

An Economic Analysis of Universally Mandated Versus Private Ordering for Proxy Access

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The SEC Office of Economic and Risk Analysis has made available on its website a lengthy [working paper](#) on proxy access, specifically on the trade-offs between universal proxy access through federal regulation and the “private ordering” of proxy access through shareholder proposals. The main question that the paper attempts to address is whether private ordering would be able to realize or surpass the enhancement in shareholder value that could result from universal proxy access. The paper concludes that while private ordering does lead to an increase in shareholder value, since the announcement of the adoption of a bylaw causes a 0.5% boost, it is nonetheless a “second best outcome” that does not efficiently deliver proxy access to the companies that the authors find need it most. Since this is an economics analysis, the authors focused on market returns upon the SEC’s announcement that it was staying the proxy access rules in 2010. News accounts document that the stay was a surprise, and the market reacted just after the announcement, which supports the assertion that the returns could be attributed to the stay. The group of companies that had lower returns are viewed as the “targeted firms” that “would have benefited the most” from proxy access.

The authors seem to find it surprising that proponents are not sending proposals to the targeted firms that would seem the most likely to derive the highest shareholder value from proxy access. Instead, they find that shareholders are more likely to submit proposals “at large firms with fewer growth opportunities,” which the authors speculate may be due to the desire for increased attention “on proponent interests” or to build publicity for proxy access, among other reasons. This lack of correlation between the companies that are receiving proposals and the expected benefit of universal proxy access leads to the conclusion that private ordering “falls short” when compared to universal proxy access.

A footnote to the article indicates that the views expressed belong solely to the three authors, two of whom are employees of the SEC, and are not the views of the Commission.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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