cites First Amendment arguments and states' rights concerns as grounds, among others, for overturning the new rules.

On October 4, 2010, the SEC agreed to this delay in order to "avoid[ ] potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the new rules were to become effective during the pendency of a challenge to their validity." Accordingly, companies who were gearing up to comply with the new proxy access rules, including by amending their advance notice bylaws, are faced with the reality that, once again, proxy access is in a state of limbo.

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Corporate Governance Group, whose names and contact information are provided at the end of this alert.

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<sup>1</sup> See our previous Client Alert entitled "SEC Adopts Long-Awaited Proxy Access Rules," dated September 14, 2010.

<sup>2</sup> See Release No. 33-9136 entitled "Facilitating Shareholder Director Nominations," which is available on the SEC's website at <http://sec.gov/rules/final/2010/33-9136.pdf>.

<sup>3</sup> For a further discussion of the Wall Street Reform Act, please see our Client Alerts entitled "Corporate Governance Highlights of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010" (dated July 21, 2010) and "'Accredited Investor' Standard For Reg D Offerings Tightened By Wall Street Reform Act" (dated August 4, 2010).

<sup>4</sup> Generally, any company whose 2011 annual meeting falls at least 120 days after the effective date.

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