

# KIRKLAND GOVERNANCE WATCH

July 22, 2011

## “V-Day” for Corporate America — Appeals Court Strikes Down SEC’s Proxy Access Rule

*The court’s decision threw out the SEC’s Proxy Access Rule in its entirety.*

On July 22, 2011, the U.S. Court of Appeals for the District of Columbia Circuit rejected a new Securities and Exchange Commission rule requiring a corporation to include in its proxy materials director nominees put forward by a shareholder (or group of shareholders) who have owned three percent or more of company stock for at least three years (the so-called “proxy access” rule). In another major blow to the SEC, the court said the SEC’s rule was “arbitrary and capricious” and that the agency had failed to properly weigh the economic consequences of the new regulations.

The court’s decision threw out the rule in its entirety. Judge Douglas Ginsburg, who wrote the opinion for the court, said the SEC “relied upon insufficient empirical data” when it determined that the rule would “improve board performance and increase shareholder value by facilitating the election of dissident shareholder nominees.”

The court agreed with the arguments made by the U.S. Chamber of Commerce and the Business Roundtable, who brought the lawsuit against the SEC in 2010. 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.”

There is nothing in the opinion that prevents the SEC from beginning to enforce the companion “private ordering” proxy rules, which would allow the adoption by shareholders and companies of proxy access rules on a case-by-case basis. In addition, the SEC is free to re-approve the vacated rule or issue a revised one at any time. However, given the reasoning used in the opinion and the current political environment, it will be challenging for the SEC to re-adopt a rule prior to the 2012 proxy season.

Click [here](#) to read the full opinion.

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If you have any questions about the matters addressed in this *Kirkland Governance Watch*, please contact the following Kirkland authors or your regular Kirkland contact.

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