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A Delaware Lawyer in Chairman Schapiro's 'Court'

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A Delaware Lawyer

I joined the Delaware Bar in 1976, and practiced with a large Wilmington law firm for 18 years before joining the Widener faculty. Since that time I've been privileged to serve on the Council of the Delaware State Bar Association's Corporation Law Section, the group that evaluates and proposes amendments to the Delaware General Corporation Law. I deeply value my association with the Delaware Bar, and I like to think that my faculty colleagues and I have enriched the relationship between the Law School and the Delaware corporate bench and bar.

So from that very Delaware-centric perspective, and in the face of often and earnestly expressed concerns about the possibility that federal law might unduly intrude on and adversely affect the role of Delaware corporate law, it was a bit surprising at first to have received a call in the fall of 2009 from the chief counsel of the Division of Corporation Finance at the SEC, asking if I'd be interested in a temporary job at the SEC working on issues implicating state corporate law.

My surprise didn't last long: the idea for the position quickly made a lot of sense. The Division of Corporation Finance is the arm of the SEC that deals with proxy voting, proxy contests, shareholder proposals, tender offers, and other matters of corporate governance within the SEC's jurisdiction. There's a very close relationship with state corporate law in these areas, and it was gratifying that the commission's staff recognized the important role of state law. So, with appreciation for the flexibility and support from Dean Ammons and the law school, I signed on to an 18-month stint in Washington, from January 2010 through June 2011.

My work at the SEC focused mostly on two projects. One was what's generally known as the proxy mechanics concept release, a top to bottom review of the way the U.S. system of shareholder voting works—or doesn't work well. Among the many topics addressed in the concept release was the role of proxy advisory firms, who supply voting recommendations and often directly execute share voting on behalf of institutional investor

clients who don't want to hire their own staffs to evaluate the thousands of voting decisions each year that they're essentially required to make. This is an increasingly important subject, as proxy voting advice significantly influences advisory shareholder votes on executive compensation (so-called "say on pay"), votes which became mandated last year by the Dodd-Frank financial reform legislation.

The more controversial initiative I worked on was what's widely known as "proxy access"—the set of rules that would have required companies in very limited circumstances to include shareholder nominees for directors in the companies' own proxy solicitation materials. I had already encountered the proxy access rules, as proposed by the commission in mid-2009, from a very different perspective. In a then unprecedented step, the Delaware bar association submitted a comment to the SEC opposing the rules as proposed. In that comment, which I helped prepare as a member of the governing council of the Corporation Law Section, the bar association was urging instead that the commission permit stockholders at individual companies to adopt proxy access bylaws authorized under the Delaware corporate statute. In essence, we were advocating an approach of choice at the individual company level—what became known as the "private ordering" approach—rather than the sort of mandatory minimum standards approach the commission had proposed.

So when I arrived at the commission, I had been actively supporting a policy position that was at odds with the proposal then being advanced by the commission. And when I was asked to work on the process of refining that proposal and crafting a final rule, I had to give some thought to my role. Obviously, I was free to advocate within the commission for modifications to the proposal. Most importantly, though, I was there as a lawyer for the commission. So I realized that my job was not to tell the commissioners what proxy access rules to adopt, but to give my best professional advice about the merits of the final rules, and how best to write those rules, particularly in the areas in which they interacted with state corporate law.

It was an interesting job and turned up a surprising number of largely unexplored questions of state law: To what extent can state law limit the right to nominate directors? Can a charter provision, or bylaw adopted by the board, take away that right entirely? Can a bylaw deny the right to nominate candidates who don't meet certain qualifications? Can it take away the right to nominate if certain information about the nominator or the

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Portrait of Judge Helen S. Balick

In the accompanying article, Professor Hamermesh describes a mutually beneficial relationship between the law school and the Delaware corporate bench and bar. The law school is moving forward with an effort to develop a similar symbiotic relationship with the Delaware bankruptcy bench and bar.

The newly established Helen S. Balick Chair in Business Bankruptcy Law honors Judge Balick's pivotal role in the national development of business bankruptcy proceedings. The chair is intended to stimulate and coordinate constructive debate on issues germane to business bankruptcy law through publication of scholarly articles, print and web-based publications on business bankruptcy topics, and by promoting the teaching and training of students, judges, and practicing lawyers in the business bankruptcy field.

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nominee isn't provided? It might be valid to nominate a candidate who doesn't satisfy a bylaw qualification like owning stock (which can be bought after election but before being seated as a director), but is it valid to nominate a candidate who will never be able to satisfy some other valid bylaw qualification? And what qualifications could be valid, and what qualifications would unreasonably impair the stockholders' ability to elect directors?

In the final proxy access rule (Rule 14a-11) adopted in August 2010, the commission rejected the private ordering approach, although the minimum standards adopted were really quite limited: to put any candidate in the company's proxy material, the nominating stockholder had to have owned 3% of the company's stock for at least three years. Nevertheless, and even though Congress in the Dodd-Frank Act expressly gave the SEC the authority to adopt the proxy access rules, a suit was brought to invalidate those rules on the theory that the commission hadn't adequately considered their costs and benefits. Last July, the D.C. Circuit agreed, finding the commission's actions "arbitrary and capricious" and therefore invalid.

My reaction to that ruling, I admit, was motivated in part by my own personal investment in the rulemaking effort and my acquaintance with the other SEC staff members who worked incredibly hard, intelligently, and carefully on the rule release. But I'm also concerned about the impact of the D.C. Circuit's decision on rulemaking in general. As I wrote last fall:

> *In concluding that the commission failed in its duty to evaluate the economic consequences of Rule 14a-11, the court engaged in a remarkable display of judicial activism. The court referred to one study indicating that Rule 14a-11 would have deleterious economic consequences, and acknowledged that the commission considered that study but found it unpersuasive in light of subsequent studies criticizing it. The court even acknowledged that the commission relied on two studies suggesting that proxy access would promote positive economic returns. Somehow, however, the court determined that these two studies were "relatively unpersuasive." That determination, critical to the entire ruling, was truly remarkable. Those studies may well be erroneous in one or more ways. But are courts now in the business of rendering unexplained and unreviewable evaluations of empirical studies? If the court made some analysis to determine that the two studies relied on by the commission were "relatively unpersuasive," it certainly did not share that analysis with the public, nor did it articulate any institutional comparative advantage that gave its economic judgments priority over those of the commission. And it most certainly did not even cite the leading Supreme Court opinion (Chevron) on the question of the deference owed by courts to administrative agencies acting within the sphere of their delegated authority. ... This result may well appeal to ideological opponents of regulation, but not to those who believe that reasonable regulation of securities markets is essential to an economically efficient system of capital formation.*

In short, I think the DC court decision seriously weakened the commission and maybe other administrative agencies as well.

Perhaps this experience with the DC Circuit is part of the larger set of political tugs and pulls that brought about perhaps the most curious experience I had in Washington. Last spring, as Congress was locked in a cliffhanging controversy about the federal budget, we were all told to prepare for a government shutdown. I left work on a Friday not certain when or even whether I'd be back in the office, or when or even if I'd get paid again. Conferring with outside parties was surreal: "this is what we can tell you today; you could get back to us next Monday, but if we're not here, we won't be able to give you any further guidance." When I left on Friday, all I knew was that my Blackberry would vibrate sometime that weekend with further news.

Of course, a deal was cut late that night, and I finished my tour of duty a few months later. Despite the frustrations, I don't regret a day of it.