

## WHAT THEORY AND THE EMPIRICAL EVIDENCE TELL US ABOUT PROXY ACCESS

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Corporate and securities laws have traditionally endowed a public company's board of directors with exclusive authority to decide whether shareholder proposals on proxy access are included in the company's annual proxy solicitation materials. Recently, the Securities and Exchange Commission (SEC) amended its rules to allow such proposals to be included whether or not the board approves. But what are the consequences of potentially empowering a small group of privileged shareholders, in addition to the board, to decide which nominees for election to the board will be included in a public company's proxy solicitation materials (its proxy statement and proxy voting card)?

In a new paper for the Mercatus Center at George Mason University, corporate governance scholar Bernard S. Sharfman demonstrates that there is a strong theoretical argument against the SEC's current rule about proxy access proposals. Additionally, the empirical support for universal proxy access is weak and conflicting, and the SEC must consider this evidence before requiring universal proxy access.

To read the entire paper and learn more about its author, please see "[What Theory and the Empirical Evidence Tell Us about Proxy Access.](#)"

### WHAT IS PROXY ACCESS?

Traditionally, the board of directors and its nominating committee have controlled the nomination of candidates to serve as board members. Proxy access is the ability of certain privileged shareholders to have their own slate of director nominees included in the company's proxy solicitation materials for purposes of voting at the annual meeting, whether or not the board of directors approves of these nominees.

Under the SEC's new regime, proxy access can be implemented on a company-by-company basis, either through a binding shareholder-initiated bylaw approved by shareholders at the annual meeting or through a board-implemented charter amendment or bylaw. Universal proxy access

For more information, contact  
Kate De Lanoy, 703-993-9677, [kdelanoy@mercatus.gmu.edu](mailto:kdelanoy@mercatus.gmu.edu)  
Mercatus Center at George Mason University  
3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

would sidestep this company-by-company process for almost all public companies by automatically allowing certain privileged shareholders to place nominees for the board into the proxy solicitation materials—without the need for a charter amendment or bylaw. The SEC has yet to implement universal proxy access.

## KEY POINTS

Corporate law, governance theory, and the available empirical evidence on the value of proxy access to shareholders show that proxy access is contrary to well-established principles of corporate law and governance and likely does not enhance shareholder wealth.

- *The SEC’s proxy access rule is inefficient.* By requiring corporations to include shareholder proposals on proxy access in their proxy solicitation materials, the SEC is not enhancing the “private ordering” of a company’s governance arrangements. Instead, the rule acts as a federal barrier to the more efficient approach of allowing the board to exclusively determine which nominees should appear in the company’s proxy materials.
- *Regulators should assume that corporate boards are better suited to identify the best candidates to serve on the board than activist shareholders.* The superiority of board decision-making for the purposes of nominating directors shows that proxy access is an inefficient and unnecessary means of nominating and electing directors. Directors are in a better position than shareholders to determine whether shareholder-proposed nominees should be included in the proxy materials.
- *Strong empirical evidence could rebut the presumption that the board is in a better position to identify the best candidates, but the evidence currently available does not do so.* The presumption is that the “preservation of managerial discretion” in the nomination of directors is wealth enhancing for shareholders. Empirical evidence that consistently shows proxy access to be wealth enhancing for shareholders could rebut this presumption, but the available empirical evidence does not support such a conclusion. Before moving forward with universal proxy access, the SEC should consider the mixed empirical evidence and reject universal proxy access as a solution to a problem that does not exist.

## POLICYMAKER TAKEAWAY

Shifting the decision-making authority of public companies through proxy access risks inefficient corporate decision-making and a loss in shareholder value. The SEC should return to its traditional approach to proxy access, allowing a board of directors to omit shareholder proposals on proxy access from a company’s proxy materials at its discretion, and should keep universal proxy access off its agenda.