

Will Private Ordering Become the Norm? And How?

Recently, I [blogged](#) about a Supreme Court case - *West Virginia v. EPA* - that may have implications for the SEC's rulemaking authority going forward. When you layer the [SEC's recent rule changes](#) to unwind proxy advisor regulations that only took effect a few years ago - and the [lawsuit](#) that has now been filed in the wake of that - we have an unsteady regulatory environment that seemingly will continue to shift due to political tailwinds more than any other time in the SEC's history.

What happens when there is such a regulatory void? One possible answer is some degree of uncertainty and perhaps chaos. Another possible answer could be more private ordering than what we now have today. Both may well become our reality.

"Private ordering" is when market forces help to dictate the parameters of what companies decide to implement as part of their own internal codes and policies. In most cases, "market forces" in the corporate governance context means that large institutional investors - as well as the proxy advisors - place pressure on companies to adopt provisions in their charters, bylaws or corporate governance guidelines (or perhaps even adopt standalone policies), or merely make public disclosures, that align with positions that are championed by these stakeholders.

The growth of private ordering and the increasing importance of shareholder engagement have emerged hand-in-hand as the darlings of today's corporate governance world. Just as private ordering kept proxy access alive when the SEC's efforts to adopt proxy access rules floundered for many years, it would seem that private ordering will be the driving force to fill the regulatory void that we may face in the coming years.

The rub is how effective will that private ordering be when the resolutions may not be all that simple? For proxy access, it was pretty clear what the desired result should look like from most quarters. It may not be so easy going forward in areas like climate change where investors might not be so aligned on what they seek and industry - and individual company - situations tend to fall all over the map.

Leadership will be of paramount importance to get it right and there is reason to be concerned that various parties don't place enough trust in others so that we don't wind up making the world a better place.

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