SECURITIES AND EXCHANGE COMMISSION
FACILITATING SHAREHOLDER DIRECTOR NOMINATIONS; FINAL RULE
Release Nos. 33-9136; 34-62764; IC-29384; File No. S7-10-09
RIN 3235-AK27
75 Fed. Reg. 56,668 (Sept. 16, 2010)

MOTION FOR STAY OF PROXY ACCESS RULES BY BUSINESS ROUNDTABLE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Business Roundtable and the Chamber of Commerce of the United States of America ("Petitioners") hereby request that the Securities and Exchange Commission stay its final rules regarding proxy access for shareholder director nominations, including the rules' November 15, 2010 effective date. Facilitating Shareholder Director Nominations, Final Rule, 75 Fed. Reg. 56,668 (Sept. 16, 2010). Petitioners request this stay pending resolution by the U.S. Court of Appeals for the District of Columbia Circuit of the petition for review petitioners have filed with that Court. *Business Roundtable, et al. v. SEC*, U.S. Court of Appeals for the D.C. Circuit, Case No. 10-xxxx. Petitioners seek a stay of Rule 14a-11 and associated amendments to the Commission's rules; they do not request a stay of the amendment to Rule 14a-8. A brief in support of this motion is attached.

An answer to this motion is respectfully requested by **Tuesday, October 5, 2010**, so that petitioners may promptly proceed to Court for appropriate relief if a stay is not granted.

Dated: September 29, 2010

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION FOR STAY OF PROXY ACCESS RULES BY BUSINESS ROUNDTABLE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTRODUCTION

On August 25, 2010, pursuant to a 3-2 decision, the Commission adopted final rules—the Proxy Access Rules—defining circumstances in which shareholders may place a director nominee in a company's proxy materials. Facilitating Shareholder Director Nominations, Final Rule, 75 Fed. Reg. 56,668 (Sept. 16, 2010). Petitioners have challenged the Proxy Access Rules in a petition filed with the United States Court of Appeals for the District of Columbia Circuit today, September 29. They now request that implementation of the rules be stayed pending resolution of that litigation.

Under the Administrative Procedure Act, an agency may stay its own action pending judicial review when the "agency finds that justice so requires." 5 U.S.C. § 705; *see also National Treasury Employees Union v. Fed. Labor Relations Auth.*, 712 F.2d 669, 676 n.15 (D.C. Cir. 1983) (noting cases "in which a federal agency, *in its discretion* . . . undertakes to stay execution of . . . agency action") (emphasis added). Thus, the four conditions considered by the courts in determining whether to grant emergency relief need not be present. *See* D.C. Cir. R. 18(a). Although those conditions nonetheless are satisfied, as shown below, we respectfully submit that the principal reason the Commission should grant a stay is to avoid the uncertainty, confusion, and significant, potentially unnecessary costs that will result if the rules go into effect while under legal challenge.

The appropriateness of a proxy access rule has been under discussion by the Commission on and off for decades. Proposed Rule, 74 Fed. Reg. at 29,029 n.73 (June 18, 2009) (noting that the Commission first considered proxy access in 1942). Few issues in corporate governance have generated more disagreement or stronger passions, in part because of the serious disruptions that issuers of securities and others have long feared would result. Those disruptions include the threat of an access candidate being used as "leverage" to achieve other, special interest objectives of the nominating shareholder(s); the distraction of directors and officers from other

responsibilities and the direct costs to shareholders of an election contest; and disruption in the operation of the board itself if an access nominee is elected. All of these costs will occur if the rules are not stayed, even if the Court of Appeals strikes the rules down before the conclusion of its 2010-2011 Term.

We respectfully submit that stewardship of the national economy during these difficult economic times counsels strongly in favor of a stay. Proxy access has waited more than 65 years. There is no discernable harm to delaying the effective date of the rules until the resolution of the petition for review. By granting such a stay, the Commission will immediately provide clarity for what otherwise would be a proxy season of great uncertainty for issuers and shareholders, and will avert numerous questions (including no-action letter requests) that are certain to be presented to the Commission if the rules and litigation proceed simultaneously. Most importantly, by granting a stay the Commission will avert what could be tens of millions of dollars in unnecessary costs for American businesses if the rules are ultimately invalidated by the Court.

DISCUSSION

The Commission may grant a stay in its discretion for the reasons stated above without applying the four-part test applied by courts to determine whether to grant emergency relief. The elements of that test are easily satisfied, however: Petitioners are substantially likely to prevail in their challenge to the Proxy Access Rules, irreparable harm will result if a stay is not granted, and the balance of hardships and the public interest both militate in favor of a stay.

A. Petitioners Are Substantially Likely To Prevail On The Merits

Petitioners have challenged the rules on the ground that they are "arbitrary and capricious" in violation of the Administrative Procedure Act, that the Commission failed to adequately assess the rules' effects on "efficiency, competition, and capital formation" as required by the Securities Exchange Act of 1934 and the Investment Company Act of 1940, 15

U.S.C. §§ 78c(f); 78w(a)(2); 80a-2(c), and that the rules infringe First and Fifth Amendment rights. For multiple reasons, petitioners are substantially likely to prevail in this challenge.

1. The Commission erred in appraising the costs the Proxy Access Rules would pose. During the rulemaking period, commenters explained at length that the rules would result in costly election contests pitting issuers' nominees against nominees put forward by institutional investors such as union funds and state pension funds. *See, e.g.*, Comment Letter of Chamber of Commerce at 5-8 (Aug. 14, 2009); Comment Letter of Business Roundtable at 109-11 (Aug. 17, 2009). Petitioner Chamber of Commerce estimated that proxy contests cost anywhere from $4 million to $14 million for large companies, and $800,000 to $3 million for smaller companies, and that comparable costs were expected for election contests under the new rules. Comment Letter of Chamber of Commerce at 7 (Aug. 14, 2009); 75 Fed. Reg. at 56,770 (citing Chamber's figures for proxy contests).

In evaluating the rules' costs and benefits, the Commission did not dispute commenters' evidence that hotly contested elections would be costly if they occurred. But, the Commission hypothesized, such contests might not materialize because directors might "determine not to expend . . . resources to oppose" shareholder nominees, rather, they might "simply include the shareholder director nominees" in the proxy materials without opposition. 75 Fed. Reg. at 56,770. The Commission offered no support for this assertion, and it squarely conflicts with commenters' explanation that, "pursuant to the board's fiduciary duty to act in the best interests of the company and all its shareholders, a board is likely to expend significant resources to defeat shareholder nominees whom the board believes are unqualified or less qualified to serve on the company's board than the board's nominees." Comment of Business Roundtable at 78 (Aug. 17, 2009); *see also* Comment of American Bar Ass'n at 35 (Aug. 31, 2009) ("If the nominee is determined not to be as appropriate a candidate as those to be nominated by the board's independent nominating committee or to likely advocate positions that the board believes are not

in the company's best interests, then the board will be compelled by its fiduciary duty to make an appropriate effort to oppose the nominee, which may include committing company resources and money to campaign against the candidate, just as is done in the context of traditional proxy contests."). The Commission's only response was that directors' fiduciary duties would prevent them from opposing shareholder nominations when they had "no good faith corporate purpose" for such opposition. 75 Fed. Reg. at 56,770. The Commission cannot seriously maintain, however, that there would be "no good faith purpose" for directors to expend the resources necessary to secure election of the person they have determined, in the exercise of their fiduciary duties, will best serve the company and its shareholders. On the contrary, a shareholder nominee will go forward as an "access" nominee rather than the board's nominee only if the board has reviewed the shareholder nominee's qualifications and determined they will not serve the company and shareholders as well as the nominee identified by the board. A board making this decision will already have made a choice that election of their nominee warrants the higher costs caused by an election contest.

The Commission also attempted to disavow any costs that would result from contested elections under the rules as costs "associated with the traditional State law right to nominate and elect directors," rather than costs resulting from the rules themselves. 75 Fed. Reg. at 56,765, 56,767. That is inaccurate, as explained below, because the Commission is creating a new means of putting forward director candidates in company proxy materials that is not authorized by the laws of any state. In any event, the intent and effect of these rules are to cause an increase in contested elections; the contested elections resulting from the rules are a cost that the Commission must account for in its cost-benefit analysis and its assessment of the rules' effects on efficiency, competition, and capital formation. *See Chamber of Commerce v. SEC*, 412 F.3d 133, 143-44 (D.C. Cir. 2005), where the Court found it a "*non sequitur*" for the Commission to fail to account for costs that were the practical consequence of a rule, merely because the costs

were not strictly required by the rule. In this regard, the Commission did not even provide an estimated total cost of the new form of election that would occur under the rules, despite "its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation." *Id.* at 144.

In assessing the rules' costs and benefits, the Commission also gave inadequate weight to the motives and intensity of nominating shareholders. During the rulemaking process, numerous commenters emphasized that union funds were among the most active shareholders and often pursued changes that furthered union interests rather than the company's or shareholders'. *See, e.g.*, Comment Letter of Business Roundtable at 14-17 (Aug. 17, 2009). As one knowledgeable, respected observer explained, "Those . . . most inclined to be activist investors are associated with state governments and labor unions, and often appear to be driven by concerns other than a desire to increase the economic performance of the companies in which they invest." Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1765 (2006) (cited in Comment Letter of Business Roundtable at 102 (Aug. 17, 2009)).

Union pension funds submitted 295 out of 699 shareholder proposals received by U.S. public companies in 2006, more than any other investor group, and have continued to submit shareholder proposals at a high rate since then. Comment Letter of Business Roundtable at 102 (Aug. 17, 2009) (citing Ashwini K. Agrawal, *Corporate Governance Objectives of Labor Union Shareholders: Evidence from Proxy Voting* 9 (NYU Working Paper No. FIN-08-006, 2009), *available at* http://ssrn.com/abstract-1354494 ("Agrawal Study")). This study also demonstrated that union funds are more activist toward an issuer when their affiliated union represents the issuer's workers, strong evidence that the funds act for reasons other than maximizing the value of their investment. *See* NERA report at 12 (Aug. 17, 2009) (citing Agrawal Study). *See also* Stephen M. Bainbridge, *Director Primary and Shareholder Disempowerment*, 119 HARV. L.

Rev. 1735, 1755 (2006) ("Union pension funds tried to remove directors or top managers, or otherwise affect corporate policy, at over 200 corporations in 2004 alone.") (cited in Comment Letter of Business Roundtable at 16 (Aug. 17, 2009)).

The adopting release did not address this concern, indeed it does not use the word "union" (except when identifying by name the rules' many union commenters). The Commission compounded this error by repeatedly hypothesizing that nominating shareholders would be constrained in the costs they imposed on issuers by their "understanding" and concern for adverse consequences for the company. 75 Fed. Reg. at 56,765, 56,772. It was not reasonable for the Commission to rely on the supposed beneficent motive of nominating shareholders without addressing—or even acknowledging—the record evidence that this most active class of shareholders seeks to *impose* costs on companies or otherwise acts for reasons other than maximizing the value of the investment in the issuer.

In sum, it is arbitrary and capricious for a rulemaking agency to "entirely fail[ ] to consider an important aspect of [a] problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Proxy access has been one of the most contentious issues in the Commission's history because disagreements over a proxy access rule prefigure the disagreements that will manifest themselves when proxy access is used. It was not reasonable for the Commission to premise its cost analysis on the assumption that issuers, who have been so active in this rulemaking, would become passive and quiescent once access nominees are put forward. Nor was it reasonable for the Commission not to confront the alternative agendas of union funds, state funds, and others, which are extensively documented in the rulemaking record.

2. The rules are arbitrary and capricious in estimating the frequency with which proxy access will be used, further undermining the Commission's cost-benefit analysis. The rationale for the rules is that they will facilitate director election contests by providing shareholders a means of putting forward nominees that is less costly than traditional proxy

contests. *See, e.g.*, 75 Fed. Reg. at 56,669, 56,755 ("The availability of the new rules also may encourage shareholders who would not have previously considered conducting a proxy contest to take a greater role in the governance of their company by using the new rules to have their nominees for director included in a company's proxy materials."). And yet, in estimating the frequency with which proxy access contests will occur—and therefore the costs the rules would impose—the Commission began with the premise that access contests will occur *less frequently* than traditional proxy contests. The Commission estimated that in 2009 there were 57 proxy contests for operating companies and 11 contests for investment companies. 75 Fed. Reg. at 56,743 n.804; 56,744 n.807. From this, the Commission estimated that only 45 companies and 6 investment companies would receive access nominations, based purely on the conjecture that the rules' thresholds for nominating shareholders (3 percent held for 3 years) would make access nominations less attainable than proxy contests. That analysis turns the rules on their head by supposing that a rule the Commission claims will "facilitate" nomination contests actually will be less useful than "costly" proxy contests. This reasoning is not credible, is arbitrary and capricious, and renders the Commission's cost-benefit analysis unreliable.

3. The adopting release is arbitrary and capricious in its treatment of state law. The rules' stated purpose is to effectuate shareholders' "state law rights" to nominate directors. *See, e.g.*, 75 Fed. Reg. at 56,671. Delaware, where more than half of U.S. public companies are incorporated, *id.* at 56,671 n.38, has a law that specifically addresses shareholder access to the proxy for director nominations and provides that an access mechanism may be established by a company's shareholders through a bylaw amendment. Del. Code Ann. tit. 8, §§ 112-13. The Model Business Corporation Act provides similarly. While claiming to effectuate state law rights, the Proxy Access Rules effectively moot them, establishing a federal proxy access regime by fiat regardless of what system an issuer's shareholders would adopt under the law of Delaware or another state. The Commission's stated concern that "companies not incorporated

in Delaware could frustrate shareholders efforts" to establish proxy access, is among other things, a poor rationale for trumping the Delaware law that is applicable to the majority of U.S. public companies. The release's claim that shareholders' use of state law procedures "could face significant obstacles" is an acknowledgment that state law rights are not being effectuated, they are being overridden by a new federal regime. *Compare American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010) (invalidating SEC rule for failure to adequately consider rule's interaction with state law).

4. The rules purport to empower shareholders, but bar the holders of a majority of shares from acting to prevent a small minority from imposing costly election contests on the whole. Numerous commenters and the dissenting Commissioners argued that shareholders should have the authority to institute alternative, more demanding requirements for proxy access or to bar proxy access altogether. *See* dissenting opinion of Commissioner Casey ("[W]hile the adopting release maintains that the proxy access rules increase shareholder choice simply by mandating that shareholder nominees appear on a company's proxy card rather than on a nominating shareholder's proxy card, the release refuses to concede that the rules eliminate shareholder choice by precluding them from exercising their state law rights to establish procedures by which a company conducts director elections."); dissenting opinion of Commissioner Paredes ("Rule 14a-11 denies shareholders room to engage in the kind of private ordering that mandatory disclosure is intended to facilitate and therefore frustrates the kind of shareholder choice that disclosure seeks to empower."); *see also* Comment Letter of the American Bar Ass'n at 38 (Aug. 31, 2009); Comment Letter of the Society of Corporate Secretaries & Governance Professionals at 2-3 (Aug. 13, 2009); Comment Letter of Professor Joseph A. Grundfest at 5-7 (July 24, 2009). The final rule amends Rule 14a-8 to enable shareholders to use the company proxy to propose more permissive access standards, but

precludes more *restrictive* standards. This arbitrarily conflicts with the rules' stated rationale of empowering shareholders to make significant decisions.

The adopting release claimed in response to these comments that mandated limitations are part and parcel of the federal securities laws and that "[n]o provision of the Federal securities laws can be waived by referendum." 75 Fed. Reg. at 56,673. That response fails for multiple reasons. First, the final rules permit shareholders to "waive by referendum" limitations imposed by the rules, such as the 3-year holding requirement. *Id.* at 56,760 n.906. Second, the fact the Commission has not done something before is hardly reason to dismiss it out of hand when suggested by two Commissioners and numerous respected commenters. Third, permitting such shareholder choice is entirely appropriate for rules intended to further state law principles of corporate governance, the foundation of which is self-government and private ordering. In the words of Commissioner Parades, "Recognizing that one-size-fits-all mandates are inappropriate for many businesses, the enabling approach [of state law] defers to private ordering to determine how each firm should be organized to advance its particular needs and interests most effectively. Enabling corporate law allows the internal affairs of each corporation to be tailored to the firm's unique attributes and qualities." Dissent of Commissioner Paredes.

5. The Commission further erred by covering investment companies under the rules, which are subject to a range of different statutory requirements than operating companies. Comment Letter of Investment Company Institute at 17-20 (Aug. 17, 2009). These include requirements to obtain shareholder approval for a range of specific actions, including changes in structure, important financial transactions, and the investment advisor contract. 15 U.S.C. §§ 80a-13, 15(a), -15(c).

The Commission responded that these "regulatory protections offered by the Investment Company Act [do not] . . . decrease the importance of the rights that are granted to shareholders under State law." 75 Fed. Reg. at 56,684, 56,763. Commenters were not suggesting, however,

that the Investment Company Act's requirements "decrease the importance" of state law rights, but rather that those requirements reduce the *need* for proxy access in the investment company context. At minimum the Commission should have separately evaluated the benefits of proxy access for investment companies against the baseline protections established by the Investment Company Act, just as in *American Equity* it was instructed to assess the asserted benefits of the rule at issue there against the protections provided by state law. 613 F.3d at 178. The Commission also gave insufficient attention to the differences in the operation of investment companies and other public companies, including the significant costs that a director elected under the rules would impose on investment companies' unitary and cluster boards.

6. The rules violate the First Amendment and is a taking of corporate property because it forces companies to fund and carry election-related speech that is opposed by a company's duly-elected board of directors. Even if holders of 95 percent of a company's shares find this use of the company proxy to be a waste of corporate assets, they are barred from preventing it. (*See* point 3 above.)

The "mandated support" of "speech by others" "is contrary to the First Amendment principles set forth" in numerous decisions of the Supreme Court. *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001). Thus, the Court has held that a company cannot be forced to include in its monthly bills speech by third parties that it disagrees with. *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986). Rule 14a-11 has such an effect. In *dicta* in that case the four-Justice plurality said that SEC Rule 14a-8 did not violate the First Amendment because, in part, "management has no interest in corporate property except . . . as derives from the shareholders." *Id.* at 14 n.10 (plurality opinion). However, Rule 14a-11 purposely trumps shareholders' ability to control use of the company proxy, establishing what the adopting release acknowledges is an individual, not collective, shareholder right. *See* 75 Fed. Reg. at 56,673 ("When the federal securities laws establish protections or create rights for security holders, *they*

do so individually, not in some aggregated capacity.") (emphasis added). By the Commission's own rationale, then, Rule 14a-11 does not "govern speech by a corporation to itself," as the Supreme Court described Rule 14a-8. *Pacific Gas*, 475 U.S. at 14 n.10 (emphasis omitted). Rather, it subsidizes speech by a select group of special interest shareholders "individually," even against the will of the holders of the great majority of shares and the elected leadership.

B. The Rules Would Cause Irreparable Injury

Generally, a stay is appropriate when failure to grant it would impair a court's ability to grant an effective remedy. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.1. In this case, the Court's ability to grant an effective remedy will be impaired if a stay is not granted because of the costs petitioners and others will incur even if the Court invalidates the rules this Term.

Under the rules' November 15 effective date, companies that mailed their proxy materials March 15, 2010 or later will be immediately subject to the rules. (The rules require a shareholder to nominate a director "no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting." 75 Fed. Reg. at 56,730.) More than 2,000 companies fall into this category. Thousands of additional companies will be subject to proxy access director nominations by the end of the year. For companies that receive a shareholder nomination, they will need to (1) draft a proxy disclosure for the Rule 14a-5 deadline; (2) review the amount and duration of share ownership by the nominating shareholder(s) for compliance with Rule 14a-11 thresholds; (3) review the Schedule 14N submitted by the nominating shareholder(s) to determine if the candidate(s) meet all procedural and director qualification requirements; (4) determine whether there is a basis for excluding the nominee from the proxy materials and, if so, file a notification and possible no-action request with the SEC; (5) incur the costs of defending the board's nominees against the shareholder's proposed nominee. Several comment

letters emphasized the significant costs of complying with the Proxy Access Rules and engaging in a proxy contest with a shareholder-nominated director. *See, e.g.*, Comment Letter of the Chamber of Commerce at 5-8 (Aug. 14, 2009); Comment Letter of Business Roundtable at 109-11 (Aug. 17, 2009); Comment Letter of Biogen Idec Inc. at 2 (Aug. 7, 2009). Companies with elections that would be subject to the rules also may have shareholder-nominated directors elected and seated by the end of April 2011, which would significantly and unalterably affect the company's governance even if the rules ultimately are invalidated.

Companies that do not include a shareholder director nominee in their 2011 proxy materials will nonetheless have to begin immediately (1) evaluating governance documents and determining if any bylaw amendments are necessary in light of Rule 14a-11; (2) establishing or updating formal processes for considering shareholder nominees; and (3) reviewing board composition, board size and director qualifications and making any necessary changes to governance documents. *See, e.g.,* Comment of Business Roundtable at 97-98 (Aug. 17, 2009). All of these changes and evaluations will be made in an atmosphere of uncertainty as to whether the rules will survive judicial challenge.

Finally, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). *Accord Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod*).

C. Staying the Rules Would Not Harm Third Parties And Will Promote the Public Interest

If the challenged provisions are stayed, the public interest will be served and no harm will occur to other parties. It is in the public's interest for the Court to determine the lawfulness of the Commission's adoption of the Proxy Access Rules before corporate boards face the costs of

implementing the rules and the potential irreversible change if shareholder directors are elected pursuant to rules that a court determines are arbitrary and capricious, not cost-justified, or unconstitutional. The Commission already has recognized the benefits that may result from a deferred effective date, delaying compliance for smaller companies for *three* years. 75 Fed. Reg. at 56,674, 56,687. The same benefits would accrue to public companies and their shareholders.

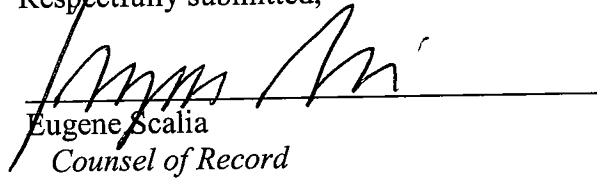
In short, the Proxy Access Rules will cause irretrievable costs, uncertainty, and confusion if allowed to take effect while under legal challenge. The rules' supporters cannot cite comparable costs to American business and shareholders if but one more year passes before the rules—if upheld—take effect.

CONCLUSION

For the foregoing reasons, petitioners request that the Commission grant its Stay Motion. If a stay is granted, petitioners will join the Commission in seeking expedited review by the D.C. Circuit to remove the uncertainty about the legal status of the rules.

Dated: September 29, 2010

Respectfully submitted,



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