

# Small Business Securities Bulletin

A periodic bulletin keeping small businesses informed about current developments in securities law and related matters



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## D.C. Circuit Strikes Down SEC's Proxy Access Rule

As we reported in our [October 2010 Bulletin](#), in August 2010 the SEC adopted a new rule 14a-11 that would have required SEC reporting companies subject to the federal proxy rules to include in their proxy materials director nominees nominated by qualifying stockholders or groups of stockholders that held at least 3% of the company's voting power for at least three years, subject to compliance with other provisions of the rule. At the same time, the SEC amended Rule 14a-8(i) with respect to stockholder proposals to provide that companies generally could no longer exclude from their proxy materials shareholder proposals seeking to establish procedures for the inclusion of stockholder nominees in a company's proxy materials in addition to the Rule 14a-11 process. In September 2010, the U.S. Chamber of Commerce and the Business Roundtable filed a petition with the Court of Appeals for the D.C. Circuit seeking judicial review of Rule 14a-11. Last month, the Court vacated Rule 14a-11, finding that the SEC was "arbitrary and capricious" in adopting the rule and that the SEC failed to adequately address the economic impact of the rule. SEC Chairman Mary Schapiro later put out a statement that the SEC would not seek a rehearing of the decision by the D.C. Court of Appeals or seek Supreme Court review, but that she "remain[s] committed to finding a way to make it easier for shareholders to nominate candidates to corporate boards."

As a result, Rule 14a-11 mandating a federal proxy access scheme will not become applicable. The amendments to Rule 14a-8(i) allowing stockholders to propose their company adopt its own proxy access procedures, known as "private ordering," however, was not a part of the decision and became effective on

September 20, 2011. Therefore, stockholders who otherwise meet the qualifications for inclusion of proposals in a company's proxy materials will be able to propose that stockholders adopt proxy access procedures for their individual companies during the 2012 proxy season. We expect that the SEC will propose a new federal proxy access scheme at some point in the future, but not in the short term given, among other things, that it still has a number of remaining rules to implement pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

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### **About Me**

I am a former SEC attorney who also has prior "big firm" experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you. Visit my bio at [www.ober.com/attorneys/penny-somer-greif](http://www.ober.com/attorneys/penny-somer-greif).

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