

Meridian Client Update

The End of the Road for Proxy Access? SEC Will Not Appeal Court's Ruling Striking Down Proxy Access Rule

The Securities and Exchange Commission (SEC) announced late on Tuesday, September 6 that it will not appeal the decision by the U.S. Court of Appeals to invalidate the agency's proxy access rule. This marks a significant victory for corporate America and for those who believe matters of corporate governance should be left to state legislatures.

We are not surprised by the agency's decision not to appeal as we observed in a prior Client Update (see Meridian Client Update, vol. 2, issue 8) that it was unlikely that the Supreme Court would agree to review the lower court's decision.

At least for now, mandated proxy access for qualifying shareholders is dead. However, SEC Chair Mary Schapiro issued the following statement which makes clear that the agency will continue to investigate approaches to opening up the corporate ballot box to shareholders:

"I firmly believe that providing a meaningful opportunity for shareholders to exercise their right to nominate directors at their companies is in the best interest of investors and our markets. It is a process that helps make boards more accountable for the risks undertaken by the companies they manage. I remain committed to finding a way to make it easier for shareholders to nominate candidates to corporate boards."

"At the same time, I want to be sure that we carefully consider and learn from the Court's objections as we determine the best path forward. I have asked the staff to continue reviewing the decision as well as the comments that we previously received from interested parties."

Despite the comments by Ms. Schapiro, the SEC's significant rulemaking backlog makes it highly unlikely that in the near term the agency will invest the significant resources and time needed to develop an alternative proxy access rule that would pass judicial muster.

The Court of Appeals decision to strike down proxy access did not impact the SEC's amendments to Rule 14a-8. Under those amendments, eligible shareholders are permitted to require companies to include shareholder proposals regarding proxy access procedures in company proxy materials. Through this procedure, shareholders and companies have the opportunity to establish proxy access standards on a company-by-company basis – rather than a specified standard like that contained in Rule 14a-11.

Although the amendments to Rule 14a-8 were not challenged in the litigation, the SEC voluntarily stayed the effective date of those amendments. The stay of the effective date of the amendments to Rule 14a-8 and related rules will expire without further SEC action when the Court of Appeals decision is finalized, which is expected to be September 13, 2011. When the stay expires, the Rule 14a-8 amendments will go into effect.

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