



# JONES DAY COMMENTARY

## SEC MAINTAINS STATUS QUO IN SHAREHOLDER ACCESS

On November 28, 2007, the Securities and Exchange Commission (the “SEC”) approved, in a split vote, an amendment to Rule 14a-8(i)(8) of the proxy rules to codify the Staff’s interpretation of the rule and maintain the status quo with regard to shareholder access to a company’s proxy statement with respect to director elections and nominations. The adoption of the proposal was made prior to the 2008 proxy season, according to SEC Chairman Christopher Cox, in order to avoid a potential end run around the proxy disclosure and antifraud rules.

### BACKGROUND

On July 25, 2007, the SEC issued two proposals, which were discussed in an August 2007 *Jones Day Commentary*,<sup>1</sup> regarding shareholder access to a

company’s proxy statement with respect to director elections and nominations. The proposals were in direct response to the decision of the United States Court of Appeals for the Second Circuit in *American Fed’n of State, County & Mun. Employees v. American Intern. Group, Inc.*<sup>2</sup> The Second Circuit’s holding called into question the SEC’s existing interpretation that shareholder proposals relating to board elections were excludable.

### REVISED LANGUAGE

Rule 14a-8(i)(8) currently permits a company to omit any shareholder proposal that “relates to an election for membership on the company’s board of directors or analogous governing body.” The revised rule allows a company to omit any shareholder proposal “[i]f the

1. See “SEC Releases Shareholder Access Proposals” at [http://www.jonesday.com/pubs/pubs\\_\\_detail.aspx?pubID=S4559](http://www.jonesday.com/pubs/pubs__detail.aspx?pubID=S4559)
2. 2006 WL 2557941 (2<sup>nd</sup> Cir. Sept 5, 2006).

proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election." The added language, while subtle, clarifies the longstanding SEC position that a shareholder proposal related to the nomination process for directors is properly excludable.

## IMPACT OF THE PROPOSAL

The proposal will have little impact on current shareholder proposal procedures because most companies will continue to exclude shareholder proposals generally related to director elections. However, it is unlikely that this is the last we will hear about shareholder access. Several commentators, institutional investors, and shareholder activists have stated that the proposal is inadequate and, as a result, will likely continue to advocate for greater access to the proxy statement. In addition, Chairman Cox has stated that he will reopen the shareholder access discussion in 2008 with the objective of doing something other than maintaining the so-called "status quo."

## LAWYER CONTACTS

If you have any questions about the proposal or for further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

**Thomas C. Daniels**

1.216.586.7017

[tcdaniels@jonesday.com](mailto:tcdaniels@jonesday.com)

**Christopher M. Kelly**

1.216.586.1238 (Cleveland)

1.212.326.3438 (New York)

[ckelly@jonesday.com](mailto:ckelly@jonesday.com)

**Timothy J. Melton**

1.312.269.4154

[tmelton@jonesday.com](mailto:tmelton@jonesday.com)

**Lizanne Thomas**

1.404.581.8411

[lthomas@jonesday.com](mailto:lthomas@jonesday.com)

**Mark L. Hanson**

1.404.581.8573

[mlhanson@jonesday.com](mailto:mlhanson@jonesday.com)

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at [www.jonesday.com](http://www.jonesday.com). The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.