



## D.C. Circuit Strikes Down Proxy Access Rules

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**Editor's Note:** [Adam Emmerich](#) is a partner in the corporate department at Wachtell, Lipton, Rosen & Katz focusing primarily on mergers and acquisitions and securities law matters. This post is based on a Wachtell Lipton firm memorandum. Other posts about proxy access, including several papers from the Program on Corporate Governance, are available [here](#).

In an opinion issued today in the challenge brought by the Business Roundtable and U.S. Chamber of Commerce to the SEC's adoption of proxy access, the U.S. Court of Appeals for the D.C. Circuit vacated the entire proxy access regime as an "arbitrary and capricious" exercise of the SEC's authority. The [opinion](#), written by Judge Ginsburg, chides the SEC for failing "adequately to assess the economic effects" of the rules. The court levels particular criticism at the SEC's analysis of the likely costs associated with, and the frequency of, proxy contests utilizing the access rules, reliance upon "insufficient empirical data" to support a conclusion that proxy access would improve board performance, and failure to address the possibility that unions and pension funds would use the rules as a bargaining chip in unrelated negotiations with issuers. While noting that these overall defects in the rule render it invalid with respect to all types of issuers, the opinion offers lengthy criticism in particular of the decision to subject investment companies to the proxy access rules, due to the enhanced regulation imposed by the Investment Company Act of 1940.

The court did not reach plaintiffs' claims that proxy access rules are fundamentally unconstitutional, theoretically leaving open the possibility that an access regime could be implemented in revised form in the future if the above defects are addressed. It is unclear whether the SEC will continue to pursue proxy access in the face of this unqualified rejection of such a high-profile initiative which had been many years in the making. What is virtually certain, however, is that proxy access will not apply to the 2012 proxy season.

While shareholder activists are likely to be disappointed by this decision and seek to portray it as a setback for "shareholder democracy," we believe this is a positive development for American corporations and their shareholders. As we [have always said](#), proxy access is not a necessary or even beneficial element of corporate governance. Shareholders have many avenues to influence boards of directors, who are in general more independent, more engaged and more vigilant than ever before, and we do not expect this ruling to decrease the frequency of proxy contests.