

ICI VIEWPOINTS

SEPTEMBER 14, 2011

Commentary: Court Strikes Down SEC's Proxy Access Rule

By Dorothy Berry

On July 22, the United States Court of Appeals for the District of Columbia Circuit vacated the proxy access rule adopted by the Securities and Exchange Commission (SEC) last year. The court found that the SEC had failed to adequately assess the economic effects of the rule and noted in particularly harsh terms the SEC's failure to adequately address the rule's impact on investment companies. The case was brought by the Business Roundtable and the U.S. Chamber of Commerce, and IDC filed an amicus brief jointly with ICI in support of their petition to vacate the rule as applied to investment companies. We're pleased with the result but disappointed that it took a litigated action to get here.

During the comment process, IDC, ICI, and others had pointed out the important differences between operating companies and investment companies and the burdens to funds of the SEC's "one size fits all" approach. We questioned the policy basis for extending the rule to investment companies when fund shareholders have significant protections under the 1940 Act and explained the detrimental and costly impact it could have to the unitary and cluster board structures of fund boards. We reiterated those arguments in our brief to the court.

We are heartened that the court heard and understood our concerns. While it vacated the rule as applied to all companies, the court found it "prudent to take up the more serious concerns posed by investment companies" in case the SEC on remand applied a newly justified version of the rule "only to be met in court again by valid objections."

This is the fifth time since 2005 that this court has struck down an SEC rule, and the third decision based on the agency's failure to properly weigh economic consequences. The court's message to the SEC is loud and clear: a robust economic analysis, as required by statute, must be undertaken before adopting any future rules. The court also made it emphatically clear that the SEC must take into consideration the unique structure of mutual funds in imposing new regulatory requirements intended for public operating companies. These required undertakings are necessary to promote and protect the interests of fund shareholders. We expect the SEC will satisfy these important obligations in its future rulemakings.

Update: The SEC recently confirmed that it will not seek a rehearing of the court's decision, nor will it seek Supreme Court review.

Dorothy A. Berry is independent director of PNC Funds; independent chair of Professionally Managed Portfolios, and chair of the Independent Directors Council Governing Council.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete.

Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.