

# SPECIAL SECTION

Hot Issues Alerts

## Corporate Governance Developments In Washington

By Thomas Quaadman

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Over the past several weeks, the debate on financial regulatory reform has intensified and as a result there have been a number of important developments to update everyone on.

### SEC Happenings

As we all know the Securities and Exchange Commission has been engaged in a rule making regarding proxy access rules. While the comment period was only open for 60 days, the SEC received a large volume of letters expressing many concerns and raising several issues related to this proposal. In fact, a cursory review of the SEC's website shows that they are still posting new comment letters as they are received and that SEC Commissioners and Staff are engaged in meetings with



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many people and organizations representing diverse viewpoints.

Because this debate is still ongoing and due to the volume of input that it has received, the SEC announced in early October that it would not take up a final consideration of proxy access until early next year, probably sometime in February. Therefore, any potential changes to proxy access will not be effective until the 2011 proxy season at the earliest. One of the reasons for delay is concern that the SEC's authority to engage in proxy-access rulemaking will be challenged in the courts.

Additionally, the SEC has been engaged in rulemaking on increased proxy disclosures and solicitation enhancements. The comment period closed on September 15, and it is expected that the SEC will finalize the rule making in early December so the new rules will be effective for the 2010 proxy season.

### Waters Amendment to the Investor Protection Act

Representative Barney Frank (D-MA), chair of the House Financial Services Committee, has publicly stated that he will not take up corporate governance legislation until the Committee has completed its work on financial regulatory reform, which would be in early 2010. The effort in the House is being spearheaded by Representatives Gary Peters (D-Mich.) and John Campbell (R-Calif.).

However, because of concerns related to legal challenges that may dispute the SEC's authority to issue proxy access rules, Representative Maxine Waters (D-Calif.) offered a clarifying amendment to the Investor Protection

## Two Tracks For EFCA In 2010

By Glenn Spencer

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Despite repeated statements to the contrary, it is highly likely that 2009 will have come and gone without passage of organized labor's top priority: the so-called Employee Free Choice Act (EFCA). However, no one with an interest in this legislation should let down his guard. While health care currently dominates the issues landscape, union leaders have made it clear that once health care moves off center stage, EFCA will come roaring back. On November 16, for example, *Roll Call* quoted AFL-CIO president Richard Trumka as saying: "We're committed to getting health care done...and then we'll get to the Employee Free Choice Act...I feel very confident that in the wake of health care, you'll see that we'll get the Employee Free Choice Act done." On November 6, Andy Stern of the Service Employees International Union (SEIU) added: "I think after we get through this health care situation...we are going to see a change in our labor laws."

These types of premature announcements of victory are nothing new – such assurances have been commonplace throughout 2009. But what makes it more likely than not that EFCA will see some type of action early next year is increasing anxiety within the union movement that time is running out. If EFCA proved too hot to handle in the first session of the 111th Congress, it may be even less palatable in the middle of an election year. And if recent polling (not to mention off-year election results) is any indication, the Democrats' 60 seat lock on the Senate may come undone in November 2010. Adverse results in that election, from the union perspective, will push EFCA not just to the back burner, but possibly off the stove completely.

If the time for pro-EFCA forces to push is early next year, a key question is what product will be the focus of that push. The original version of the bill (S. 560, H.R. 1409), with its de facto elimination of secret ballots and forced government arbitration, looks increasingly unlikely to garner 60 votes. And the group of seven senators attempting to craft an alternative bill has yet to devise the magic formula that brings enough senators on board and still meets the unions' objectives. Numerous proposals have been floated, but thus far, unions have made it clear that these fall short of their expectations.



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Where those negotiations ultimately lead, if anywhere, is still unclear. This much, however, is certain. At some point next year, union leaders in Washington will simply demand that Senate Majority Leader Harry Reid give them a vote. And despite the howls of protest that will erupt from within his own caucus, he is likely to comply, even if it's a vote he thinks he may lose.

But unions aren't just waiting around for the Senate to act. "Plan B" for enactment of EFCA by other means is already underway. And Plan B has a name: Craig Becker.

Becker is currently the Associate General Counsel for the SEIU. He has also been nominated to fill one of the vacancies on the National Labor Relations Board (NLRB). The NLRB is entrusted with overseeing union certifications and investigating unfair labor practice charges, and Becker has some very "unique" views about how labor law should be interpreted and enforced.

For example, Becker has written that "employers should be stripped of any legal cognizable interest in their employees' election of representatives." This radical view would even extend to prohibiting employers from alerting the NLRB to illegal campaign conduct. In the same law review article quoted above, Becker wrote that "employers should have no right to raise questions concerning voter eligibility or campaign conduct." Taking such views one step further, Becker believes that employers shouldn't even be heard when it comes to most NLRB cases, writing: "employers should have no right to be heard in either a representation case or an unfair labor practices case."

Becker has also indicated his support

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## Corporate Governance

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Act (H.R. 3817). The Water's Amendment simply states that the SEC has the authority to issue rules on shareholder's access to the company proxy if it chooses to do so. This amendment does not direct the SEC to take any action, rather it just elucidates that the SEC has the power to act if it wishes too.

The Water's Amendment passed the House Financial Services Committee by a vote of 39-30 on November 4. Floor consideration of the Investor Protection Act is expected to take place in December. Despite the passage of the Waters Amendment, the House Financial Services Committee is expected to take up the Peters-Campbell effort early next year.

### The Dodd Bill

On November 10, Senator Christopher Dodd (D-Conn.), chair of the Senate Banking Committee, released a discussion draft of his version of financial regulatory reform legislation. The Dodd announcement compliments the release of proposals by the White House and Representative Barney Frank earlier this year. The markup of the Dodd bill is expected to start before Thanksgiving with the Banking Committee should complete consideration before Christmas. Full Senate consideration is not anticipated until next year, and it may take months for the House and Senate financial regulatory packages to be reconciled and a final proposal ready for passage.

The Dodd bill contains a series of corporate governance provisions, many of which are modified versions of proposals contained in the Shareholder Bill of Rights proposed by Senator Charles Schumer (D-NY) earlier this year. The Dodd bill includes:

**Majority Voting** - The Dodd bill mandates that uncontested directors must be elected by a majority. An uncontested director who receives less than a majority vote must submit his resignation to the Board. The Board may refuse to accept the resignation with a public explanation. The Schumer bill did not allow for the resignation to be rejected.

**Proxy Access** - Within 180 days of the Dodd bill becoming law the SEC must issue proxy access rules. The Dodd bill does not include thresholds as the Schumer bill does.

**Leadership Disclosures** - Rejecting the provisions of the Schumer bill that mandated the separation of the Chairman and CEO positions, the Dodd bill requires the disclosure of the leadership structure and an explanation of why that structure is being used. The Dodd bill is similar to the disclosure regime contained in the SEC proposed proxy disclosure and solicitation enhancements rule.

**Staggered Board** - The Dodd bill

prohibits staggering the terms of directors, unless specifically authorized by a vote of the Shareholders.

These four provisions would be applicable to all public companies and a failure to comply with these legal requirements would also be considered a violation of exchange listing rules. The Dodd bill also gives the SEC explicit authority to exempt companies from any or all of these requirements based upon the size of the issuer and other criteria the SEC deems important.

The Dodd bill also includes a number of requirements on executive compensation and governance, applicable to public companies, but without any opt-out authority for the SEC. These provisions include:

**Say on Pay** - Non-binding advisory shareholder vote on executive compensation.

**Golden Parachutes** - Shareholder votes on golden parachute policies for issuers.

**Compensation Committees** - Compensation committees must be independent and can employ their own consultants and legal counsel. Requirements regarding the independence of the committee and the consultant will largely be left up to SEC rule making.

**Claw backs** - The Dodd bill also mandates issuers to develop policies for claw backs of incentive based compensation if the company must issue restatements of financial reports related to material non compliance with securities laws.

Finally, the Dodd bill also includes a series of governance provisions for financial institutions and those that are determined to be systemically important by the newly proposed Agency for Financial Stability ("AFS," the Systemic Risk Regulator) and the proposed consolidated banking regulator, the Financial Institutions Regulatory Administration ("FIRA"). These provisions include:

**Risk Management Committees** - Systemically important financial institutions will be required to form committees to manage risk and the AFS will determine the independence requirements of these committees. The Schumer bill had mandated risk-management committees for all public companies.

**Compensation** - FIRA may restrict the payment of compensation for senior executive officers. Additionally, excessive compensation may lead to higher capital requirements.

**Director Liability** - Directors will not be liable, if the directors acquiesce to the FDIC being appointed as a receiver in the instance that resolution authority is exercised to wind down a firm.

This represents the current state of play. The next several weeks will be crucial as the House attempts to put the finishing touches on its work and the Senate begins its undertaking in earnest.

## EFCA

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for barring employers from playing a role in unit determinations, removing employer observers from polling sites, preventing employers from challenging NLRB rulings in federal court and granting union organizers access to an employers' private property. All of these positions seem at odds with past board precedents, court decisions and decades of labor law.

Becker's opinion is that many of these dramatic steps could be taken regardless of whether or not Congress amends the National Labor Relations Act. For example, Becker has written

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## Corporate Counsel Organization Highlights

### ACC Issues Policy Statement Supporting Business Courts

At its 2009 Annual Meeting in Boston, the Association of Corporate Counsel adopted a statement promoting the use of business courts for resolution of business disputes, an update of a similar statement passed in 1996 by ACC's predecessor organization.

To reflect developments since the original adoption of the policy, ACC has reaffirmed its support of the statement. Though substantial progress has been made since 1996 in creating business courts, there remain 34 states that do not have business courts, and many states have business courts in only one location. Funding issues in some states present obstacles to the continuation and expansion of such courts.

Therefore, ACC supports the efforts of those seeking expansion of business courts to ease pressure on overcrowded state court systems. The 2009 version follows:

#### Business Courts

The Association of Corporate Counsel urges states to consider wherever appropriate the advantages of specialized procedures for resolution of business disputes. ACC believes that the most effective way to realize such advantages is for states to create business courts or specialized court divisions or parts dedicated to business litigation.

The United States has a large and sophisticated business community with unique legal needs. Businesses have increasingly turned to other forums to resolve their disputes, to avoid the difficulties often encountered in overburdened state courts. The United States should have public state court systems that can resolve commercial disputes efficiently. Business courts result in more cost-effective and timely case processing and an improvement in the quality of dispositions. They therefore foster a more favorable environment for creating and maintaining businesses, and as a result enhance the economic well-being of the nation.

Business courts ease pressure on overcrowded state court systems.

that new restrictions on employers' activities during elections "could be achieved with almost no alteration of the statutory framework." It is hardly a stretch to suggest that this same view might hold with regard to the provisions of EFCA.

Becker's nomination has cleared the Senate Health, Education, Labor and Pensions committee, but is the subject of a hold that will prevent a full confirmation vote — for now. Much like what an alternative version of EFCA could look like, how long the nomination stays in legislative Purgatory is an open question. But it's a safe bet to say that next year will be a very interesting one in the field of labor law.

Removing complex commercial cases from other parts of the courts allows those parts to function more efficiently and reduces the possibility that a few complicated commercial cases will displace the time and attention that the many other cases pending in those parts should receive. The legal issues in commercial litigation are often complex. Efficient resolution of these disputes requires the expertise of judges experienced in these areas and skilled at handling these cases.

Business courts can effectively utilize the following types of features to facilitate dispute resolution:

1. Advanced case management techniques, including close judicial oversight of each stage of litigation and case tracking by type and complexity.
2. State of the art technology.
3. Court-annexed alternative dispute resolution to encourage early case settlement.

4. Cooperation among counsel and with the court in achieving a cost-effective resolution of the dispute.

On June 13, 1996, the Board of Directors of the American Corporate Counsel Association (predecessor to ACC) adopted a policy statement supporting the creation of business courts. At the time that statement was adopted, four states had created business courts and a number of additional states were considering the concept. Since that time, 12 additional states have created business courts, and such courts now exist in 16 states. The business community in the United States and its legal counsel have had numerous opportunities during the past 13 years to observe and evaluate the operations of business courts and the contributions they have made to state courts. The experience of the states which have created business courts has been positive and presents a strong argument for expanding the use of such courts.

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