The Upcoming Showdown on Shareholder Proxy Access

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The spring of 2013 will be a watershed moment in the battle between shareholders and boards for control of publicly-traded corporations in the United States. At issue will be whether significant shareholders should be allowed to place nominees for the board on the company's own proxy statement. In the absence of this kind of "shareholder proxy access," shareholders who disagree with the company's direction have to engage in an expensive and time-consuming campaign against the incumbent board, which (as a practical matter) has meant that virtually all director slates run unopposed. Proponents of proxy access argue that some modest competition in the director election process is desirable, and that giving larger investors more influence in the director election process would benefit all shareholders. Opponents of proxy access argue that it would shift a dangerous amount of power to certain kinds of shareholders (for example, union pension funds) who could pursue objectives counter to shareholder value maximization, and that proxy access might deter some well-qualified directors from serving on corporate boards.

So who's right? Shareholder proxy access is one of the most hotly debated topics in all of business law, and there will probably never be a definitive answer to this question. But we can gain some insight from our recent on-and-off experience with comprehensive proxy access. In August 2010, under authority granted by the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC promulgated a comprehensive proxy access rule that would have applied to all U.S. public companies. But on October 4th, 2010, the SEC unexpectedly delayed the implementation of its rule in response to a legal challenge from the Business Roundtable, and on July 22nd, 2011, the D.C. Circuit Court of Appeals agreed with the Business Roundtable's arguments and struck down the rule. The SEC backed down from comprehensive proxy access but implemented rules that facilitated proxy access on a company-by-company basis, should shareholders want it. Commentators are predicting that shareholder proxy access will be the hot issue in the spring 2013 proxy season, as shareholders at U.S. public companies demand access to the company's own ballot.

In our research, we examined the shareholder base of all U.S. public companies to determine their degree of vulnerability to the SEC's 2010 rule. We then calculated the return to each of these companies on October 4th, 2010, when the SEC delayed its Rule, and July 22nd, 2011, when the D.C. Circuit struck down the Rule. The findings, forthcoming in the *Journal of Law & Economics*, show that companies that would have been most vulnerable to shareholder proxy access declined significantly in value compared to companies that would have been more insulated from the rule on these two dates, after controlling for market movements and other factors. In fact, companies that had more traditionally "activist" institutional investors declined the most. These findings suggest that the SEC's comprehensive rule increased value for U.S. public companies, on average, and when shareholder proxy access disappeared the market took that value away. For the S&P 1500, we estimate that the value loss amounted to approximately $70 billion in the aftermath of the October 4th announcement alone.

Not every company is the same, of course. Shareholder proxy access may be a terrific idea for companies that have not adequately pursued shareholders' interests, but an unnecessary nuisance

for companies that are more responsive to shareholders. Shareholders should make a case-by-case determination on whether to vote for proxy access in the 2013 proxy season. But our recent experience with comprehensive shareholder proxy access provides a natural experiment that sheds light on which way shareholders should be leaning in their decision. Our research suggests that shareholders should generally favor proxy access, unless contextual factors suggest that the company is already sufficiently responsive to shareholder interests.