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SEC Not Pursuing Mandatory Proxy Access at this Time

Testifying today before a House Financial Services subcommittee, SEC Chairman Mary Schapiro stated that, because of capacity constraints, proposing a revised mandatory rule on shareholder access to company proxy materials is "not on the Commission's immediate agenda." She noted, however, that the issue is one that the SEC will "continue to look at over time."

Last summer, the D.C. Circuit Court of Appeals vacated the SEC's Rule 14a-11, finding that the SEC had "acted arbitrarily and capriciously" in adopting the rule without adequately assessing its economic effects. At the time, the SEC said that it was considering its options but noted that its changes facilitating private ordering in proxy access were not impacted by the Court's decision.

In the current 2012 proxy season, less than two dozen companies have received proxy access proposals. This modest level of activity is in part explained by activist shareholders waiting to learn whether or not the SEC would be re-promulgating a mandatory rule. Because it is now clear that this will not happen, at least not for the 2013 proxy season, we can expect the focus on private ordering through shareholder proposals to continue and increase.

As we have previously discussed, the Staff of the SEC continues to respond to requests to exclude shareholder proxy access proposals on various grounds. Most recently, the Staff allowed Staples to exclude a binding shareholder proxy access proposal that conflicted with the company's bylaws. As the SEC has responded to no-action requests to exclude proposals, activist shareholders have adapted their proposals to remove identified deficiencies. With each iteration of Staff guidance, activists are better able to craft resolutions that can withstand companies' efforts to exclude them. One significant question that remains unanswered is whether and when a company can preempt a shareholder access proposal that it considers unacceptable with its own management-sponsored proposal for a proxy access bylaw (or charter provision) with which it is willing to live.

A number of proxy access proposals, both binding and precatory, are going to a vote this year, which will provide some insight into institutional shareholders' views on proxy access. The first such proposal to go to a vote (a binding proposal with a low 1%-for-one-year ownership threshold) failed to pass at Wells Fargo's annual meeting yesterday. ISS, which has indicated that it will consider proxy access proposals on a case-by-case basis, had recommended that shareholders vote in favor of the Wells Fargo proposal despite its very low threshold. One company – Hewlett-Packard – agreed, in exchange for the withdrawal of a shareholder access proposal, to submit a management proxy access proposal in 2013 at the 3%-for-three-years holding requirement that had been included in the now-vacated Rule 14a-11. Despite the fate of Rule 14a-11, the SEC-blessed thresholds may well become a widely accepted standard.

Chairman Schapiro's statement means that a federally mandated proxy access rule is off the table for the moment at least. However, private-ordering through shareholder proxy access proposals will continue and likely intensify. Companies should pay careful attention to continuing developments in order to be prepared for the 2013 proxy season.

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