California Corporate & Securities Law

Are Proxy Access Bylaws Legal?

By Keith Paul Bishop on December 8, 2011

Proxy Access Meets Private Ordering

Despite the invalidation of the Securities and Exchange Commission's proxy access rule last summer, many companies are considering, or are being forced to consider, adoption of proxy access bylaws. This is what many academics are wont to call "private ordering".

I've seen a number of recommendations concerning proxy access bylaws – whether they should be adopted, what they should say, etc. The *sub silentio* assumption is that these bylaws are legal. But are they?

Forget Maine, Remember Delaware

Remember, that Delaware in 2009 enacted legislation, H.B. 19, 145th Gen. Assem. (Del. 2009), to authorize explicitly and specifically a proxy access bylaw provision. Tit. 8, Del. Code § 112.

Don't Even Think About Discriminating In California

California, in contrast, has enacted no such provision. The current General Corporation Law would seem to rule out discriminatory bylaws. Indeed, at least two statutes mandate equality. Section 400(b) provides:

All shares of any one class shall have the same voting, conversion and redemption rights and other rights, preferences, privileges and restrictions, unless the class is divided into series.

In addition Section 203 provides:

Except as specified in the articles or in any shareholders' agreement, no distinction shall exist between classes or series of shares or the holders thereof.

(Don't be confused by the reference to a "shareholders' agreement". As defined in Section 186, the term has a very specific meaning limited to close corporations.)

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

My answer to the question of whether a proxy access bylaw is valid is that it depends – it depends on the law of the state of incorporation. Maybe, we'll see the question addressed in Rule 14a-8 no-action letters.

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com