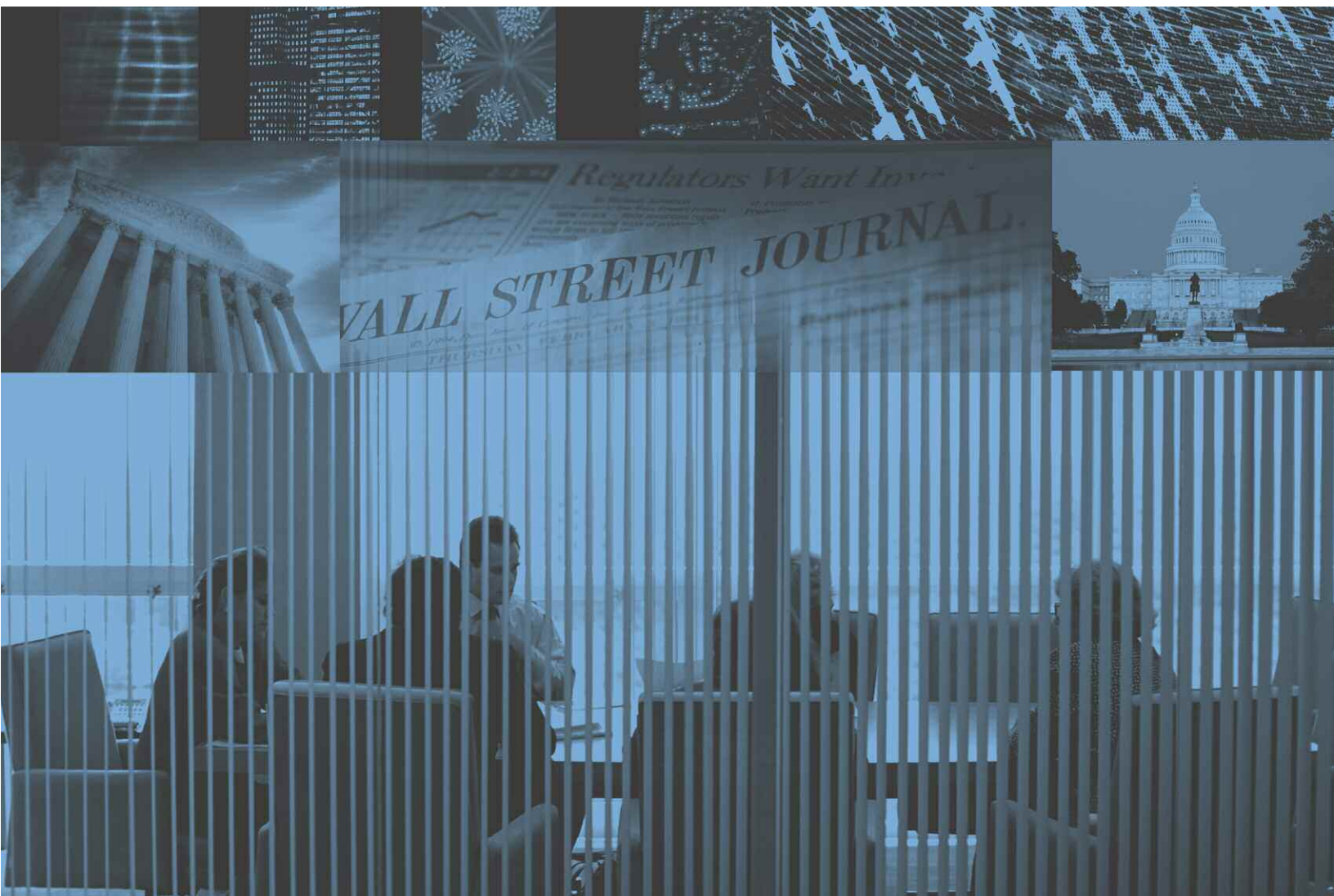


SPECIAL REPORT

Proxy Access

A Study of 500+ Letters Submitted to the SEC
on “Facilitating Shareholder Director Nominations”

November 30, 2009



Winner Biennial TOPS Awards 2004, 2006, and 2008
- *Highest Rated Proxy Solicitation Firm*

Proxy Access

A Study of 500+ Letters Submitted to the SEC on “Facilitating Shareholder Director Nominations”

November 30, 2009

This report was prepared by The Altman Group.
Authors: Kenneth L. Altman and James F. Burke

Please forward any comments or inquiries to
proxyaccess@altmangroup.com

The Altman Group, Inc.
60 E. 42nd St.
New York, NY 10165
(212) 681-9600
www.altmangroup.com



The Altman Group

Winner Biennial TOPS Awards 2004, 2006, and 2008
- Highest Rated Proxy Solicitation Firm

DISCLAIMER: This report is for educational purposes. Information contained in this report was obtained from letters sent to the SEC, and posted in the public domain on the SEC's web site. No representations or warranties are made as to the accuracy of the information and claims contained in, or derived from, those third party letters. No responsibility or liability, including for consequential or incidental damages, can be accepted for any errors, omissions or inaccuracies in this report. Nothing in this report should be deemed a recommendation or offer to purchase or sell any security. Nothing in this report should be considered or used as legal advice. All trademarks, copyrights, and comments are owned by their respective authors.

TABLE OF CONTENTS

	<u>Page</u>
<u>Summary</u>	1
1. Comments from Publicly-Traded Companies.....	6
A. Letter of 26.....	11
B. Other Publicly-Traded Companies.....	14
2. Corporate Directors Writing On Their Own Behalf.....	27
3. “Activist” Investors.....	29
4. Institutional Investors (Excluding Activists).....	32
5. Others (Mostly Unaffiliated Individuals).....	38
6. Executives of Privately Owned Companies.....	40
7. Associations.....	41
8. Providers of Proxy and Corporate Governance Services.....	51
A. Proxy Advisory Firms.....	51
B. Proxy Solicitors.....	52
C. Broadridge.....	53
D. Others.....	54
9. Law Firms and Committees of Bar Associations.....	55
10. Academics.....	59
11. Unions.....	61
12. Conclusion.....	64
A. “Fundamental Rights” and Punitive Powers.....	64
B. “Workability” Issues.....	65
C. Looking Ahead.....	66

List of Tables

Table 1: Comments to the SEC, Facilitating Shareholder Director Nominations.....	3
(# Letters Per Category)	
Table 2: Categories (Sorted).....	4
Table 3: Summary of Arguments Submitted For and Against Proposed Rule 14a-11.....	5
Table 4: Issues Raised by 111 Publicly-Traded Companies (Summary).....	7
Table 5: List of ICI Proposals to Modify Proposed Rule 14a-11.....	33
Table 6: Comparison of Proposals to Modify 14a-11 Offered by The Business.....	45
Roundtable and The Society of Corporate Secretaries & Governance Professionals	
Table 7: Law Firms Submitting Letters to the SEC on “Facilitating Shareholder.....	58
Director Nominations”	
Table 8: Publicly Traded Companies Submitting Letters on Facilitating Shareholder.....	67
Director Nominations	

SUMMARY

The SEC is considering rule changes designed, according to its Proposing Release on “Facilitating Shareholder Director Nominations,” to: “remove impediments to the exercise of shareholders’ rights to nominate and elect directors to company boards of directors. The new rules would require, under certain circumstances, a company to include in the company’s proxy materials a shareholder’s, or group of shareholders’, nominees for director. The proposal includes certain requirements, key among which are a requirement that use of the new procedures be in accordance with state law, and provisions regarding the disclosures required to be made concerning nominating shareholders or groups and their nominees. In addition, the new rules would require companies to include in their proxy materials, under certain circumstances, shareholder proposals that would amend, or that request an amendment to, a company’s governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with the Commission’s disclosure rules—including the proposed new rules.”¹ The SEC is also proposing changes to certain other rules and regulations—including existing exemptions from proxy rules and beneficial ownership reporting requirements—that may be affected by the new proposed procedures. The list of specific proposed and existing rules and regulations at issue in the Proposing Release is long,² but comments submitted focused primarily on the central issues related to the SEC’s Proposed Rule 14a-11 (federal direct “proxy access”), new Regulation 14N and Schedule 14N (notice and disclosure requirements), and proposed amendments to 14a-8 (that would enable shareholder proposals, which companies would be required to include in company proxy materials, proposing to amend a company’s by-laws concerning director nomination procedures or disclosures related to shareholder nominations).³

On June 18, 2009, the SEC’s proposed rule on “Facilitating Shareholder Director Nominations” (Release Nos. 33-9046; 34-60089; IC-28765; File No. S7-10-09) was published in the *Federal Register*. The release indicated that comments “should be” received on or before Aug. 17, 2009. After complaints about the short period for comments, the SEC continued to post additional comments on its web site

¹ “SEC: Facilitating Shareholder Director Nominations [Release Nos. 33–9046; 34–60089; IC– 28765; File No. S7–10–09],” *Federal Register*, Vol. 74, No. 116, Thursday, June 18, 2009. Also <http://www.sec.gov/rules/proposed/2009/33-9046.pdf>

² The SEC is proposing a new Rule 82a of Part 200 Subpart D—Information and Requests, and new Rules 14a–11, 14a–18, and 14a–19, new Regulation 14N and Schedule 14N, and amendments to Rule 13 of Regulation S–T, Rules 13a– 11, 13d–1, 14a–2, 14a–4, 14a–6, 14a–8, 14a–9, 14a–12, and 15d– 11, Schedule 14A, and Form 8–K, under the Securities Exchange Act of 1934. The proposed amendments would also affect disclosure via Schedule 14C.

³ The SEC’s Proposing Release stated: “We are proposing an amendment to Rule 14a–8(i)(8), the election exclusion, to enable shareholders, under certain circumstances, to require companies to include in company proxy materials proposals that would amend, or that request an amendment to, a company’s governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11. The proposal would have to meet the procedural requirements of Rule 14a–8 and not be subject to one of the substantive exclusions other than the election exclusion (e.g., the proposal could be excluded if the shareholder proponent did not meet the ownership threshold under Rule 14a–8)...revised Rule 14a–8(i)(8) would not restrict the types of amendments that a shareholder could propose to a company’s governing documents to address the company’s provisions regarding nomination procedures or disclosures related to shareholder nominations, although any such proposals that conflict with proposed Rule 14a–11 or state law could be excluded.” A footnote clarified “certain circumstances” to note that: “A proposal would continue to be subject to exclusion under Rule 14a–8(i)(2) if its implementation would cause the company to violate any state, federal, or foreign law to which it is subject, or under Rule 14a–8(i)(3), if the proposal or supporting statement was contrary to any of the Commission’s proxy rules. “SEC: Facilitating Shareholder Director Nominations [Release Nos. 33–9046; 34–60089; IC– 28765; File No. S7–10–09],” *Federal Register*, Vol. 74, No. 116, Thursday, June 18, 2009, pg. 29056. <http://www.sec.gov/rules/proposed/2009/33-9046fr.pdf>

through October 27, 2009. The following analysis is based upon a review of all letters and comments accepted and posted by the SEC through October 27th at <http://www.sec.gov/comments/s7-10-09/s71009.shtml>.

On Oct. 2, 2009, *Bloomberg News* reported that SEC Chairman Mary Schapiro delayed a final vote on the proposed rules, which had been widely expected to occur in November, in order to give staff at the SEC more time to review comments. SEC Commissioner Elisse B. Walter also commented on October 2, 2009: “I have doubts that we will be in the position to make a truly informed judgment about these rules and be able to take final action in November (as some have speculated). Although I can't give you a definitive date, I expect we will likely move forward and consider an adopting release sometime in early 2010.”⁴ The move to delay a decision was not unexpected due to: the complexity of the proposal (including a range of fundamental questions of law and jurisdiction); the potential need for enabling legislation from Congress; the breadth of the questions and “technical” issues contained in the very lengthy Proposing Release; and numerous requests in submissions to the SEC for more time to respond and to delay implementation out to the 2011 proxy season. A group of “former members of the Senior Staff of the Securities and Exchange Commission” even delivered a procedural comment on this topic recommending that the SEC not “divert its resources to these matters,” because “the problem is complex and the Commission’s legal authority to act in this area is limited.”⁵

SEC Commissioner Elisse B. Walter’s comments on October 2, which were delivered before the 48th Annual Corporate Counsel Institute at Northwestern University School of Law, offered the first public commentary from a Commissioner on letters submitted concerning the proposed rules on proxy access: “Now, I have heard some rumblings that my fellow Commissioners and I are not serious about proposed Rule 14a-11, otherwise known as our direct access proposal — in effect that we might be issuing this type of proposal to elicit comments that would justify our backing away from it. So, I want to tell you that I am, in fact, quite serious about our direct access proposal...our proposed approach, with both direct access and shareholder proposals, provides a reasonable way for us to unfetter a shareholder's franchise right. In my view, such a two-pronged approach would help ensure that shareholders have a real say in determining who will oversee management of the companies that they own...It is simply unacceptable to me for an expensive proxy contest to be the only alternative available under our proxy rules for shareholders to nominate and seek to elect directors of their own choosing. And, although I understand that more and more companies are adopting majority voting, I do not believe that this advance alone is sufficient. Quite simply, majority voting provides a more effective opportunity for shareholders to show opposition to a candidate; access to the company's proxy statement provides an affirmative opportunity for shareholders to offer a different candidate...We received over 500 detailed and thoughtful comment letters...The comment letters raise a number of complex issues, including issues related to the workability of various aspects of our proposal...Many comment letters also suggest strongly that we should allow shareholders to change their companies' access rules and, in particular, that shareholders should be permitted to approve provisions that may be more restrictive than those we've set in proposed Rule 14a-11—even provisions that deny shareholder access to the company's proxy statement ... I must say, however, that I have a less favorable reaction to those who suggest that directors should also have that unfettered choice.”⁶

⁴ Commissioner Elisse B. Walter, “SEC Rulemaking – Advancing the Law to Protect Investors,” Comments before the 48th Annual Corporate Counsel Institute (Northwestern University School of Law), Oct. 2, 2009. <http://www.sec.gov/news/speech/2009/spch100209ebw.htm>

⁵ <http://www.sec.gov/comments/s7-10-09/s71009-502.pdf>

⁶ Commissioner Elisse B. Walter, “SEC Rulemaking – Advancing the Law to Protect Investors,” Comments before the 48th Annual Corporate Counsel Institute (Northwestern University School of Law), Oct. 2, 2009.

TABLE 1**Comments to the SEC, Facilitating Shareholder Director Nominations (File No. S7-10-09)**

Letters Submitted By *	Totals as of: 27-Oct-09	# of Letters Submitted
Publicly Traded Companies		102
<i>Companies Participating in a Group Letter Dated Aug. 17 =</i>	26	1
NASDAQ	<i>Companies are listed in Table 8 (pg.67)</i>	11
NYSE	<i>Companies are listed in Table 8 (pg.67)</i>	99
AMEX	<i>Companies are listed in Table 8 (pg.67)</i>	1
	<i>Total Companies Submitting:</i>	111
Corporate Directors at Public Companies Offering Comments On Their Own Behalf		21
Executives of Privately Owned Companies (Mostly Small Business Owners)		60
Law Firms and Committees of Bar Associations (Group Letter = 1)		21
Providers of Proxy & Corporate Governance Services (Research/Advisory/Solicitors/Others)		10
"Activist" Investors		20
Institutional Investors (Excluding Those Categorized As "Activists")		33
Academics (Group Letter = 1)		8
Associations (NAM, Business Roundtable, etc.)		29
Unions		5
Others (Mostly Unaffiliated Individuals)		195
Form Letter Types A, B, C (Total excludes 1 Type C letter submitted on behalf of a company)		21
	TOTAL:	526

* Counts *exclude* posted "memoranda" on meetings, and multiple submissions from the same *author*.

* See <http://www.sec.gov/comments/s7-10-09/s71009.shtml>

More than 500 letters were received by the SEC in response, including 103 letters submitted on behalf of publicly traded companies. The latter total includes a group letter submitted by “corporate secretaries and governance professionals” of 26 publicly traded companies, including: Air Products & Chemicals, Alcoa, Allstate, Consolidated Edison, Devon Energy, DuPont, Merck & Co., Microsoft, Monsanto, Peabody Energy, Pfizer, Pitney Bowes, Eli Lilly, Honeywell, Ingersoll-Rand, Intel, Johnson & Johnson, Kraft Foods, Medco Health Solutions, Procter & Gamble, Reynolds American, Ryder System, Safeway, UnitedHealth Group, Verizon Communications, and Xerox. While most of the companies participating in that group letter submitted their own separate responses, 9 did not. Thus, the total number of publicly traded companies submitting signed letters was 111 (99 NYSE-listed, 11 NASDAQ, and 1 NYSE Amex). These companies are listed in Table 8 (starting on page 67).

The average market capitalization of companies submitting responses was \$32.39B. The very high market capitalization average captures the limited representation among the submissions of small- and mid-cap companies. It also reflects a very meager response rate among all publicly-listed companies (1.6%).

All of our categories are sorted in the table below by the number of letters submitted to the SEC on “Facilitating Shareholder Director Nominations”:

TABLE 2

Categories (Sorted)	# Letters
Others (Mostly Unaffiliated Individuals)	195
Publicly Traded Companies	103
Executives of Privately Owned Companies (Mostly Small Business Owners)	60
Institutional Investors (Excluding Those Categorized As "Activists")	33
Associations (NAM, Business Roundtable, etc.)	29
Directors of Publicly Traded Corporations	21
Law Firms and Committees of Bar Associations (Group Letter = 1)	21
Form Letter Types (SEC Categorizations) “A, B, and C” (Total, excl. 1 letter submitted by a co.)	21
"Activist" Investors	20
Providers of Proxy & Corp. Governance Services (Research/Advisory/Solicitors/Others)	10
Academics (Group Letter = 1)	8
Unions	5

* Counts exclude posted memoranda on telephone and other "meetings." Letters posted at <http://www.sec.gov/comments/s7-10-09/s71009.shtml>

SUMMARY OF ARGUMENTS

Most submissions offered generalized commentary on the subject of direct proxy access (Proposed Rule 14a-11) and revisions of 14a-8 (re: shareholder proposals). Detailed responses offered in response to the numerous questions contained within the SEC’s Proposing Release came mostly in letters submitted by critics of the direct proxy access initiative, who offered their responses as “alternative” propositions: either as proposed modifications in the event that the SEC decides to adopt some form of Proposed Rule 14a-11, or the SEC is open to considering dropping Proposed Rule 14a-11 to consider a “private ordering” alternative structured via additional revisions to 14a-8. We go into great detail in the sections below on the more specific and “technical” details addressed in the submissions. In the table below, we offer a summary overview of general arguments by proponents and opponents of Proposed Rule 14a-11 (“universal” direct proxy access).

TABLE 3

SUMMARY OF ARGUMENTS SUBMITTED FOR AND AGAINST PROPOSED RULE 14a-11 (DIRECT PROXY ACCESS)

OPPOSITION

- SEC currently lacks the statutory authority to adopt Rule 14a-11
- Curtails shareholder rights under state laws
- Creates conflicts with U.S. and state laws regarding corporate regulatory compliance reviews of director qualifications
- Conflicts with foreign laws governing shareholder rights for foreign domiciled corporations listing on U.S. exchanges
- Oppose “one size fits all” approach
- Will substantially increase the number of costly and unproductive proxy contests driven by special interest groups and event driven hedge funds
- Provides another means to effect a gradual change in corporate control
- Current mechanisms for groups and individuals to nominate directors are sufficient
- Increases short-term focus of companies (reducing long-run shareholder returns)
- Promotes dysfunctional boards
- “Private ordering” (via shareholder proposals) is a superior alternative, while a universal direct proxy access mandate is unnecessary in light of the rate of adoption of majority voting and recent changes in Delaware corporate law
- Concept of mandated direct access is inconsistent with the principle of majority voting to privately order proxy access
- Will disrupt the operations of corporations to the potential disadvantage of non-publicly traded suppliers and others who depend upon a clarity of strategy on the part of publicly traded companies
- Too many “workability” issues in current form (bordering on “unworkable,” and requiring exclusion of certain companies, including registered investment companies)

ADVOCATES

- Hold directors “accountable,” and increase options for “removing directors” who “fail” to represent shareholders’ interests (punitive)
- Another mechanism to effect change of control, if necessary, to hold boards accountable
- The ability to nominate directors is a franchise/fundamental/basic “right” that should be available at all companies, and not subject to triggering events (even if shareholder majorities disagree). Basic “right” of even individual shareholders, subject to certain minimum qualifying ownership thresholds, to have “direct proxy access” must be imposed because companies and shareholders are assumed to be predisposed to systematically resist granting access rights (with “expensive” proxy fights as the only alternative).
- Eliminate exclusive board control of the proxy card and sole discretion over the mechanisms that govern their director elections
- Increase “alignment” between the interests of boards and shareowners (implicit in the argument: even if special or political)
- Improved board accountability believed to contribute to higher shareholder returns (evidence cited in the letters focused on a recent IRRC study documenting a very short-run “contest effect” associated with shareholder actions leading to director replacements and the creation of hybrid boards)

1. COMMENTS FROM PUBLICLY TRADED COMPANIES
--

Among the 111 publicly traded companies participating in formal written responses to the SEC's Proposing Release, nearly all rejected the basic concept of trying to impose a "one size fits all" and "universal" approach to "proxy access." Many argued that the Proposed Rule 14a-11 is simply unworkable, and a fatally flawed initiative. For example, Procter & Gamble noted that: "If, as the SEC states in its proposed rule, shareholders have a 'fundamental right to [directly] nominate and elect members to company boards of directors,' then shareholders also have a fundamental right to determine the rules and processes for such nominations. Proposed Rule 14a-11...is a universal approach...It's like saying that Americans have a fundamental right to eat ice cream ... but only if it's vanilla. It's an unworkable approach, as evidenced by the 400+ questions that the SEC asks in its proposed rule..."⁷ The companies argue that the Proposed Rule augurs a surge of costly, frivolous, and even "politicized" proxy contests, along with: dysfunctional boards, an increasing focus on short-term and "special interests" rather than long-term objectives, and a veritable tidal wave of contests and litigation over conflicts with shareholder rights under state and foreign laws.⁸ Some 17 companies also asked that if the SEC proceeds it should delay effective implementation out to the 2011 proxy season.

Many companies urged the SEC to delay or halt further consideration of 14a-11 in order to give them, and shareholders, more time to adjust to recent changes in regulations related to corporate governance and communications issues, including "e-proxy" rules that went into effect in 2007, Amended NYSE Rule 452, and recent changes in Delaware corporate law (including Sections 112 and 113, which became effective Aug. 1, 2009). Indeed, there was particular concern that the companies be given some time to assess the impact of Amended NYSE Rule 452, not least because the latter will make attaining quorum and 'majority' votes for directors harder, as well as increase the risk of failed director elections at corporations with majority voting.

Several companies argued that the SEC has no statutory authority to adopt Proposed Rule 14a-11,⁹ and took note of Commissioner Kathleen Casey's words from May 20, 2009, acknowledging that there is "significant doubt" on this issue.¹⁰ IBM concluded that "the Proposal ignores the fundamental premise of existing corporate law -- that directors -- not shareholders -- have well-established and understood fiduciary duties to act in the best interests of the company and its shareholders."¹¹ MeadWestvaco cited Justice Powell in *CTS Com. v. Dynamics Corp. of America*. 481 U.S. 69 (1987): "No principle of

⁷ Procter & Gamble (Steven W. Jemison, Chief Legal Officer), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-221.pdf>

⁸ A Swiss company listed on the NYSE, ACE Ltd., sought to remind the SEC that "the proposed rules constitute an unnecessary expansion of the role of the United States federal government in the internal governance of corporations created by the law of other countries and American states." ACE Ltd.(Robert F. Cusumano, General Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-482.pdf>

⁹ Perhaps the most detailed response by a company on the subject of statutory authority was offered by AT&T's Wayne Watts (General Counsel) in a letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-209.pdf>

¹⁰ Ameriprise Financial (Thomas R. Moore, Chief Governance Officer), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-487.pdf>

¹¹ IBM (Andrew Bonzani, Assistant General Counsel), letter to the SEC dated Aug. 12, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-108.pdf>

corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.”¹²

Most companies submitting letters focused their comments on Proposed Rule 14a-11, rather than discussing the possible merits of an “alternative” regime of incremental change via amendments to Rule 14a-8. Indeed, tw telecom asked that the Commission consider a new comment period if it moves to adopt changes to Rule 14a-8 without Rule 14a-11.

A substantial number of comments offered support for amending Rule 14a-8 to allow shareholder proposals relating to the director election process. BNSF called for “an amendment to Rule 14a8(i)(8) to allow proposed by-law amendments by shareholders to permit access as long as it is allowed under state law.”¹³ Many companies argued that they should have more time to experiment with and determine the forms of proxy access suitable for their companies (so-called “private ordering”). For example, Best Buy supported the “private ordering” approach as “preferable to a mandatory ‘one size fits all’ uniform federal Rule 14a-11 approach fraught with practical workability issues.”¹⁴

Some companies noted that the breadth of questions presented by the SEC in its Proposing Release reflected just how complex a “universal” system can be in practice. The subject matter raised in the Proposing Release resulted in the companies addressing a broad range of issues and proposals for modifications, but only in the event that the SEC proceeds to adopt Proposed Rule 14a-11. A detailed summary of issues raised by formal company responses is provided here - condensed into a single table (showing selected company positions identified in [brackets]).

TABLE 4

FACILITATING SHAREHOLDER DIRECTOR NOMINATIONS: ISSUES RAISED BY 111 PUBLICLY TRADED COMPANIES (SUMMARY)

1. General *opposition* to Proposed Rule 14a-11 and a “universal” proxy access system:
 - A. SEC currently lacks the statutory authority to adopt Rule 14a-11
 - B. Curtails shareholder rights under state laws
 - C. Creates conflicts with U.S. and state laws re: corporate regulatory compliance reviews of director qualifications
 - D. Conflicts with foreign laws governing shareholder rights for foreign domiciled corporations listing on U.S. exchanges
 - E. Oppose “one size fits all” approach
 - F. Will substantially increase the number of costly and unproductive proxy contests driven by special interest groups and event driven hedge funds
 - G. Provides another means to effect a gradual change in corporate control
 - H. Increases short-term focus of companies (reducing long-run shareholder returns)
 - I. Promotes dysfunctional boards
 - J. “Private ordering” (through shareholder proposals) is a superior alternative to direct access

¹² MeadWestvaco (Wendell L. Willkie II, General Counsel), letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-233.pdf>

¹³ BNSF (James H. Gallegos (Corporate General Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-315.pdf>

¹⁴ Best Buy (Todd G. Hartman, Associate General Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-486.pdf>

2. If SEC Proceeds to Adopt, Then Suggested Changes to Proposed Rule 14a-11 Include:

- A. Delay effective implementation date out to the 2011 proxy season [AGL Resources, Alcoa, Cigna, Cummins, Deere, Eaton Corp., FMC Corp., General Mills, ITT Corp., Leggett & Platt, McDonald's, Office Depot, PepsiCo, Ryder System, Sara Lee, Sherwin-Williams, Whirlpool]
- B. Oppose elimination of a company's board nominating committee from the director selection and nomination process [numerous companies]
- C. Number of shareholder director nominees that should be permitted to be nominated and serve on a board at any one time should be limited [Wells Fargo]. Each nominating shareholder or group should be limited to one director nominee at each annual meeting [Aetna, Deere, Eli Lilly, FMC Corp, Frontier Communications, JPMorgan Chase, ITT Corp., Leggett & Platt, McDonald's, U.S. Bancorp,]. One nominee only - to give opportunity to multiple nominee stockholders [BorgWarner]. Lower the maximum # of total shareholder nominees in a single year to 10-15% of the company's board of directors (10% [Aetna, American Express, Boeing, Honeywell, Northrop Grumman, Sara Lee, Lionbridge], 15% [Allstate, BorgWarner, Headwaters, U.S. Bancorp, Wells Fargo], 20% [Callaway Golf]). Shareholders nominating a bloc of directors should be required to conduct a traditional proxy contest [JPMorgan Chase]. Maximum number of shareholder nominees would be equal to the greater of one director or 25% of the number of directors that may be elected by the class of securities held by the shareholders seeking to make the nomination [New York Times].
- D. Clarify that if the Board endorses the proxy access nominee then that nominee will continue to count as a shareholder nominee for purposes of meeting the proxy access director "cap" [BorgWarner, DTE Energy]
- E. Clarify post-election designation of an elected proxy access director. Shareholder-designated nominees should remain as such after election either indefinitely or for a specified period of time (e.g., 5 years), unless the company's nominating or corporate governance committee (or its board) determines otherwise [Pfizer].
- F. Constraints on aggregation for purposes of Proposed Rule 14a-11....Limit groups to four shareholders with a written agreement [Allstate]. No group aggregation [Cummins, Norfolk Southern, Wells Fargo, Weyerhaeuser]. Minimum ownership percentage for each stockholder that participates in a group, and permit each stockholder to participate in only one group [Sara Lee]. If individual nominating shareholder or group reduces ownership after notice, then shareholder/s and nominees are ineligible to continue under the proxy access process – no post-notice substitutions to get a group above the threshold [Verizon].
- G. Raise ownership thresholds for qualifying to nominate a director. For shareholders acting alone – 2% [ADP], 3% [Best Buy], 5% [Letter of 26, Advance Auto Parts, American Express, Best Buy, BNSF, Boeing, BorgWarner, Consolidated Edison, Cummins, Darden Restaurants, DTE Energy, Emerson Electric, ExxonMobil, Headwaters, HomeDepot, Honeywell, ITT Corp., JPMorgan, Leggett & Platt, McDonald's, Northrop Grumman, PepsiCo, Pfizer, Praxair, Procter & Gamble, Sara Lee, Tesoro Corp., Textron, Wells Fargo, Comcast Corp., Lionbridge, tw telecom, Alaska Air, Callaway Golf], 10% [Allstate, Motorola, Office Depot], 15% [Texas Instruments], 20% [AT&T]. For a group – 5% [Deere], 10% [Letter of 26, Advance Auto Parts, Alcoa, American Express, Best Buy, Boeing, BorgWarner, Consolidated Edison, Darden Restaurants, DTE Energy, Emerson Electric, ExxonMobil, Home Depot, Honeywell, JPMorgan, Leggett & Platt, McDonald's, Procter & Gamble, Sara Lee, Textron, Wells Fargo, Weyerhaeuser, Comcast Corp., Lionbridge, tw telecom, Alaska Air, Callaway Golf], 15% [Motorola, Texas Instruments]). Contingent thresholds -- 3% for a single nominating shareholder, 5% for a group – IF certain "triggering events" are required [Protective Life].
- H. Extend share holding period from 1 year to 2-3 years [Letter of 26, most companies responding proposed 2 years]
- I. "Net long" beneficial ownership threshold and holding periods [Letter of 26, PepsiCo, MetLife, Protective Life, Texas Instruments, UnitedHealth Group, U.S. Bancorp, tw telecom, others]. "Only continuous net long conventional ownership of 'physical' securities should count toward satisfaction of minimum ownership and holding period requirements" [Honeywell]. Define beneficial ownership based on "economic risk of ownership" [Theragenics].
- J. Require nominating shareholders to disclose "total positions" (long/short/equity/debt/any arrangement affecting the shareholder's voting or economic rights) – [Letter of 26, others]. Any arrangement that may impact its voting or economic rights with respect to such securities [Pfizer]. "Any stock lending, hedge, derivative, synthetic, or similar securities in the company, for the past three years in order to allow other stockholders to assess the nominating stockholder's or stockholder group's interests in the long-term health of the company" [Alaska Air]
- K. Require nominating shareholders to hold shares for a minimum period after the successful election of their nominee [Letter of 26, others]. 2 years [Office Depot]. Letter of 6: "We recommend that the period be the initial term of service of the director (i.e., one year for a director elected annually, or three years for a director on a classified board)." Sale only if "justified by clear changed circumstances" [Tesoro Corp.]. "Only" consequence of stock sale by nominating holder is "disclosure" – A sale of more than 50% of the stock held at the time of the nomination triggers requirement to file an amended Schedule 14N disclosing that fact [Intel]. If nominating shareholder sells earlier than represented, then the nominated director should tender his or her resignation [tw telecom].
- L. "First in" approach for nominations is unworkable, favor priority to the largest shareholder [Letter of 26, BorgWarner, Caterpillar, Deere, Leggett & Platt, McDonald's, PepsiCo, Praxair, Sara Lee, tw telecom, others], or longest ownership tenure [Boeing, FMC Corp., FPL, Honeywell, Motorola], or "ownership tenure for individual shareholders or groups with the same ownership percentage" [Deere], individual over group [Honeywell]. "Larger individual shareholders" take priority, or company chooses based on its assessment of merits [Textron].
- M. No substitution of proxy access nominees if an original nominee is determined not to be eligible or otherwise becomes unavailable to serve later than the cut-off date for filing the Schedule 14N [American Express]

- N. Clarify procedures regarding withdrawals and exclusions of nominations [*Letter of 26*, Honeywell]. Withdrawal of a "first in" nomination would not then allow the "second in" nomination to become eligible for "first in" status under Rule 14a-11 [Xerox].
- O. Fix timing issues for notice by a new Schedule 14N. Period for notice expanded to a minimum of 150 days [*Letter of 26*, FPL, Pfizer, Weyerhaeuser] prior to the date of the prior year's proxy statement. 180 days [Consolidated Edison]. Specific deadline of 120-day advance notice (14N), which matches the Rule 14a-8 deadline for notifying a company of a shareholder proposal to be included in the company's proxy statement [PepsiCo, Praxair]. 120 days [Texas Instruments].
- P. Create a "window period" for notice (14N) by establishing a "first date for submission" [*Letter of 26*, BorgWarner, FPL]. 180 day window [American Express]. 150-120 day window [McDonald's]
- Q. "Resubmission threshold" - Bar subsequent nominations of a *shareholder director nominee* who does not receive a threshold % of the votes cast for X years - 2 years [PepsiCo], 3 years [*Letter of 26*] - following the meeting at which the nominee was defeated [*Letter of 26*]. Recommended threshold: 30% [*Letter of 26*], 35% [Aetna], 25% [PepsiCo].
- R. "Resubmission threshold" - Bar subsequent director nominations *by a shareholder who nominates a director* who does not receive at least a threshold % of votes (40% [General Mills], 35% [Aetna, Boeing], 30% [*Letter of 26*, FPL, Pfizer, Intel], 25% [BorgWarner, Caterpillar, Deere, DTE Energy, FMC Corp, Leggett & Platt, Northrop Grumman, PepsiCo, Sara Lee, U.S. Bancorp, Wells Fargo, Applied Materials, Comcast Corp.], 15% [ADP]) cast in the election. Bar for a period of X years – 2 years [Leggett & Platt, Northrop Grumman, Sara Lee, Intel], 3 years [*Letter of 26*, PepsiCo, Pfizer, others]. Could also be triggered if a nominated director is actually elected to the board [*Letter of 26*]. Tiered thresholds: 1 year prohibition if less than 25% of the vote, and 2 year prohibition if less than 10% of the votes cast [Whirlpool].
- S. Preclude shareholders who have lost a proxy contest from bringing another one at the company's expense for a period of five years [Alcoa]
- T. Each shareholder nominee must meet the same independence standards as other nominees and directors [tw telecom, and others]. Shareholder nominees must meet subjective independence criteria of the applicable listing standards, and ensure "director equivalency" on meeting company requirements and regulatory constraints on directors [Intel]. Each proxy access nominee must be independent of the nominating shareholder [American Express, BorgWarner, Caterpillar, Leggett & Platt, Sara Lee, others]. Aetna, American Express, Norfolk Southern, and others asked for expanded independence requirements. A shareholder nominee should have to meet all requirements applicable to a company's other independent directors [McDonald's]. Nominees required to satisfy director independence and qualifications – as adopted and disclosed by the company's board [Sara Lee]. Shareholder nominee must meet *all* company-specific eligibility criteria and director guidelines [Home Depot, U.S. Bancorp, others], such as mandatory retirement ages, "overboarding" restrictions and share ownership requirements [Caterpillar], and eligibility standards applicable to directors under U.S. and state laws, e.g., Section 8 of the Clayton Antitrust Act [Tenet Healthcare, others]. Nominee must meet non-discriminatory director qualifications – as required by company bylaws [DTE Energy, Headwaters]. Company's board or nominating committee responsible for reviewing and selecting nominees from among the candidates submitted by shareholders, subject to full public disclosure on Form 8-K of the reasons for its selection [McDonald's].
- U. Expanded disclosures re: nominees [Aetna, American Express, BorgWarner, Eli Lilly], including information required in a company's advance notice bylaws, to validate independence and eligibility, assess reasons for mounting the election contest and implications if the proxy access nominee is elected. Nominees must complete any company "director and officer questionnaire" prior to the printing and mailing of the proxy statement [DTE Energy]. Hold nominees to the same standard imposed on a company's nominees pursuant to the proposed rule "Proxy Disclosure and Solicitation Enhancements" [BorgWarner, Eli Lilly]. Require consent to a background check for the nominee [American Express].
- V. Specify triggering events [Allstate, AEP, Boeing, CIGNA, Cummins, ExxonMobil, FMC Corp, Frontier Communications, ITT Corp., Motorola, Pfizer, Tenet Healthcare, Theragenics, Xerox, tw telecom, Callaway Golf]. Event: failure of a director to get 50% "for" (majority voting only), or 50%+ withheld [Texas Instruments, Callaway Golf]. Proposed "triggering event" - if, at any meeting at which directors are elected, at least one director had withheld votes of at least 35% of the votes actually cast, unless the director received a favorable vote of at least a majority of the shares outstanding [Protective Life]. Other proposed "triggering events" – company indicted, delisted, does not act on shareholder proposal that receives a majority of the votes cast, or does not accept resignation of director who received less than a majority of the votes cast [Comcast Corp.]. Limit time period after triggering event that 14a-11 could be used to 1 year [Texas Instruments].
- W. Exempt companies from 14a-11 that have adopted some form of majority voting [Alcoa, Honeywell, Pfizer]. Exempt companies that "act responsibly and have been accountable to its shareholders" [Koppers Holdings].
- X. Exempt company from proxy access rules for three years if it voluntarily includes a shareholder nominee for director in its proxy materials outside of the Rule 14a-11 process [Comcast Corp.]
- Y. "Opt out" from the Proposed Rule for companies adopting and implementing their own form of proxy access [DTE Energy]
- Z. Proposed Rule cannot preempt state laws on proxy access "unless the SEC affirmatively finds that the law of a particular state is unfair and unreasonable" [Horizon Lines]
- AA. Remedy if a denial of intent to control turns out later to be false [Deere]. 1 year (minimum) "stand still" for a nominating shareholder [Home Depot].
- BB. If a company faces a proxy contest outside of the proxy access regime, none of the proxy access nominees should remain eligible [American Express]. Company can exclude proxy access candidates if it is facing a traditional proxy

contest that year [Leggett & Platt]. No access combined with a traditional proxy contest (including a short slate contest) in the same year [JPMorgan Chase]. Expand exemption to include companies already facing a “short slate” contest that same year [BorgWarner].

- CC. Provisions of Rule 14a-11 should not be applicable to companies that do not have any publicly traded common stock [Southern Co]
- DD. Companies should have flexibility to design “user friendly” proxy cards and “notices” [Letter of 26, Pfizer, others], including a single vote option for the company's nominees as a group [numerous companies]
- EE. Companies should have greater freedom to include educational materials with “notice” mailings [Letter of 26]

3. Suggested Changes to Proposed Rule 14a-11(e):

- A. Eliminate liability for the company if it knows or has reason to know that information concerning a stockholder nominee contained in a company’s proxy materials is false or misleading [BorgWarner, Caterpillar]. The Company should be entitled to explicitly state in the proxy that “the company has done no investigation of, and takes no responsibility for, the accuracy or completeness of the information supplied to it by the nominating stockholder or group or the nominee for director” [BorgWarner].
- B. Certification from nominating shareholder that information provided on the nominee for the proxy statement contains no material misstatements or omissions [American Express, others]

4. Mixed Opinion on the SEC’s Proposed Changes to Rule 14a-8:

- A. Many letters from companies didn’t address the topic of the SEC’s proposed changes to Rule 14a-8. Most companies addressing Rule 14a-8 supported the idea of revising the rule, but with significant additional changes (see section “5” of this table), and as part of an “alternative approach” (argued, it appeared, primarily from a defensive standpoint).
- B. Allow shareholders and companies to determine their own appropriate proxy access procedures (“private ordering”) [Letter of 26, numerous others]

5. “Alternative” Regime via Suggested Changes to 14a-8 [selected companies]:

- A. As part of an “alternative” approach, the SEC should not only remove the director election exclusion, but also increase the minimum ownership thresholds [Honeywell, others]. From \$2K to at least 1% [e.g., Boeing, Caterpillar, General Mills, JPMorgan Chase, others], “greater of 1% of outstanding shares or \$10,000...minimum share requirement of 500 shares” [Lionbridge], 3% [Procter & Gamble], 5% [tw telecom], and higher - see proposed ownership thresholds for Proposed Rule 14a-11. “Net long” 1% [MetLife]. Expand share holding period requirement to X number of years: 2 years [MetLife], 3 years [tw telecom]. See also related proposals for PR 14a-11.
- B. Nominating shareholders pledge to retain their shares through at least the first term of their director nominee [Eaton Corp]. 2-3 years [tw telecom]. See also related proposals for PR 14a-11.
- C. “Exclude a proposal...for any meeting held within 2 years of the last time the proposal was included if the proposal received less than 25% of the vote” [JPMorgan Chase]. See also related proposals for PR 14a-11.
- D. Amend Rule 14a-8(i)(12) to provide that proxy access stockholder proposals are subject to high resubmission thresholds [Caterpillar]. See also related proposals for PR 14a-11.
- E. Clarify “substantially implemented” standard in Rule 14a-8(i)(10) – to preclude additional proxy access proposals for a period of three years after standards are approved by a majority of shareholders, with the “substantially implemented” standard applying after three years [Best Buy].
- F. A shareholder nomination under Rule 14a-11 should count as a shareholder proposal for purposes of the single proposal requirements of Rule 14a-8 [Southern Co.]

6. Focus on Problems with the Current System to Elect Directors Instead of Adopting Proposed Rule 14a-11:

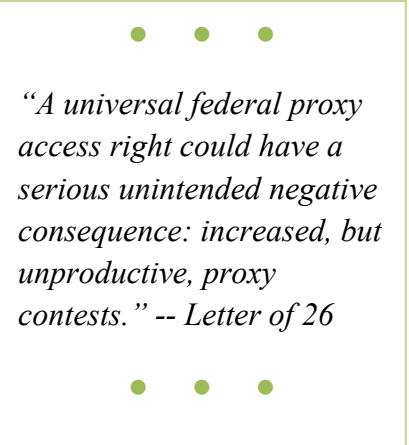
- A. Address the role of largely unregulated proxy advisory firms and their influence over the voting of institutional investors [3M, IBM, Lionbridge, others]
- B. Reform the NOBO/OBO system [3M, IBM, Weyerhaeuser]
- C. Address issues related to borrowed shares [3M] and “empty voting” [IBM, Weyerhaeuser]

Various companies indicated in their letters to the SEC that they generally supported comments submitted to the SEC by the Business Roundtable, U.S. Chamber of Commerce, the Securities Industry and Financial Markets Association, Society of Corporate Secretaries & Governance Professionals, and Association of Corporate Counsel. The typically very comprehensive letters submitted by those associations are reviewed in a separate section below. Rather, the focus here will be on examining the concerns expressed directly by the market participants that will have to bear the burden of the SEC’s initiative on “proxy access.” In this context, the most significant response came in the form of a group

letter signed by corporate secretaries and governance professionals of 26 publicly traded companies.¹⁵ Since 26 of the 111 publicly traded companies submitting responses were able to agree upon the language contained in that letter, a review of the issues raised in it is an appropriate starting point.

A. Letter of 26

While companies participating in the *Letter of 26* supported the proposed amendments to Rule 14a-8(i)(8), the signatories argued that “proposed Rule 14a-11 goes far beyond removing federal impediments to state law rights in that, among other things, it unnecessarily curtails state law shareholder rights to adopt company-specific proxy access by-laws.... we do not support the Commission’s adoption of a mandatory, universal proxy access system at this time.” The group argued that: “Proposed Rule 14a-11 would impose a specific proxy access structure on every public company, regardless of its state of incorporation or its specific circumstances and priorities... A universal federal proxy access right could have a serious unintended negative consequence: increased, but unproductive, proxy contests.”¹⁶ Supporting amendments to Rule 14a-8(i)(8), the companies argued, would “be the most effective way for companies and their boards and shareholders to resolve issues related to proxy access. Allow individual companies and their boards and shareholders to adapt proxy access to their changing needs and circumstances. Avoid unintended negative consequences, including distraction from critical business and strategic priorities, likely to result from a ‘one size fits all’ approach.” The *Letter of 26* also noted that if the objective of the SEC is to reduce the costs related to shareholder nominations, then “the Commission should wait to see if eProxy relieves shareholders of the high cost of proxy contests.” “eProxy” refers to the “notice and access” model to deliver proxy materials, which has only been in effect since 2007.



“A universal federal proxy access right could have a serious unintended negative consequence: increased, but unproductive, proxy contests.” -- Letter of 26

The companies argued that the Proposing Release was inconsistent in expressing an interest by the Commission in having “only holders of a significant, long-term interest in a company”¹⁷ able to rely on Rule 14a-11, while requiring nominating shareholders to have held a minimum ownership position for only one year. As a result, the group argued for a 2-3 year holding period. The companies also argued for higher ownership thresholds for a shareholder to qualify to name a director nominee for inclusion in a company’s proxy statement, and recommended: “that the minimum ownership percentage thresholds for large accelerated filers be raised to 5% for shareholders acting alone and 10% for shareholders acting in concert. These higher thresholds would ensure that a reasonably significant, but still attainable, percentage of shareholders support a Rule 14a-11 nominee and would protect all shareholders from the costs associated with a Rule 14a-11 proxy contest initiated by a small percentage of shareholders with little chance of actual success.” We take note that in the *Letter of 26* and numerous other company submissions there was little said about the SEC’s proposed tiered thresholds based on classifications in Exchange Act Rule 12b-2 (large accelerated [including registered investment companies, or RICs, with

¹⁵ Companies participating in the letter, included: Air Products & Chemicals, Alcoa, Allstate, Consolidated Edison, Devon Energy, DuPont, Merck & Co., Microsoft, Monsanto, Peabody Energy, Pfizer, Pitney Bowes, Eli Lilly, Honeywell, Ingersoll-Rand, Intel, Johnson & Johnson, Kraft Foods, Medco Health Solutions, Procter & Gamble, Reynolds American, Ryder System, Safeway, UnitedHealth Group, Verizon Communications, and Xerox.
<http://www.sec.gov/comments/s7-10-09/s71009-472.pdf>

¹⁶ Ibid.

¹⁷ *Federal Register*, Vol. 74, No. 116 (June 18, 2009), pg. 29035.

net assets of \$700MM or more], accelerated filers [including RICs with net assets of \$75MM-\$700MM], and non-accelerated filers [including RICs with net assets of less than \$75MM]). While opposition to tiered thresholds was not explicit in most letters, it was apparent that the companies were either more concerned about higher thresholds for larger individual shareholders or preferred thresholds that were across-the-board.

The *Letter of 26* urged extensive disclosures concerning the holdings of nominating shareholders, and proposed that:

“The Commission should require that each nominating shareholder: Represent that, during the required holding period, it has not hedged or otherwise divested its economic interest in the requisite shares. Disclose its total position—both short and long—in all forms of the company’s securities—both debt and equity. Disclose any arrangement that affects the nominating shareholder’s voting or economic rights...Rule 14a-11 should require nominating shareholders to hold their shares for a minimum period beyond the election of their nominee. We recommend that the period be the initial term of service of the director (*i.e.*, one year for a director elected annually, or three years for a director on a classified board).”¹⁸

The Commission’s Proposing Release indicated that it had taken a “decision not to include triggering events in the current proposal” due to a “concern that the federal proxy rules may be impeding the exercise of shareholders’ ability under state law to nominate directors at all companies, not just those with demonstrated governance issues.”¹⁹ The *Letter of 26* was critical of this decision, arguing that: “eliminating a company’s board nominating committee from the director selection and nomination process removes the oversight and judgment provided by the members of the committee and eliminates any comprehensive board-endorsed review process for shareholder-nominated director candidates. Rule 14a-11 should require Rule 14a-11 nominees to submit the same information to the company’s independent nominating committee as would be required of other director nominees, such as answers to the company’s standard director questionnaire form....”²⁰

On the issue of conflicts between the Proposed Rule and existing U.S. and state laws and regulations concerning the qualifications of director candidates, the *Letter of 26* noted that: “In certain cases, a federally mandated prescriptive proxy access rule could result in violation of such laws and regulations that could be avoided if companies were permitted to tailor their proxy access by-laws, including disclosures required of shareholder nominees, to their particular circumstances...there are a number of other potential legal impediments to electing a director that are not covered by the proposed Rule 14a-11 disclosure requirements. For example, companies are required to conduct a comprehensive analysis of potential competitive concerns prior to nominating a director for election. Under Section 8 of the Clayton Act, candidates are prohibited from serving as a director or officer of two competing companies if they exceed certain *de minimis* safe harbors...In addition, there are other areas where companies may be required to make certifications regarding its directors...including: U.S. government procurement regulations; Department of Defense facility security clearance procedures; Department of State export licensing certification requirements; Federal Communication Commission rules; bank holding company laws; and financial institution interlocks...These regulatory compliance reviews are time-consuming undertakings that do not fit within the timeframe contemplated under proposed Rule 14a-11...we believe

¹⁸ *Letter of 26* companies to the SEC. <http://www.sec.gov/comments/s7-10-09/s71009-472.pdf>

¹⁹ *Federal Register*, Vol. 74, No. 116 (June 18, 2009), pg. 29033.

²⁰ *Letter of 26* companies to the SEC. <http://www.sec.gov/comments/s7-10-09/s71009-472.pdf>

proposed Rule 14a-11 does not allow adequate time for companies to review and evaluate Schedule 14N and to challenge the inclusion of shareholder nominees, where appropriate.”²¹

The “first in” approach for director nominations defined in Proposed Rule 14a-11 was challenged by the *Letter of 26*. Current language in the Proposed Rule, they argue, would open the door to shareholders sending in: “nominations at a time arbitrarily far in advance of the meeting to ‘lock in’ their nomination right, which may not be in the best interests of all shareholders. Even if there is a defined start date for the nomination period, the ‘first in’ priority approach may still result in the receipt of multiple nominations on the start date.” The 26 argued that “the Commission should revert to the priority mechanism included in the Commission’s 2003 proxy access proposals, which would have granted priority to the largest shareholder (aggregated for shareholders acting in concert) to submit an eligible nomination.”²²

The *Letter of 26* went on: “Furthermore, proposed Rule 14a-11 is not sufficiently clear as to whether the withdrawal or exclusion of the ‘first in’ nomination after the submission deadline will cause the ‘second in’ nomination, which would otherwise be ineligible, to later become eligible. We believe that a withdrawal or exclusion of a ‘first in’ nomination after the deadline should not then allow the ‘second in’ nomination to become eligible for ‘first in’ status under Rule 14a-11. As a purely practical matter, the timing provisions of the rule would not allow for multiple successive elimination processes to occur in a single proxy season – once a company has gone through the process of confirming with the Commission staff that a nominee can be excluded, there would be no time to evaluate and, if necessary, raise eligibility issues with the Commission about the next candidate. Companies need clarity as to the universe of potentially eligible shareholders by the Rule 14a-11 nomination deadline. If adopted, Rule 14a-11 should explicitly clarify this point.”²³

Many companies urged changes to fix timing issues with the SEC’s Proposed Rule.²⁴ The *Letter of 26* urged that the Commission “establish a uniform federal requirement providing a minimum of 150 days prior to the date of the prior year’s proxy statement for submission of Schedule 14N.” The *Letter of 26* explained: “We believe a minimum period of 150 days prior to the date of the distribution of the proxy materials for the preceding year is needed to allow the company’s management and board time to review and evaluate the shareholder nominees, receive background information from the nominee, discuss the nominee’s qualifications with the nominating shareholders, the nominating committee and the board, and prepare submissions to the Commission where needed; to allow time for the Commission to respond to a

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Proposed Rule 14a-11 would establish a requirement that a nominating shareholder (quoting the SEC’s Proposing Release): “Provide and file with the Commission a notice to the company on proposed new Schedule 14N of the nominating shareholder’s or group’s intent to require that the company include that nominating shareholder’s or group’s nominee in the company’s proxy materials by the date specified by the company’s advance notice provision or, where no such provision is in place, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year’s annual meeting, except that if the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 days from the prior year, then the nominating shareholder or group must provide notice a reasonable time before the company mails its proxy materials, as specified by the company in a Form 8-K filed within four business days after the company determines the anticipated meeting date pursuant to proposed Item 5.07, and include in the shareholder notice on Schedule 14N disclosure about the amount and percentage of securities owned by the nominating shareholder or group, length of ownership of such securities, and the nominating shareholder’s or group’s intent to continue to hold the securities through the date of the meeting as well as intent with respect to continued ownership after the election, a certification that the nominating shareholder or group is not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors, and disclosure meeting the requirements of Rule 14a-18.” *Federal Register*, Vol. 74, No. 116 (June 18, 2009), pg. 29037-8.

notice of intent to exclude a candidate; and to allow the company to prepare and distribute proxy materials...The 150-day period should include a minimum 30-day period for the company to notify the nominating shareholders that eligibility requirements have not been met...We believe the period for submission of Schedule 14N to the company should be limited as to the first date for submission as well as the last date, thereby creating a ‘window period’ rather than simply a deadline for submission. The limit on the first date for submission is necessary to: (i) avoid turning ‘proxy season’ into a year-round event; (ii) clarify that a company is not required to treat late submissions from the prior year as submissions for the current year; and (iii) allow the company to have adequate controls for determining the sequence of submissions. The rules also need to establish or allow companies to adopt ordering rules to determine priority where more than one Schedule 14N is received on the same date.”²⁵ Other companies submitting letters offered alternative minimum periods ranging from 180 days to 120 days. American Express proposed a 180 day window period, and McDonald’s a window of 150-120 days.

The *Letter of 26* also explained that company advance notice by-laws are not an appropriate reference for determining the deadline for submitting Schedule 14N, because “they usually provide for a notice period shorter than the 120 days prior to the prior year’s proxy statement date, due to state law restrictions, that would be the default under the proposed rules...It is not unusual for advance notice provisions to require notice only 60 or 90 days prior to the annual meeting. If the final rules include the reference to advance notice provisions to establish the deadline for submission for Schedule 14N, many companies may amend their by-laws to adopt longer advance notice periods, which could pose a problem under state law.”²⁶

The *Letter of 26* expressed concern that companies: “will face new questions about the ‘universal proxy card’ that will include both management and shareholder nominees – and hence, more nominees than open board seats. We are concerned that the mandated format will risk significant retail voter confusion and errors when voting, whether they are using physical proxy cards, the telephone, or the Internet.”²⁷ The *Letter of 26* proposed that: 1) “companies have flexibility to design ‘user friendly’ universal proxy cards and ‘notices.’ Shareholders who want to vote in accordance with management’s recommendations for directors should be able to do so easily, using mechanisms such as checking a box for that purpose”; and 2) “Companies have greater freedom to include educational materials with ‘notice’ mailings regarding 14a-11 elections.”

Concern that unsuccessful nominees will be repeatedly resubmitted led the group to propose that: “a shareholder director nominee who does not receive at least 30% of the votes cast in the election should be barred from being nominated again, by any shareholder or the company, for a period of three years following the meeting at which the director nominee was defeated. In addition, a shareholder who either (i) nominates a director who does not receive at least 30% of the votes cast in the election, or (ii) nominates a director who is actually elected to the board, should be barred from being able to nominate the same individual, or any other individual, as the case may be, for a period of three years.”²⁸

B. Other Publicly Traded Companies

Our review here includes both letters submitted separately by 17 of the companies participating in the *Letter of 26*, most of which presented issues repeating concerns and proposals raised in the *Letter of 26*,

²⁵ *Letter of 26* companies to the SEC. <http://www.sec.gov/comments/s7-10-09/s71009-472.pdf>

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

and letters submitted by another 85 companies. Collectively, the latter group presented an array of major and minor variations on the arguments and proposals advanced by the *Letter of 26*, Business Roundtable, Society of Corporate Secretaries & Governance Professionals, “Group of Seven” law firms (letter dated Aug. 17, 2009), and other group letters that selected companies voiced support for. Unencumbered by the need for consensus, or an additional measure of diplomacy, by participating in a group letter, some companies took the rhetorical gloves off when challenging the SEC’s initiative on “proxy access.” We explore below only those arguments and proposals that were novel or supplemental to the core issues raised in the *Letter of 26*. Additional details on specific thresholds and variations on proposals offered by selected publicly traded companies can be found in Table 4 (above).

Numerous companies voiced strong opposition to Proposed Rule 14a-11, and challenged basic assumptions and claims advanced in the SEC’s Proposing Release. Bruce R. Ross, Chairman of the Board at Biogen Idec, wrote: “With all due respect, we disagree with the Commission’s assertion that the

● ● ●

“The Release is terrible public policy because it risks impairing the continued functioning of effective boards while failing to improve the operation of deficient boards.” - Gregg M. Larson, Deputy General Counsel and Secretary, 3M Company.

● ● ●

federal proxy rules stand in the way of a shareholder’s ability to nominate and elect directors to company board of directors. Shareholders of Biogen Idec have the unfettered right to nominate directors, subject only to compliance with a reasonable requirement of advance notice to the company. Nothing in the federal proxy rules impedes that ability. The ability to have those nominees elected, of course, is (a) different story. Even here, though, it is not the federal proxy rules themselves that impede the ability of a shareholder to have a nominee elected: it is the fact that compliance with the Commission’s rules costs money. The Commission’s proposal seeks to solve that problem by in effect shifting that cost to all of the shareholders instead of placing it on the dissident shareholders.”²⁹

Gregg M. Larson, Deputy General Counsel and Secretary at 3M, writing on behalf of the company, argued that “the Release is terrible public policy because it risks impairing the continued functioning of effective boards while failing to improve the operation of deficient boards.”³⁰ Larson also noted that the Proposed Rule’s elimination of the role of “the independent nominating and governance committee in favor of proxy access for stockholder-nominated director candidates increases the chance for a dysfunctional board, and reduces the chance for a collegial board of thoughtful and challenging directors from whom the CEO seeks guidance.” ExxonMobil warned that “many well qualified directors would be unwilling to serve under a politicized model of routine election contests.”³¹

Cummins Inc. expressed a common viewpoint when arguing that the Proposed Rule changes are “unnecessary because of the significant changes in corporate governance that have occurred in recent years, including widespread adoption of majority voting in uncontested director elections, amendments to state corporate law in various states that either authorize proxy access bylaw amendments or create proxy access rights, the availability of proxy contests (the costs of which have been reduced by the Commission’s e-proxy rules and the possibility of reimbursement under recent amendments to Delaware

²⁹ Biogen Idec (Bruce R. Ross, Chairman), letter to the SEC dated Aug. 7, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-86.pdf>

³⁰ 3M Company (Gregg M. Larson, Deputy General Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-214.pdf>

³¹ ExxonMobil (David S. Rosenthal, VP, Investor Relations), letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-178.pdf>

corporate law authorizing proxy reimbursement bylaws) and other avenues for shareholder input, including shareholder proposals and the increasing number of ‘vote no’ campaigns. The impact of these changes is increasing as a result of the movement to majority voting in uncontested director elections...”³²

As described above, many of the companies responding argued that the Proposed Rule not only tramples on shareholder rights under state laws, but also the ability of companies and shareholders to establish proxy access rules appropriate for their companies. Horizon Lines developed this line of argument to suggest that the Proposed Rule not preempt state laws on proxy access “unless the SEC affirmatively finds that the law of a particular state is unfair and unreasonable.”

Many of the companies responding voiced support for amending Rule 14a-8(i)(8) to remove the director election exclusion, but only with additional revisions designed to facilitate a “private ordering” alternative to Proposed Rule 14a-11. A handful of companies explored in greater detail exactly what this “alternative” regime under Rule 14a-8 could look like. Most of the proposals were similar to modifications envisioned for Proposed Rule 14a-11, including: higher minimum ownership thresholds (raised to at least 1% [proposed by Boeing, Caterpillar, General Mills, JPMorgan Chase, others], or the “greater of 1% of outstanding shares or \$10,000” and a “minimum share requirement of 500 shares” [Lionbridge], “net long” at 1% [MetLife], 3% [Procter & Gamble], 5% [tw telecom], and higher [see proposals for 14a-11]); expand required shareholding periods to 2-3 years (see also proposals for 14a-11); and set high resubmission thresholds (amend Rule 14a-8(i)(12)). Best Buy also asked for the SEC to clarify the “substantially implemented” standard in Rule 14a-8(i)(10) to preclude additional proxy access proposals for a period of three years after standards are approved by a majority of shareholders (with the “substantially implemented” standard applying after three years).

A number of companies criticized Proposed Rule 14a-11 on the grounds that it would give individuals and groups with very narrow interests an opportunity to burden companies with contests and issues that are not “constructive.” Alcoa observed that: “Proposed Rule 14a-11, as drafted, is likely to become a vehicle for special interest shareholders and event driven hedge funds...Special interest shareholders typically are concerned with issues of importance to them, but not necessarily of importance to the economic well being of the enterprise or to the majority of the shareholders.”³³ Alcoa urged that the SEC: “Require shareholders who propose nominees for election to the board to act in the best interest of the company as a whole in proposing such nominees. Provide for a private right of action if they do not.” AGL Resources noted that the Proposed Rule would empower institutional shareholders with interests that may not align with retail shareholders, including employees and retirees, and others with long-term investment interests.³⁴

According to Thomas Moore, Corporate Secretary and Chief Governance Officer of Ameriprise Financial, the SEC’s proposal does not address the issue of preventing “proxy access from being used as part of a coordinated strategy to effect the gradual transfer of control...to a group of directors who each represented that they had no such intent at the time of their nomination or election.”³⁵ Deere’s President and CEO Samuel R. Allen pointed out that: “there is no safeguard provision to assure that an initial

³² Cummins Inc. (Marya Mernitz Rose, General Counsel), letter to the SEC dated Aug. 17, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-271.pdf>

³³ Alcoa (Donna Dabney, VP, Secretary Corporate Governance Counsel), letter to the SEC dated Aug. 17, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-158.pdf>

³⁴ AGL Resources (Paul R. Shlanta, Exec. VP and General Counsel), letter to the SEC dated Aug. 17, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-203.pdf>

³⁵ Ameriprise Financial (Thomas R. Moore, Chief Governance Officer), letter to the SEC dated Aug. 17, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-487.pdf>

relatively modest investment cannot be levered over time into a change in control to the detriment of the corporation and its shareholders, as a whole. The proposed rule requires an initial certification that a control change is not intended, but there is no stated remedy if the denial of intent to control turns out later to be false.”³⁶ Home Depot also asked for a remedy in such a situation, and proposed a 1 year (minimum) “stand still” for a nominating shareholder. Leggett & Platt asked for a provision allowing a company to exclude any Rule 14a-11 candidates if the company is facing a traditional proxy contest that year, “since the combination of shareholder nominations from multiple sources could result in a change of a majority of the company’s board of directors.”³⁷ Microsoft expressed concern at the “serious risk of unfavorable and unintended consequences that could be triggered by the Commission’s proposed piecemeal dilution of the critical ‘control’ concept set forth in Section 13(d) of the Securities Exchange Act of 1934 and implementing Regulation 13D/G. We respectfully urge the Commission to defer its consideration of this ostensibly de-regulatory initiative until it has the benefit of public comment that must be solicited in connection with the proposed Regulation 13D/G rulemaking project...”³⁸ American Express offered a proposal that: “the rule amendment creating an exemption from the proxy rules for a nominating group specifically require a certification by the person or persons soliciting other holders to join the group that the sole purpose of the solicitation is to form a nominating group, that it or they have a bona fide intent to make a nomination and that they do not have a ‘control’ intent. We believe all members of the group should be required to make a similar certification as to their bona fide intent to make a nomination and to disclaim any control intent. Absent such limitations, we are concerned that a party could commence a solicitation for purposes of ‘testing the waters’ for purposes other than a proxy access nomination, such as formation of a Section 13(d) group with a control intent.”³⁹

JPMorgan Chase proposed that “shareholders who intend to nominate a bloc of directors should be required to conduct a traditional proxy contest pursuant to Regulation 14A)...Shareholders should not be permitted to nominate directors pursuant to proposed Rule 14a-11 if a company becomes subject to a traditional proxy contest (including a short slate proxy contest) in that same year (otherwise proposed Rule 14a-11 could have the effect of changing control of the company).” In a footnote to the above, JPMorgan Chase took note that: “The possibility of a change of control is a particular concern in light of the recent Amylin Pharmaceuticals no-action letter issued by the staff of the Division of Corporation Finance (letter to EastbourneCapital LLC dated March 30, 2009, and letter to Icahn Associates Corp. dated March 30, 2009) and the Commission’s proposed amendment to Rule 14a-4(d)(4), as set forth in ‘Proxy Disclosure and Solicitation Enhancements’ (Proposing Release No. 33-9052, dated July 10, 2009), which would allow a traditional dissident shareholder to ‘round out’ its short slate proxy card by including proxy access shareholder nominees.”⁴⁰

Other companies expressed concerns about the lack of clarity in the Proposed Rule about what would happen if a company faces a proxy contest outside of the proxy access regime – in the same year that there are proxy access shareholder nominees. American Express argued that in such cases none of the

³⁶ Deere (Samuel R. Allen, President and CEO), letter to the SEC dated Aug. 10, 2009.
<http://www.sec.gov/comments/s7-10-09/s71009-226.pdf>

³⁷ Leggett & Platt (John G. Moore, Chief Legal Officer), letter to the SEC dated Aug. 17, 2009.
<http://www.sec.gov/comments/s7-10-09/s71009-250.pdf>

³⁸ Microsoft (John A. Seethoff, Deputy General Counsel), letter to the SEC dated Aug. 24, 2009.
<http://www.sec.gov/comments/s7-10-09/s71009-507.pdf>

³⁹ American Express (Carol V. Schwartz, Chief Governance Officer), letter to the SEC dated Aug. 13, 2009.
<http://www.sec.gov/comments/s7-10-09/s71009-301.pdf>

⁴⁰ JPMorgan Chase (Stephen M. Cutler, General Counsel), letter to the SEC dated Aug. 17, 2009.
<http://www.sec.gov/comments/s7-10-09/s71009-297.pdf>

proxy access nominees should remain eligible. Leggett & Platt argued that the company should be able to exclude proxy access candidates. BorgWarner proposed an exemption for companies already facing a “short slate” contest that same year.

Concerned about reducing the level of disruption every year on a board’s functioning, many of the respondents supported changes to restrict the number of shareholder nominees using the federal “proxy access” rules to as few as possible (25% was generally seen as far too high, and even constituting “strong influence on control of the company” [JPMorgan Chase]).⁴¹ Aetna,⁴² for example, urged the Commission to “lower the maximum number of shareholder nominees to 10% of the company’s board of directors, or one nominee, whichever is greater.” A handful of other companies also asked for a 10% limit, while several companies were content with a limit of 15% (Allstate, BorgWarner, Headwaters, U.S. Bancorp, Wells Fargo).

Ten companies asked to limit each nominating shareholder or group to nominating only one director nominee at each annual meeting (Aetna, Deere, Eli Lilly, FMC Corp, Frontier Communications, JPMorgan Chase, ITT Corp., Leggett & Platt, McDonald’s, U.S. Bancorp). Aetna asked that: “each nominating shareholder or group should be limited to one director nominee in any year. Also, the Commission should count toward the calculation of the maximum number of shareholder nominations available for election any candidate initially nominated or elected pursuant to proposed Rule 14a-11, even where the nominee is endorsed by the company and included on the company’s own candidate slate... This rule should apply for three years following the director’s initial election to the board as a proxy access director. After the three year period, such director would cease to have the status of a proxy access director.” American Express offered a proposal to put a time limit of three years for continuous service by a “proxy access director” – “otherwise, over a period of years, the election of a succession of proxy access directors could in our view severely disrupt Board functioning.”⁴³

RECOMMENDED READING:

1. “SEC: Facilitating Shareholder Director Nominations [Release Nos. 33–9046; 34–60089; IC– 28765; File No. S7–10–09],” *Federal Register*, Vol. 74, No. 116, Thursday, June 18, 2009. <http://www.sec.gov/rules/proposed/2009/33-9046.pdf>
2. *Letter of 26 companies to the SEC.* <http://www.sec.gov/comments/s7-10-09/s71009-472.pdf>
3. *Letter of 7 Law Firms to the SEC.* <http://www.sec.gov/comments/s7-10-09/s71009-212.pdf>
4. *RiskMetrics letter to the SEC.* <http://www.sec.gov/comments/s7-10-09/s71009-166.pdf>
5. *Business Roundtable letter to the SEC.* <http://www.sec.gov/comments/s7-10-09/s71009-267.pdf>
6. *American Bar Association, multiple submissions to the SEC.* <http://www.sec.gov/comments/s7-10-09/s71009-456.pdf> and <http://www.sec.gov/comments/s7-10-09/s71009-535.pdf>
7. *Broadridge letter to the SEC.* <http://www.sec.gov/comments/s7-10-09/s71009-296.pdf>
8. *Investment Company Institute letter to the SEC.* <http://www.sec.gov/comments/s7-10-09/s71009-360.pdf>

Some companies want constraints on the formation of groups under 14a-11. Allstate proposed limiting groups to four shareholders with a written agreement. A handful of companies proposed that there be no group aggregation at all (see Table 4). Sara Lee proposed a minimum ownership percentage

⁴¹ JPMorgan Chase (Stephen M. Cutler, General Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-297.pdf>

⁴² Aetna (Judith H. Jones, President and Corporate Secretary Law & Regulatory Affairs), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-110.pdf>

⁴³ American Express (Carol V. Schwartz, Chief Governance Officer), letter to the SEC dated Aug. 13, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-301.pdf>

for each stockholder that participates in a group, and a provision allowing each stockholder to participate in only one group.

Some companies asked for more clarification on quantifying the number of total nominees for which access must be provided. American Express noted: “The proposed rule is silent on the situation where the company's nominating committee includes in its slate a director who was elected as a shareholder nominee the previous year...the proper way to address this is to provide that the number of total nominees for which access must be provided in respect of an annual meeting is reduced by the number of proxy access directors re-nominated by the Board. A director's status as a proxy access director would cease after a period, which we suggest as three years, of continuous service on the Board. Otherwise, over a period of years, the election of a succession of proxy access directors could in our view severely disrupt Board functioning.”⁴⁴ Pfizer argued that shareholder-designated nominees should remain as such after election either indefinitely or for a specified period of time, unless the company's nominating or corporate governance committee (or its board) determines otherwise. DTE Energy urged the SEC to clarify that: “If, at any time prior to the shareholders' meeting, the board decides to endorse the nominating shareholder's nominee and include the nominee on the board's slate, the nominee should nevertheless continue to be treated as a proxy access shareholder nominee for purposes of determining the maximum number of proxy access shareholder nominees to be included in the company's proxy materials for that year. This will help facilitate discussions between boards and nominating shareholders, as a board may be more likely to come to an accommodation concerning a nominating shareholder's nominee knowing that, if it were to do so, it would not need to then begin the process of negotiating all over with yet another nominating shareholder because the ‘endorsed’ nominee will not count towards the cap on proxy access shareholder nominees.”⁴⁵

Many companies were also concerned about the prospect of shareholders taking advantage of the proxy access procedures to submit a nominee every year, even if the nominees submitted by that shareholder or shareholder group continually fail to receive a significant number of votes. Alcoa proposed precluding shareholders who have lost a proxy contest from bringing another one at the company's expense for a period of five years. BorgWarner argued for the adoption of a: “Resubmission threshold...If the nominating stockholder's nominee fails to receive 25% of the vote at the meeting at which his nomination is voted upon, the nominating stockholder (and, if applicable, all of the members of the nominating group) should be prohibited from submitting another nominee for a period of two years.” BorgWarner also argued that: “Each nominating stockholder should only be permitted to nominate one director, rather than up to 25% of the board of directors as proposed...Most contests for control of a company do not involve a change in the majority of the membership of a board of directors. Dissident stockholders often seek to influence a change of control by the nomination of ‘short slates’, which are a ‘bloc’ of directors consisting of less than a majority of the board membership. Therefore, we believe that stockholders who intend to nominate a bloc of directors should be required to conduct a traditional proxy contest pursuant to Regulation 14A or a short slate proxy contest using Rule 14a-4(d).”⁴⁶

Many of the companies responding brought up this issue of “resubmission thresholds.” Proposals to *bar subsequent director nominations by a shareholder* who nominates a director who does not receive at least a threshold % of votes cast in an election included thresholds ranging from 15% (ADP) up to 40%

⁴⁴ Ibid.

⁴⁵ DTE Energy (Patrick Carey, Associate General Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-473.pdf>

⁴⁶ BorgWarner (Laurene H. Horiszny, Chief Compliance Officer), letter to the SEC dated Aug. 18, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-320.pdf>

(General Mills). The most commonly supported threshold % of the votes was 25-30% (see Table 4). Terms proposed ranged from 2-3 years. The *Letter of 26* raised the possibility that this bar on resubmissions could be triggered if the director is actually elected to the board. Whirlpool offered a more complex proposal of tiered thresholds: a 1 year prohibition if less than 25% of the vote, and 2 year prohibition if less than 10% of the votes cast.

A proposed “resubmission threshold” for the shareholder director nominee, in which subsequent nominations of a nominee who does not receive a threshold % of the votes cast would be barred, was also mentioned in the *Letter of 26*, but few others advanced a similar approach. The few letters that did raise the issue had proposed thresholds of 25%-35%, and proposed impact periods of either 2 or 3 years.

The “first in” approach for shareholder nominations was also widely seen as unworkable. More than 30 companies responding favored giving priority to the largest shareholder. A handful favored giving priority to the nominating shareholder with the longest ownership tenure. Deere favored giving priority to the longest “ownership tenure for individual shareholders or groups with the same ownership percentage.” Honeywell and Textron favored giving priority to nominating shareholders acting individually over any nominees put forward by a group. Textron also suggested that the company might choose which has priority based on its assessment of merits.

The *Letter of 26* asked for the SEC to clarify procedures regarding withdrawals and exclusions of nominations. American Express raised the technical issue of whether to disallow any substitution of proxy access nominees if an original nominee is determined not to be eligible or otherwise becomes unavailable to serve later than the cut-off date for filing the Schedule 14N. Xerox argued that withdrawal of a “first in” nomination should not then allow the “second in” nomination to become eligible for “first in” status under Rule 14a-11. BorgWarner and DTE Energy asked that the Commission clarify that if the Board endorses the proxy access nominee then that nominee will continue to count as a shareholder nominee for purposes of meeting the proxy access director “cap.”

Most companies responding asked that the SEC consider raising ownership thresholds for shareholders to qualify to nominate a director, and extend the share holding period requirement from 1 year to 2 years. The most common proposal was for an ownership threshold of 5% for a shareholder acting alone and 10% for a group (see Table 4). Praxair noted that “A 5% ownership threshold is widely used in many other SEC rules, including the requirement to file Schedules 13D and 13G as well as in Regulation S-K Items 404(a) and 407(c)(2), and would be more appropriate here.”⁴⁷

More than 30 companies asked the SEC to consider adopting rules affecting proxy access that require nominating shareowners to meet thresholds based on “net long” ownership and holding periods. Honeywell, for example, argued that only continuous “net long” conventional ownership of ‘physical’ securities should count toward satisfaction of minimum ownership and holding period requirements. Theragenics argued that thresholds should be based on a definition of “beneficial ownership” rooted in the “economic risk of ownership.” This thinking also drove numerous companies to request disclosure of “total positions” held by nominating shareholders (long/short/equity/debt/any arrangement affecting the shareholder’s voting or economic rights).

Suspicious that the proposed proxy access procedures would be used by shareholders that are not truly in it for the “long-term,” some companies, writing separately, and the *Letter of 26*, suggested a

⁴⁷ Praxair (Mark D. Nielson, Associate General Counsel), letter to the SEC dated Aug. 13, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-128.pdf>

provision require nominating shareholders to hold shares for a minimum period *after the successful election of their nominee* (1-3 years). Tesoro Corp. proposed that the nominating shareholders could only sell their positions if justified by changed circumstances. Intel proposed a requirement for disclosure (via a 14N filing) if a nominating shareholder sells more than 50% of the stock held at the time of the nomination. tw telecom proposed that if a nominating shareholder sells earlier than represented, then the nominated director should tender his or her resignation.

Many companies responding expressed opposition to the idea of marginalizing, if not eliminating, a company's board nominating committee and qualifications review process in the case of 14a-11 shareholder nominees. McDonald's proposed that under 14a-11, a company's board or nominating committee could remain responsible for reviewing and selecting nominees from among the candidates submitted by shareholders, subject to full public disclosure on Form 8-K of the reasons for its selection. Most companies responding were particularly concerned at the prospect of having "proxy access" nominees on their proxy materials without a level of prior disclosure and review of qualifications that is currently expected, and in certain cases mandated, for other nominees. Intel argued that shareholder nominees must have a "director equivalency" when it comes to meeting company requirements and regulatory constraints on other independent directors. BorgWarner and Eli Lilly urged that nominees be held to the same standard imposed on a company's nominees pursuant to the SEC's proposed rule "Proxy Disclosure and Solicitation Enhancements."⁴⁸

Disclosure requirements for, and the "independence" of, shareholder nominees were "hot button" issues. Home Depot, U.S. Bancorp, and others asked that shareholder nominees meet *all* company-specific eligibility criteria and director guidelines, including [as Caterpillar argued] mandatory retirement ages, "overboarding" restrictions and share ownership requirements. Tenet Healthcare and others argued that the shareholder nominees meet eligibility standards applicable to directors under U.S. and state laws, e.g., Section 8 of the Clayton Antitrust Act. While numerous companies asked that each shareholder nominee meet company standards for "independence," some went further and asked that the nominees be independent of the nominating shareholder. Aetna and other companies urged the SEC to expand required disclosures regarding shareholders, including information required in a company's advance notice bylaws, in order to validate independence and eligibility, assess reasons for mounting the election contest and implications if the proxy access nominee is elected. DTE Energy and others asked that nominees complete any company "director and officer questionnaire" prior to the printing and mailing of proxy statements. American Express proposed a requirement that each shareholder nominee consent to a background check. Aetna argued for: "more expansive independence requirements for shareholder nominees ... (and) additional disclosure in Schedule 14N of any relationships between the nominating shareholder(s) and their nominees, including family and employment relationships, ownership interests, commercial relationships and any other arrangements or agreements. In addition, nominating shareholder(s) should be required to disclose: (i) any direct or indirect interests of the nominating shareholder(s) and their nominee in any competitors of the company; and (ii) the name(s) of any other public company board to which the nominating shareholder has nominated a director pursuant to Rule 14a-11." American Express argued that "the shareholder nominee should be required to be independent from the nominating shareholder, as was required in the Commission's 2003 proposal. We believe that

⁴⁸ <http://www.sec.gov/rules/proposed/2009/33-9052fr.pdf>

such a restriction is appropriate to ensure that the nominee acts in the interest of all shareholders and is not disposed to advance the interests of a nominating shareholder.”⁴⁹

Intel was critical of the basic approach taken by the SEC: “We believe stockholder nominees must also meet the subjective independence criteria of the applicable listing standards. To do otherwise would allow stockholders to elect a director who might be ineligible to serve on key board committees such as audit or compensation. This could burden some directors at the expense of others, adversely affect the issuer and threaten its compliance with listing, proxy voting advisory service and SEC standards, and should rightly be a basis for exclusion. In recent years, boards have spent a great deal of energy to try and cultivate boards that meet more extensive standards developed by the SEC, the NYSE and NASDAQ, as well as a variety of proxy advisory firms, rating agencies, and institutional investors. We think it is ironic that the SEC would advocate ignoring all but the NYSE and NASDAQ’s objective independence tests for stockholder nominees while company nominated directors remain subject to these considerations; it has been the SEC that has been one of the strongest advocates for such standards and processes.”⁵⁰

BorgWarner proposed that the SEC expand the disclosure requirements for proxy access nominees on Schedule 14N to include:

- a. “A description of (1) any material transaction between the stockholder and the company or any of its affiliates within the 12 months prior to the filing of the Schedule 14N, and (2) any discussion regarding the nomination between the stockholder and a proxy advisory firm; any holdings of more than 5% of the securities of any competitor of the company (i.e., any enterprise with the same SIC code);
- b. Any meetings or contacts, including direct or indirect communication by the stockholder, with the management or directors of the company that occurred during the 12-month period, other than with respect to the proposed nomination;
- c. The items required by Item 4 of Schedule 13D regarding the purpose or purposes of the nomination;
- d. A description of any contracts, arrangements, understandings or relationships (legal or otherwise) between the nominating stockholder or group and any person with respect to any securities of the company, regarding such nominating stockholder's or group's economic rights with respect to the company's securities, including without limitation, hedging transactions; and
- e. The same information that a company would be required to disclose in its proxy statement regarding its nominees for director pursuant to the Commission's proposed rule entitled ‘Proxy Disclosure and Solicitation Enhancements’ (Proposing Release No. 33-9052, dated July 10, 2009).”

American Express urged the SEC to consider that it should be up to the nominating shareholder to certify that any information provided on the nominee for the proxy statement contains no material misstatements or omissions. BorgWarner, Caterpillar, and others wanted even more protection: they proposed eliminating liability under Proposed Rule 14a-11(e) for the company if it knows or has reason to know that information concerning a stockholder nominee contained in a company’s proxy materials is false or misleading. BorgWarner argued: “Pursuant to existing Rule 14a-8(1), a company is not responsible for stockholder proposals or supporting statements. We also note that the Commission's 2003 proxy access proposal provided that the company had no liability for the statements of the

⁴⁹ American Express (Carol V. Schwartz, Chief Governance Officer), letter to the SEC dated Aug. 13, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-301.pdf>

⁵⁰ Intel (Cary Klafter, VP, Legal and Corp. Affairs), letter to the SEC dated Aug. 13, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-130.pdf>

nominating stockholder or group. The purpose of proposed Rule 14a-11 is...not undermined by providing that the company has no liability for the nominating stockholder's statements that the company is required to include in its proxy materials. The 'knows or has reason to know' language contained in proposed Rule 14a-11 (e) and 14a-19 suggests that companies have some duty to investigate or otherwise confirm the accuracy of the information provided by the nominating stockholder or group."⁵¹ BorgWarner's proposal is grounded in the Rule's short timelines, which provide for insufficient time to "investigate the statements made by the nominating stockholder or group and the nominee...Furthermore, even if the company had reason to believe-for example, based on information received in the questionnaire - the information provided by the nominating stockholder or group or the nominee is false or misleading, the company does not have the right to exclude the information from the proxy statement...The Company should be entitled to explicitly state in the proxy that 'the company has done no investigation of, and takes no responsibility for, the accuracy or completeness of the information supplied to it by the nominating stockholder or group or the nominee for director.'"⁵²

Most companies responding also want to ensure that the SEC does not marginalize or eliminate the role of nominating committees in terms of regulatory and company by-law compliance reviews. The *Letter of 26* detailed concerns about potential conflicts with regulatory compliance reviews. Alcoa responded with a proposal to keep the nominating committees in the loop for proxy access nominees by requiring "shareholders who wish to propose a nominee to first bring the candidate to the attention of the Governance and Nomination Committee and provide a reasonable period for vetting the candidate before allowing a shareholder to launch a proxy contest at the company's expense...(and) require shareholder nominees to comply with the same director criteria with which the board's nominees are required to comply."⁵³

Some 15 companies argued that only companies facing "triggering events" should be open to shareholder nominations under Proposed Rule 14a-11. This is a critical point of contention, because one of the defining elements of the SEC's proposed proxy access regime is the elimination of all "triggering events" and associated thresholds. Allstate proposed that the final rule specify that direct proxy access will be made available "only...at companies that have suffered certain events demonstrating insufficient oversight. Such triggering events would include management indictment on criminal charges, delisting by any exchange, or material earnings restatements."⁵⁴ ExxonMobil argued that: "proxy access under Rule 14a-11 should only be available in cases in which access would represent a reasonable response to an objectively determinable issue."⁵⁵ Texas Instruments suggested a triggering event would be the failure of a director to get 50% of the votes cast "for" (majority voting only), or 50%+ withheld. Protective Life proposed the following "triggering event": if, at any meeting at which directors are elected, at least one director had withhold votes of at least 35% of the votes actually cast, unless the director received a favorable vote of at least a majority of the shares outstanding. Comcast Corp. proposed that "triggering events" could include: the company being indicted, delisted, not acting on a shareholder proposal that

⁵¹ BorgWarner (Laurene H. Horiszny, Chief Compliance Officer), letter to the SEC dated Aug. 18, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-320.pdf>

⁵² Ibid.

⁵³ Alcoa (Donna Dabney, VP, Secretary Corporate Governance Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-158.pdf>

⁵⁴ The Allstate Corporation (Thomas J. Wilson, Chairman, President & CEO), letter to the SEC dated Aug. 18, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-470.pdf>

⁵⁵ ExxonMobil (David S. Rosenthal, VP, Investor Relations), letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-178.pdf>

receives a majority of the votes cast, or does not accept the resignation of a director who received less than a majority of the votes cast. Texas Instruments proposed setting a 1 year time limit for applying 14a-11 after a triggering event occurs.

Some companies offered proposals to have “exemptions” to 14a-11. Koppers Holdings proposed that all companies that “act responsibly and have been accountable to its shareholders” should be exempt. American Express proposed an event-driven exemption: “if a company is or prior to the meeting becomes the subject of a proxy contest outside of the proxy access regime, none of the proxy access nominees should remain eligible for election to the board.” Alcoa proposed that the SEC: “only impose the mandatory federal proxy access on companies that have not been responsive to shareholders or that do not provide a meaningful right for shareholders to reject board nominated candidates. That is, exempt companies that have adopted some form of majority voting and that have taken action in response to shareholder proposals that have won a majority of votes cast.”⁵⁶ DTE Energy proposed an “opt out” of proposed Rule 14a-11 by adopting and implementing their own form of proxy access. Comcast Corp. proposed exempting companies for three years if the companies voluntarily include a shareholder nominee for director in its proxy materials outside of the Rule 14a-11 process.

Certain companies raised timeline issues for required notice to the company via a new Schedule 14N, and to provide adequate time for companies to challenge proxy access nominees. American Express noted that Proposed Rule 14a-11 allows a nominating shareholder to provide notice (14N) “as late as the final date under the advance notice by-law...As is the case for many companies, our advance notice by-law provides a minimum notice period of 90 days before the date of our prior year's annual meeting.” American Express asked for more flexibility by proposing “that the deadline for proxy access not be tied to the advance notice by-law deadline.” Caterpillar noted that: while the “no action letter” process in the Proposed Rule “may work under the Commission's proposed 120 calendar days standard, companies with standard advance notice bylaws that permit shareholders to submit their nominees for directors as late as 90, 60, or 30 calendar days prior to the shareholder's meeting will be effectively precluded from challenging a shareholder nominee.”⁵⁷ Consolidated Edison also asked for changes in the timelines: “The potential difficulties posed by these timeframes would be even greater if a company is required to review two or more Schedule 14N submissions in one two-week period or is required to restart the Schedule 14N review process after the clock has already started running with a new shareholder after determining that the shareholder who was first in the door did not meet the eligibility requirements. To allow a company sufficient time to review Schedule 14N submissions, Proposed Rule 14a-11 should be revised so that the 120 and 14-day periods are increased to at least 180 and 45 calendar days, respectively.”⁵⁸

The “universal proxy card” requirement resulted in numerous requests to clarify the Proposed Rule to eliminate risk of voter “confusion” between company and shareholder nominees. The most common recommendation was that shareholders should be permitted to check a box to vote for the company's nominees as a group. Emerson supported “the suggestions of the Society of Corporate Secretaries & Governance Professionals that (1) there should be a clear distinction in both the proxy statement and proxy card between the company slate and the shareholder nominees, (2) the proxy card should contain a bold statement instructing the shareholder that, in order to vote for a shareholder nominee, he or she must

⁵⁶ Alcoa (Donna Dabney, VP, Secretary Corporate Governance Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-158.pdf>

⁵⁷ Caterpillar (James B. Buda, General Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-272.pdf>

⁵⁸ Consolidated Edison (Carole Sobin, Secretary), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-278.pdf>

both check the box for that nominee and strike a candidate from the company slate, and (3) any proxy including shareholder nominees that is voted in blank will be deemed a vote for the entire company slate.”⁵⁹

The Proposing Release creates confusion regarding companies with a controlling shareholder, or which have no publicly traded common stock (e.g., debt and preferred stock issuers), as well as companies with dual class capital structures. In the latter case, the Proposed Rule would enable shareholders to obtain a greater number of available seats. The New York Times focused on this single issue in its letter to the SEC, and asked that: “Rule 14a-11...be modified so that the maximum number of shareholder nominees would be equal to the greater of one director or 25% of the number of directors that may be elected by the class of securities held by the shareholders seeking to make the nomination.”⁶⁰

● ● ●

“(W)hen combined with the recent amendments to New York Stock Exchange Rule 452, proxy access under Rule 14a-11 will likely result in unprecedented influence of unregulated proxy advisory firms on director elections and other governance matters.”

-- CSX

● ● ●

Southern Co. expressed concern that Rule 14a-11 “would be applicable to companies that do not solicit proxies for annual meetings of shareholders but instead file information statements under Schedule 14C. This would include not only companies that have publicly traded common stock (with a large controlling shareholder), but also companies that have no publicly traded common stock (debt and preferred stock issuers)...Southern Company believes the provisions of Rule 14a-11 should not be applicable to companies that do not have any publicly traded common stock (i.e., issuers of only non-convertible debt and non-convertible preferred and preference stock)...the New York Stock Exchange takes a similar approach, exempting debt and preferred stock issuers from nearly all of the corporate governance requirements of Rule 303A.”⁶¹

Some companies, including 3M, IBM, and others, urged the Commission to address problems with the current system to elect directors before further consideration of the proposed rules. Among the issues raised by the companies were: more regulation governing the conduct of proxy advisory firms, but also reform of the NOBO/OBO system, and measures to address the impact of borrowed shares on votes (along with proposals from a dozen or so companies to require shareholder disclosures based on “net” holdings). CSX warned that “when combined with the recent amendments to New York Stock Exchange Rule 452, proxy access under Rule 14a-11 will likely result in unprecedented influence of unregulated proxy advisory firms on director elections and other governance matters.”⁶² Lionbridge Technologies joined 3M and IBM in asking for the Commission to review the influence and role of proxy advisory firms. Lionbridge asked the Commission to consider: “regulation of these firms, including requirements that these firms be responsible for factual accuracy in their reports in advance of issuance and have an affirmative obligation to speak to companies to correct information or discuss issuer views...Increasingly, our efforts to establish a direct and open dialogue with our investors have been undermined by their engagement of proxy advisory firms...our

⁵⁹ Emerson (Frank L. Steeves, General Counsel), letter to the SEC dated Aug. 17, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-213.pdf>

⁶⁰ New York Times (Kenneth A. Richieri, General Counsel), letter to the SEC dated Aug. 14, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-183.pdf>

⁶¹ Southern Company (Melissa K. Caen, Assistance Secretary), letter to the SEC dated of Aug. 17, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-265.pdf>

⁶² CSX (Ellen M. Fitzsimmons, General Counsel), letter to the SEC dated Aug. 17, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-335.pdf>

investors tell us that they have little ability to alter a recommendation of the proxy advisory firms, even when they believe they have a compelling business case to do so or if they believe the proxy advisory firm is not accurately or appropriately measuring our company's performance..We also have observed that proxy advisory firms are now establishing corporate governance policies rather than simply advising their clients...the proposed rules will serve only to further institutionalize the position of the proxy advisory firms in the shareholder communication process...”⁶³

⁶³ Lionbridge Technologies (Guy de Chazal, Lead Director), letter to the SEC dated Aug. 13, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-161.pdf>

2. CORPORATE DIRECTORS WRITING ON THEIR OWN BEHALF

The following is based upon a review of 21 letters from corporate directors at publicly traded companies. Most within this category submitted comments on their own behalf, including submissions from directors at companies which responded separately with formal written responses (typically submitted by general counsels [and reviewed above]). Most of the letters in this group raised issues that were consistent with those addressed in letters submitted on behalf of the companies. As a result, we will focus here on those issues, arguments, and proposals that are novel or offer some unique perspective from the viewpoint of active company directors.

● ● ●

“The proposal does not recognize that public company directors are generally highly accountable and responsive to shareholders.”

– James M. Kilts, a director at Meadwestvaco Corporation, Metropolitan Life Insurance Company, and Pfizer

● ● ●

Corporate directors from a wide range of backgrounds and experiences expressed nearly universal opposition to imposing a “universal” standard on proxy access. Indeed, the National Association of Corporate Directors indicated in its letter to the SEC that it does not support proposed Rule 14a-11, but supports revisions to Rule 14a-8 in order to give “private ordering” a “reasonable opportunity to work.”⁶⁴

Some directors argued that the SEC’s proposals will cause more harm than good by marginalizing the influence of what are mostly responsive directors. For example, James M. Kilts, a director at Meadwestvaco Corporation, Metropolitan Life Insurance Company, and Pfizer, writing on his own behalf, explained that the SEC’s proposal: “recognizes neither the extent to which directors are

already accountable to shareholders...nor recent corporate governance reforms that have enhanced the process by which directors are selected. The proposal also would diminish – if not eliminate – the role of boards and committees in evaluating the qualifications of candidates designated by shareholders and would have an adverse impact upon the functioning of boards...The proposal does not recognize that public company directors are generally highly accountable and responsive to shareholders. At the same time, the proposal would reduce rather than enhance director accountability and responsiveness...a nominee designated by a shareholder or group of shareholders would be deemed qualified if he or she meets the minimum standards imposed by the applicable stock exchange. Boards and their nominating or governance committees would have an extremely limited role, if any, in the selection process for any such nominee, which would diminish if not eliminate their ability to fully consider a candidate’s independence, integrity and ability...The proposal...could result in the election of persons whose abilities and experience are inappropriate to the board and/or its needs and could effectively create two different classes of directors. Further, the proposal would turn a regular annual election of directors into a contested election. The best boards are characterized by high levels of candor and collegiality; since the proposal could impair both, it would adversely affect corporate governance.”⁶⁵ Constance J. Horner, a director at Ingersoll-Rand, Pfizer, and Prudential Financial, writing on her own behalf, expressed concerns about the SEC’s proposal: “(1) it fails to recognize the extent to which directors are already accountable to shareholders and the extent to which recent corporate governance reforms have enhanced the process by which directors are elected; (2) it would deprive boards and committees of the ability to assess a shareholder-designated candidate’s independence and qualifications; and (3) it does not adequately

⁶⁴ NACD, letter to the SEC dated Aug. 17, 2009. (<http://www.sec.gov/comments/s7-10-09/s71009-173.pdf>)

⁶⁵ James M. Kilts dated, letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-477.pdf>

consider the possible adverse effects of proxy access on the dynamics and optimal functioning of boards.”⁶⁶

Some directors expressed strong opposition to the proposed rules, and went so far as to challenge the veracity of arguments made in the Proposing Release. While the Release claimed an economic imperative, DuPont’s Chairman, Charles O. Holliday, Jr., observed that “the Commission’s proposal may

● ● ●

“It is inconsistent with both the principle of majority shareholder rule and the corporation law of the individual states for the federal government to mandate proxy access rules that cannot be changed by a majority vote of the shareholders.” -- Professor Laura D'Andrea Tyson (former Chairman of the President’s Council of Economic Advisers and a director at AT&T)

● ● ●

well exacerbate one of the agreed-upon causes of the crisis—the emphasis on short-term gains at the expense of long-term, sustainable growth.”⁶⁷ Chairman Holliday also warned that: “the prospect of having to run for election in a highly charged, political atmosphere and serve on a board with ‘special interest’ directors is sure to deter the very qualified and experienced individuals we want to serve as members of corporate boards. This is especially true given the Commission’s recent approval of amendments to New York Stock Exchange Rule 452...the Commission has grossly underestimated the staff resources necessary to administer the procedure to be created under proposed Rule 14a-11...”⁶⁸

One of the more notable responses, and critiques of the SEC’s proposals, came from UC Berkeley Professor Laura D'Andrea Tyson, who wrote to the SEC “in my capacity as a director of AT&T Inc.”⁶⁹ The former Chairman of the President’s Council of Economic Advisers (Clinton Administration) argued that: “It is inconsistent with both the principle of majority shareholder rule and the corporation law of the individual states for the federal government to mandate proxy access rules that cannot be changed

by a majority vote of the shareholders. Whether the majority of shareholders wish to establish stricter or more liberal proxy access rules, they should be free to do so in accordance with their own views of the best interests of the company...the proposed new rules - with their low ownership threshold and short holding period - will encourage hedge funds and other short-term speculators to attempt to influence corporate policy in favor of short-term profits rather than long-term shareholder value...(the) proposed rules will cause significant disruption to the process for electing directors and will divert both corporate and Board resources away from urgent issues of day-to-day governance.”

⁶⁶ Constance J. Horner, letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-476.pdf>

⁶⁷ DuPont (Charles O. Holliday Jr., Chairman), letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-264.pdf>

⁶⁸ Ibid.

⁶⁹ Laura D'Andrea Tyson, letter dated Aug. 27, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-517.pdf>

3. “ACTIVIST” INVESTORS

Included in this category were 20 letters from institutional investors identified by The Altman Group as having a history of supporting, or initiating, “activist” agendas through shareholder proposals and changes in the boardroom. The majority of the letters so categorized came from pension and other institutional fund managers.

A range of “activist” investors have been advocating a direct proxy access right for years. Most within this group of letter writers voiced support for both Proposed Rule 14a-11 and the proposed amendment to Rule 14a-8 (removing the director election exclusion), which CalSTRS called a move to “correct the wrong visited upon shareholders when the SEC amended Rule 14a-8 to reverse the decision

“We believe that the Commission's proposed rules represent an important step towards the democratization of U.S. public companies ... We believe that the proposed eligibility thresholds are too low.” – ValueAct Capital

of the Second Circuit of Appeals in the *AFSCME vs. American International Group, Inc.* decision.”⁷⁰ Many of the “activist”-oriented investors/institutions writing to support the SEC’s proposed rules offered few, if any, novel proposals or requests for modifications. This pattern appeared to reflect a general desire to speed up consideration and adoption of the SEC’s proposed rule changes – as is - in order to have them in place for the 2010 proxy season: an objective that was explicit in a short note from the Ontario Teachers’ Pension Plan Board.⁷¹

Even so, there were some respondents, who were broadly supportive of the Proposed Rule, who still found cause to request changes. CalSTRS called “Rule 14a-11...the greatest advancement of shareholder fundamental rights in decades,” but still asked that

the Commission: “better define the computation of the percentage of securities owned”; allow “the shareholder/group with the largest economic interests to proceed” rather than use the “first-in” approach; and “provide a new exemption for soliciting activities undertaken by shareholders seeking to form a group pursuant to Rule 14a-11,” which “would enable shareholders to gauge the popularity of their nominees without incurring the prohibitive expenses of engaging in a proxy solicitation.”⁷² Walden Asset Management (Boston Trust & Investment Management Co.) and Trillium Asset Management also supported giving priority to the shareholder/group that is the largest financial owner rather than a first-in approach.⁷³ Norges Bank Investment Management argued that there was “no need” for a first past the post rule, and urged instead that “all valid nominations” be placed on the ballot.⁷⁴

Some activists were clearly surprised by how low the nominating thresholds are in the SEC’s Proposing Release. ValueAct Capital strongly supported the SEC’s “important step towards the democratization of U.S. public companies,” but argued that “the proposed eligibility thresholds are too low. We think that such a low barrier would flood issuers with requests to include nominees...thereby creating confusion for shareholders, logistical headaches for issuers and opening the door to small special interests who do not share the interests of all shareholders generally. Therefore, we propose that the level be 10% of outstanding shares (calculated in the same method as used for Section 13 filings) for all U.S.

⁷⁰ <http://www.sec.gov/comments/s7-10-09/s71009-471.pdf>

⁷¹ <http://www.sec.gov/comments/s7-10-09/s71009-228.pdf>

⁷² <http://www.sec.gov/comments/s7-10-09/s71009-471.pdf>

⁷³ <http://www.sec.gov/comments/s7-10-09/s71009-168.pdf>

⁷⁴ <http://www.sec.gov/comments/s7-10-09/s71009-258.pdf>

issuers regardless of size.”⁷⁵ Even more interesting, coming from a fund manager, was ValueAct Capital’s comment that “eligibility should be conditioned on meeting the ownership threshold by holding a net long position for the required period. It seems fundamentally out of step with the spirit of the proxy access rules to require a certain level of ownership but then trade away the economics of that ownership by permitting the owner to be short against the same security to any meaningful extent.” The same firm also argued that while “there should be no prohibition on any affiliation between nominees and nominating shareholders or groups...there should be full disclosure of any affiliation...” ValueAct Capital also asked that the Commission consider exempting from Section 16 any group of like-minded shareholders aggregating holdings “solely for the purpose of nominating a director pursuant to the proxy access rules,” and include language preventing shareholder rights plans from being “triggered upon the formation of a group of shareholders solely for the purposes of nominating a director pursuant to the proposed regulation.”

Other activist managers questioned the length of the holding period requirement in light of the SEC’s assertion that only holders with a “long-term interest” in the company should be able to rely on Rule 14a-11. OPERS generally supported the Proposal Rule, but also argued that a more appropriate continuous ownership period is two years.⁷⁶ The Sheet Metal Workers National Pension Fund also supported the “broad contours of the proposed Rule 14a-11,” but urged the Commission to modify the Proposed Rule by: extending the holding period requirement to 2 years; clarifying the definition of “continuous ownership” to note that the holdings of institutional shareholders may fluctuate during any specified period; have ownership determinations based on the minimum number of shares owned during the holding period, take into account shares on loan; and give priority to the group with the largest holding, rather than a first-in approach.⁷⁷

Some companies and many critics of the Proposed Rule noted that the initiative is rooted fundamentally by a drive to lower the costs that activists currently have to bear in order to gain a presence on corporate boards. CalPERS, when claiming that current rules unfairly discourage shareowner nominations, started their argument by noting that when nominating committees prevent shareowner nominated candidates from being “fairly considered in elections” it is the “shareowners” that are: “therefore forced to create their own ‘ballot’ and mount a proxy campaign. Because this process is prohibitively expensive, it rarely occurs outside of hostile takeover or other change in control efforts.”⁷⁸

Some “activist” investors argued that the Proposed Rule did not go far enough to open the doors to having shareholders nominate, according to CalPERS’ letter: “as many director candidates as necessary to focus the board’s attention on optimizing the company’s operating performance, profitability, and sustainable returns to shareowners.” CalPERS expressed support for the Proposed Rule’s requirement “to include no more than one shareowner nominee or the number of nominees that represents 25 percent of the company’s board of directors, whichever is greater.” However, the institution also “advised” that because “it is very difficult for a single director to effect change where there has been a contested election...the minimum number of permitted number of nominees should not be less than two.”

CalPERS provided ammunition for critics arguing that supporters of a Federal direct proxy access rule want to open the door to contests (at company expense) for corporate “control.” So that there is no

⁷⁵ ValueAct Capital (Allison Bennington, General Counsel), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-488.pdf>

⁷⁶ <http://www.sec.gov/comments/s7-10-09/s71009-208.pdf>

⁷⁷ <http://www.sec.gov/comments/s7-10-09/s71009-283.pdf>

⁷⁸ CalPERS (Joseph A. Dear, Chief Investment Officer), letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-259.pdf>

uncertainty about “context,” here is the complete paragraph from CalPERS’ letter: “In principle, CalPERS supports the concept that shareowners should have the ability to nominate as many director candidates as necessary to focus the board’s attention on optimizing the company’s operating performance, profitability, and sustainable returns to shareowners. CalPERS views the proposed limitations on the number of nominees as inconsistent with the intent and spirit of this proposal, which is to remove impediments to the exercise of shareowners’ rights to nominate and elect directors to company boards of directors. Conceivably, a change in control could be necessary to ensure the company is being managed to achieve long-term, sustainable shareowner returns. Nonetheless, CalPERS supports the Commission’s proposal at this point in time in order to allow for a measured adoption of proxy access.”⁷⁹

William Ackman’s Pershing Square Capital Management delivered a long letter defending the SEC’s proposal as: “a systemic solution for a systemic problem...Our hope is that, outside the control context, selection of the best nominees in a contest will be based more on character, competency, and relevancy of their experience rather than the identity of the person nominating the candidate.”⁸⁰ Even so, the firm noted “areas of concern,” including: “Current shareholder proxy access proposals set ownership thresholds as low as 1% of a company’s outstanding stock and as such there is a risk that the threshold is too low and may encourage wasteful proxy contests. Because of the significant campaign costs other than the printing and distribution of proxy statements and ballots (like the associated opportunity cost of time and direct legal, travel and solicitation expenses), we are hopeful that this risk remains unrealized. If not, the system will need to be reexamined...we are apprehensive of a ‘first-to-file’ system where the first shareholder (rather than the largest shareholder or group of shareholders) has priority access to the proxy statement...While it may be the case that a wholly independent candidate is the best person for the job in any given circumstance, we see no reason why this should be imposed as a matter of law. So long as full and fair disclosure of affiliations and business relationships remains the standard in proxy disclosures, this is a variable that should be left up to the contestants. Separately (and importantly), we urge the SEC to extend the right to a universal ballot outside the limited context of shareholder proxy access.”

● ● ●

“While some may fault the SEC’s proposal as too blunt of a tool because it applies to all corporations, we have no such objection. The fundamental policy aim of the proposal is to facilitate greater participation in corporate governance by shareholder representatives system-wide. It is a systemic solution for a systemic problem and is, therefore, appropriately broad in scope.”

– Pershing Square Capital Management

● ● ●

⁷⁹ Ibid.

⁸⁰ Pershing Square Capital Management, L.P., letter to the SEC dated August 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-311.pdf>

4. INSTITUTIONAL INVESTORS (EXCLUDING ACTIVISTS)

Within this group of letters we found a sharp divergence of opinions on the proposed rule changes between investment companies and other institutional investors. This segment includes letters from both large and small institutional investors that The Altman Group does not also categorize as “activist” (as above). The most significant opposition to the proposed rules came from investment companies. Indeed, the Investment Company Institute (ICI) recommended excluding investment companies from the current proposal.⁸¹ The Council of Institutional Investors, which is an “association of public, corporate, and union pension funds,” was “generally” more supportive of Proposed Rule 14a-11.⁸² Even so, “Council members approved” a “policy” statement that challenged key points of the Proposed Rule:

“Companies should provide access to management proxy materials for a long-term investor or group of long-term investors owning in aggregate at least three percent of a company’s voting stock, to nominate less than a majority of the directors. Eligible investors must have owned the stock for at least two years. Company proxy materials and related mailings should provide equal space and equal treatment of nominations by qualifying investors.

To allow for informed voting decisions, it is essential that investors have full and accurate information about access mechanism users and their director nominees. Therefore, shareowners nominating director candidates under an access mechanism should adhere to the same SEC rules governing disclosure requirements and prohibitions on false and misleading statements that currently apply to proxy contests for board seats.”⁸³

ICI is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). As such, it was interesting to note that after weighing the balance of interests of an association that includes fund managers, including some “activist” institutions, and companies subject to the proposed rule changes, the ICI came down in favor of a recommendation that: “the Commission not adopt proposed Rule 14a-11 at this time. Requiring all public companies to permit shareholders to use the company’s proxy machinery to nominate directors would force implementation of a dramatic change through a one-size-fits-all approach. Instead, the Commission first should permit shareholders and company management to work together to tailor companies’ governing documents through bylaw amendments to suit the specific interests of the company and its shareholders.”⁸⁴ ICI also urged that the SEC “exclude investment companies from this proposal and...consider whether a proxy access proposal should apply to investment companies at all...The Release presents no empirical data or other information to explain the Commission’s policy basis for extending the proposed requirements to investment companies.”⁸⁵

The ICI’s argument about the need for higher ownership thresholds was particularly informative in that it was backed up with some empirical data. ICI argued that the “thresholds must be sufficiently high to limit the circumstances under which a single investor is able to nominate a director, in order to decrease the likelihood of a nomination that might be designed to achieve objectives that could be inconsistent with the company’s structure and objectives, and unrelated to effective board governance.”

⁸¹ ICI (Paul Scott Stevens, President & CEO), letter to the SEC dated Aug. 17, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-360.pdf>

⁸² <http://www.sec.gov/comments/s7-10-09/s71009-78.pdf>

⁸³ Council of Institutional Investors (Jeff Mahoney, General Counsel), letter to the SEC dated Aug. 4, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-78.pdf>

⁸⁴ ICI (Paul Scott Stevens, President & CEO), letter to the SEC dated Aug. 17, 2009.

<http://www.sec.gov/comments/s7-10-09/s71009-360.pdf>

⁸⁵ *Ibid.*

The reasoning underpinning this argument was described in a footnote: a “recent ICI study of proxy voting by investment companies found that sponsorship of shareholder proposals is fairly concentrated. For example, half of the 239 shareholder proposals offered at companies with shareholder meetings from July 1, 2006 to June 30, 2007 were sponsored by just five individuals. And while 19 labor unions submitted 186 shareholder proposals during the same period, three unions submitted half of these.”⁸⁶

Should the SEC adopt some form of Proposed Rule 14a-11, the ICI recommended changes that were in line with those proposed by some corporations responding to the Proposing Release. The most significant ICI recommendations are detailed in the following table:

TABLE 5

List of ICI Proposals to Modify Proposed Rule 14a-11

1. “(O)nly shareholders (or groups of shareholders) who own 5 percent or more of a company’s securities for at least one year be permitted to submit bylaw amendments regarding director nomination procedures...only shareholders (or groups of shareholders) of operating companies who own at least 10 percent of a company’s securities for at least two years be permitted to nominate directors on a company’s proxy statement”;
2. “Access...(be) limited to shareholders who have acquired shares without the intent of changing or influencing control of the issuer”;
3. “Access should be predicated on a significant ownership interest”;
4. “All members of a shareholder nominating group should have continuously and beneficially held the company’s voting securities for an extended period of time”;
5. “Companies should be required to include no more than one shareholder nominee”;
6. “Nominating shareholders should be required to disclose their motivation for nominating a particular candidate”;
7. “Companies should be permitted to provide shareholders with the ability to vote for the entire company-recommended slate by checking one box”;
8. “Nominating shareholders should have liability for their statements, and companies should be shielded from liability for those statements”;
9. “Rule 14a-8(i)(8)...the proposed threshold of \$2,000 in market value, or 1 percent, of the company’s securities is far too low...we recommend...5 percent or more of a company’s securities for at least one year”;
10. “The application of disclosure requirements along the lines of those in proposed Rule 14a-19, which would help make known whether proponents are seeking bylaw amendments to serve their own interests or the interests of long-term shareholders”;
11. “Requiring proponents of this type of shareholder proposal to state that they do not hold and have not acquired shares for the purpose of or with the effect of influencing or changing control of the company or to gain more than a limited number of seats on the board”;
12. “(P)roviding in rule text that the nominating shareholder would be liable for statements *provided by* the nominating shareholder to the company and included in the company’s proxy materials...provide that a company would not be responsible for any disclosure in the company’s proxy statement *based on* information provided by the nominating shareholder...the company only would be responsible for false and misleading information provided by a nominating shareholder if the company knows that information is false or misleading.”
13. “(A) longer holding period than that proposed, such as two years, would provide greater assurance that shareholder proponents are committed to the long-term mission of the company”;
14. “Counting shareholder nominated directors as such for at least three years against the rule’s limitations”;
15. “(P)ermit the shareholder or group of shareholders with the most significant stake in the company to put forward its nominee.”
16. “(N)ominating shareholders disclose their motivation in seeking a nomination (*e.g.*, to gain publicity for a particular policy issue) and any formerly recommended nominees (including how many such nominees and their identities).”
17. “(C)larify that shareholder nominees would be required to satisfactorily complete...the same questionnaire as other nominees at the company’s request...”
18. Schedule 14N should “include a written statement from the record holder of the shares beneficially owned by the nominating shareholder verifying that, as of the date of the shareholder notice on Schedule 14N, the shareholder continuously held the minimum required of securities for the requisite time period. Such a requirement is essential

⁸⁶ ICI letter cited Investment Company Institute, *Proxy Voting by Registered Investment Companies: Promoting the Interests of Fund Shareholders*, Research Perspective, Vol. 14, No. 1 (July 2008), at pp. 1 and 6-7.

given that shares are typically held by brokers and banks in omnibus accounts. The prevalence of omnibus accounts, along with Commission rules prohibiting banks and broker-dealers from providing issuers with the names of certain shareholders, often makes it difficult, if not impossible, for issuers to verify the extent and length of their beneficial shareholders' ownership of company shares."

19. "Proposed Rule 14a-4(b)(2)(iv) would require a company to include both company nominated and shareholder nominated directors on a single form of proxy...It is unclear, as a practical matter, how a firm tabulating a shareholder vote would treat any form of proxy that was voted for more directors than there are board positions. Neither existing Commission rules nor the proposal address this critical issue. Simplicity with respect to voting mechanics is necessary so as not to unintentionally disenfranchise shareholders. We therefore strongly recommend permitting issuers to provide shareholders with the ability to check a box and vote for the entire company-recommended slate."
20. "(A) group formed solely for the purpose of (i) nominating a director under proposed Rule 14a-11, (ii) soliciting in connection with the election of that nominee, or (iii) having that nominee elected as director should not be viewed as the type of group that should be aggregated together for purposes of Section 16...investment company holdings, particularly if coupled with the holdings of other investment companies, could easily reach Section 16's 10 percent threshold. Accordingly, we urge the Commission to revise the proposed approach."
21. "The Release requests comment on whether the Commission should apply the 'interested person' standard of Section 2(a)(19) with respect to the representation that a nominee be independent from an investment company. The Institute strongly agrees that because, as noted in the Release, the Section 2(a)(19) test is tailored to the types of conflicts of interest faced by investment company directors, it is more appropriate for investment company directors than the independence standard applied to directors of other companies."
22. "The Institute strongly urges the Commission not to adopt a Form 8-K filing requirement for investment companies...investment companies typically are not required to file Form 8-K...Rather, we recommend that the Commission require investment companies to inform shareholder proponents of the intent to nominate date through another method (or combination of methods) of disclosure...Such methods could include, but would not be limited to, a press release or posting information on the company's website."⁸⁷

Vanguard Group did not support the rules as proposed based on two primary arguments: "First, from the position of the Vanguard funds as issuers, we are concerned that the Proposed Rules could disrupt the corporate governance model that the Commission has developed for investment companies. The corporate governance needs of investment companies and the regulatory framework in which they operate differ substantially from those of public operating companies....Second, from the position of the Vanguard funds as long-term investors in thousands of public companies, we are concerned that the Proposed Rules' ownership thresholds are far too low. Our proxy voting principles are based on maximizing value to fund shareholders over the long term, and we strongly support the exercise of shareholder rights, in proportion to economic ownership, as a fundamental privilege of stock ownership. However, in our view, the Proposed Rules lower the bar *too* far, giving investors an ability to influence and disrupt corporate management that is out of proportion with their stake in companies' long-term success....The concerns that animate the Proposed Rules – to ensure that director nominations are not dominated by entrenched management interests – are unnecessary in the mutual fund context, because new directors are nominated by independent directors, who are the shareholders' proxies, and who are charged with explicit statutory and regulatory obligations to protect the funds from overreaching by their management firms. In sum, we believe that the approach of the Proposed Rules calls into question the continuing validity of the Commission's Fund Governance Rules and undermines the carefully considered structure under which independent directors are charged with protecting shareholders' interests, by, among other things, nominating other independent directors."⁸⁸

Capital Research & Management Co. supported the exclusion of investment companies and urged the Commission to adopt much higher ownership thresholds: "we recommend that the Commission consider 5%, 8% and 10% ownership thresholds, depending on a company's market capitalization. These levels should provide sufficient protections against the objectives of a single shareholder, which may be

⁸⁷ ICI (Paul Scott Stevens, President & CEO), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-360.pdf>

⁸⁸ Vanguard Group (Heidi Stam, General Counsel), letter to the SEC, dated Aug. 18, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-326.pdf>

inconsistent with a company's long-term operating goals...amendments to Rule 14a-8 should be consistent with those proposed by the Commission with respect to Rule 14a-11. As such, they should not make it easy for proponents, who may have objectives that are inconsistent with a company's other shareholders, to submit bylaw proposals concerning the election of board members. As proposed, we feel that the threshold of \$2,000 in market value, or 1%, of a company's securities, is too low. In order to align the interests of shareholder proponents with those of long-term shareholders, we suggest that the Commission require that shareholders must own at least 5% to be allowed to submit bylaw amendments regarding director nomination procedures."⁸⁹

A number of institutions offered support for the Commission's proposed rules, but also recommended various modifications. Thomas P. DiNapoli, the State Comptroller of New York State and sole Trustee of the New York State Common Retirement Fund, was generally supportive of the SEC's proposals, as is, but with one exception: he opposed the first in approach to determining which shareholder candidates are included in a company's proxy materials, and urged consideration of a process that gives preference to "size and duration of holdings."⁹⁰ T. Rowe Price argued that "the Commission should defer action on investment companies until the marketplace gains more experience with shareholder access as applied to operating companies." The firm also proposed a range of changes to 14a-11, and noted that: "A 1% threshold is too low...The significance of a 5% ownership threshold has been well established throughout the Securities Exchange Act of 1934. Importantly, there is full transparency at this level through the beneficial ownership reporting requirements under Section 13...the laddered 1%-3%-5% scale is not particularly relevant since most of the companies that we invest in would fall within the lowest 1% threshold...the Commission should make clear in the rule that 'beneficial ownership' equates to long-term economic ownership, as opposed to temporal, synthetic ownership through customized derivatives positions and stock borrowing...exclude an otherwise eligible nominee where that nominee (or a different nominee from the same nominating shareholder) was included in the company's proxy in the prior year but earned less than 10% of the votes cast... we encourage the Commission to consider adding to Rule 14a-11 some means by which minority shareholders of dual-class and parent-controlled companies could meaningfully avail themselves of the rule...reconsider the rule's 'first-to-file' provision" in favor of "the shareholder or group with the largest economic stake in the company..."⁹¹

Hermes Equity Ownership Services (EOS) was generally supportive of the Proposed Rule, but offered some recommendations of a technical nature. In particular, the firm urged that shareholders be given the opportunity to correct minor technical defects in their filings with both companies and the SEC. For both controlled companies and companies with dual class capital structures, Hermes urged that the SEC set the maximum number of shareholder nominees that may be included in the company's proxy materials at 25% of the board in its entirety, not 25% of the directors entitled to be elected by common shareholders. They also want to ensure that if, for example, a company's statement in opposition to a shareholder nominee exceeds 500 words, then the shareholder's statement in support should be allowed to exceed 500 words. Doing so would achieve parity.⁹²

AllianceBernstein, which was generally supportive of the Proposed Rule 14a-11, as is, noted that: "we recognize that shareholder access to corporate proxies must be limited in order to discourage frivolous proposals...We therefore encourage the Commission to impose nominee eligibility criteria that would exclude an otherwise eligible nominee from being listed in the company's proxy materials as a

⁸⁹ CRMC, letter to the SEC, dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-313.pdf>

⁹⁰ <http://www.sec.gov/comments/s7-10-09/s71009-244.pdf>

⁹¹ <http://www.sec.gov/comments/s7-10-09/s71009-218.pdf>

⁹² Hermes Equity Ownership Services, letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-153.pdf>

director candidate for three years if that nominee receives less than 10% of the shareholder vote... We further believe that imposing eligibility criteria will safeguard against the possible abuse of the director nomination process that would be made possible by insufficient parameters, much like imposing mandatory minimum ownership requirements and holding period thresholds.”⁹³ In response to Proposing Release question E.9, the firm offered a detailed response: “Rule 14a-11 should provide an exception for controlled companies. For this purpose, the Commission should consider the definition of ‘controlled company’ adopted by the New York Stock Exchange in Section 303A of its Listed Company Manual, under which ‘controlled company’ is defined as a company in which ‘more than 50% of the voting power is held by an individual, a group or another company.’”

Abe M. Friedman, who is the Global Head of Corporate Governance & Proxy Voting at Barclays Global Investors, supported the general principle of direct proxy access, but urged that its application be narrowed, including through triggering events. Although recognizing that “incumbent boards are best positioned to identify the skills that may be lacking, or the roles that require augmenting, within the boardroom,” he went on to argue that: “given the critical importance to shareholders of an ability to elect directors that represent their interests, and given that boards can, and occasionally do, fail in their duty to protect shareholder interests, shareholders should have a mechanism to insert new views in the boardroom where necessary. Hence we favor the general principle set forth in proposed Rule 14a-11 — that after meeting certain minimum threshold requirements, and only in non-hostile situations, long-term shareholders should have access to the company proxy to nominate director candidates... a narrowly tailored approach with triggering mechanisms pointing to a failure of the board to fulfill their nominating function appropriately, prior to allowing access in any particular instance, is the most appropriate and most shareholder protective approach to shareholder access... we favor the sort of triggering events contained in the access proposal that was considered by the SEC in 2003, as we believe those limits would likely confine use of the rule to the most appropriate situations. Without a triggering event requirement, the shareholder access provisions will be more vulnerable to abuse by investors with short-term goals or take-over interests...”⁹⁴

BGI also made an interesting argument for higher ownership thresholds (5-15% of O/S), depending on the company’s market capitalization, because they would favor “a shareholder nominee who is supported by more than one shareholder (e.g., a group of shareholders whose aggregate holdings represent 5-15% of outstanding shares).” Such a nominee, Friedman argued, “is more likely to both be successful as a candidate, and to represent a wider range of investor concerns. If a candidate is nominated by a single investor, we believe that the candidate is more likely to have an agenda that is driven by narrowly supported interests.” Friedman also proposed that the SEC create a “sunset” provision for “any rule that is adopted on this topic,” which “would provide an opportunity for the SEC and the market to

⁹³ <http://www.sec.gov/comments/s7-10-09/s71009-176.pdf>

⁹⁴ <http://www.sec.gov/comments/s7-10-09/s71009-172.pdf>. BGI, like many other investment companies submitting responses, urged that “the proposed rule be revised to exclude investment companies, pending a more extensive review of how the proposed rule should be tailored to address the specific issues facing investment companies. The proposed rule does not reflect the distinctive issues of investment companies, and we believe that a thorough analysis of the issues that the proposed rule would pose for investment companies needs to be undertaken... For example, unlike most public issuers, investment companies are generally structured as series companies overseen by a single board. As such, an investment company may hold a proxy vote that addresses the concerns of a single series, but to elect directors, the investment company must hold proxy vote by the entire fund complex. Under the proposed rule, it is not clear whether a 1% holder of a single series would be permitted to nominate a director, or if a shareholder would have to be a 1% holder of the entire fund complex. We believe that the latter standard is more appropriate, and that such a standard would be clearly articulated if the rule’s impact on investment companies were subjected to a more comprehensive review.”

evaluate whether a shareholder nomination right functions as intended, and also allow for the continued evolution of other corporate governance mechanisms (such as majority voting or plurality with resignation for directors who fail to achieve 50% support) that protect shareholders.”

SEC Investor Advisory Committee Member Responds to Comments

We have saved the most notable response in this group for last. Hye-Won Choi, the Head of Corporate Governance at TIAA-CREF, and the new co-chair of the SEC’s Investor Advisory Committee (“IAC”),⁹⁵ submitted a letter dated Sept. 18, 2009: “to reiterate...continued support for the Proposal and to respond to a number of arguments made by commentators against the adoption of Rule 14a-11...”⁹⁶ She went on to detail what were the first published reactions of an SEC IAC member to letters opposing the SEC’s proposed rules on proxy access: “Commentators have raised two major objections to proxy access: the Proposal (i) will exacerbate the problems associated with the short-term orientation of markets rather than encourage a longer-term perspective, and (ii) is costly and unnecessary because recent governance reforms are sufficient to safeguard shareholder rights....We believe the Proposal as a whole includes effective safeguards against use by ‘special interests’ or short-term shareholders. Most importantly, even if such candidates were included on the ballot, they would not be elected unless they received support from a majority of shareholders...By definition, special interest directors could not be elected because they would not receive the requisite level of votes. We are also skeptical that boards would submit to unreasonable demands made by an investor with little support from other shareholders.”⁹⁷

Choi went on to argue that: “existing reforms are incomplete as long as boards retain the exclusive control of the proxy card and sole discretion over the mechanisms that govern their own elections...One alternative offered by opponents is ‘private ordering’... Another alternative is that access rights should be triggered by certain events, such as a majority vote of shareholders or a significant withhold vote against directors...We believe that these approaches would diminish the effectiveness of proxy access....The ability to nominate directors is a basic right rooted in state law that should be available at all companies as a matter of principle. It should not be subject to certain events or conditions or available only at underperforming companies. It should be viewed as a right, not a form of punishment. Shareholders should have broad discretion to use the right as they see fit...We agree that shareholders should have the ability to tailor access rights to the specific situations of individual companies, as long as the right is assured and there are reasonable means of exercising the right...Private ordering could result in a systematic denial of the right by shareholders to nominate directors at the companies they own. In fact, companies currently are able to grant access rights, but almost none have chosen to do so...We believe very few companies would voluntarily adopt proxy access, even under shareholder pressure, under the argument of being disadvantaged in the marketplace. We are especially concerned that companies that are in need of greater director accountability would be the most likely to resist shareholder nominees through an access regime...There is no justifiable reason to further delay implementation.”⁹⁸

⁹⁵ <http://www.sec.gov/news/press/2009/2009-175.htm>

⁹⁶ <http://www.sec.gov/comments/s7-10-09/s71009-536.pdf>. An earlier letter from TIAA-CREF is available at <http://www.sec.gov/comments/s7-10-09/s71009-217.pdf>

⁹⁷ Ibid.

⁹⁸ Ibid.

5. OTHERS (MOSTLY UNAFFILIATED INDIVIDUALS)

Some 195 letters were categorized as coming from “others”: a group comprised of all remaining letters that could not be categorized as belonging to any other segment, and which consists primarily of letters submitted by individuals not identifying themselves as being affiliated with any *corporate* or other entity that would otherwise provide a basis for classification as belonging in a different category. As a result, this segment includes not only individuals providing no information at all to assist with categorization, but also a significant number of small unincorporated business owners. Many of the letters offered perspectives on the potential consequences of the proposed rule changes on the general economy and small businesses. Most of the letters in this segment were extremely short in length, and read more like notes to indicate votes of opposition or support.

An overwhelming majority of the letters in this segment voiced opposition to Proposed Rule 14a-11. Grounds provided included arguments ranging from claims that they will be an expensive distraction for

● ● ●

“Experience on how to properly run a business will go right out the window if the shareholder proxy access rule is changed. You cannot replace business knowledge with government rules and regulations meant to benefit the government...This is not what free enterprise is all about.”

– Paul Shannon, Providence, Rhode Island (see fn 102)

● ● ●

companies to a scheme to increase the power of “special interests”⁹⁹ and the Federal government. Dozens of letters came from small business owners who perceive the proposed rules as an attack on the existing system, which could “trickle down” and severely impair their livelihoods.¹⁰⁰ (See also “Executives of Privately Owned Companies” below). A number of people identifying themselves as engaged in small businesses are concerned that the proposed rules will open up boardrooms to directors with explicit “political or ideological” agendas.¹⁰¹ Some writers see the proposed rules as part of a broader politicized attack on the “free enterprise” system,¹⁰² and an agenda to increase the power of unions.¹⁰³ Some urged the SEC to abandon its proposed rules in favor of improving the proxy voting system and advancing retail investor education.¹⁰⁴

At the other end of the spectrum, support for the SEC’s proposed changes came from individuals who see them as a way to advance their special interests. Selected comments supported the proposed rules as a mechanism to advance broader socio-political agendas, such as giving a voice in the boardrooms to the interests of shareholders of various wealth levels,¹⁰⁵ or promoting “diversity” (defined, based on the writer, as either expertise or federally protected classes). Some support for the proposed rule was clearly grounded in a range of ideological imperatives: the most “extreme” example of which probably belongs to a CPA from North Carolina, who urged the SEC to assert a “right to nominate and elect directors” because “corporate boards are one of the last strongholds of dictatorship in the world.”¹⁰⁶ There were also a variety of letters in which the authors use consideration of the proposed rule changes, and the submission/review process,

⁹⁹ See, e.g., letter at <http://www.sec.gov/comments/s7-10-09/s71009-403.pdf>

¹⁰⁰ See, e.g., letter at <http://www.sec.gov/comments/s7-10-09/s71009-415.pdf>

¹⁰¹ See, e.g., letter at <http://www.sec.gov/comments/s7-10-09/s71009-359.pdf>

¹⁰² See, e.g., letter at <http://www.sec.gov/comments/s7-10-09/s71009-287.pdf>

¹⁰³ See, e.g., letter at <http://www.sec.gov/comments/s7-10-09/s71009-202.pdf>

¹⁰⁴ See, e.g., letter at <http://www.sec.gov/comments/s7-10-09/s71009-202.pdf>

¹⁰⁵ See <http://www.sec.gov/comments/s7-10-09/s71009-509.htm>

¹⁰⁶ See <http://www.sec.gov/comments/s7-10-09/s71009.shtml>

to support and advance tangential or unrelated initiatives, such as a modified executive compensation process.¹⁰⁷

Additional support was evident in letters from individuals concerned about promoting accountability in the financial services industry as a result of the financial crisis.¹⁰⁸ However, despite the economic crisis, there were remarkably few letters in which the authors described the turmoil as a reason to advance the SEC's agenda on "proxy access." To the contrary, the bulk of the letters citing the economic crisis came from persons (primarily in small businesses), who are concerned that the proposed rules will exacerbate economic difficulties (see also the next section).

¹⁰⁷ See, e.g. at <http://www.sec.gov/comments/s7-10-09/s71009-521.htm>

¹⁰⁸ See, e.g., letter from the Ursuline Sisters of Tildonk at <http://www.sec.gov/comments/s7-10-09/s71009-188.pdf>

6. EXECUTIVES OF PRIVATELY OWNED COMPANIES

Some 60 letters submitted were categorized as coming from executives at companies that are not publicly traded. Our intent behind this segmentation was to analyze viewpoints from businesses that will not be directly impacted by the SEC's proposed rules. Most of the responses were from small business owners. Very few responses within this segment offered detailed arguments. Rather, the overwhelming majority of the letters in this group offered what were often sharp criticisms of the SEC's initiative on proxy access.

The most common criticisms of the SEC's proxy access initiative are that it will allow "special interests" to gain access to the boardroom, put unqualified people into director seats, burden and distract corporate management, and impose additional costs that will trickle down to their smaller businesses. Executives at large and small privately owned companies seem particularly concerned at how decision-making by the boards of publicly traded companies could lead to distractions, delays, and disruptions of a range of business operations (in particular with regard to suppliers).

Curiously, the smaller the business the more magnified the potential harm from the proposed rules appears to be to those submitting comments. We can mark one end of the spectrum with this comment from the President & CEO of Crown Battery Manufacturing Co., Hal Hawk, who argued that the proposed rules threaten to "politicize" decision-making and "will prove to wreak havoc on a company and its regular business operations."¹⁰⁹ Another writer argued that the rule changes could see "more businesses close."¹¹⁰ Then there was Rohit Patel, the President and CEO of Intellect Corporation, who was Ernst & Young's "Entrepreneur Of The Year® 2007" in Maryland: "While I am as outraged by the behavior and actions of a select few unscrupulous individuals as most Americans...Such actions are the exception and not the norm, and we should not over regulate for regulation sake. Taking two steps backward may cost our nation years in our collective desire for economic recovery."¹¹¹

The Business Roundtable argued in a submission, which is examined in detail in the next section of this report, that the proposed rules would "discourage entrepreneurs from seeking financing in the public markets." A letter from Chris Dumestre, the Manager of Southland Properties, Inc., noted that: "While our business model and services may never lead our organization to becoming publicly traded, it is possible that this one day may be a reality. Instituting these proxy access changes could not only affect such a decision in the future, but it could alter the real estate market when factoring in costs to publicly traded groups. The changes would institute an environment of confusion, self-interest and division... directors and company leaders may lose authority and control over their companies' best interests because of changes in the way they are nominated and elected...we cannot afford to have our employees or directors work in discord and division...Should these people be subjected to the politicization and confusion that would accompany elections under these proposed changes, we would lose efficiency and operative ability."¹¹²

¹⁰⁹ <http://www.sec.gov/comments/s7-10-09/s71009-336.pdf>

¹¹⁰ <http://www.sec.gov/comments/s7-10-09/s71009-165.htm>

¹¹¹ <http://www.sec.gov/comments/s7-10-09/s71009-344.pdf>

¹¹² <http://www.sec.gov/comments/s7-10-09/s71009-353.pdf>

7. ASSOCIATIONS

The 29 letters that we have categorized in this segment come from a range of interest groups responding to the Proposing Release. Rather than draw conclusions about consensus views within this group of extremely diverse viewpoints, our examination will focus on illuminating insights and arguments from the letters that were particularly informative or novel (among the 500+ submissions).

In light of the current financial and economic crisis, one of the more notable responses in this group came from the Financial Services Roundtable (hereafter “FSR”), which “represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO.”¹¹³ The FSR wrote that: “we support the proposed amendment of Rule 14a-8, under which issuers would no longer be able to exclude shareholder proxy-access proposals under Rule 14a-8(i)(8)... by adopting this change and deferring to state law, the jurisdictional issue of state *versus* the federal government can be avoided. If the proposed amendments to Rule 14a-8 are adopted, we submit that there would not be a practical need for new Rule 14a-11.” If the Commission proceeds to adopt 14a-11, the FSR urged the Commission to adopt a series of revisions (some with novel language) to the Proposed Rule, including: “allow companies, by a majority of the shares voted, to adopt different conditions and requirements (including any of the protections proposed below if the Commission were to proceed with federal rulemaking without incorporating them in the final rule)”; increase the proposed ownership threshold to 5%, due, in part, to the fact that “many of our members have experienced...shareholder proposals promulgated by special interest shareholders to offer to withdraw their nominations if the issuer accedes to unrelated demands”; “restore the independence requirement from the 2003 Proposal, and require the nominees to meet all of the company’s independence standards (not just the NYSE objective standards)”; replace the “first-in” rule with priority given to “larger shareholders”; and “allow the board’s independent nominating and corporate governance committee (or, in the case of NASDAQ-listed companies with no such committees, the board’s independent directors) to interview and comment on (but not to veto) any shareholder nominees.”¹¹⁴

Selected companies responding to the Release offered positive comments about the views expressed in letters by the Business Roundtable, U.S. Chamber of Commerce, the Securities Industry and Financial Markets Association, Society of Corporate Secretaries & Governance Professionals, Association of Corporate Counsel (ACC Corporate and Securities Committee), and National Association of Manufacturers. The U.S. Chamber of Commerce’s Center for Capital Markets Competitiveness (“CMCC”) called the SEC’s proposals “unwise, unnecessary, and beyond the Commission’s authority...the States, not the SEC, have the authority to act in this realm...While the SEC suggests that the current economic conditions merit reconsideration of this proposal, over 97% of public companies were not connected with the financial crisis. Accordingly, the Proposal seems to be a solution in search of a problem... from these proposals will flow substantial unintended consequences that will

● ● ●

“Over 97% of public companies were not connected with the financial crisis. Accordingly, the Proposal seems to be a solution in search of a problem.” -- U.S. Chamber of Commerce’s Center for Capital Markets Competitiveness

● ● ●

¹¹³ <http://www.sec.gov/comments/s7-10-09/s71009-515.pdf>

¹¹⁴ Ibid.

harm corporate governance, shareholder value, and future economic growth in the United States.”¹¹⁵ The ACC’s Corporate and Securities Committee opposed adoption of Proposed Rule 14a-11, but supported the: “proposed amendment to Rule 14a-8(i)(8) to permit shareholders to propose proxy access bylaws for their respective companies...Federally mandated proxy access is not necessary because shareholders already have the ability to nominate candidates to the board via the proxy contest procedure. Moreover, with the introduction of e-proxy, the costs associated with these contests have been materially reduced. In addition, states have begun to enact laws to enable shareholders to recoup certain expenses associated with soliciting proxies for the election of directors.”¹¹⁶ The National Association of Manufacturers voiced opposition to the SEC’s proposals because the “proposed rules will give greater influence to activist shareholders promoting social or political interests over shareholder value.”¹¹⁷ The Securities Industry and Financial Markets Association (SIFMA) urged the SEC to adopt “only the amendments to Rule 14a-8,” and make an assessment later as to whether Rule 14a-11 is still necessary. SIFMA went on: “If the Commission decides nonetheless to go ahead and adopt Rule 14a-11, we encourage the Commission to provide for a private ordering mechanism in the final rules. Rule 14a-11 could become the default proxy access standard, but if a majority of shareholders agree, a company should be able to make modifications to establish an alternative that is better for the company’s individual circumstances.”¹¹⁸

The “proposed rules will give greater influence to activist shareholders promoting social or political interests over shareholder value.”

– National Association of Manufacturers

Among the groups cited in letters to the SEC from selected companies, it was the Society of Corporate Secretaries & Governance Professionals (hereafter referred to as the “Society”)¹¹⁹ and Business Roundtable (“BR”)¹²⁰ that received the most mentions. The two groups also happen to have submitted some of the most comprehensive responses to the Proposing Release. Moreover, both organizations offered some survey data on company responses: data that is included in Table 5 (below) - where appropriate.

The central argument of both the Society and BR was one of opposition to Proposed Rule 14a-11, as is, and support for amending Rule 14a-8(i)(8) to permit shareholders to propose proxy access bylaws for their respective companies (“private ordering”). BR argued that: “Proposed Rule 14a-11 and certain related proposed rule amendments (the “Proposed Election Contest Rules”) are not necessary, would have serious adverse consequences and are beyond the authority of the..SEC...to adopt.”¹²¹ The Society wrote: “(W)e do not support adoption of proposed Rule 14a-11 as currently proposed...If proposed Rule 14a-11 is adopted, it should, at a minimum, be modified to permit companies and their shareholders to ‘opt out’...eligibility thresholds, nominee’s independence and disclosure requirements, and notice and other procedural

¹¹⁵ U.S. Chamber of Commerce CCMC (David T. Hirschmann, Sr. VP), letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-181.pdf>

¹¹⁶ Corporate and Securities Committee of the Association of Corporate Counsel (Arden T. Phillips, Chair), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-337.pdf>

¹¹⁷ NAM (Dena Battle, NAM, Dir., Tax and Domestic Economic Policy), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-503.pdf>

¹¹⁸ Securities Industry and Financial Markets Association (Thomas F. Price, Mng. Dir.), letter to the SEC dated Aug. 23, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-129.pdf>

¹¹⁹ Society of Corporate Secretaries & Governance Professionals (Neila B. Radin, Chair, Securities Law Committee), letter to the SEC dated Aug. 12, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-122.pdf>

¹²⁰ Business Roundtable, letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-267.pdf>

¹²¹ Ibid.

requirements, likewise should be modified...”¹²² BR urged the adoption of a modified version of the Commission’s proposed amendment to Rule 14a-8(i)(8): “We note that at the Commission’s May 20, 2009 open meeting, Commissioner Paredes suggested an alternative under which Rule 14a-8(i)(8) would be amended to permit proxy access shareholder proposals only if the law of the company’s state of incorporation expressly authorizes a company to have a proxy access provision in its governing documents. See Commissioner Paredes, Statement at Open Meeting (May 20, 2009).”¹²³ As for the Commission’s “proposed Rule 14a-8(i)(8) amendments,” BR argued that they “would permit shareholders only to impose more lenient but not more restrictive proxy access requirements on nominating shareholders, even if a majority of a company’s shareholders desired more restrictive access requirements.”¹²⁴

The Business Roundtable challenged the SEC’s authority to establish a federal direct proxy access rule. In particular, BR offered a lengthy discourse on why the proposed rules “exceed the Commission’s statutory authority” under 14(a), state laws, and even the U.S. Constitution. The latter argument was grounded on an assertion that U.S. 1st and 5th Amendment protections are implicated by the Commission’s proposals, which, if enacted, would “deprive companies of their ‘autonomy to choose the content’ of their proxy materials...Fifth Amendment...because a company’s proxy materials are the private property of the company...”¹²⁵ The U.S. 5th Amendment argument was novel among the letters submitted, but the U.S. 1st Amendment argument was also made in a letter, with supporting arguments, submitted by W. Brinkley Dickerson, Jr. of Troutman Sanders LLP.¹²⁶

BR also noted that: “The Proposed Election Contest Rules will help institutional investors, not the individual shareholders Congress intended the Commission to protect. The institutional shareholders of special concern fall into two general categories: (i) union-affiliated and other large pension funds; and (ii) hedge funds. The risk that such institutional shareholders will exploit the nomination mechanism...is significant. That risk could drive firms away from the public markets...Hedge funds pose a particular problem because, as is now well known, in addition to holding voting common stock that would entitle them to use the subsidized nomination procedure in the Proposed Election Contest Rules, they also may hold other securities that in effect allow them to profit if the company fails instead of succeeds.”¹²⁷

¹²² Society of Corporate Secretaries & Governance Professionals (Neila B. Radin, Chair, Securities Law Committee), letter to the SEC dated Aug. 12, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-122.pdf>

¹²³ Business Roundtable, letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-267.pdf>

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ W. Brinkley Dickerson, Jr., letter to the SEC: “A proxy statement is a form of speech that is entitled to First Amendment protection...Compelling a corporation to include nominations of directors by shareholders in the corporation’s proxy materials infringes on the corporation’s right of free speech in that the Commission’s proposed rule does not distinguish between expressive and non-expressive content. See *Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (holding that speech ‘does not lose its protection because of the corporate identity of the speaker’). Thus, absent this distinction, a requirement that third-parties’ ‘speech’ be included in a corporation’s proxy statement is overbroad and therefore unconstitutional. Under the proposed rules, a shareholder has the ability to request that a corporation’s proxy statements include ‘political’ as well as nonpolitical speech as a shareholder’s nomination of directors is capable of expressive content...The Commission’s proposed rule...would force a corporation to include expressive speech that it disagrees with, a direct violation of the First Amendment. See *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 12 (1986) (holding that the ‘state is not free either to restrict ... speech to certain topics or views or force [a response] to views that others may hold’).” See <http://www.sec.gov/comments/s7-10-09/s71009-318.pdf>

¹²⁷ Business Roundtable, letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-267.pdf>

BR offered some estimates of the potential costs of implementing the proposed rules: “(T)he Commission has underestimated the hours and cost burden valuations in its Paperwork Reduction Act analysis...in our July 2009 Survey, our member companies reported that for each shareholder nominee the... listed preparations would require a total of an average of 99 hours of company personnel and director time—a far greater time burden than the 30-hour estimate provided by the Commission...our July 2009 Survey reported that the average total cost for such outside services for the above-listed items would be \$1,159,073 per company for each shareholder nominee...according to our July 2009 Survey, if a company opposes a proxy access nominee, it will incur an average of 302 hours of company personnel and director time.”

Other arguments advanced by BR included: that the SEC’s proposed rules will “promote short-termism”; “encourage the election of special interest directors”; result in frequent “politicized” director elections; deter qualified directors from serving as directors; hinder the ability of companies to satisfy board composition requirements; increase the influence of proxy advisory firms; increase the number of election contests; and place “additional demands on an already over-burdened and ill-functioning” proxy voting system. A novel argument presented by BR was that the proposed rules could “discourage entrepreneurs from seeking financing in the public markets.” BR also asserts that companies from

● ● ●

“The Proposed Election Contest Rules will help institutional investors, not the individual shareholders Congress intended the Commission to protect. The institutional shareholders of special concern fall into two general categories: (i) union-affiliated and other large pension funds; and (ii) hedge funds. The risk that such institutional shareholders will exploit the nomination mechanism... is significant.” -- Business Roundtable

● ● ●

Europe, for example, might find the rules “particularly extravagant and burdensome.” Like many companies submitting responses, BR also sought a delay on implementation until the 2011 proxy season: “a one-year transition period is necessary before the effective date of any rules creating a federal proxy access mandate...”¹²⁸

If the Commission proceeds to adopt 14a-11, BR argued for a range of revisions to the Proposed Rule. BR’s highest priority concerns were that the proposed rules not preempt state law and that they only “apply only where there is objective evidence of need for greater director accountability (a “triggering event”)...possible triggering events...a director fails to receive a majority of votes cast and either does not resign or the board does not accept the director’s offer to resign and where a shareholder proposal receives a majority of votes cast and the company fails to respond to the proposal.” BR also argued for an exemption for companies that have adopted director accountability measures from the Proposed Rules.

BR and the Society listed a number of proposed revisions should the Commission proceed to adopt Proposed Rule 14a-11. Those proposals are compared in Table 5, which starts on the next page (quoting texts of the letters submitted by the two groups to the SEC, with subject headings in *italics*). Readers of this report are also urged to review both letters,¹²⁹ since they rank among the most comprehensive responses to the Proposing Release.

¹²⁸ Ibid.

¹²⁹ Business Roundtable, letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-267.pdf> and Society of Corporate Secretaries & Governance Professionals (Neila B. Radin, Chair, Securities Law Committee), letter to the SEC dated Aug. 12, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-122.pdf>

TABLE 6

**COMPARISON OF PROPOSALS TO MODIFY 14a-11
OFFERED BY THE BUSINESS ROUNDTABLE AND THE
SOCIETY OF CORPORATE SECRETARIES & GOVERNANCE PROFESSIONALS**

ISSUES:**Number of Shareholder Nominees**

“Cap on number of nominees...permit companies to exclude from their proxy materials any shareholder proposal that would create a proxy access procedure that could result in the election of shareholder nominees to more than a majority of a company’s board of directors.” [Society]

“(T)he Proposed Election Contest Rules should not apply when shareholders are conducting a traditional proxy contest at a company...if exclusion were not permitted...could result in a change in control.” [BR] “Proxy access shareholder nominees are not permitted if there is a traditional proxy contest.” [Society]

“(O)ne shareholder nominee should be the limit, regardless of the size of the board...July 2009 Survey...companies responding had an average of 11.5 directors, meaning that many surveyed companies would be required to include multiple nominees in their proxy materials.” [BR] “Nominating shareholders may only submit one nominee...In the BRT Survey, 61% of the survey participants stated that the nominating shareholder should only be able to nominate one director.” [Society]

“Proxy access shareholder nominees may not constitute more than 15% of the Board.” [Society]

“An incumbent director who was elected as a shareholder nominee pursuant to the Proposed Election Contest Rules should count against the maximum number of shareholder nominees discussed above...incumbent directors nominated by shareholders outside the Proposed Election Contest Rules also should be counted against the maximum number of shareholder nominees...”[BR]

“(C)larify whether an incumbent director loses his or her status as a ‘shareholder nominee’ if the nominee subsequently is nominated by the company...the Commission needs to address the status of an individual that a company agrees to nominate as a board/company nominee, but only after a shareholder or group of shareholders provides notice to the company of their intent to nominate the individual...clarify that such a nomination does not constitute an agreement between the shareholder or the nominee and the company...” [BR]

“Nominees count against the proxy access director ‘cap’...Proxy access shareholder nominee status continues even if endorsed by the Board...Proxy access shareholder nominee status continues for three years following election to the Board...the Proposed Rules may incentivize the nominating committee or the board not to re-nominate the director in order to avoid that person becoming a ‘management’ director...thereby allowing another nominee to be put forth by shareholders under proposed Rule 14a-11...any company nominee that was initially elected as a shareholder nominee shall reduce the number of nominees that may be nominated pursuant to proposed Rule 14a-11(d)(1) for a period of an additional two years; provided that such director is nominated by the nominating committee or the board in each such additional year.” [Society]

Ownership Thresholds

“(O)wnership thresholds should be raised to 5% for all companies and the holding period extended to two years...10% on groups of shareholders...a 5% ownership threshold is consistent with the 5% ownership threshold in the Commission’s rules requiring a shareholder or group of shareholders to file a Schedule 13D.” [BR]

“Nominating Shareholder Must Own 5% and a Group Must Own 10%...In a proxy access survey recently conducted by the Business Roundtable and the Society to gauge CEO and company views and opinions regarding the Proposed Rules (the “BRT Survey”), roughly 36% of the survey participants stated that the appropriate ownership eligibility threshold (based on outstanding shares) for nominating shareholders should be 5%, while 25% favored a threshold of 10%, and 22% favored a threshold in the range of 15-25%.” (70 CEOs participated in the BRT survey). [Society]

“A shareholder should not be permitted to be a member of more than one nominating group.” [Society]

“(T)he ownership standard for a proxy access proposal under the proposed amendments to Rule 14a-8(i)(8) should be at least 1% of the company’s voting stock. While this ownership threshold is higher than for other proposals under Rule 14a-8, it is lower than the proposed ownership threshold under proposed Rule 14a-11 in recognition that the shareholder is proposing a proxy access procedure, rather than nominating a particular person as a director-nominee.” [Society] “(I)nterpret the ownership threshold for shareholders submitting proxy access shareholder proposals... raise the ownership threshold for all Rule 14a-8 shareholder proposals...to at least 1% of a company’s outstanding shares for proxy access shareholder proposals.” [BR]

Definition of “Beneficial Ownership”/Net Ownership

“(R)equire nominating shareholders to have a net long economic and direct beneficial ownership position (in the form of being the ‘ultimate’ beneficial owner with full voting and investment power) during the entire requisite holding period.” [BR]

“Given the prevalence of derivatives in the equity markets and the ability to de-couple economic interest from voting rights, we believe proposed Rule 14a11 should require possession of the full voting interest in the securities and should specify that the nominating shareholder have a net long beneficial ownership position during the entire two-year holding period for the purpose of submitting a nominee. The nominating shareholder should also be required to produce evidence from its broker-dealer or custodian that the continuous net long beneficial ownership requirement has been met. We do not believe that the record holder is in a position to make this certification and, thus, proposed Schedule 14N should be revised accordingly.” [Society]

Holding Period/Definition of “Long-Term”

“Nominating shareholders must have held their shares for two years...In the BRT Survey, 54% of the survey participants stated that the minimum holding period should be two years, while 30% thought it should be three years or longer.” [Society]

“(A) two-year holding period that continues through the date of the annual meeting is insufficient and consideration should be given to extending it through the service of any elected shareholder-nominated director. The Proposed Election Contest Rules would require that nominating shareholders intend to hold their securities through the date of the relevant annual or special meeting...nominating shareholders, as part of their initial notice requirement, should be required to represent their intent to continue to satisfy the requisite ownership threshold for the duration of their nominees’ service on the board, or at least through the term for which they have nominated the director.” [BR]

“Nominating shareholders must hold shares through the date of the shareholders’ meeting...If any nominating shareholder does not remain eligible, the company should be permitted to withdraw such nominating shareholder’s nominee from consideration for election at the shareholders’ meeting.” [Society]

Resubmission Threshold

“If the nominating shareholder’s nominee fails to receive 25% of the vote at the meeting at which such nominee’s nomination is being voted upon, the nominating shareholder (and, if applicable, all of the members of the nominating group) should be prohibited from submitting another nominee for a period of two years...In addition, the nominee should not be eligible for nomination for a similar two-year period.” [Society]

“(A) shareholder’s right to nominate director candidates in successive years should be linked to the success of the shareholder’s candidates in previous elections...A shareholder whose nominee fails to receive significant support (e.g., at least 25% of the shares outstanding in an election in one year) should not be permitted to use the Proposed Election Contest Rules for the subsequent two years...”[BR]

Other Eligibility Requirements

“(A) company should not be required to include in its proxy materials a shareholder nominee whose candidacy or, if elected, board membership would violate controlling state law, federal law or the rules of a national securities exchange or national securities association. However, the Proposed Election Contest Rules should go further and permit a company to exclude a shareholder nominee if the nominee fails to meet the eligibility requirements set forth in the company’s governing documents, including its requirements with respect to director independence and qualifications.” [BR]

“Require that a nominating shareholder, or a representative who is qualified under state law to nominate a candidate on such shareholder’s behalf, attend the company’s annual meeting and nominate any director candidates in person.” [BR]

“(R)equire(e) nominating shareholders to represent that neither the nominee nor the nominating shareholder (nor any member of the nominating shareholder group, if applicable) has a direct or indirect agreement with the company regarding the nomination...the Commission should expressly permit negotiations and other communications between the nominating shareholder and the company regarding shareholder nominees.” [BR]

“(L)imit the relationships between a nominating shareholder or group and their director nominee or nominees by imposing the same restrictions as in the 2003 Proposal...”[BR]

“Require nominees to satisfy subjective independence standards...nominees...should be required to meet the subjective independence standards of the NYSE or NASDAQ (requiring a board determination that the nominee has no material relationship that would impair independence)...nominee should be required to complete the same questionnaires and provide the same information as a company’s other directors...Both the NYSE and NASDAQ require a majority of a company’s board to be independent and Item 407 of Regulation S-K requires disclosure of relationships that the board considered in making independence determinations. Moreover, both exchanges require all of a company’s audit committee members (and compensation and governance committee members, in the case of the NYSE) to meet the subjective independence requirements.

Whether a shareholder's nominee will qualify as an independent director and be eligible to serve on these various committees is material information that a company's shareholders should have when voting for nominees for director." [BR]

"Nominee must be independent of the nominating shareholder...the nominee may not be (i) a nominating shareholder, (ii) a member of the immediate family of any nominating shareholder, or (iii) a partner, officer, director or employee of a nominating shareholder or any of its affiliates." [Society]

"First-in-Time" Rule

"(F)irst-in-time approach ignores the qualifications of the nominees and their ability to represent the concerns of the shareholders...bears no relation to the length of time or amount of a shareholder's ownership of company securities...in the event that more nominees are submitted than permitted, the shareholder holding the company's shares for the longest period of time (should) be permitted to nominate a candidate." [BR]

"(W)here there is more than one eligible nominating shareholder, the nominating shareholder with the largest holdings should be entitled to include its nominee in the company's proxy materials." [Society]

Disclosure/Filing/Compliance Requirements

"Disclosures required for a nomination pursuant to an applicable state law provision or a company's governing documents." [Society]

"The nominee must meet valid bylaw qualifications and director guidelines." [Society]

"Nominating shareholders must certify that they are not seeking to change control of the company..."[Society]

"Proposed Election Contest Rules are inconsistent with the Commission's recently proposed proxy disclosure amendments, which require additional disclosure with respect to the particular experience, qualifications, attributes, and skills of each director and nominee...some companies have adopted more rigorous independence standards for all their independent directors than imposed by exchange rules...some companies have established independence standards limiting a director's affiliation with nonprofit organizations receiving contributions from the company. Finally, certain industries, such as defense contracting and gaming, impose additional requirements on the directors of companies in those industries. We strongly believe that all of a company's directors and director nominees, including shareholder nominees, should be subject to these eligibility requirements...a company should be able to exclude a nominee whose candidacy or, if elected, board membership would violate controlling state law, federal law or the rules of a national securities exchange or national securities association." [BR]

"(A) shareholder nominee, once elected to the board, should be required to comply with a company's non-discriminatory board service guidelines, such as mandatory retirement age, share ownership requirements and the maximum number of other boards and board committees on which directors may serve." [Society]

"Nominee must complete a company's standard directors' and officers' questionnaire." [Society]

"Improve Schedule 14N...a description of any material transaction of the nominating shareholder with the company or any of its affiliates that occurred during the 12 months prior to the formation of any plans or proposals to nominate a candidate, or during the pendency of any proposal to nominate someone or any nomination...We agree with the proposed requirement that Schedule 14N be amended promptly for any material change to the facts set forth in the originally filed Schedule 14N. However, the Commission should either expressly state that 'promptly' means within two business days, or should clarify that the requirement should be interpreted in a similar manner to the 'promptly' standard of Rule 13d-2(a),288 which generally is thought to be within two business days." [BR]

"Additional Required Disclosures...in the Schedule 14N: a description of (1) any material transaction between the nominating shareholder or any of its affiliates and the company or any of its affiliates within the 12 months prior to the filing of the Schedule 14N, and (2) any discussion regarding the nomination between the shareholder and a proxy advisory firm; any holdings of more than 5% of the securities of any competitor of the company (i.e., any enterprise with the same SIC code); any meetings or contacts, including direct or indirect communication by the shareholder, with the management or directors of the company that occurred during the 12-month period, other than with respect to the proposed nomination; the items required by Item 4 of Schedule 13D regarding the purpose or plans of the nominating shareholder in respect of the nomination (nominating shareholders that beneficially own 5% or more of a subject class of securities should have the option of disclosing this information on their Schedule 13D, as discussed below); a description of any contracts, arrangements, understandings or relationships (legal or otherwise) between the nominating shareholder or any of its affiliates and any other person with respect to any securities of the company; and if adopted, the same information that a company would be required to disclose in its proxy statement regarding its nominees for director pursuant to the Commission's proposed new rules set forth in 'Proxy Disclosure and Solicitation Enhancements' (Proposing Release No. 33-9052, dated July 10, 2009)." [Society]

"(T)he percentage ownership of a nominating shareholder both for purposes of the requisite percentage threshold and for purposes of determining the size order of shareholders be determined based on their Schedule 14N filings." [Society]

“The proposed exemption from Schedule 13D is not appropriate... We believe that any nomination of a director by a nominating shareholder pursuant to proposed Rule 14a-11 is for the purpose or will have the effect of influencing control of the company and that the nominating shareholder is, therefore, by definition, not a passive investor...(A) nominating shareholder should be required to report its holdings, plans, proposals, intentions and other interests either as part of the Schedule 14N or on a Schedule 13D.” [Society]

“(C)larify what actions are required if the information provided by the nominating shareholder or group changes materially after the proxy statement is mailed to shareholders. An express provision should be included stating that a company is not required to amend its proxy statement and redistribute materials to shareholders if the information to be amended is solely that provided by the nominating shareholder or group. Rather, the nominating shareholder or group should be required to amend its Schedule 14N promptly and also notify shareholders, at its own expense, of the material change...if the nominee is not elected to the board, we agree that the nominating shareholder or group should be required to file a final amendment to Schedule 14N within 10 days of the final results of an election disclosing the nominating shareholder’s or group’s intention with regard to continued ownership of their shares.” [BR]

“We oppose the proposed amendments to Rule 13d-1 that would allow a nominating shareholder or group relying on the Proposed Election Contest Rules to remain eligible to report their beneficial ownership on Schedule 13G, rather than Schedule 13D. Shareholders or groups of shareholders seeking to nominate up to 25% of a company’s directors are by definition not passive investors and should be required to report their holdings, plans, proposals, intentions and other interests on Schedule 13D... We also note that there is a distinct possibility that a nominating shareholder or group may initially take the position (and certify) that its nominations are not being made for the purpose or with the effect of changing control of a company, but it may later turn out, or at least appear, that such nomination was done for exactly that purpose.” [BR]

Exclusions/Withdrawals

“No substitute proxy access shareholder nominees. If a shareholder nominee is excluded by a company following the receipt of a no-action letter from the staff of the Commission pursuant to proposed Rule 14a-11 or the nominating shareholder withdraws its nominee as a result of the procedure for determining eligibility specified in proposed Rule 14a11(f)...” “If a disqualifying event occurs after the company’s proxy materials have been disseminated, the company should be able to issue supplemental proxy materials and new proxy cards that remove the disqualified nominee, and the company should be entitled to disregard any votes cast for the disqualified nominee.” [Society]

Timeline Issues

“(L)inking the deadline for shareholder notice to a company’s advance notice bylaw creates an unworkable timeline. This is because the typical deadline for providing notice under a company’s advance notice bylaw is between 90 and 120 days prior to the company’s annual meeting. At the same time, the Proposed Election Contest Rules require a company to provide any notice of its intent to exclude a nominee to the Commission at least 80 days before the company files its proxy statement, which typically is done 30 to 45 days prior to the meeting. Thus, under the Proposed Election Contest Rules, it is likely that the company will be required to challenge a shareholder nominee’s inclusion in its proxy materials before it ever receives notice of such shareholder nomination...create an independent deadline for the shareholder notice under the Proposed Election Contest Rules...at a minimum, shareholders should be required to provide notice to a company of their intention to submit a nominee at least 150 days before the date that the company mailed its proxy materials for the prior year’s annual meeting.” [BR]

“(P)rovide for a specific window within which nominating shareholders can make a nomination pursuant to proposed Rule 14a-11 (e.g., no earlier than 150 calendar days and no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year’s annual meeting).” “Deadline for submitting a nominee pursuant to Proposed Rule 14a-11 should be the same as the deadline for submitting a Proposal pursuant to Rule 14a-8(d)...If a company attempts to amend its advance notice bylaw to take into account the required time to comply with the proposed Rule 14a-11 no-action procedures, increasing the minimum notice period might well be held invalid under Delaware law (and perhaps the laws of many other states), on the grounds that the period is unreasonably long and would have the effect of unduly constraining shareholders’ right to nominate directors.” [Society]

Company Liability

“(P)rovide that companies may indicate in their proxy materials that: (i) the relevant statements were provided by the nominating shareholder, not the company; (ii) the company has no responsibility or liability for the statements; and (iii) the nominating shareholder has sole responsibility and liability for the statements...Companies also should be able to set the shareholder statements apart from their own materials by using different fonts, colors, graphics or other visual devices.” [BR]

“(B)ecause companies are acting as a mere conduit for the shareholders’ materials, we disagree with the liability standard proposed in Rule 14a-11(e) and in the note to Rule 14a-19, which would make a company liable for including such statements in its proxy materials if the company knows or has reason to know that the information is false or misleading...The Proposing Release provides no guidance to companies that would enable them to determine whether their procedures for reviewing and verifying information contained in nominating statements would meet this requirement...” [BR]

“The Proposed Rules indicate that the company would have liability if it ‘knows or has reason to know that the information is false or misleading.’ We believe that this is inappropriate, as the company does not have sufficient time to investigate the statements made by the nominating shareholder and the nominee, and it also does not necessarily have the means to determine whether the statements are false or misleading...Pursuant to existing Rule 14a-8(1), a company is not responsible for shareholder proposals or supporting statements...a company should be entitled to explicitly state in the proxy statement that ‘the company takes no responsibility for the accuracy or completeness of the information supplied to it by the nominating shareholder or group or the nominee for director.’” [Society]

Communications/Proxy Card

“(R)equir(e) a clear delineation in the proxy statement and in the proxy card of the company slate and the shareholder nominees. In addition, there should be included on the face of the proxy card in bold letters the following statement: ‘In order to vote for a shareholder nominee, you must check the box for that nominee and strike a candidate from the company slate.’” [Society]

“If adopted, the Proposed Election Contest Rules would add a new exemption to the proxy solicitation rules ‘for communications made in connection with...[the Proposed Election Contest Rules] that are limited in content and filed with the Commission’ on the date of first use. This rule would supplement existing Rule 14a-2(b)(2), which provides an exemption for solicitations ‘other than on behalf of the registrant’ of up to ten shareholders. We believe that it is inappropriate to provide shareholders with a greater ability to communicate with fellow shareholders than is otherwise available to companies, particularly in an election contest where both the company’s and the shareholder’s nominees are included in the same proxy materials.” [BR]

“(T)he Commission should not adopt these rules without contemporaneously improving the mechanics for communicating with beneficial owners of shares held in ‘nominee’ or ‘street’ name...Even companies’ ability to communicate with NOBOs...is limited. Under current rules, only nominees (not the company) have voting authority for the beneficial owners of the securities held in street name...the rules provide companies with no ability to communicate directly with OBOs...the current framework for distinguishing between NOBOs and OBOs and requiring companies to seek and pay for NOBO lists...does not take full advantage of the tremendous technological advances that have been made since the 1980s.” [BR]

“(T)he Proposed Election Contest Rules would add to the already-increased need for companies to communicate with all of their shareholders, which has resulted from increasing activism by institutional shareholders, the prevalence of majority voting and recent amendments to NYSE Rule 452 eliminating the ability of brokers to vote uninstructed shares held in street name under the ‘10-day rule’ in uncontested director elections.” [BR]

“We strongly oppose the Commission’s proposed amendments to Rule 14a-4, which would require that when one or more shareholder nominees are included in a company’s proxy materials, the company’s proxy card may not include a mechanism for shareholders to vote ‘for the company nominees as a group, but would instead require that each nominee be voted on separately.’ ... (T)he proposed amendments are inconsistent with investor expectations and voting protocols that have been in place since the Commission amended Rule 14a-4(b)(2) to allow voting for a company’s director nominees as a group almost 30 years ago. In addition, because the new form of proxy card will list more director nominees than open board seats, it may result in over-voting, under-voting and other voting errors...the Commission should explicitly provide for a mechanism in the rule that would allow companies to clearly differentiate between the company’s nominees and shareholder nominees.” [BR]

Exceptions/Opt-Outs

“Companies should be permitted to “opt-out” of proposed Rule 14a-11.” [Society]

“Proposed Rule 14a-11 should provide an exception for, and not be applicable to, controlled companies.” [Society]

“If a company is subject to proposed Rule 14a-11 or, if as we have suggested, has ‘opted out’ of the Rule 14a-11 proxy access procedure, it would be inappropriately disruptive to require a company thereafter to include in its proxy materials shareholder proposals that seek only incremental changes to that procedure. Such incremental changes would subject companies to annual uncertainty as to the specific nature of their director-election process. Accordingly, the Commission should provide clear guidance regarding the application of the ‘substantially implemented’ standard in Rule 14a-8(i)(10).” [Society]

Among the remaining submissions by associations, the most notable was a letter by the National Investor Relations Institute (NIRI), which is a professional association of corporate officers and investor relations practitioners with more than 4,000 members. NIRI indicated that while it “does support the proposed amendment to Exchange Act Rule 14a-8(i)(8),” it “does not support the proposed Exchange Act Rule 14a-11. The proposed rule represents a substantive change to the proxy system, federalizing shareholder rights currently under the states’ domain.”¹³⁰ However, what draws particular attention to this letter is that NIRI, which represents the interests of practitioners who rank among the most knowledgeable about the “proxy plumbing” system, chose to focus instead on more pressing needs regarding the proxy voting system. From the letter: “NIRI believes more fundamental changes are needed to ensure the U.S. proxy voting system is as fair and transparent as possible including improved public disclosure of share ownership so public companies know who their shareholders are, and an improved system of direct communication with these shareholders.” NIRI argued that the SEC’s “proposal will exacerbate the retail vote decline trend due to the additional complexity of proxy access.”¹³¹

NIRI urged the Commission to “consider a comprehensive review of the proxy system and ownership transparency regulations.” In particular, they advanced a proposal to convert 13F reporting to a monthly basis: “This reporting scheme should be similar to what now occurs with retail investors - receiving investment reports on a monthly basis within a few days of the end of the month. Companies should expect a similar monthly accounting of true ownership of all shares owned, including changes due to share lending, coordinated as a utility function for the financial markets. Institutional holders, including hedge funds, should abide by the same frequent public reporting scheme and abandon the quarterly requirement. Reporting rules should be strictly enforced with meaningful penalties for non-compliance.”

With regard to the NOBO/OBO distinction, NIRI urged that “public companies should have access to contact information for all of their beneficial owners and should be permitted to communicate with them directly. The NOBO (non-objecting beneficial owner) and OBO (objecting beneficial owner) classification for beneficial owners should be eliminated.” NIRI went on to propose that “the lists of beneficial owners used for shareholder meetings and other communications purposes...be maintained as an industry non-profit utility by a data aggregator. The data aggregator would obtain beneficial owner contact information from all brokers, banks, and other intermediaries, but no information about any intermediary relationship with a customer would be provided. Beneficial owner positions should be fully reconciled as of a specified record date for a shareholder meeting, including shares on loan and any ‘failure to deliver’ shares. All intermediaries would be required to reconcile beneficial owner and other positions back to their total holding position at DTCC or another depository institution.”¹³²

NIRI also wants the “proxy voting process (to)...be fully transparent and auditable, starting with the compilation of a reconciled list of beneficial owners eligible to vote and ending with the final tabulation of votes cast at a shareholder meeting...Brokers and other financial intermediaries engaged in share lending (or with “failure to deliver” positions) should be required to reconcile their share positions as of the record date for each shareholder meeting.”¹³³

¹³⁰ <http://www.sec.gov/comments/s7-10-09/s71009-124.pdf>

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

8. PROVIDERS OF PROXY AND CORPORATE GOVERNANCE SERVICES

This segment includes letters from many top providers of proxy and corporate governance-related services, including proxy advisors, proxy solicitors, selected consultants and Broadridge Financial Solutions. While proxy advisory firms, including RiskMetrics and Glass, Lewis & Co., and selected consultants advocated in favor of the proposed rules, comments from proxy solicitors and Broadridge focused on a pressing need to improve the proxy plumbing system and for the SEC to provide greater clarity on rules for tabulating votes in elections with shareholder nominees.

A. Proxy Advisory Firms

Numerous companies and associations submitting responses argued that proxy advisory firms are both a source of concern and certain to benefit from adoption of the Proposed Rule on direct proxy access. The Business Roundtable argued that: “statistics indicate that proxy advisory firms exert a strong influence on the proxy voting decisions of institutional investors, and, further, that some institutional investors are unwilling to deviate from the recommendations of such firms, even in light of a company’s individual circumstances. If institutional investors rely heavily on the recommendations of proxy advisory firms in election contests, the Proposed Election Contest Rules will not function in the manner intended by the Commission...if the Commission adopts the Proposed Election Contest Rules, election contest results will reflect the recommendations of *proxy advisory firms*, rather than the will of the shareholders....proxy advisory firms have no economic interest in the companies for which they issue voting recommendations....conflicts of interest may be present at certain firms that both create voting guidelines for institutional investors and advise the companies to which these voting guidelines are applied.”¹³⁴ The Business Roundtable found in a July 2009 survey that respondents reported that some 15.0% of their institutional investors follow the proxy voting guidelines of RiskMetrics Group, Inc. without deviation, while some 6% followed the proxy voting guidelines of Glass, Lewis without deviation (quoting one respondent indicating that “certain institutions indicated to us in the solicitation process that they completely outsource the proxy voting decision-making process...”).¹³⁵

In their letters to the SEC, both RiskMetrics and Glass, Lewis downplayed concerns that the SEC’s proposals will result in a surge of shareholder nominations and proxy contests. While admitting that the Proposed Rule would lead to “additional shareholder nominators stepping forward,” RiskMetrics argued that “there is no reason to believe that it would lead to an explosion in shareholder nominations.”¹³⁶ Glass, Lewis asserted that “shareholders would exercise the nomination right only rarely, and rarer still would be the actual election of a dissident director since other shareholders would need to vote in support of the dissident’s director nominee at the subject company.”¹³⁷ Even so, Glass, Lewis noted that: “the very low likelihood of an unqualified, agenda-driven dissident candidate being elected does not lessen the concern that the nomination of a director not supported by the current board can distract management and the board from focusing on the strategy of the company as they strive to fend off the dissident director and, in the case of directors, save their positions.”¹³⁸ Curiously, the submission by Glass, Lewis refrained from commenting on a range of details in the Proposing Release.

¹³⁴ <http://www.sec.gov/comments/s7-10-09/s71009-267.pdf>

¹³⁵ Ibid.

¹³⁶ RiskMetrics (Martha Carter, Head of Global Research and Global Policy Board), letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-166.pdf>

¹³⁷ Glass, Lewis & Co., letter to the SEC dated Aug. 10, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-93.pdf>

¹³⁸ Ibid.

RiskMetrics informed the SEC that: “While we generally support the current proposal, we encourage consideration of some changes to the proposed rule that would provide additional safeguards.” RiskMetrics argued for *lower* thresholds to nominate, including: “a lower threshold for smaller filers. Alternatively, the Commission could consider a combination of a dollar value threshold or a combination of value and ownership stake, to ensure that the process does not exclude small but still significant shareowners from potential access to the ballot.” The proxy advisor also recommended “that the Commission consider allowing a nominator to redress a failure to meet that requirement if, within a specified period, the composition of the nominator group is changed appropriately.”¹³⁹

Other policy recommendations of RiskMetrics were generally in line with the Proposing Release, as is, but with some notable exceptions. When it came to the length of ownership needed to qualify to nominate a director, RiskMetrics indicated it is willing to “consider a two-year ownership minimum to be reasonable in light of concerns by some shareholders that the ballot access process be available only to investors with significant long-term economic interest in, and experience with, the company.” RiskMetrics also questioned the “first come, first served” approach, and urged adoption of rules that favor “the shareholder or group representing the largest ownership stake.” The firm also recommended “that the Commission consider a voting support threshold to qualify a nominator or nominating group to resubmit a candidate for inclusion in the company’s materials. While we do not strongly favor a particular threshold, one that is within a range of 15% to 25% or 30% support would be reasonable.” In addition, the firm supported relying on “listing standards to determine nominee independence,” but rather than argue for more rigorous standards in the rules noted that: “in applying voting policy, RiskMetrics may consider more rigorous independence standards for all nominees in determining a vote recommendation, including, for example, examination of the relationship between a shareholder nominee and the nominator.”¹⁴⁰

RiskMetrics argued that “the essential value of proxy access is in establishing the right of shareholders to effect board change, and thereby assure board accountability.”¹⁴¹ The implication is that a federal direct proxy access rule would be grounded less on a “fundamental right to nominate and elect” (quoting SEC Chairman Schapiro from her speech on May 20, 2009),¹⁴² than on the *power to punish* – to hold boards “accountable.” Glass, Lewis & Co. also asserted in their submission that: “Through the vote, shareholders can hold directors accountable and remove directors who fail to adequately represent shareholders’ interests in overseeing management and ultimately working to increase shareholder returns.”¹⁴³

B. Proxy Solicitors

Submissions from The Altman Group and Georgeson (Computershare) focused on concerns that implementation of proposed rules on proxy access, combined with implementation next year of Amended NYSE Rule 452, would result in an increase in the number of contested and “close” elections. The Altman Group’s submission observed that: “the Commission’s action in making its proxy access proposals so quickly after the amendment of Rule 452, and without first addressing important issues of shareholder communications, is a serious mistake....The Commission’s actions have focused, to our

¹³⁹ RiskMetrics (Martha Carter, Head of Global Research and Global Policy Board), letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-166.pdf>

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Chairman Mary L. Schapiro, “Statement at SEC Open Meeting on Facilitating Shareholder Director Nominations,” May 20, 2009. <http://www.sec.gov/news/speech/2009/spch052009mls.htm>

¹⁴³ Glass, Lewis & Co., letter to the SEC dated Aug. 10, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-93.pdf>

dismay, more on the architecture of corporate governance and less on creating an environment where corporate democracy takes root. A broad, national, democratically elected government such as our own could not exist if there were no reliable mechanisms for elected representatives or their challengers to communicate with voters, or once balloting is completed, a trustworthy and verifiable system for determining who was entitled to vote. Corporate shareholder democracy, as envisioned in the Commission's proposals, will be similarly hobbled by a failed communication system, one lacking transparency for companies and dissidents that are seeking to identify and establish an open channel of communication with shareholders." The Altman Group's primary proposal to address this issue revolves around promoting greater transparency through the creation of an ABO (All Beneficial Owners) option (disclosure of all beneficial owner names), which would be used "solely with regard to record dates for votes at company annual or special meetings, or in other situations requiring shareholder action."¹⁴⁴ (Note: The Altman Group has recently published a paper expanding upon this ABO proposal).¹⁴⁵

Computershare (Georgeson) wrote that while it takes no "formal position on whether the SEC should facilitate Proxy Access," it is the "likelihood that Proxy Access will lead to a greater number of contested, and therefore, 'close call' elections" which prompted it to "strongly" recommend that the SEC: "promptly consider additional changes to the proxy system to enhance the ability of companies to directly communicate with all of its shareholders. We believe that such changes should include 'end-to-end validation' of proxy votes to ensure that shareholder votes are received and recorded as the shareholder intends. If the SEC formally adopts a Proxy Access rule, we strongly recommend that (the) SEC simultaneously eliminate the distinction between OBOs and NOBOs (non-objecting beneficial owners, who hold their shares through brokers, but permit themselves to be identified to companies)."¹⁴⁶

C. Broadridge

Broadridge submitted comments of a technical nature, since the firm "does not opine on regulatory policy." The firm's request for clarifications on rules for the design of proxy cards provided insight into the scale of the task ahead for the SEC, which has ventured to create Federal corporate election laws while seemingly unprepared (based on questions in the Proposing Release) to have to deal with issuing what could end up being a book filled with procedures for the design and treatment of proxy cards. Broadridge asked:

"-If there are 10 director seats available, and a shareholder nominates 1 candidate, bringing the total to 11, would the entire proxy be invalidated or just the director proposal if a shareholder votes in favor of ALL 11 nominees?"

"-Does a vote against or abstain constitute a 'vote', and would the shareholder be limited to 'vote' on only 10 nominees?"

Voting options should be clearly specified. Since the director nominees will be treated as individual proposals, the standard voting options of For, Against, or Abstain would apply. Is a 'withhold' choice also contemplated?"

Would a majority voting standard be allowed given the possibility of less than a full slate being elected?"

The proposal allows the issuer or shareholder to 'solicit in favor of their nominees outside the proxy statement' via a designated website or written material. Would the shareholder be allowed to include management's voting instruction form, or proxy, with the written material?"

Are there any requirements regarding the order of the proposals presented on the proxy card? For example, can director items be intermixed with the proposals, or can the shareholder nominee be separated from the management proposal?"

¹⁴⁴ The Altman Group (Kenneth L. Altman), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-288.pdf>

¹⁴⁵ The Altman Group, "Practical Solutions to Improve the Proxy Voting System." Position paper submitted to the SEC and available from The Altman Group (see contact information in the front matter for this report).

¹⁴⁶ <http://www.sec.gov/comments/s7-10-09/s71009-321.pdf>

If common and preferred shareholders are voting on class-specific candidates, will nominations be allowed on both, or will they be limited to the principal voting security?

How would the Notice and Access process be affected? Are changes being considered that would allow use of a second Notice with the first mailing? Will additional explanatory text be allowed to highlight that a shareholder nominee is included?”¹⁴⁷

D. Others

The IRRC Institute¹⁴⁸ submitted a study on “The Effectiveness of Hybrid Boards,”¹⁴⁹ which is already being cited by some supporters of the SEC’s proposed rules on proxy access, including Hye-Won Choi from TIAA-CREF (and co-chair of the SEC’s Investment Advisory Committee), as well as Howard Sherman, the CEO of GovernanceMetrics International.¹⁵⁰ However, the report’s stated caveats and limitations (including a sample base from only 2005-2008, and a study of returns from a period marked by extreme volatility) render the results as interesting, but with limited policy relevance. The report’s most interesting finding was of “a sizeable contest effect increase in share prices,” in particular during a three-month period leading up to the formation of the hybrid board. However, the report offered this caveat: “the contest effect...was clearly related to a specific activist initiative – the proxy contest – rather than a general expectation of productive activism.”

● ● ●

“RiskMetrics has tracked the returns of a portfolio of companies where activists gained board seats in 2005, and found that this portfolio outperformed the S&P 500 index even during the recent market turmoil. While this research is limited, there was no indication that the presence of dissident directors on boards has a detrimental impact on shareholder value....” -- RiskMetrics

● ● ●

Choi wrote in her letter to the SEC dated Sept. 18, 2009, that: “even at companies where shareholder action results in director replacement, the empirical research is encouraging. The IRRC Institute found that companies with ‘hybrid boards’ resulting from successful proxy contests significantly outperformed peer companies....”¹⁵¹ From the IRRC report (data “from 2005 through 2008”): “On average...total shareholder returns at ongoing companies with hybrid boards were 19.1% – 16.6 percentage points better than peers – from the beginning of the contest period through the hybrid board’s one year anniversary...Among the 15 ongoing businesses in the sample for which three years of performance data was available following the creation of a hybrid board, total shareholder returns averaged only 0.7% over the three-year

period – 6.6 percentage points worse than peers.”¹⁵²

RiskMetrics also offered a new research claim: “for the last four years RiskMetrics has tracked the returns of a portfolio of companies where activists gained board seats in 2005, and found that this portfolio outperformed the S&P 500 index even during the recent market turmoil. While this research is limited, there was no indication that the presence of dissident directors on boards has a detrimental impact on shareholder value, and it appears that election of a shareholder-nominated director may create value over a multi-year period.”¹⁵³

¹⁴⁷ <http://www.sec.gov/comments/s7-10-09/s71009-296.pdf>

¹⁴⁸ <http://www.irrcinstitute.org/>

¹⁴⁹ <http://www.sec.gov/comments/s7-10-09/s71009-15.htm> and http://www.irrcinstitute.org/pdf/IRRC_05_09_EffectiveHybridBoards.pdf

¹⁵⁰ <http://www.sec.gov/comments/s7-10-09/s71009-175.pdf>

¹⁵¹ <http://www.sec.gov/comments/s7-10-09/s71009-536.pdf>

¹⁵² http://www.irrcinstitute.org/pdf/IRRC_05_09_EffectiveHybridBoards.pdf

¹⁵³ RiskMetrics (Martha Carter, Head of Global Research and Global Policy Board), letter to the SEC dated Aug. 14, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-166.pdf>

9. LAW FIRMS AND COMMITTEES OF BAR ASSOCIATIONS

Many of the law firms responding, as well as all of the letters from business law committees of selected State Bars,¹⁵⁴ sounded arguments largely in line with those of the American Bar Association (Committee on Federal Regulation of Securities of the Business Law Section), which were detailed in a letter dated Aug. 31, 2009,¹⁵⁵ and in an “appendix” filed separately on Sept. 18, 2009 (a massive 38-page long table detailing point-by-point responses to specific questions in the Proposing Release).¹⁵⁶ The ABA argued that “Rule 14a-8(i)(8) should be amended in a targeted way to permit shareholder proposals related to proxy access and that proposed Rule 14a-11 and any other prescriptive federal access rule would not be workable across the range of situations to which it would have to apply and should not be adopted at this time. Proxy access should be available to shareholders who have a meaningful ownership stake in a company and seek election of a limited number of independent persons they nominate as directors in a manner that has no control effect.” A letter from the Delaware State Bar Association (Council of its Section of Corporation Law) urged the: “Commission to decline to adopt proposed Rule 14a-11. It should instead allow proxy access systems to develop under the framework of private ordering and shareholder choice created by state law. The one-sided inflexibility of proposed Rule 14a-11 impairs that scope of choice, and with it, significant substantive rights under state corporate law.”¹⁵⁷ We have also provided detail on the positions that each law firm submitting letters had with regard to Proposed Rule 14a-11 (see the chart on the next page).

The most significant contribution from law firms came in the form of a group letter from seven major law firms (referred to hereafter as the *Letter of 7 Law Firms*),¹⁵⁸ some of which also filed separate supplemental letters (footnoted), including: 1) Wachtell, Lipton, Rosen & Katz,¹⁵⁹ 2) Skadden, Arps, Slate, Meagher & Flom LLP; 3) Cravath, Swaine & Moore LLP; 4) Davis Polk & Wardwell LLP;¹⁶⁰ 5) Latham & Watkins, LLP; 6) Simpson Thacher & Bartlett LLP,¹⁶¹ and 7) Sullivan & Cromwell LLP.¹⁶² The *Letter of 7 Law Firms* concluded that “the SEC not adopt proposed Rule 14a-11 but, rather, amend Rule 14a-8(i)(8) to permit stockholders to utilize Rule 14a-8 for proposals relating to proxy access.”¹⁶³

A central theme in the *Letter of 7 Law Firms* was that the SEC’s proposed rules will disrupt current momentum evident at a state level towards enabling adoption of company bylaws establishing proxy access and proxy contest reimbursement policies. The *Letter of 7 Law Firms* argued that: “prior to the SEC’s announcement of its current proxy access proposals, Delaware amended its corporate statute explicitly to enable adoption of a bylaw establishing a proxy access regime (and/or a proxy contest reimbursement policy) by board or stockholder action. In a related development, the committee

¹⁵⁴ Corporations Committee of the Business Law Section, State Bar of California, letter to the SEC dated Aug. 18, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-495.pdf>. Delaware State Bar Association (Council of its Section of Corporation Law), letter to the SEC dated July 24, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-65.pdf>

¹⁵⁵ <http://www.sec.gov/comments/s7-10-09/s71009-456.pdf>

¹⁵⁶ The most comprehensive point-by-point response to the Proposing Release was this 38 page long table from the ABA’s Committee on Federal Regulation of Securities of the Business Law Section.

<http://www.sec.gov/comments/s7-10-09/s71009-535.pdf>

¹⁵⁷ <http://www.sec.gov/comments/s7-10-09/s71009-65.pdf>

¹⁵⁸ <http://www.sec.gov/comments/s7-10-09/s71009-212.pdf>

¹⁵⁹ A separate letter to the SEC from this firm is at <http://www.sec.gov/comments/s7-10-09/s71009-263.pdf>

¹⁶⁰ A separate letter to the SEC from this firm is at <http://www.sec.gov/comments/s7-10-09/s71009-99.pdf>

¹⁶¹ A separate letter to the SEC from this firm is at <http://www.sec.gov/comments/s7-10-09/s71009-289.pdf>

¹⁶² A separate letter to the SEC from this firm is at <http://www.sec.gov/comments/s7-10-09/s71009-430.pdf>

¹⁶³ <http://www.sec.gov/comments/s7-10-09/s71009-212.pdf>

responsible for drafting revisions to the Model Business Corporation Act (the “MBCA”), which has been adopted in whole or in part in over 30 states, has approved proposed amendments to the MBCA consistent with the new provisions of the Delaware corporate law. We expect many states will follow these leaders and modify their statutes to facilitate adoption of proxy access and proxy reimbursement bylaws. Moreover, ‘model’ proxy access bylaws are emerging, including a concept draft of a proxy access bylaw drafted by the Shareholder Proposal Task Force of the ABA Committee on Federal Regulation of Securities. As a matter of policy and in the interests of federalism, the SEC should step back to allow these developments to flourish.”¹⁶⁴

The *Letter of 7 Law Firms* argued that “if the SEC decides to adopt Rule 14a-11, our principal recommendations...are”:

- The rule should not be effective for the 2010 proxy season;
- Stockholders should be entitled to modify or opt-out entirely from the SEC’s proxy access regime and boards should be entitled to adopt or amend proxy access bylaws subject to stockholder ratification of board action;
- If a traditional proxy contest were commenced, the availability of Rule 14a-11 should be suspended;
- The ownership thresholds to determine eligibility to use Rule 14a-11 should be adjusted upwards to 5% for individual stockholders and higher thresholds for groups of stockholders;
- The number of persons solicited for the purpose of forming a stockholder nomination group should be limited to 10 absent compliance with the existing proxy rules;
- The nominee’s candidacy and election should not violate the company’s governing documents or corporate governance guidelines;
- Each nominating stockholder or stockholder group should be limited to one nominee;
- The notice period for submitting proxy access nominees should be a uniform specified period prior to the anniversary of the mailing of the prior year’s proxy statement and any proxy access rule should provide for a defined, reasonably short window period for stockholder nominations and not merely a deadline;
- In the event the number of eligible proxy access nominees exceeds the 25% limit, the determination of which nominees to include should be based on the size of the nominating stockholder’s holdings rather than a first-in system;
- Short positions and derivatives should be disclosed, and the ownership requirements should require both voting and dispositive power on a continuous “net long” basis;
- Persons or groups beneficially owning in excess of 5% of a class of voting securities who act in connection with a nomination should not have a per se exemption from Schedule 13D.

There were a number of law firms submitting comments supporting the Proposed Rules, largely as is. The *Letter of 7 Law Firms* drew a reaction in the form of a group letter from 9 securities and corporate governance law firms, including Labaton Sucharow LLP, Barroway Topaz Kessler Meltzer Check LLP, Bernstein Litowitz Berger & Grossmann LLP, Berman DeValerio, Cohen Milstein Sellers & Toll PLLC, Grant & Eisenhofer, P.A., Milberg LLP, Pomerantz Haudek Grossman & Gross LLP, and Kaplan Fox & Kilsheimer LLP (Hereafter *Letter of 9*).¹⁶⁵ The *Letter of 9* argued that “Proposed Rule 14a-11 should be implemented as published and without further amendment,” because, among several reasons stated: “The arguments raised by critics of the Proposed Rule are unpersuasive and merely perpetuate corporate interests bent on maintaining the status quo and insulating entrenched management and incumbent directors from true accountability to shareholders.”¹⁶⁶ This group also argued that “it is imperative that the Commission act to reverse the amendments to Rule 14a-8 adopted in December 2007, which unnecessarily impair the rights of shareholders and unwisely reduce the accountability of directors of U.S. corporations.”

Among the novel proposals and arguments from law firms were the following observations from Cleary Gottlieb Steen & Hamilton LLP: “any final version of Rule 14a-11 should apply only to a subset of large accelerated filers that are subject to Exchange Act Section 14(a), and in any event not beyond the

¹⁶⁴ <http://www.sec.gov/comments/s7-10-09/s71009-212.pdf>

¹⁶⁵ <http://www.sec.gov/comments/s7-10-09/s71009-508.pdf>

¹⁶⁶ <http://www.sec.gov/comments/s7-10-09/s71009-508.pdf>

class of large accelerated filers. Limited implementation is appropriate given the significant shift in governance that the Rule would represent and the complexity and variety of consequences it will likely have for both companies and the Staff. The Commission should not underestimate the burden of compliance with a detailed federal rule, especially for smaller companies.”¹⁶⁷

O'Melveny & Myers LLP offered insight on a workability problem related to the SEC's notice requirement referencing the release of the company's proxy statement: “As a result of the Delaware Chancery Court's decision in *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, many public companies have amended their bylaws to provide that shareholders must submit director nominees 90 to 120 days prior to the first anniversary of the previous year's meeting, which would equate to 50 to 80 days prior to the date that the company filed its definitive proxy materials for the previous year's meeting (assuming the proxy was filed 40 days before the annual meeting to comply with the Commission's notice and access delivery procedures). Companies that adopted advance notice bylaws have specifically chosen to time the submission of director nominees to the date of the prior year's annual meeting, rather than to the filing date of definitive proxy materials, in response to the Delaware Chancery Court's statement that it could not find ‘a single example of a permissible advance notice bylaw that has set the notice required by reference to the release of the company's proxy statement.’ Due to the timing requirements for shareholder nominations under the Proxy Access Proposal, companies that have adopted advance notice bylaws in response to the *JANA* decision will likely be precluded from seeking no-action relief to exclude a shareholder nominee under proposed Rule 14a-11.”¹⁶⁸

¹⁶⁷ <http://www.sec.gov/comments/s7-10-09/s71009-310.pdf>

¹⁶⁸ <http://www.sec.gov/comments/s7-10-09/s71009-328.pdf>

Table 7: Law Firms Submitting Letters to the SEC on "Facilitating Shareholder Director Nominations" ("Proxy Access")

Firm Name	Contact Name	Position on Proposed Rule 14a-11	Address
Alston & Bird LLP	David E. Brown, Jr.	"not to adopt Rule 14a-11"	90 Park Avenue New York, NY 10016
Barroway Topaz Kessler Meltzer Check LLP	Darren J. Check	<i>Letter of 9</i> (favor adoption of Proposed Rule 14a-11)	280 King of Prussia Road Radnor, PA 19087
Berman DeValerio	Joseph J. Tabacco, Jr.	<i>Letter of 9</i> (favor adoption of Proposed Rule 14a-11)	425 California St. Suite 2100 San Francisco, CA 94104
Bernstein Litowitz Berger & Grossmann LLP	Max W. Berger	<i>Letter of 9</i> (favor adoption of Proposed Rule 14a-11)	1285 Avenue of the Americas New York, NY 10019
Cleary Gottlieb Steen & Hamilton LLP	Alan L. Beller	Apply to large-accelerated filers only	One Liberty Plaza, New York, NY 10006
Cohen Milstein Sellers & Toll PLLC	Herbert E. Milstein	<i>Letter of 9</i> (favor adoption of Proposed Rule 14a-11)	1100 New York Ave Suite 500 West Washington, DC 20005
Cravath, Swaine & Moore LLP	Richard Hall	<i>Letter of 7 ("not adopt proposed Rule 14a-11")</i>	825 Eighth Ave. New York, NY 10019
Davis Polk & Wardwell LLP	William M. Kelly	<i>Letter of 7</i> and "she've proposed rule 14a-11 for now"	450 Lexington Avenue New York, NY 10017
Dewey & LeBoeuf LLP	Elizabeth W. Powers	"do not support direct shareholder access to the proxy statement"	1301 Avenue of the Americas New York, NY 10019-6092
Duane Morris LLP	John W. Kauffman	"not be applicable to controlled companies"	30 South 17th Street, Philadelphia, PA 19103
Fenwick & West LLP	Jeffrey R. Vetter	"Rule 14a-11 would facilitate unintended changes in control"	Silicon Valley Ctr, 801 California St., Mountain View, CA 94041
Grant & Eisenhofer, P.A.	Jay W. Eisenhofer	<i>Letter of 9</i> (favor adoption of Proposed Rule 14a-11)	485 Lexington Avenue 29th Floor New York, NY 10017
Kaplan Fox & Kilsheimer LLP	Robert Kaplan	<i>Letter of 9</i> (favor adoption of Proposed Rule 14a-11)	850 Third Avenue New York, NY 10022
Keating Muething & Kiekamp PLL	F. Mark Reuter	"proposal to amend Rules 14a-11 and 14a-8 should not be adopted"	One East Fourth Street, Suite 1400, Cincinnati, OH 45202
Labaton Sucharow LLP	Edward Labaton	<i>Letter of 9</i> (favor adoption of Proposed Rule 14a-11)	140 Broadway 34th Floor New York, NY 10005
Latham & Watkins, LLP	Charles M. Nathan	<i>Letter of 7 ("not adopt proposed Rule 14a-11")</i>	885 Third Avenue New York, NY 10022
Milberg LLP	Barry A. Weprin	<i>Letter of 9</i> (favor adoption of Proposed Rule 14a-11)	One Penn Plaza 49th Floor, New York, New York 10119
O'Melveny & Myers LLP	Arthur B. Culvahouse, Jr.	"one-size-fits-all" mandate...fails to differentiate"	1625 Eye Street, NW Washington, D.C. 20006-4001
Pomerantz Haudek Grossman & Gross LLP	Marc I. Gross	<i>Letter of 9</i> (favor adoption of Proposed Rule 14a-11)	100 Park Avenue New York, NY 10017
Schulte Roth & Zabel LLP	Marc Weingarten	"we approve of the approach taken in the Proposing Release"	919 Third Ave., NY, NY 10022
Shearman & Sterling LLP	Christa A. D'Alimonte	"not adopt (or, at least, defer adoption of) Rule 14a-11"	599 Lexington Ave., New York, NY 10022
Sidley Austin LLP	Sidley Austin	"negative effects substantially outweigh whatever benefits"	One South Dearborn St. Chicago, IL 60603
Simpson Thacher & Bartlett LLP	John G. Finley	<i>Letter of 7</i> and "only adopt" proposed amend. to Rule 14a-8	425 Lexington Ave. NY, NY 10017
Skadden, Arps, Slate, Meagher & Flom LLP	Marc S. Gerber	<i>Letter of 7 ("not adopt proposed Rule 14a-11")</i>	1440 New York Avenue, N.W. Washington, D.C. 20005
Sullivan & Cromwell LLP	James C. Morphy	<i>Letter of 7 ("not adopt proposed Rule 14a-11")</i>	125 Broad Street New York, NY 10004
Thompson Hine LLP	Derek D. Bork	"Technical deficiency"/timeline	3900 KeyCenter, 127 PublicSquare Cleveland, Ohio 44114
Troutman Sanders LLP	William B. Dickerson	"should not be adopted"	600 Peachtree Street NE, Suite 5200 Atlanta, Georgia 30308
Vinson & Elkins LLP	Robert L. Kimball	"in general we oppose adoption of the proposed rules"	Trammell Crow Ctr, 2001 Ross Ave, Suite 3700 Dallas, TX 75201
Wachtell, Lipton, Rosen & Katz	Eric S. Robinson	<i>Letter of 7 ("not adopt proposed Rule 14a-11")</i>	51 West 52nd St. New York, NY 10019

List excludes lawyers submitting on their own behalf ("other" category) and law firms submitting on behalf of companies.

10. ACADEMICS

This segment includes letters submitted by current professors in various faculty departments (mostly business and law). While the total number of submissions from academics was small (8), this segment includes two letters submitted by two large groups of professors (with a total of 90 professors contributing to the 2 separate letters). Most of the letters in this group were written to advocate positions and introduce ideas rather than deliver relevant studies (with two notable exceptions).

Among the notable exceptions was Prof. Joseph A. Grundfest (Stanford Law School), who offered a detailed study titled: “Internal Contradictions in the SEC’s Proposed Proxy Access Rules.” Grundfest focused on the inconsistency of the SEC’s approach when assuming that a: “majority of shareholders are sufficiently intelligent and responsible to nominate and elect directors. But the Proposed Rules prohibit the identical shareholder majority from establishing a proxy access regime, or from amending the Proposed Rules to establish more stringent access standards.” He also described a “second contradiction” relating: “to the Commission’s assertion that the Proposed Rules replicate the physical shareholder meeting as governed by state law. Nothing in state law sets a minimum proxy access standard, defines the contours of any access proposal to be considered by shareholders, or prohibits a majority of shareholders from amending an access standard to make it more stringent while allowing the same majority to relax the

● ● ●

“The goal is to bring more information, and if needed, new directors into the boardrooms, not to facilitate more election contests for its own sake.” – 10 Members of the Faculty of Harvard Business and Harvard Law Schools (writing on their own behalf)

● ● ●

standard. The Proposed Rules thus fail to achieve the Commission’s stated objective, and instead erect barriers to shareholder action that exist nowhere in state law.” He concluded that these contradictions “are...fatal to the Proposed Rules under the Administrative Procedure Act. The inconsistencies can, however, be cured by revising the Proposed Rules so that they constitute fully enabling provisions that allow a majority of shareholders to adopt a wide range of proxy access rules through an opt-in mechanism.”¹⁶⁹

Another notable exception was Prof. Jonathan Macey (Yale Law School), who co-authored a “Report on Effects of Proposed SEC Rule 14a-11 on Efficiency, Competitiveness and Capital Formation” (NERA Economic Consulting),¹⁷⁰ which was submitted as an appendix to a letter from the Business Roundtable. This study concluded that the “costs of this Rule, if adopted, will be substantially higher than acknowledged by the SEC. These costs overwhelm the few benefits posited by the SEC, some of which will be small and others of which are simply not credible.”

Ten members of the faculty of the Harvard Business and Harvard Law Schools, writing as “individuals, not as representatives of our schools,” declared their support for the broader goals of the proposed rule, but also voiced “concerns about its form and specific provisions.” The letter went on to argue that: “the SEC should ‘start slow’ with respect to shareholder access in order to avoid too much change, with possibly unanticipated negative interactions, all at once. Specifically, the SEC should institute a higher threshold, applicable across-the-board for all public companies -somewhere in the range of 5-10%, with aggregation still possible...The goal is to bring more information, and if needed, new directors into the boardrooms, not to facilitate more election contests for its own sake.” Among the

¹⁶⁹ <http://www.sec.gov/comments/s7-10-09/s71009-64.pdf>

¹⁷⁰ <http://www.sec.gov/comments/s7-10-09/s71009-267.pdf>

letter's novel proposals were ideas such as: "shareholders using the rule could be required to provide pre-sale notification to the public of an intent to sell securities"; "permit any company subject to the new rule the ability to 'opt out' of the rule upon a majority vote of outstanding shareholders. The opt-out could be complete, or partial (by raising or lowering the threshold amount, or the pre-or post-contest holding period, or otherwise)...Perhaps the opt-out might be sunsetted, with a renewed shareholder vote after, say 10 years. Similarly, any company that clearly 'opts-out' of the new rule in its charter prior to going public should be able to do so..."¹⁷¹

A larger group of eighty professors of law, business, economic and finance submitted a letter dated Aug. 17, 2009. This group included professors affiliated with forty-seven universities around the United States, all of whom: "support the SEC's proposals to remove impediments to the exercise of shareholders' rights to nominate and elect directors and to enable shareholders to place proposals regarding nomination and election procedures on the corporate ballot. All of the Submitting Professors urge the SEC to adopt a final rule based on the SEC's current proposals, and to do so without adopting modifications that could dilute the value of the rule to public investors."¹⁷² After that, the letter indicated a lack of consensus on additional comments contained in the document.

¹⁷¹ <http://www.sec.gov/comments/s7-10-09/s71009-164.pdf>

¹⁷² <http://www.sec.gov/comments/s7-10-09/s71009-282.pdf>

11. UNIONS

Responses from a handful of unions were generally supportive of the SEC’s Proposing Release, and focused primarily on urging the SEC to “not postpone consideration of this matter” (AFL-CIO). However, even among the unions, many had reservations about the low ownership thresholds included in the Proposing Release and the Commission’s “first-in-time” approach. Moreover, this group contains one of the most fascinating letters submitted to the SEC on the proposed rules. It comes from one of the most active proponents of majority voting and a proxy access right to a company’s proxy statement for shareholder director nominations: The United Brotherhood of Carpenters (UBC). UBC wrote to “strongly” urge “the Commission not to adopt proposed Rule 14a-11.”¹⁷³

The AFL-CIO urged the SEC to: “extend the holding period requirement to two years as of the date of the shareholder notice on Schedule 14N. As we noted in comments to the SEC on earlier proxy access proposals, the AFL-CIO opposes a one-year holding period because it could enable hedge funds and other opportunistic shareholders to manipulate the proposed Rule 14a-11 and force companies to take short-term measures to pump up their stock price at the expense of long-term shareholder value.”¹⁷⁴ The group also asked the SEC to “clarify its definition of ‘continuous ownership’ to take into account that the holdings of institutional shareholders may fluctuate during any specified period...the right to nominate directors should be based on the number of shares beneficially owned, not shares that are held on loan...We also urge the SEC to clarify the proposed Rule 14a-11 so that the ownership determination is based on the *minimum number* of shares owned during the holding period.” The “first in” approach was also seen as problematic, leading the AFL-CIO to “recommend that the eligibility of the shareholder or group of shareholders eligible to nominate directors under Rule 14a-11 be based on the group with the largest holding....”

James P. Hoffa, writing on behalf of the International Brotherhood of Teamsters, offered his union’s “strong support” for the SEC’s initiative, but also offered some suggested modifications: “(W)e have deep concern that the Proposed Rule’s one-year holding period would enable short-term investors, such as hedge funds, to use proxy access as a tool for short-term gain at the expense of long-term value creation. We suggest that the Commission adopt a more reasonable holding period of at least two years...We further suggest that the Commission clarify how it will calculate the percentage of securities owned to address any potential ambiguities that might arise due to common fluctuations in share ownership...We also suggest that the Commission ensure that shareholders eligible to use proxy access be able to nominate at least two candidates in all cases...we oppose the Proposed Rule’s first-in approach...the shareholder or group of shareholders with the largest beneficial ownership in the company should be given the opportunity to nominate the maximum number of shareholder-nominated director candidates.”¹⁷⁵

In contrast, The United Brotherhood of Carpenters wrote to “strongly urge the Commission not to adopt proposed Rule 14a-11 establishing a federal proxy access right for shareholder nominations. Alternatively, we support the Commission’s proposed amendment of Rule 14a8(i)(8) to enable shareholders, under certain circumstances, to require companies to include in company proxy materials

¹⁷³ United Brotherhood of Carpenters (Edward J. Durkin, Dir. Corporate Affairs Department), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-492.pdf>

¹⁷⁴ AFL-CIO (Richard Trumka, Secretary-Treasurer), letter to the SEC dated Aug. 10, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-105.pdf>

¹⁷⁵ International Brotherhood of Teamsters (James P. Hoffa, General President), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-204.pdf>

proposals that would establish or request the establishment of a proxy access right for shareholder director nominees.”¹⁷⁶ This, from a union with pension funds (UBC funds) that have advanced shareholder proposals calling for a proxy access right to a company's proxy statement for shareholder director nominations.

UBC described its history as an activist investor: “As long-term investors with broad investment portfolios (UBC funds currently hold stock in 3,603 US corporations), we are challenged to design and advance governance mechanisms to achieve appropriate levels of board oversight and accountability, without stimulating risky and short-term focused corporate behavior that would undermine our long-term investment interests. Operating on this premise, in 1999 UBC pensions funds and other Building Trades pension funds (‘Trades Funds’) submitted the first shareholder proposals calling for the establishment of a proxy access right to a company's proxy statement for shareholder director nominations. The proxy access proposals were part of an initiative to advance a series of complementary governance reforms designed to promote long-term corporate value enhancement and board accountability. During 2000, the Trades Funds engaged in months of extensive dialogue with senior corporate executives and board members of thirty-two companies, including ExxonMobil, General Electric, Procter & Gamble, Chevron, Texaco, and others, exploring a range of legal, practical, and strategic issues related to the implementation of a proxy access right for shareholder director nominations...since the Commission's 2003 proxy access rulemaking, important governance and disclosure reforms have been implemented that heighten board

● ● ●

“It would be imprudent for the Commission to mandate the proposed proxy access right without clear evidence of the effectiveness of an access right. The better course of action would be for the Commission to immediately confirm the right of shareholders to submit proxy access proposals and allow the private ordering process to develop a new and effective accountability mechanism.”

– *United Brotherhood of Carpenters*

● ● ●

accountability to shareholders. The most important of these reforms, the widespread adoption of a majority vote standard in uncontested corporate elections, directly addresses the root causes of an ineffective proxy process and ‘rubber stamp’ elections. The amendment to the New York Stock Exchange rule 452 to eliminate broker discretionary voting in director elections strengthens the influence of the majority vote standard, as it will make it more difficult for directors to obtain majority votes... The widespread adoption of a majority vote standard in uncontested director elections has stimulated a greater degree of investor attentiveness to board elections and the development of institutional investor voting guidelines that are transforming director elections into meaningful exercises of director accountability.”¹⁷⁷

UBC went on: “(T)he full impact of these reforms on director accountability has yet to be felt.... The combination of a majority vote standard in corporate governing documents and a post-election director resignation policy has produced a powerful and practical director election standard that has significantly enhanced director accountability to shareholders. UBC and Trades Funds have submitted over 470 majority vote shareholder proposals since 2003, and as of today, companies representing almost 70% of the total market cap of the S&P 500 have adopted a majority vote standard in their governing documents, with hundreds of other companies adopting the standard as well, including an increasing number of mid and small cap companies. It is interesting to note that not a single corporation's adoption of a majority vote standard was the result of a binding bylaw proposal; rather non-binding proposals drove the debate and led to subsequent adoption actions by corporate boards ... The Commission's 2007 action to amend

¹⁷⁶ United Brotherhood of Carpenters (Edward J. Durkin, Dir. Corporate Affairs Department), letter to the SEC dated Aug. 17, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-492.pdf>

¹⁷⁷ Ibid.

Rule 14a-8(i)(8) to expressly permit the exclusion of shareholder proposals seeking to establish a proxy access right has impeded constructive debate on the multi-faceted aspects of the proxy access issue ... (A) mandated and highly complex proxy access right is an accountability mechanism that will exact accountability at a very high price for investors...It would be imprudent for the Commission to mandate the proposed proxy access right without clear evidence of the effectiveness of an access right. The better course of action would be for the Commission to immediately confirm the right of shareholders to submit proxy access proposals and allow the private ordering process to develop a new and effective accountability mechanism.¹⁷⁸

¹⁷⁸ Ibid.

12. CONCLUSION

Comments on October 2nd from both SEC Commissioner Elisse Walter and Chairman Mary Schapiro signaled that an adopting release on proxy access will be forthcoming, but not until early 2010. The SEC reportedly postponed a final vote, which some had expected in November, in order to give staff more time to address all of the “workability” issues.

The most remarkable aspect of letters submitted supporting the SEC’s initiative on proxy access is just how little is said in most of them about all of the complexities and conflicts raised by the Proposing Release. Most of the comments from advocates have little to say in terms of addressing many of the SEC’s own voluminous requests for comments in the Proposing Release. One key reason is that a number of supporters submitting comments are clearly hoping that the Commission will adopt the proposed rules with as little delay as possible (some explicitly urged the Commission to adopt the Proposed Rule, as is, in time for the 2010 proxy season). In this context, it was also interesting to find so few companies and directors responding to the Proposing Release. It appeared that few were willing to join their peers and go on the record opposing the seemingly inevitable adoption of the proposed new rule on proxy access.

A. **“Fundamental Rights” and Punitive Powers**

In a speech delivered on May 20, 2009, SEC Chairman Mary Schapiro declared that shareholders have a “fundamental right to nominate and elect members to company Boards of Directors.” She also used language arguing that this “right” is only “real” with the effective exercise of a punitive power: the “ability of shareholders to hold Boards accountable through the exercise of their fundamental right.” Chairman Schapiro argued that only the proposed rules, because they enable shareholders “to have their nominees included in the company proxy ballot that is sent to all voters,” have the ability to “turn what would otherwise be a somewhat illusory right to nominate into something that is real – and has a real chance of holding boards of directors accountable to company owners.”¹⁷⁹ Indeed, some publicly traded companies submitting responses urged the Commission to modify the proposed rules to include “triggering events,” or, in the alternative, exempt companies that are responsive to shareholders, have majority voting standards, support shareholder nominees, or meet other criteria sufficient to avoid the threat of punishment.

Some critics of the proposed rules argued in their letters to the Commission that a federal direct proxy access rule will trample on the rights of shareholders to nominate and elect members to company Boards of Directors. Professor Laura D'Andrea Tyson, the former Chair of the President’s Council of Economic Advisers (Clinton Administration), was not alone in arguing that: “it is inconsistent with both the principle of majority shareholder rule and the corporation law of the individual states for the federal government to mandate proxy access rules that cannot be changed by a majority vote of the shareholders.”¹⁸⁰ Prof. Joseph A. Grundfest (Stanford Law School) described another “contradiction” in the Proposing Release relating: “to the Commission's assertion that the Proposed Rules replicate the physical shareholder meeting as governed by state law. Nothing in state law sets a minimum proxy access standard, defines the contours of any access proposal to be considered by shareholders, or prohibits a majority of shareholders from amending an access standard to make it more stringent while allowing the

¹⁷⁹ Chairman Mary L. Schapiro, “Statement at SEC Open Meeting on Facilitating Shareholder Director Nominations,” May 20, 2009. <http://www.sec.gov/news/speech/2009/spch052009mls.htm>

¹⁸⁰ Laura D'Andrea Tyson, letter dated Aug. 27, 2009. <http://www.sec.gov/comments/s7-10-09/s71009-517.pdf>

same majority to relax the standard. The Proposed Rules thus fail to achieve the Commission's stated objective, and instead erect barriers to shareholder action that exist nowhere in state law.”¹⁸¹

How is this new punitive power likely to be exercised? The most significant impact of Proposed Rule 14a-11 will be to strengthen the influence and power of large activist investors and their advisors. Proposed Rule 14a-11 will make it less costly for certain activists to either pressure boards or implement an incremental strategy directed at ultimately taking “control” of a company’s board. If low eligibility thresholds are adopted, we would expect to see a surge in the number of proxy contests. Where the SEC has proposed to shift some of the total costs onto the companies for holding boards accountable through contests for director seats, it has been the cost of organizing “short slate” proxy contests that has helped to limit unproductive contests. Curiously, some supporters of Proposed Rule 14a-11 argued in their letters to the Commission that stakeholders in the system need not worry so much about a resulting “explosion” in the number of nominations and contests, because the actual number of dissident directors who will ever get elected to boards is likely to be very small! Indeed, the Proposed Rule is likely to result in a surge of unproductive contests. What is more difficult to assess is just how many costly and ineffective contests there will be for each successful election of a director nominated by shareholders under Proposed Rule 14a-11.

B. “Workability” Issues

A widely held view among those submitting detailed responses, including many voicing general support for the SEC’s initiative, is that the proposed rules have significant “workability” issues. Evidence of a broad-based “consensus” among both advocates and opponents of Proposed Rule 14a-11 is limited to less than a handful of workability issues. First, and foremost, there is general opposition to the “first-in” time rule, the basic premise of which is inconsistent with the Commission’s consideration of substantive qualifications for eligibility to use Proposed Rule 14a-11. The most commonly proposed alternative is to give priority to nominations by an individual or group with the largest ownership stake. Second, there is also broad-based interest in having the Commission extend the holding period requirement from 1 year to 2 years, if only because a period of less than two years is widely seen as inconsistent with the SEC’s claim to be interested in having “only holders of a significant, long-term interest in a company be able to rely on Rule 14a-11.”¹⁸² Comparing the proposals of selected “activist” investors with those from critics of Proposed Rule 14a-11 yields an additional common “workability” issue: interest in ensuring that companies are not overwhelmed with ineffective contests, which underpins a shared interest in higher ownership thresholds for eligibility to use Proposed Rule 14a-11 (although proposed ownership thresholds vary widely).

If we assume that the SEC will proceed to adopt some form of Proposed Rule 14a-11 (and not include event triggers or exemptions), then what are the most significant “workability” issues raised by critics of Proposed Rule 14a-11? The “Top 10” issues are:

1. Need to delay effective implementation out to the 2011 proxy season in order to give all participants sufficient time to prepare.
2. Replace the “first in” time rule with priority given to the largest shareholder (individual or group).
3. Extend the holding period requirement for shareholders nominating a director to 2 years.
4. Increase ownership thresholds (% of shares outstanding) for qualifying to nominate a director under 14a-11.

¹⁸¹ <http://www.sec.gov/comments/s7-10-09/s71009-64.pdf>

¹⁸² “SEC: Facilitating Shareholder Director Nominations [Release Nos. 33–9046; 34–60089; IC– 28765; File No. S7–10–09],” *Federal Register*, Vol. 74, No. 116, Thursday, June 18, 2009.

5. Lower the maximum number of total 14a-11 shareholder nominees in a single year, and clarify procedures/priorities for a company facing both 14a-11 nominations and a “short slate” contest in the same year.
6. Director equivalency: each shareholder nominee under 14a-11 must meet the same independence and other standards as required for all other directors of the corporation (and nominees).
7. Set a high barrier to resubmissions of nominations under 14a-11.
8. Fix timing issues for notice by a new Schedule 14N, including creating a “window period” for nominations by establishing a “first date for submission.”
9. Clarify procedures regarding withdrawals and exclusions of nominations.
10. Companies should have the flexibility to design “user friendly” proxy cards and “notices,” including a single vote option for the company's nominees as a group.

C. Looking Ahead

Both the SEC’s Proposing Release and recent comments on the proposals by SEC Commissioners suggest that the initiative will not achieve stated policy objectives simply through implementation of the proposed rules. Promoting board “accountability” and “unfettering a shareholder’s franchise right” are very broad policy objectives that are likely to drive still further regulatory initiatives. Indeed, the eligibility thresholds defined in the Proposing Release for use of direct proxy access under Proposed Rule 14a-11 could change over time. Those thresholds would almost certainly have to be revised based on experiences from the initial experiment.

Most critics, and even some supporters, of the SEC’s initiative on proxy access expressed concern that the Commission set appropriate eligibility thresholds for exercising the “right” of direct proxy access. Here, the Proposing Release resorts to a limited survey concerning a wide range of eligibility thresholds – only to receive a very narrow sample base in response. Eligibility thresholds are anything but a “technical” issue. The thresholds and other eligibility requirements go to the heart of regulating who actually gets to exercise the “fundamental right” of direct access, and whether the rule will even be effective in achieving any policy objectives at all other than the establishment of the mechanism. Before proceeding further, the SEC might consider taking the time to do a broader survey of companies and likely users of the proposed rule – in particular with regard to eligibility and threshold criteria.

--END--

Table 8: Publicly Traded Companies Submitting Letters on Proxy Access (SEC File No. S7-10-09)

Company	Ticker	Exchange	Author	Title
3M Company	MMM	NYSE	Gregg M. Larson	Deputy General Counsel
ACE Limited	ACE	NYSE	Robert F. Cusumano	General Counsel
ADP	ADP	NYSE	James B. Benson	General Counsel
Advance Auto Parts	AAP	NYSE	Sarah E. Powell	Sr. VP, General Counsel
Aetna	AET	NYSE	Judith H. Jones	VP, Law & Regulatory Affairs
AGL Resources	AGL	NYSE	Paul R. Shlanta	Exec. VP, General Counsel
Alaska Air	ALK	NYSE	Keith Loveless	VP, General Counsel
Alcoa	AA	NYSE	Donna Dabney	VP, Corp. Governance Counsel
Allstate Corp.	ALL	NYSE	Thomas J. Wilson	Chairman, Pres. and CEO
American Electric Power	AEP	NYSE	John B. Keane	Exec. VP, General Counsel
American Express	AXP	NYSE	Carol V. Schwartz	Chief Governance Officer
Ameriprise Financial	AMP	NYSE	Thomas R. Moore	VP, Chief Governance Officer
Anadarko Petroleum	APC	NYSE	James T. Hackett	Chairman, Pres. and CEO
AT&T	T	NYSE	Wayne Watts	Sr. Exec. VP, General Counsel
Avis Budget Group	CAR	NYSE	Ronald L Nelson	Chairman, CEO
Best Buy Co.	BBY	NYSE	Todd G. Hartman	VP, Chief Compliance Officer
BNSF	BNI	NYSE	James H. Gallegos	VP, Corp. General Counsel
Boeing Company	BA	NYSE	Michael F. Lohr	VP, Asst General Counsel
BorgWarner	BWA	NYSE	Laurene H. Horiszny	Chief Compliance Officer
Boston Scientific	BSX	NYSE	Timothy A. Pratt	Exec. VP, General Counsel
Brink's Company	BCO	NYSE	McAlister C. Marshall, II	VP, General Counsel
Callaway Golf	ELY	NYSE	Brian Lynch	VP, Corporate Secretary
Caterpillar	CAT	NYSE	James B. Buda	VP, General Counsel
Chevron	CVX	NYSE	Lydia I. Beebe	Chief Governance Officer
CIGNA Corp.	CI	NYSE	Carol Ann Petren	Exec. VP, General Counsel
CNH Global N.V. (ADR)	CNH	NYSE	Harold D. Boyanovsky	President and CEO
Consolidated Edison	ED	NYSE	Carole Sobin	Secretary
CSX Corp.	CSX	NYSE	Ellen M. Fitzsimmons	Sr. VP, General Counsel
Cummins	CMI	NYSE	Marya Mernitz Rose	VP, General Counsel
Darden Restaurants	DRI	NYSE	Paula J. Shives	Sr. VP, General Counsel
Deere and Co.	DE	NYSE	Samuel R. Allen	President and CEO
Devon Energy	DVN	NYSE	Janice A. Dobbs	VP, Corporate Governance
DTE Energy	DTE	NYSE	Patrick B. Carey	Associate General Counsel
DuPont	DD	NYSE	Mary E. Bowler	Corporate Counsel
Eaton Corp.	ETN	NYSE	Alexander M. Cutler	Chairman and CEO
Eli Lilly & Co.	LLY	NYSE	James B. Lootens	Deputy General Counsel
Emerson Electric	EMR	NYSE	Frank L. Steeves	Sr. VP, General Counsel
ExxonMobil	XOM	NYSE	David S. Rosenthal	VP, Investor Relations
FedEx Corp.	FDX	NYSE	Christine P. Richards	Exec. VP, General Counsel

Company	Ticker	Exchange	Author	Title
FMC Corp.	FMC	NYSE	Andrea E. Utecht	VP, General Counsel
FPL Group	FPL	NYSE	Alissa E. Ballot	VP & Corp. Secretary
Frontier Communications	FTR	NYSE	Maggie Wilderotter	Chairman and CEO
General Electric	GE	NYSE	Michael R. McAlevey	VP, Chief Corp., Sec. & Fin. Counsel
General Mills	GIS	NYSE	Roderick A. Palmore	Exec. VP, General Counsel
Headwaters	HW	NYSE	William S. Dickinson	Chairman, Corp. Governance Cmte
Home Depot	HD	NYSE	Jack VanWoerkom	Exec. VP, General Counsel
Honeywell	HON	NYSE	Thomas F. Larkins	VP, Deputy General Counsel
Horizon Lines	HRZ	NYSE	Robert S. Zuckerman	General Counsel
IBM	IBM	NYSE	Andrew Bonzani	VP, Asst General Counsel
ITT Corp.	ITT	NYSE	Frank R. Jimenez	VP, General Counsel
JPMorgan Chase & Co.	JPM	NYSE	Stephen M. Cutler	General Counsel
Koppers Hldgs	KOP	NYSE	Steven R. Lacy	Sr. VP, General Counsel
Leggett & Platt	LEG	NYSE	John G. Moore	Chief Legal Officer
McDonald's	MCD	NYSE	Gloria Santona	Exec. VP, General Counsel
MeadWestvaco Corp.	MWV	NYSE	Wendell L. Willkie, II	Sr. VP, General Counsel
Media General	MEG	NYSE	Philip Richter	Fried Frank (on company's behalf)
MetLife	MET	NYSE	Richard S. Collins	Senior Chief Counsel
Motorola	MOT	NYSE	A. Peter Lawson	Exec. VP, General Counsel
New York Times Co.	NYT	NYSE	Kenneth A. Richieri	Sr. VP, General Counsel
Norfolk Southern Co.	NSC	NYSE	James A. Hixon	Exec. VP, Law and Corp. Relations
Northrop Grumman	NOC	NYSE	Joseph F. Coyne, Jr.	VP, Deputy General Counsel
Office Depot	ODP	NYSE	Elisa D. Garcia C.	Exec. VP, General Counsel
Peabody Energy	BTU	NYSE	Alexander C. Schoch	Exec. VP, Chief Legal Officer
PepsiCo	PEP	NYSE	Thomas H. Tamoney	Sr. VP, Deputy General Counsel
Pfizer	PFE	NYSE	Matthew Lepore	VP, Asst General Counsel
Praxair	PX	NYSE	Mark D. Nielsen	Associate General Counsel
Procter & Gamble	PG	NYSE	Steven W. Jemison	Chief Legal Officer
Protective Life Corp.	PL	NYSE	Alfred F. Delchamps, III	Sr. Associate Counsel
RPM International	RPM	NYSE	Edward W. Moore	VP, General Counsel
Ryder System	R	NYSE	Robert D. Fatovic	Exec. VP, Chief Legal Officer
Safeway	SWY	NYSE	Robert A. Gordon	Sr. VP, General Counsel
Sara Lee Corp.	SLE	NYSE	Brett J. Hart	Exec. VP, General Counsel
Sherwin-Williams Co.	SHW	NYSE	Christopher M. Connor	Chairman and CEO
Southern Co.	SO	NYSE	Melissa K. Caen	Assistant Secretary
Tenet Healthcare	THC	NYSE	Paul Castanon	VP, Asst General Counsel
Tesoro Corp.	TSO	NYSE	Robert W. Goldman	Chair, Governance Committee
Texas Instruments	TXN	NYSE	Joseph F. Hubach	Sr. VP, General Counsel
Textron	TXT	NYSE	Terrence O'Donnell	Exec. VP, General Counsel

Table 8: Publicly Traded Companies Submitting Letters on Proxy Access (SEC File No. S7-10-09)				
Company	Ticker	Exchange	Author	Title
Theragenics Corp.	TGX	NYSE	M. Christine Jacobs	Chairman and CEO
Tidewater	TDW	NYSE	Dean E. Taylor	Chairman, Pres. and CEO
Time Warner Cable	TWC	NYSE	Marc Lawrence-Apfelbaum	Exec. VP, General Counsel
UnitedHealth Group	UNH	NYSE	Dannette L. Smith	Secretary to the Board
Unitrin	UTR	NYSE	Scott Renwick	Sr. VP, General Counsel
US Bancorp	USB	NYSE	Lee R. Mitau	Exec. VP, General Counsel
Valspar	VAL	NYSE	Rolf Engh	Exec. VP, General Counsel
Verizon Communications	VZ	NYSE	William L. Horton, Jr.	VP, Associate General Counsel
Wells Fargo & Co.	WFC	NYSE	Laurel A. Holschuh	Sr. VP, Asst. General Counsel
Weyerhaeuser	WY	NYSE	Daniel S. Fulton	President and CEO
Whirlpool	WHR	NYSE	Daniel F. Hopp	Sr. VP, General Counsel
Xerox	XRX	NYSE	Ursula M. Burns	CEO
Applied Materials	AMAT	NASDAQ	Joseph J. Sweeney	Sr. VP, General Counsel
Biogen Idec	BIIB	NASDAQ	Bruce R. Ross	Chairman
Comcast Corp.	CMCSA	NASDAQ	Arthur R. Block	Sr. VP, General Counsel
Einstein Noah Restaurant Group	BAGL	NASDAQ	Jill Sisson	General Counsel
Intel Corp.	INTC	NASDAQ	Cary Klafter	VP, Legal & Corp. Affairs
Lionbridge Technologies	LIOX	NASDAQ	Guy de Chazal	Lead Director
Microsoft	MSFT	NASDAQ	John A. Seethoff	Deputy General Counsel
PACCAR	PCAR	NASDAQ	David C. Anderson	VP, General Counsel
tw telecom	TWTC	NASDAQ	Tina Davis	Sr. VP, Deputy General Counsel
VCG Holding Corp.	VCGH	NASDAQ	Troy H. Lowrie	Chairman and CEO
Yahoo!	YHOO	NASDAQ	Roy Bostock	Chairman
Tompkins Financial	TMP	AMEX	Stephen S. Romaine	President and CEO
"Letter of 26" - Group Letter, Aug. 17 (Below Are Companies That Did Not Submit Separate Letters - As Above)				
Air Products & Chemicals	APD	NYSE	Mary T. Afflerbach	Chief Governance Officer
Ingersoll-Rand Co.	IR	NYSE	Barbara A. Santoro	VP & Secretary
Johnson & Johnson	JNJ	NYSE	Douglas K. Chia	Sr. Counsel
Kraft Foods	KFT	NYSE	Carol J. Ward	VP & Corp. Secretary
Medco Health Solutions	MHS	NYSE	Thomas M. Moriarty	General Counsel
Merck & Co.	MRK	NYSE	Celia A. Colbert	Sr. VP, Asst General Counsel
Monsanto Co.	MON	NYSE	David F. Snively	Sr. VP, General Counsel
Pitney Bowes	PBI	NYSE	Amy C. Corn	VP, Chief Governance Officer
Reynolds American	RAI	NYSE	McDara P. Folan, III	Sr. VP, Deputy General Counsel

Notes: Some publicly listed companies had multiple senior executives providing separate comments to the SEC.

Contact information in such cases is for the last executive submitting comments with contact details.

About The Altman Group

The Altman Group is the premier proxy solicitation and corporate governance consulting firm in the United States. We provide services to over 750 clients globally each year. While the majority of our clients are based in the U.S., we also have more than 100 clients throughout Europe, Asia, and South America. Collectively, our executives have experience working on more than 15,000 annual and special meetings, more than 2,000 exchange/tender offers, over 150 proxy fights, and telephone solicitation campaigns to tens of millions of corporate and mutual fund investors. We have the highest proxy fight win rate of any proxy solicitation firm over the last three years, with successful outcomes for our clients approximately 80% of the time.

We attribute the success we have achieved to the unparalleled level of service we provide to our clients. It is the quality of our staff and their commitment to outstanding client service that have made us the highest ranked firm in our industry. The Altman Group has won the last three biennial Top Overall Proxy Solicitor (TOPS) awards (2004, 2006, and 2008) as the leading proxy solicitation firm based upon client satisfaction.

Recognizing the increasing need for C-Suite & Board level advisory services, our staff includes two former professionals from RiskMetrics, as well as a corporate governance expert who was a member of the corporate governance rating team at Moody's, and led the governance engagement programs for the New York City Pension Funds.

The Altman Group is also widely regarded as the thought leader in the proxy solicitation industry. Our recent letter to the SEC addressing a proposal to reform the proxy voting system is available on our website at <http://www.altmangroup.com/pdf/PracticalSolutionTAG.pdf>.

The Altman Group's free weekly e-newsletter, "Governance & Proxy Review," is circulated to more than 16,000 issuers, attorneys, and other corporate governance professionals. We invite you to read it on our website, and subscribe by sending an e-mail to newsletter@altmangroup.com.

For further information please contact:

Ken Altman
kaltman@altmangroup.com
(212) 400-2601



The Altman Group

Winner Biennial TOPS Awards 2004, 2006, and 2008
- *Highest Rated Proxy Solicitation Firm*



Winner Biennial TOPS Awards 2004, 2006, and 2008
- *Highest Rated Proxy Solicitation Firm*

New York
60 East 42nd Street
One Grand Central Place
New York, NY 10165
TEL: 212.681.9600
FAX: 212.681.1383

New Jersey
1200 Wall Street West
Lyndhurst, NJ 07071
TEL: 201.806.7300
FAX: 201.460.0050

Rio de Janeiro, Brazil
Praia de Botafogo 316/908
Rio de Janeiro - Brasil - 22250-040
TEL: 55.21.2237.8072

www.altmangroup.com

For further information please contact:

Ken Altman
President, The Altman Group
TEL: 212.681.9600
E-mail: kaltman@altmangroup.com