ORAL ARGUMENT NOT YET SCHEDULED
No. 10-1305

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BUSINESS ROUNDTABLE and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Final Rules
of the Securities and Exchange Commission

BRIEF OF THE STATE OF DELAWARE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Lawrence W. Lewis
STATE OF DELAWARE
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8400
State Solicitor,
the State of Delaware

Frederick H. Alexander
Shannon E. German (application pending)
Counsel of Record
MORRIS, NICHOLS, ARSHT
& TUNNELL LLP
1201 N. Market Street
Wilmington, DE 19801
(302) 658-9200
sgerman@mnat.com
Counsel for Amicus,
the State of Delaware

December 9, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

IDENTITY, INTEREST, AND AUTHORITY OF THE *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), the State of Delaware, through its executive branch, has chosen to participate in this action as an *amicus curiae* because SEC Rule 14a-11 was purportedly adopted in aid of a state corporate law right. Delaware has a particular interest in the Rule and its effect on state corporate law, as more than 50% of corporations traded on the major stock exchanges are incorporated in Delaware. *See* State of Delaware, Department of State: Division of Corporations, http://corp.delaware.gov/aboutagency.shtml (last visited Dec. 9, 2010). For the reasons discussed below, rather than aiding state law rights, Rule 14a-11 runs counter to recent Delaware legislation that clearly establishes stockholders' ability, consistent with long-standing corporate law principles, to adopt an access regime of their design if they so choose.

SUMMARY OF ARGUMENT

In August of 2009, the Delaware General Assembly enacted, and the Governor signed, an amendment to the Delaware General Corporation Law ("DGCL") to clarify that bylaws of a corporation could establish a right of proxy access. This amendment gives stockholders the ability to decide whether and when stockholders would be granted such a right of access. This amendment, together with the amendments to SEC Rule 14a-8 adopted at the same time as Rule 14a-11, would allow stockholders increased flexibility in shaping the process by which

directors are elected. This company-by-company flexibility is consistent with long-standing Delaware corporate law principles.

SEC Rule 14a-11, which takes away that choice, is completely contradictory to Delaware's newly adopted statute governing proxy access. Thus, the SEC's attempt to "facilitate shareholders' effective exercise of their traditional state law rights to nominate directors and cast their votes for nominees" fails, because it ignores Delaware's policy of allowing stockholders, through their ability to amend bylaws, to determine how any particular corporation will protect the rights of stockholders in the election process. *See* Facilitating Shareholder Director Nominations, Exchange Act Release Nos. 33-9136, 34-62764, 75 Fed. Reg. 56,668, at 18 (Sept. 16, 2010). Indeed, Rule 14a-11 denies stockholders their state law right to freely amend proxy access bylaws.

ARGUMENT

I. Delaware Corporate Law And Private Ordering

Delaware's corporate law is comprised of the DGCL and the common law, which together govern the relationship among stockholders, directors and others. This body of law governing corporations has evolved steadily over the last 100 years as Delaware has become the preeminent jurisdiction to which other states look both in drafting their statutes and in formulating their common law. *See* Donald F. Parsons Jr. & Joseph R. Slights III, *The History of Delaware's Business*

Courts, Bus. Law Today, March/April 2008, at 21-22; Robert B. Ahdieh, *From "Federalization" to "Mixed Governance" in Corporate Law: A Defense of Sarbanes-Oxley*, 53 Buff. L. Rev. 721, 736 (Summer 2005) ("With defined exceptions, . . . the law of competing jurisdictions tracks significant features of Delaware law.") (citing William J. Carney, *The Production of Corporate Law*, 71 S. Cal. L. Rev. 715, 731-34 (May 1998) (observing significant uniformity among states on both core and non-core corporate charter terms)); *see id.* ("There is, for the most part, a national corporate law in the United States; it is simply enacted by the state of Delaware.").

In large part, this body of law is "enabling," and grants corporations and their stockholders broad latitude to privately order their corporate governance structure. *See Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1078 (Del. Ch. 2004) ("The DGCL is intentionally designed to provide directors and stockholders with flexible authority, permitting great discretion for private ordering and adaptation."), *aff'd*, 872 A.2d 559 (Del. 2005); Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 Cornell L. Rev. 1257, 1260 (Sept. 2001) (The "Delaware model" is "largely enabling and provides a wide realm for private ordering."); *see also* E. Norman Veasey, *The Stockholder Franchise is Not a Myth:*

A Response to Professor Bebchuk, 93 Va. L. Rev. 811, 825 (May 2007) (concluding that private ordering, as permitted under the DGCL's default rules and the MBCA, "remains the most flexible and best approach to protecting stockholder power").

II. Delaware Recognizes The Importance Of The Voting Right.

This body of law protects the ability of stockholders to choose and replace the directors. For example, all stockholders have the right to obtain a list of stockholders of the corporation pursuant to Section 220 of the DGCL, for any proper purpose, including distributing proxy materials to other stockholders and soliciting their proxies. *See* Del. Code Ann. tit. 8, § 220. Moreover, once a proxy contest is initiated, Delaware courts have guarded the stockholder franchise from inequitable conduct by corporate management. *See, e.g.*, *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 658, 662-63 (Del. Ch. 1988) (holding that where the board's principal motive in increasing the size of the board of directors from seven to nine members was to prevent or delay the stockholders from possibly placing a majority of the members on the board in a contested election, the board had breached its fiduciary duty of loyalty); *Wisconsin Inv. Bd. v. Peerless Sys. Corp.*, C.A. No. 17637, 2000 WL 1805376, at *12 (Del. Ch. Dec. 4, 2000) (holding that adjournment of a stockholder meeting for the primary purpose of garnering additional support for a proposal to add one million shares to the corporation's

stock option plan required a compelling justification), *reh'g denied*, 2001 WL 32639 (Del. Ch. Jan. 5, 2001).

III. Proxy Access Under Section 112

Despite its developed jurisprudence on elections, prior to 2009, there was no Delaware statute that addressed whether a corporate bylaw could provide nominating stockholders with the right to use the corporation's proxy materials. In August of 2009, the Delaware General Assembly addressed this issue by enacting the two new provisions of the DGCL, sections 112 and 113, which expressly authorize bylaws establishing, respectively, proxy access and rights to reimbursement of proxy solicitation expenses. Del. Code Ann. tit., 8, §§ 112, 113 (2009), *see* H.B. 19, 145th Gen. Assem. (Del. 2009). Section 112 permits stockholders to adopt bylaws that require the corporation to include in its proxy materials stockholder nominees for election as directors. *See* Del. Code Ann. tit. 8, § 112. Such bylaws may condition inclusion upon (1) share ownership, (2) information requirements, (3) the number or proportion of directors nominated, (4) restrictions on shares acquisitions, (5) indemnification requirements, and (6) any other lawful condition. *See id.* Section 113 permits stockholders to adopt bylaws that require the corporation to reimburse expenses incurred by a

stockholder in connection with the solicitation of proxies for the election of directors, and similarly permits conditions to payment. *See id.* § 113.[1]

Sections 112 and 113 of the DGCL do *not*, however, mandate, or even prescribe default parameters for, rights to proxy access or proxy solicitation expense reimbursement. *See* letter from James L. Holzman, Chair, Counsel of the Corporation Law Section of the Delaware State Bar Association, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, at 5 (July 24, 2009). Thus, in adopting Section 112, Delaware deliberately followed the longstanding Delaware principles of stockholder choice and private ordering. The provision gives stockholders a clear right to adopt a wide variety of proxy access models.

[1] The drafters of the Model Business Corporation Act (the "MBCA") have taken a similar approach in recent amendments. *See* Committee on Corporate Laws, A.B.A. Section of Business Law, *Report on the Roles of Boards of Directors and Shareholders of Publicly Owned Corporations and Changes to the Model Business Corporation Act—Adoption of Shareholder Proxy Access Amendments to Chapters 2 and 10*, 65 Bus. Law. 1105, 1111 (Aug. 2010) (explaining that the Committee recognized that the SEC's proposed rule would mandate that stockholders have access to the corporation's proxy statement to nominate candidates but that the Committee, in amending the MBCA, chose instead to enable a "private ordering," "company-by-company" approach that permits stockholders to adopt bylaws providing for access to management's proxy materials to nominate candidates and obtain reimbursement of reasonable expenses incurred in nominating and promoting candidates but does not require such access). The MBCA has been adopted in whole or in substantial form in thirty states and selected provisions have been adopted by many other states. *See* Committee on Corporate Laws, A.B.A. Section of Business Law, 1 Model Business Corporation Act ann. at v. (4th ed. 2008).

IV. SEC Rule 14a-11 Undermines the Fundamental Rights of Stockholders Established by Section 112.

Mandating proxy access would fundamentally alter the policy of stockholder choice embodied in Section 112. Rule 14a-11 prevents stockholders from exercising their right to adopt a variety of terms for proxy access that would differ from the strictures of Rule 14a-11 if they would prevent any nomination permitted under the rule. Thus, even where a majority of stockholders want to exercise their state law rights to adopt a more stringent bylaw under Section 112, they are prevented from doing so by the mandatory provisions of Rule 14a-11. Moreover, stockholders are prevented from exercising their Delaware law right to adopt an alternative to proxy access. For example, stockholders are prevented from adopting a proxy reimbursement bylaw under Section 113 in lieu of granting access. And, of course, stockholders are prevented from determining for themselves that, in the case of their particular corporation, neither reimbursement nor access is appropriate.

Importantly, the amendment to SEC Rule 14a-8 will work in tandem with Section 112 to enable stockholders to propose and adopt such bylaws in a manner that was not previously available to them. *See* letter from James L. Holzman, Chair, Counsel of the Corporation Law Section of the Delaware State Bar Association, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, at 2 (Oct. 9, 2009) (encouraging amendment to Rule 14a-8 in order

to "encourage rapid evolution of workable access models acceptable to all constituencies."). Under the approach enabled by Section 112 and amended Rule 14a-8, stockholders would be free to make the decisions that are best for their particular corporations and to learn from each other's innovations and mistakes. Such flexibility and diversity are hallmark virtues of a system based on stockholder freedom of choice – a freedom that is exemplified by Section 112 and Rule 14a-8 (particularly in its amended form).[2] On the other hand, a government-mandated system that makes all corporate electorates bear the cost of a rigid, invariable approach, eliminates those virtues. *See* Arthur R. Pinto, *An Overview of United States Corporate Governance in Publicly Traded Corporations*, 58 Am. J. Comp. L. 257, 283 n.150 (2010) (noting that with the enactment of Section 112, "Delaware now allows the board of directors or shareholders to amend the bylaws to allow the nomination of some directors in management's proxy statement and to establish procedures for such nominations," and that "[t]he SEC proposed approach is more regulatory by providing a widely applicable rule while the Delaware approach is consistent with private ordering"); Roberta S. Karmel, *Voting Power Without Responsibility or Risk: How Should Proxy Reform Address*

[2] Rule 14a-11 will actually chill the ability of stockholders to take full advantage of the amendments to Rule 14a-8, because stockholders will be specifically precluded from proposing bylaws that adopt a system more restrictive than the 14a-11 access regime.

the Decoupling of Economic and Voting Rights?, 55 Vill. L. Rev. 93, 94, 116 (2010) (stating that, rather than the SEC's proposed Rule 14a-11, which is a "rigid command and control regime," a better access rule would permit bylaws "permitting or mandating competing shareholder and company nominations" because then, in light of Section 112 of the DGCL, "private ordering and experimentation under state law could lead to a development of various methods for election contests"); Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 Bus. Law. 361, 372 (Feb. 2010) (observing that Delaware's permissive approach to proxy access with the enactment of Section 112 better reflects "the reality of corporate law" than the SEC's mandatory approach).

SEC Rule 14a-11, rather than furthering the Delaware nomination right, flouts an important decision recently made by the Delaware legislature and signed into law by Delaware's Governor. It ignores the state of Delaware's choice to create an enabling regime as to proxy access, where such a regime embodies the Delaware tradition of flexibility and private ordering. If the goal of Rule 14a-11 was to "facilitate shareholders' effective exercise of their traditional state law rights," it fails, because it expressly grants a non-traditional, inflexible right contrary to the "traditional" rights that Delaware's General Assembly and Governor have determined to grant.

Respectfully submitted,

/s/ Lawrence W. Lewis
Lawrence W. Lewis
STATE OF DELAWARE
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8400
State Solicitor, the State of Delaware

/s/ Shannon E. German
Frederick H. Alexander
Shannon E. German (application pending)
Counsel of Record
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
falexander@mnat.com
sgerman@mnat.com
Counsel for Amicus, the State of Delaware

December 9, 2010

3951352.8

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 1,883 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it was prepared in a proportionally-spaced typeface using Microsoft Word 14-point Times New Roman font.

/s/ Shannon E. German
Shannon E. German

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2010, I electronically filed the foregoing BRIEF OF THE STATE OF DELAWARE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I also hereby certify that I caused five (5) copies to be hand-delivered to the Clerk's Office.

Service was accomplished on the following counsel by the CM/ECF system:

Michael A. Conley
ConleyM@sec.gov
Randall W. Quinn
quinnr@sec.gov
Michael L. Post
postm@sec.gov
Tracey A. Hardin
hardint@sec.gov
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Eugene Scalia
escalia@gibsondunn.com
Daniel Jerome Davis
ddavis@gibsondunn.com
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Jeffrey Alan Lamken
jlamken@mololamken.com
Molo Lamken LLP
The Watergate
600 New Hampshire Avenue, NW
Washington, DC 20037

Timothy J. Simeone
tsimeone@wiltshiregrannis.com
Christopher J. Wright
cwright@wiltshiregrannis.com
Wiltshire & Grannis LLP
1200 18th Street, NW, 12th Floor
Washington, DC 20036

George Eric Brunstad, Jr.
Dechert LLP
90 State House Square
Hartford, CT 06103

Amar D. Sarwal
Robin S. Conrad
National Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062-0000

Steven Andrew Engel
steven.engel@dechert.com
Ruth S. Epstein
Dechert LLP
1775 Eye Street, NW, Suite 900
Washington, DC 20006

/s/ Shannon E. German
Shannon E. German