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## SEC Shareholder Proposal Amendments Become Effective

In August 2010, the SEC adopted controversial proxy access rules to create, via a new Rule 14a-11, a federally mandated procedure to allow shareholders access to a company's proxy materials for the purpose of nominating a short-slate of directors for election in opposition to the board's nominees. Concurrently with the adoption of Rule 14a-11, the SEC also narrowed the "election exclusion" under its Rule 14a-8 shareholder proposal procedures so as to permit the inclusion of proposals relating to proxy access in a company's proxy materials. In October 2010, the U.S. Chamber of Commerce and the Business Roundtable filed suit for review of Rule 14a-11 by the D.C. Circuit Court of Appeals, alleging that the rule was arbitrary and capricious in violation of the Administrative Procedure Act. Pending resolution of that litigation, the SEC stayed the effectiveness of the entire package of rules. The D.C. Circuit ultimately vacated Rule 14a-11, and the SEC has decided not to appeal that decision. The SEC has, however, decided to press forward with the Rule 14a-8 and other related amendments, and these changes are now effective.

Under these amendments, Rule 14a-8(i)(8)'s election exclusion is narrowed to allow companies to exclude only of those shareholder proposals that:

- would disqualify a nominee who is standing for election;
- would remove a director from office before his or her term expired;
- question the competence, business judgment or character of one or more nominees or directors;
- seek to include a specific individual in the company's proxy materials for election to the board; or
- otherwise could affect the outcome of the upcoming election of directors.

The rules do not add any restrictions on the types of proxy access proposals that a shareholder may submit, leaving the field open to "private ordering" and any number of possible variations of proxy access proposals (such as binding versus non-binding proposals or proposals with different proxy access parameters, including ownership thresholds or holding periods). Reports are mixed as to whether companies should anticipate a flood or a trickle of these types of proposals, so the ultimate effect of these amendments remains to be seen.

We also note that the SEC adopted procedural and disclosure requirements with respect to the inclusion in company proxy materials of shareholder nominations made pursuant to a

process specified either by state law or foreign law or by the company's governing documents, such as one that might be adopted pursuant to a proxy access shareholder proposal. Among other things, amended Rule 14a-18 requires nominating shareholders to provide notice and other information to the company on Schedule 14N within a company-specified deadline (or, if unspecified, generally 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).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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