Monday, October 25
4:30pm-6:00pm

408 - Securities 201 for In-house Counsel: Special Disclosure Topics

LaFleur Browne
AVP & Corporate Secretary
The Williams Cos.

Mark Harrington
General Counsel and Corporate Secretary
Guidance Software, Inc.

Michael W. McCurdy
EVP,General Counsel
Danvers Bancorp, Inc.

Bart Wu
Attorney

Session 408

Faculty Biographies

LaFleur Browne

La Fleur C. Browne joined The Williams Companies as the assistant general counsel and corporate secretary. In that capacity, Ms. Browne has full responsibility for the day-to-day management of the corporate secretary department. Ms. Browne practices in the areas of securities regulation, corporate governance, underwritten public offerings (debt and equity), finance transactions, benefits, executive compensation and general corporate transactions. Ms. Browne also provides support to the Board and various Committees of the Board for four public companies listed on the NYSE and NASDAQ.

Prior to joining The Williams Companies, Inc., Ms. Browne was an assistant general counsel at West Pharmaceutical Services, Inc.; an assistant corporate secretary at Corning Incorporated; and an associate attorney with Dorsey & Whitney, LLP. Ms. Browne's practice at those companies and at the firm was in the areas of securities regulation, corporate governance-domestic and international, underwritten public offerings (debt and equity), mergers and acquisitions, finance transactions, aircraft transactions, executive compensation, international transactions, commercial transactions and general corporate transactions.

Ms. Browne received her JD and BBA from Howard University.

Mark Harrington

Mark E. Harrington is the general counsel and corporate secretary at Guidance Software Inc., a publicly traded company that is a leading provider of software and services for digital investigations and electronic discovery. His responsibilities include managing the worldwide legal affairs of the company, including operational, compliance, corporate, regulatory, and risk management.

Prior to joining Guidance, Mr. Harrington was a divisional general counsel and senior attorney with the Intel Corporation where he focused on technology, business, and mergers and acquisition transactions.

Mr. Harrington previously served two terms on the executive board of ACCA Southern California and is a current member of the ACC Docket Editorial Advisory Board and programs chair of ACC's national Corporate and Securities Law Committee.

He received his JD from Southwestern Law School and his BA from U.C.L.A.

Michael W. McCurdy

Michael W. McCurdy currently serves as executive vice president, general counsel and corporate secretary of Danvers Bancorp Inc., the publicly traded holding company for

Danversbank. Danversbank is a regional community bank located in the Boston area. Mr. McCurdy oversees the company's legal affairs, including the management of corporate governance and executive compensation issues, SEC filings, stockholder relations, and mergers and acquisitions.

Mr. McCurdy was the resident and CEO of BankMalden and joined Danvers Bancorp Inc. when the merger of Danversbank and BankMalden occurred. Prior to his tenure at BankMalden, Mr. McCurdy worked as an associate with a Boston law firm.

Mr. McCurdy has served as a panelist on the topics of executive compensation, governance, and other banking related matters at American Bankers Association and Massachusetts Bankers Association programs.

Mr. McCurdy earned his BA from the University of California at Santa Barbara and his JD from Suffolk Law School.

Bart Wu

Bart Wu is an attorney whose years of experience involve advising, and providing financing to, small and large companies, and municipal entities throughout the country. Most recently, Mr. Wu was involved in the development of a business venture to explore the collection and utilization of the almost 400 million waste tires located throughout the United States.

Previously, he was chief counsel of the NYS Conservation Fund Advisory Board, a state oversight board within the NYS Department of Environmental Conservation. Before that he was a corporate banker with The Sanwa Bank, Limited. Prior to Sanwa, he was an associate general counsel of the predecessor of JPMorgan Chase, and before that he was an attorney with two New York law firms.

In addition to his membership with ACC, Mr. Wu is a member of the ABA and the NYC Bar Association. He has also served on the boards of various not-for-profit organizations, and has been the chair of their respective law committees. He currently is the vice-chair of ACC's Corporate and Securities Law Committee, has participated on the team appearing annually on behalf of the committee before the SEC's Division of Corporate Finance, and has helped guide its advocacy efforts. Mr. Wu also is the vice-chair-privacy of ACC's IT, Privacy and eCommerce Committee, leading the team that developed the privacy policies and user agreements for the ACC.

Mr. Wu received his BA and MA from the University of Pennsylvania, and his JD from the Fordham Law School.

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Securities 201: Special Disclosure Topics

Speakers:
LaFleur Browne
Mark E. Harrington
Michael W. McCurdy
Bart Wu

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Outline of Presentation

General Disclosure Issues
- Subjective Company Concerns
- Objective Requirements

Evolving Disclosure Issues and Trends
Practice Focus: SEC Comment Letters
Practice Focus: Shareholder Proposals, and Proxy Access

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General Disclosure Issues

Mark E. Harrington, Esq.,
General Counsel and Corporate Secretary
Guidance Software, Inc.

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Effective Disclosure Process

- Company Subjective Determinations "sit down with C-levels and Board and get clarity on how key SEC terms are defined for your company"
- Objective/SEC/Regulatory Requirements "after defining key SEC terms for your company, apply the rules in a consistent manner to comply with SEC and exchange rules"

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Balancing of Interests

1) Shareholder right to information vs.
2) Company concerns about materiality, competitive harm, timing
3) Confidential Treatment requests to the SEC can be made but are not always timely or easy to get

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Subjective Concerns: Define

1) Named Executive Officers
2) Section 16 Officers (sidebar: "Designated Insiders")
3) "Materiality" for your Company
4) What is "Ordinary Course"

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Methods of Disclosure

Form 8K
Forms 3, 4, 5
Form 10Q, 10K
Form 144
Proxy Statement

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Form 8K Filings

Triggering Events and Considerations

Timing Considerations

-most must be filed 4 days after occurrence

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Form 8K Reportable Events

28 Reportable Events (summary)

--Entry, Termination Amendment of a Material Definitive Agreement not made in the ordinary course

--Major Financial Events (Bankruptcy, M&A, Debt/Credit Arrangements, restructurings)

--Notice of Delisting or Failure to meet an exchange requirement (e.g. independence of Board)

--Governance Changes (Board, Key Officers, Compensation Arrangements)

--Financial Disclosures and Restatements; resignation of Auditor

--Corporate: changes to Bylaws, Code of Ethics, Fiscal Year

--Regulation FD

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Materiality

The 8-K Rules do not provide a definition of what is "material" or provide any guidance, but definitions developed by courts and the SEC do have some numerical thresholds:

– Court Definitions -- Tests have been developed by courts to identify what constitutes material information. The United States Supreme Court has held that information is material only if "there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision." This standard has also been applied by the Second Circuit finding that a fact is material if it is "reasonably certain to have a substantial effect on the market price of a security" or "if there is substantial likelihood that a reasonable person would consider it important in deciding whether to buy or sell shares."

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Agreement Not in Ordinary Course

--Typically, sales transactions related to a company's core business are generally considered ordinary course

--Those not ordinary course generally include:

--agreements with directors, officers or shareholders

--agreements that are foundational to the company being able to conduct business

--purchase/sale of property, plant or equipment whereby the purchase or sale price exceeds 15% of a company's fixed assets on a consolidated basis.

--agreements impacting assets reported in 10K or 10Qs

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Timing and Extent of Disclosure

--Four Business Days after signed agreement even if certain contingencies still exist

--Disclose the "How and Why" agreement is material; parties to it; terms that are material

--A copy of the actual agreement is not required to be filed as an attachment but must be filed with your next Form 10-Q/K covering the reporting period

--If Event occurs within four business days of a 10Q/K filing (i.e. officer departure), company may decide to include disclosure in those filings rather than in a separate 8K.

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Forms 3, 4 and 5

What: Disclosure of "Beneficial Ownership" changes for Section 16 "officers"

Who: 10% owners; directors, "officers" (sidebar: president, financial officer, controller, policy making VPs)

When: 2nd business day after trade (Form 4s)

Practice Tips: Get Board to review/approve who these people are and re-assess periodically; watch for "Trust" ownership issues; be aware of donations, share forfeitures due to tax withholdings

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Regulation FD

Item 7.01 designed to protect against selective disclosure of non-public material information to some investors and not others

Note on Safe Harbor protection of conference calls

Practice Tip: Good command over what the company has publicly said; good communication with CEO, CFO and investor relations; clearly designate company spokespersons; legal approve all investor presentations

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Form 144 Disclosures

Designation can run to status of shares to be traded or to the status of the party seeking to trade (Affiliate)

-- "restricted stock" not registered with an exchange (see S-8 process) is not readily transferable or saleable by a shareholder unless the resale qualifies as exempt from the registration requirements of Federal and State securities laws. (founder shares, private placements)

-- "control stock" are those shares owned by a director or large shareholder in a position of directing management or policies of company

Process of selling such shares involves rendering an opinion that an exemption is met (i.e. time securities held, manner and volumes of sales are below thresholds) AND making a 144 filing to disclose anticipated sales within the next 90 days.

Practice Tip: watch out for other restrictions as well (short-swing sales, internal trading blackouts, certificate legends, Section 16)

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10Q, 10K and Proxy

- Quarterly and annual disclosure of financial performance; disclosure of risk factors shareholders should consider
- Proxy discloses shareholder "ballot" information relevant to election of directors, officers, shareholder proposals (exec compensation, beneficial ownership, say on pay). Disclosures have expanded in recent years (see Dodd Frank for the latest evolving issues).

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Current Issues in Executive Compensation And Corporate Governance

Michael W. McCurdy, Esq.
Executive Vice President
General Counsel
Danvers Bancorp, Inc.

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SEC Disclosure Rules for 2010 Proxy Season

- Enhanced Compensation Disclosure
- Director and Officer Stock Option Awards
- Director and Nominee Disclosures
- Board Leadership Structure
- Use of Compensation Consultants
- Statement on Diversity

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Enhanced Compensation Disclosures

- Use clear and concise language rather than complex charts.
- Discuss potential material adverse effects of compensation on the company.
- "Reasonably Likely" standard as used for MD&A.
- No general or "boilerplate" language to describe compensation decisions.

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Director and Officer Stock Grants

- Reporting probable value of stock grants in summary compensation table.
- Potential maximum payout shall be included in a footnote.
- Revise 2007/2008 grant disclosure, if necessary.
- Disclosure of considerations for performance based awards.

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Director and Nominee Disclosures

- Disclosure of director/nominee experience, skills and attributes: why is the director/nominee qualified?
- Again, no boilerplate language.

Ex. Mr. Smith brings many years of business, management, and customer based experience, along with a knowledge of crisis and risk management to the Board.

- Disclosure of all public company boards.
- Provide information on all legal proceedings from prior 10 year period.

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Board Leadership Structure/Risk Oversight

- State whether the company combines the Chairman/ CEO roles and, if so, explain why.
- Is there a Lead Director and, if so, what is his/her role?
- What is the board's role in providing risk oversight, especially as it relates to risks that are applicable to the company?

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Use of Compensation Consultants

- Focus on avoiding potential conflicts of interest.
- Additional services provided by compensation consultant, or his/her company must be disclosed.
- Must provide basis for the decision to retain the consultant.
- Issues regarding conflict/risk management as it relates to incentive compensation plans.

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Statement on Diversity

- Does the company have a plan regarding the diversity of its directorship?
- Diversity can be defined by race, gender, national origin, or something more broad as defined by the company.
- A more broad definition might include: different viewpoints, professional experiences, education, skill or other qualities.

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Dodd-Frank Wall Street Reform and Consumer Protection Act

- Has an impact on nearly every public company.
- Establishes new disclosure requirements regarding executive compensation and corporate governance matters.
- Timeline for complete implementation remains unclear.
- SEC will create rules and guidance for Executive Compensation and Corporation Governance matters.

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Executive Compensation

- Role and Independence of Compensation Committee
- Clawback Requirements
- Pay v. Performance
- Equal Pay Disclosures
- Incentive Based Compensation Plans

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Role and Independence of the Compensation Committee

- **Independence of the Committee Members**
  - Essentially codifies existing practices of the securities exchanges regarding the independence of the committee members, with a few limited exceptions.
  - Failure to comply results in prohibition from listing on all major exchanges.
- **Use of Consultants**
  - Compensation Committee must use a number of different factors in evaluating its use of an outside consultant.
  - Must disclose consultant fees in the proxy statement in certain situations.

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Clawback

- **Repayment of Executive Incentive Compensation**
  - Issuers must institute a policy that requires the repayment of excess executive compensation when financials are restated due to a "material misrepresentation".
  - No need to show any executive negligence or misconduct.
  - Clawback provision applies to former and current executive officers.
  - Covers a three year period prior to the restatement of financials.
  - Includes any stock option grants.

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Pay v. Performance and Equal Pay Disclosures

- **Pay v. Performance**
  - Codifies existing requirement of clear and concise disclosure of compensation subject to disclosure under Item 402.
  - Also establishes requirement that an issuer establish and disclose the connection between executive pay and the financial performance of the issuer.
- **Equal Pay Disclosures**
  - Required disclosure of the difference between the pay of the CEO and the median employee annual compensation levels.
  - Must also provide a ratio of the CEO pay to the median employee pay.

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Corporate Governance

- Non-Binding Shareholder Votes
- Elimination of Broker Discretionary Voting
- Proxy Access
- Disclosure of Compensation Votes
- Role of Chairman, CEO and Lead Director

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Non-Binding Shareholder Votes

- **Say on Pay**
  - Non-binding shareholder vote on executive compensation to occur at least every three years.
  - Compensation Committee can disregard shareholder vote but must state basis for the decision to disregard.
  - This requirement will likely begin with the 2011 Proxy season.
- **Frequency of Say on Pay**
  - A separate vote to determine how often a Say on Pay resolution will be put to shareholders.
- **Say on Golden Parachutes**
  - A separate vote on existing golden parachute agreements during the shareholder meeting to approve activity that would trigger the payment.

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Corporate Governance

- **Elimination of Broker Discretionary Voting**
  - Authorizes SEC to prohibit brokers from using their own discretion to vote on the election of directors, executive compensation matters and other "significant matters" as determined by the SEC.
  - Result is an increase in shareholder proposals to declassify boards.
- **Proxy Access**
  - SEC is authorized to require issuers to provide shareholders with access to issuer proxy materials for the purpose of nominating directors.
  - Could alter the way companies accept shareholder nominations.

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Corporate Governance

- **Disclosure of Institutional Voting**
  - 13(f) institutional investment management holders are required to disclose to beneficiaries on an annual basis how they voted on Say on Pay and Say on Golden Parachutes resolutions.
- **Role of the Chairman, CEO and Lead Director**
  - Instructs the SEC to adopt guidelines regarding an issuer's disclosure of the roles of the Chairman, CEO and Lead Director, including a discussion on why the roles are combined or separate
  - Similar to the proxy disclosure rules adopted by the SEC in 2009 that were used during the 2010 proxy season.

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Overview of the SEC Comment Letter Process

LaFleur Browne, Esq.
Assistant Vice President
The Williams Companies

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The Review Process

- The Division of Corporation Finance is responsible for the review of filings of public companies under the Securities Act of 1933 and the Securities Exchange Act of 1934.

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- There are generally four individuals involved:
  - a legal examiner
  - an accounting examiner
  - a legal reviewer (typically a branch chief or special counsel)
  - an accounting reviewer (typically the accounting branch chief or senior assistant chief accountant)

  These individuals will be identified at the bottom of the comment letter.

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With the adoption of Sarbanes-Oxley, the SEC is required to review each issuer's 34 Act report once every three years. Sarbanes Oxley sets forth certain screening criteria:

- large cap companies
- issuers that have issued material restatements of their financial results
- issuers that experience significant volatility in stock price

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- emerging companies with disparities in price to earnings ratios
- issuers whose operations significantly affect any material sector of the economy
- any other factor that the SEC deems relevant

The criteria that receives the most attention is "large cap companies," which generally includes up to Fortune 1000 companies.

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Size is not the only deciding factor, the SEC also focuses on specific disclosure issues, which are stated in the latter part of this presentation. In addition, if your company or industry is receiving a fair amount of attention from the press, you are more likely to be reviewed by the SEC.

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With respect to the 33 Act, there are generally three types of reviews: a full review; monitor; and, no review:

- Generally all Initial Public Offerings get a full review.
- With respect to "monitors" this means that the SEC looks at specific issues such as whether the right form was used and whether a "plan of distribution" was unique.
- The "no review" is self explanatory.

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The SEC also screens preliminary proxies and non-S-4 merger proxies. The process used is slightly different. In those instances the SEC will review the relevant filings and will call you to inform you of their decision to review or not to review. Generally, if you have not heard from the SEC within 10 calendar days from the date of filing, you should feel free to mail or print at that time.

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If you submit responses to your comment letter and you are not successful in persuading the reviewer of your position, there is an appeal process.

For a thorough review of the SEC review process please go to the SEC's website at http://www.sec.gov/divisions/corpfin/cffilingreview.htm.

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What do you do when you receive a comment letter?

- Distribute to all relevant personnel – generally, the General Counsel, the Controller or Chief Financial Officer and your external auditors.
- Review the letter to determine issues in the comment letter and note the date the response is required.

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- Organize your team. Your team should include individuals who can be responsive to the questions asked, and generally would include an in-house attorney, the controller, outside auditor, individuals from specific areas where questions are focused, and outside counsel. You should select a leader for the project.

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- Set up initial meeting to review the questions and determine whether you can respond to the SEC within the timeframe provided in the comment letter. If it is determined that a response cannot be provided in that timeframe, call the staff and request an extension. Be prepared to have a reason for the extension.

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- Check the precedent on comments you receive through the SEC's website at http://www.sec.gov/answers/edgarletters.htm. Remember that your company and your facts may be different from the companies whose comment letters you reviewed, so do not let the responses shown be the driver.

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- Determine what your strategy will be with respect to your comment letter response. Your best strategy is to have a complete discussion on the issue without volunteering unnecessary information which can raise extraneous issues. Do not assume that the examiner understands any portion of the questions asked. Remember if you do not understand a question call your examiner and ask what the comment is driving at.

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- In preparing your response – think ahead. It is important to analyze why a question is being asked and what additional questions may be asked relating to that topic in the future.

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- Be consistent in your response. Your responses should be in line with your other public disclosures, such as information in your press releases; information provided at analyst conferences and interviews.

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- Have a meeting with the members of the team to review responses prior to filing with the SEC. Remember that your responses will be available to the public, so keep that in mind.

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- Once you are satisfied with your responses, you are ready to file with the SEC via Edgar. You should also consider faxing the response to the SEC examiner.

Note that the SEC comment letters may ask for different responses. Some may require amendments, some may require supplemental responses, and some may require disclosure in future filings. Note that future disclosure requires that the information be included in the next periodic filing.

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Comment Letter Trends

- Management's Discussion and Analysis
  - Impairments – If you have taken an impairment charge you may be asked to provide more detail on estimates used and how the impairment was evaluated.

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- Liquidity and Capital Resources – SEC comments have been focused on how the recent financial crisis is impacting a company's cash availability. Many companies have expanded their risk factors to account for this specific risk. The SEC may review these risk factors against what is stated in the MD&A.

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- Pension Accounting – As a result of the falling values of investments, the SEC has questioned the assumptions used in pension accounting. The question asked is generally focused on the relationship between historical returns and expected returns to the extent historical returns are less than expected returns.

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- Contingencies – The SEC may ask questions relating to the likelihood of outcome (probable, reasonably possible or remote) and how the company accounted for the contingency as well as critical accounting estimates used.

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- Non-GAAP Measures
  - The SEC reviews earnings releases, website postings, management presentations and other filings for compliance with regulation G. The SEC has focused on consistency in the use of non-GAAP measures in all filings – formal or informal – and has paid attention to financial metrics used in reconciliations.

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- Executive Compensation
  - Performance Targets – If a company has an incentive plan where compensation is based on performance targets, those targets should be disclosed in the proxy statement, unless the company believes that disclosing the targets will cause competitive harm. If specific performance targets are not disclosed, the SEC has asked for justification of what the competitive harm will be. If a company has previously disclosed performance targets, the SEC is less inclined to accept justification for future periods.

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– Individual Performance Goals – Where an NEO's incentive compensation has increased because of individual performance, the SEC has asked for additional disclosure regarding the specific activities that warranted the increase.

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- Disclosure Controls and Procedures
  – The SEC has focused on whether companies include the specific wording requirements in their disclosure of the effectiveness of disclosure controls and procedures.

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- Exhibits
  – The SEC has focused on exhibit filing requirements and specifically the trend by companies to exclude schedules to agreements that are not merger agreements. Note that schedules to merger agreements are excepted by Item 601(b)(2) of Regulation S-K.

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- Risk Factors
  - The SEC may comment on risk factors that they consider generic and request that a company provide more company specific, targeted discussions of the principal risks facing the company.

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Summary

- Don't become pen pals with the Staff.
- Supplement written communication with oral communication.
- Documentation is critical before receipt of comment letter.

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- If you have timing considerations please let the SEC know at the outset.
- Remember that the SEC staff are people too – be polite and professional.

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Shareholder Proposals Under Rule 14a-8
(17 CFR § 240.14a-8)
Process
Interpretation
Practice

Bart Wu, Esq.
Vice-Chair
Corporate & Securities Law Committee

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SHAREHOLDER PROPOSALS

- **Process**
  - ☒ Highlights (14a-8__)
    - (a)-(h), (j)-(l) concern procedural matters.
      - – 120d before date proxy mat. distrib. (e)(2)
      - ☒ $2,000 mkt. value or 1% of sh. eligible to vote on proposal. (b)(2)
      - ☒ 14d for S/H to respond to Co. notice of defect. (f)
      - ☒ 1 proposal (c); 500 words max. (d)
      - ☒ 80d (j) (but see below)
      - ☒ Attendance in person or by representative. (h)

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SHAREHOLDER PROPOSALS

- (i)(1) – (i)(13) concern substantive bases to object to proposal ± stmt in support
  - – (i)(1) Improper subj. for S/H under state law of organization
  - – (i)(2) Would cause Co. to violate applicable state, fed. or foreign law
  - – (i)(3) Contrary to proxy rules

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SHAREHOLDER PROPOSALS

- (i)(4) Re. personal claim or grievance
- (i)(5) Re.<5% of assets/gross sales/earnings and unrelated to Co.'s business
- (i)(6) Co. lacks power/auth to implement
- (i)(7) Re. ordinary bus. operations
- (i)(8) Re. election to Board (i.e.,"election exclusion").
  - »Now severely restricted under the Proxy Access rules discussed below.

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SHAREHOLDER PROPOSALS

- (i)(9) Conflicts with Co.'s proposal(s)
- (i)(10) Substantially implemented
- (i)(11) Substantially duplicative of proposal already included in current proxy material
- (i)(12) Subst. same subject as proposal included in last 3 yrs. and rec'd <3,6,10%
- (i)(13) Re. specific amts of $ or dividends

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SHAREHOLDER PROPOSALS

- **Interpretation**
  - Corp. Fin. has issued 5 Staff Legal Bulletins (SLB 14-14E): Helpful to work backward from E to 14
    - 14E: (i)(7)
    - 14D: (i)(1,2,6); (b)
    - 14C: (i)(6,7); (l)
    - 14B: (i)(3); (f); (j)
    - 14A: (i)(7)
    - 14: General Summary; mechanics

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SHAREHOLDER PROPOSALS

- **(i)(7)-Ordinary Business Operations**
  - Very popular basis to object, but not necessarily most successful
    - Staff position has evolved since SLB14A
      - Formerly, Staff viewed any proposal requiring Co. to engage in an evaluation of risk as excludable because it dealt with Ordinary Business Operations.

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SHAREHOLDER PROPOSALS

- Now, Staff focuses on the subject matter that gives rise to the risk, and will determine if the subject matter is "so significant" and has a "sufficient nexus" to the Co. so that the Board's management of that risk is a "significant policy matter." (SLB 14E)

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SHAREHOLDER PROPOSALS

- For example,
- Staff previously viewed CEO succession planning as an Ordinary Business Operation, because it concerned hiring/ promotion/ termination of employees.
- Now, Staff views such planning as raising a "significant policy issue" re governance that "transcends the day-to-day business matter of managing the workforce." Thus, not excludable.

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SHAREHOLDER PROPOSALS

» Similarly, Staff for some years has concluded that proposals that concern a Company's minimizing or eliminating operations that may adversely affect the environment or public health are not excludable. (SLB 14C).

» Also, proposals re. human rights, climate change and other environmental, social and governance-related issues.

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SHAREHOLDER PROPOSALS

- **(i)(3)-Contrary To Proxy Rules**
  - Another popular, but slippery basis to object to proposal and to all or portions of the statement of support.
    - Reasons to object:
      - Vague and indefinite
      - Impugns character, integrity, personal reputation or conduct without factual support
      - Includes opinions given as facts

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SHAREHOLDER PROPOSALS

- **(i)(6)-Co. lacks power/auth to implement**
  - Frequently cited against proposals for director independence.
    - Typical objection is that proposal doesn't provide for cure if loss of independence
      - Staff may allow if proposal offers any flexibility (e.g., "whenever possible", or cure period). SLB 14C

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SHAREHOLDER PROPOSALS

- (i)(6) also cited when proposer "requests", "recommends" or "requires" Board amend Co. charter.
  - Typical objection is that Board lacks auth/power to amend charter
    - Staff may allow proposer to revise to provide that the Board "take the steps necessary" to amend Co. charter. (SLB 14 D)

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SHAREHOLDER PROPOSALS

- (b)(2) & (f)- Deficiency Notices
  - Demonstrating eligibility to make proposal.
    - Introducing Brokers' Letters
      - » Acceptable proof for past several years since Staff issued N/A letter in Hain Celestial (2008).
      - » But challenged in court earlier this year by Apache Corp. in S.D. Texas.

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SHAREHOLDER PROPOSALS

- » Court held narrowly that Apache could exclude the proposal based on challenged facts re. custodian.
- » Since Apache decision, Corp. Fin. Staff have continued Hain Celestial practice thus isolating the Texas decision.

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SHAREHOLDER PROPOSALS

- **Practice-2010**
  - According to RiskMetrics, more no-action requests were filed than in past three years.
    - 198 - Co. had some basis to exclude
    - 70 - Staff did not concur
    - 34 - Proposal and No-action request were withdrawn
    - 302 - Total number of exclusion requests.

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SHAREHOLDER PROPOSALS

- Excluding withdrawn requests, Staff concurred with the Co. 66% of the time.
- Importance of timing
  - >98% Co. success if proposer fails:
    - To submit proposal within 120d
    - To respond to deficiency notice within 14d.
    - To limit proposal & statement to 500 words

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SHAREHOLDER PROPOSALS

- Requests made <80d of releasing proxy materials is ordinarily not a bar. (SLB 14B)
  - In almost all cases in 2010, Staff evaluated the merits of a no-action request. About 50% of the time, it also waived the 80d requirement.

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SHAREHOLDER PROPOSALS

- Big Issues
  - Compensation issues:
    - Say on pay
    - Anti gross-ups
    - Retention periods after terminated
    - Independent compensation comm.

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SHAREHOLDER PROPOSALS

- Big Issues
  - Board issues:
    - Independent Chairman
    - CEO succession
    - Majority voting for directors
    - Written consent

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SHAREHOLDER PROPOSALS

- Big Issues
  - Governance issues:
    - Right to call special meetings
    - Ending supermajority voting
    - Eliminate classified boards

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- Big Issues
  - Significant Policy issues:
    - Climate change/greenhouse emissions/environmental impact
    - Humane treatment/Human rights
    - Political advocacy reports/spending

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Facilitating Shareholder Director Nominations ("Proxy Access")

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PROXY ACCESS

Adopted on August 25th

- Effective date: **November 15, 2010**
- Applies to mailings: **March 15, 2011**
  - Smaller Reporting Cos. (gen. with public float of <$75 MM): November 15, 2013
- Requires: S/H or Group have **3%** voting sh. for **3** yrs.
  - Can't use borrowed sh. or shorted sh. 3 yrs. required through date file Sch. 14N.

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PROXY ACCESS

- Access: S/H can nominate up to 25% of Bd. (rounded down), and solicit proxies through Co.'s proxy statement
  - If multiple classes can elect, Co. must include the number of director seats class can elect or 25% of entire Bd., whichever is less.
  - If Bd. has 3 or fewer directors, Shareholder can nominate 1 director.

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PROXY ACCESS

- If Shareholders nominate >25% of the Board, the Shareholder or S/H group with the largest % of voting securities has priority.
- If Co. nominates candidate previously nominated by Shareholders at prior annual meeting, Co.'s nominee doesn't count toward Shareholders' 25% cap.

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PROXY ACCESS

- Process
  - Must (1) disclose information on Sch 14N regarding Shareholder/Group's relationship with nominee or with Co., holdings, and nominee's qualifications, (2) provide written statement from record holder (or bank or brokers) verifying required ownership within 7 days of filing Sch. 14N, and (3) certify:
    - Sh. not acquired "with the purpose, or with the effect, of changing control"

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PROXY ACCESS

- Nominee qualifies objectively as independent director
- There are no agreements with the Co. concerning the nominee, and
- Nominee's candidacy does not violate law or applicable stock exchange rules.

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PROXY ACCESS

Process

- Notify Co. ≤150d to ≥120d window prior to anniversary of mailing prior year's proxy materials, and deliver copy of new Schedule. 14N as filed with the SEC.
- **If Co. will include** nominee(s), it must notify Shareholder/Group no later than 30d prior to distributing proxy materials.

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PROXY ACCESS

- **If Co. challenges** nominee, it must notify Shareholder/Group within 14d of deadline for submitting nominations. Shareholder/ Group has 14d to cure deficiency. If not cured, Co. may exclude, but must notify SEC of that action no later than 80d prior to distributing proxy materials.

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PROXY ACCESS

- Co. may, "if desired" still file a no-action request to exclude.
  - Shareholder/Group has 14d from receipt of submission to respond to Co.'s no-action request to SEC.

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PROXY ACCESS

- Bases for exclusion:
  - Rule 14a-11 doesn't apply to Co.
  - Shareholder/Group did not satisfy eligibility requirements
  - Co. received more nominees than it is required to include
    - May not assert certifications or disclosure is false or misleading to exclude, or make assertion as reasoning for no-action request.

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PROXY ACCESS

- Cannot exclude Shareholder proposals under Rule 14a-8(i)(8) if it:
  - Would disqualify nominee standing for election;
  - Would remove director from office before term expired;
  - Questions competence, business judgment or character of a nominee;
  - Seeks to include specific individual in Co.'s proxy materials for election to the Board;
  - Otherwise could affect outcome of upcoming election.

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PROXY ACCESS

- (i)(8) cannot be used to exclude a proposal that seeks to restrict access under 14a-11, such as imposing a higher threshold or longer waiting period, but **can** be used to provide additional means for a Shareholder to nominate directors.

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PROXY ACCESS

- Company is not responsible for information or disclosures contained in Shareholder/Group statement of support for nominee(s) nor for information it must lift from Sch. 14N for inclusion in proxy materials.

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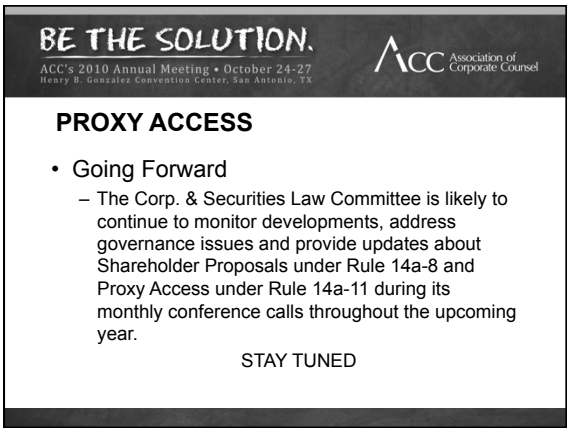
PROXY ACCESS

- Co. must use a “universal proxy” in which all nominees are listed.
- Co. can indicate whether Board recommends a vote “for” the nominee, it cannot otherwise discriminate nor provide blank check box to vote entire Co. slate.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PROXY ACCESS
• Going Forward
– The Corp. & Securities Law Committee is likely to continue to monitor developments, address governance issues and provide updates about Shareholder Proposals under Rule 14a-8 and Proxy Access under Rule 14a-11 during its monthly conference calls throughout the upcoming year.
STAY TUNED

SECURITIES 201 FOR IN-HOUSE COUNSEL: SPECIAL DISCLOSURE TOPICS SUPPLEMENTAL MATERIALS

General Disclosure Issues and
Current Issues in Executive Compensation and Corporate Governance

1. Sample periodic email message to "designated insiders" regarding blackouts for trading in company securities (.doc)

2. Company Disclosures To The Public Sample Regulation FD ("Fair Disclosure") Policy (.doc)
3. Corporate Executive Board Compensation Clawback Policies, dated October 7, 2007. (.pdf)

Overview of the SEC Comment Letter Process

1. Response to SEC Comment Letter regarding 10K filed February 26, 2010 and proxy statement filed April 8, 2010

2. Response to SEC Comment Letter, dated June 18, 2010

Shareholder Proposals and Proxy Access

1. Wu's 2010 No-Action Analysis (through August 14, 2010) (.xlsx)
2. **RULE 14a-8**
3. **SLB 14E**
4. **SLB 14D**
5. **SLB 14C**
6. **SLB 14B**
7. **SLB 14A**
8. **SLB 14**
9. Apache Corp. v. Chevedden Decision (.pdf)
10. Facilitating Shareholder Director Nominations ("Proxy Access") (.pdf)

SAMPLE PERIODIC EMAIL MESSAGE TO "DESIGNATED INSIDERS" REGARDING BLACKOUTS FOR TRADING IN COMPANY SECURITIES

Sent: Monday, June 14, 2010 10:04 AM
To: Designated Insiders
Subject: [Company] Trading Window CLOSES after market on Wednesday, June 16th

Hello,

If you are receiving this email, you are considered a Designated Insider of the Company. What that means is that by virtue of your position or function within the Company, you may commonly be in possession of material non-public information about the Company. Designated Insiders are generally prohibited from trading in [Company] company securities, starting from the last two weeks of a quarter --- until 48 hours after the earnings for that quarter have been publicly reported. For various reasons, the Company may extend a closed trading window from time to time if it determines that the level of material non-public information currently circulating in the company is at such a level to create risk for the Company or its employees who might otherwise trade in company securities.

Please note that starting after market close on **Wednesday, June 16th**, the trading window (including to window to set-up or amend any 10b51 Plans) for [Company] securities will CLOSE and remain closed until the window **opens again after market on [Date],** which is 48 hours after our anticipated Q2 2010 earnings release**.**

Please remember never to buy or sell company securities if you believe you are in possession of material non-public information about the company. Before engaging in any trading activity related to [Company] securities, you should review the [Company] Insider Trading policy and training materials, located here: http://intranet/policies/default.aspx. As a Designated Insider, you are also required to periodically complete our interactive Insider Trading training module. To access the training module, click here:

[link to interactive Insider Trading module]

Finally, prior to making any trades, please get pre-clearance with [General Counsel or designee], so the Company can determine what if any obligations it may have to disclose such trades to its shareholders.

Regards,

General Counsel

POLICY DEPARTMENT: Legal

COMPANY DISCLOSURES TO THE PUBLIC
SAMPLE Regulation FD ("Fair Disclosure") Policy

POLICY NUMBER: EFFECTIVE DATE:

I. PURPOSE

Our Company is committed to fair disclosure to investors in compliance with all applicable securities laws.

This is a highly technical area with important consequences for the Company. If you believe that a disclosure of material nonpublic information about the Company may have occurred, immediately notify our General Counsel.

Here are examples of the areas affected by this policy:

- Quarterly earnings releases and related conference calls
- Speeches, interviews and conferences
- Providing "guidance" as to the Company's performance or results
- Responding to market rumors
- Customer Meetings
- Contacts with financial analysts covering the Company
- Reviewing analyst reports and similar materials
- Referring to or distributing analyst reports on the Company
- Analyst and investor visits
- Postings on our website
- Postings on external "blogs" or bulletin boards

General

This policy has been adopted in response to SEC rules concerning the practice known as "selective disclosure" of material nonpublic information.

All questions about this policy should be directed to a member of the Company's Disclosure Committee or the General Counsel. The General Counsel and Disclosure Committee are responsible for interpreting this policy and for establishing and implementing procedures to ensure compliance of all communications with applicable securities laws.

II. SCOPE

What kinds of persons and disclosures does this policy cover?

This policy applies to all employees and covers all disclosures to people (other than to our fellow employees) who may be expected to trade in our securities, which includes our stockholders and other security holders, customers, securities brokers and dealers, financial analysts and financial institutions. If you are in doubt as to whether someone is covered by this policy, then either (i) assume that they are or (ii) contact a member of the Disclosure Committee for guidance.

What is material nonpublic information?

"*Material"* information is information that investors in our securities would consider important. This includes a range of subjects, including our current or expected operating performance, acquisitions and strategic transactions, new products, errors or defects in products, large customer deals, changes in management and potentially a host of other things. Because this is an area that requires specialized judgment, you should contact a member of the Disclosure Committee if you have questions.

"*Non Public*" information is that which we have not previously released it in a way the SEC has agreed is designed to reach the public. In the SEC's view, for example, a website posting is not adequate distribution to the public, although a press release clearly would be.

III. POLICY

How does the Company make public disclosure of material information?

In keeping with the requirement of Regulation FD of the Securities and Exchange Commission (SEC), all queries from news reporters, financial analysts and research firms must be funneled through the Vice President of Investor and Public Relations, who will ensure that no selective disclosure of information occurs. The Company is committed to disclosing information about itself fully and promptly, and constantly seeks to improve its financial communication program.

Our corporate policy, reflecting current legal requirements, is that our employees and board members will not make any disclosure of material nonpublic information about the Company to anyone outside the Company (other than to persons who first expressly agree in writing to maintain confidentiality), unless we disclose it to the public at the same time.

IV. PROCEDURES

Following are the standards by which the Company will disclose information about itself:

1. **Earnings Guidance:** We will make every attempt possible to provide quarterly and yearly earnings forecast, and related issues and drivers, in the earnings release outlook section. We will not comment one way or the other on individual earnings estimates or street consensus, including First Call or any other service.
2. **Analysts' Models:** We will not review analysts' financial models and research reports. We will assist with historical data and previously disclosed public information.
3. **Updates:** We will not give running updates during the quarter on current business performance, including orders, sales (revenues), earnings, or any material P&L and balance sheet information.
4. **One-on-One Meetings:** These meetings will be limited to previously released financial information and historical data; information regarding markets, products, processes, etc., will be discussed as long as it is not considered to be material information.
5. **Analyst and Investor Conferences:** We continue to look forward to participating in and presenting at these meetings. We will put the formal presentation on our Web site prior to the meeting. We will encourage the organizer to make webcasting connectivity available for the formal presentation.

6. **Earnings Phone Conference:** We will issue a press release prior to the phone conference announcing the date and time and that there will be a live webcast. We will continue the practice of opening the phone conference to the news media.
7. **Quiet Period:** Our quiet period will begin the last two weeks of the quarter up to the earnings release. We will have no one-on-one meetings during this time, and access to senior executives will be restricted.

As a general matter, the Company's Disclosure Committee has the responsibility to determine the content, form and timing of public disclosure, consistent with our legal responsibilities and with the best interests of the Company.

With respect to *quarterly earnings:*

- We will issue a press release through widely circulated news and wire services and file a Form 8-K with the SEC.
- We then may conduct a public conference call. If we do, we will provide advance public notice and public access information for each scheduled conference call. Anyone may listen to the call by telephone or webcast.
- We may allow a limited group to ask questions on the conference call, as long as all listeners can hear the questions and answers.
- We will make an audio recording of the conference call publicly available through our website or an outside service for one week following the call. After this time the call will be taken down so that the information does not become stale.

How do we give "guidance" about our expected future results?

We may determine that it is appropriate to make statements about our expectations for future results. The decision whether or not to do so is the responsibility of the Disclosure Committee. If we provide guidance we generally will do so by press release and Form 8-K. We will not change or confirm this guidance in any material respect except in the same way.

Will we comment on analyst reports?

We will not review or comment upon any financial analyst reports except as approved by the Disclosure Committee. In any event, such review or comment shall be limited to immaterial matters or to confirm factual accuracy consistent with available public information.

How do we pre-clear speeches and other public presentations?

All proposed disclosures of material nonpublic information about the Company, or participation in speeches, interviews or conferences where persons covered by this policy may be in attendance, must be reviewed and approved by the Disclosure Committee. Spokespersons should adhere to the script and not disclose any material nonpublic information about the Company during any "break out" or question-and-answer sessions.

What about visits by analysts or other financial professionals?

Any visits should be pre-cleared with the Disclosure Committee. Any communications during visits will be subject to this policy.

How do we respond to market or media rumors?

Whether or not the rumor has any basis in fact, we normally will respond by saying: "Our policy is no to comment on rumors or speculation." Like most companies, we follow this approach consistently in order to avoid providing an implied confirmation or denial in other circumstances. Any exceptions to this policy must be approved by the Disclosure Committee.

Who may receive nonpublic material information?

There are certain people who are required by professional responsibility or by contract to keep our information confidential. These include our employees, our attorneys, our accountants, our investment bankers, and people or entities that are subject to nondisclosure agreements with us. If you are in doubt as to whether someone falls within this category, don't guess: contact the Disclosure Committee for guidance.

What if an unauthorized disclosure of nonpublic material information happens?

If you believe such an unauthorized disclosure may have occurred, immediately contact the General Counsel. Certain inadvertent disclosures or nonpublic material information can be "cured" by appropriate and prompt subsequent disclosure.

V. RESPONSIBILITY

HR and Legal have responsibility for enforcement of this policy.

Who is authorized to disclose material nonpublic information?

Only the following people:

- The Chief Executive Officer;
- The Chief Financial Officer;
- The Vice President of Investor and Public Relations; and
- Other people who may be designated in writing as spokespersons for the Company by any two of the above individuals, or by the Disclosure Committee.

If you receive a request from someone outside the Company for material nonpublic information – for example, seeking guidance about our quarterly results, or asking for confirmation of a rumor – you should not respond. Instead, ask for the person's name and number and contact a member of the Disclosure Committee.

Why should these issues concern me?

As an employee, you are expected to comply with all Company policies. Disclosure of material nonpublic information could have significant negative consequences to the Company. As an individual, you are required to comply with all applicable laws. Under SEC rules, as an individual you could be held

liable for substantial penalties if you disclose material nonpublic information in a deliberate or reckless way.

AUDIT COMMITTEE LEADERSHIP FORUM October 2007

www.aclf.executiveboard.com

COMPENSATION CLAWBACK POLICIES

An overview of the implementations of compensation clawback policies

RESEARCH OVERVIEW

At our member's request, the Forum conducted research regarding companies' compensation clawback policies. The SEC now lists companies' recoupment policies as an example of an item that generally should be described in the CD&A section in their proxy statement. Indeed, recoupment policies have been expanded to cover situations that result in a restatement of financial results due to a material error[1]. This paper presents a summary of the Forum's findings and provides relevant examples of companies' attempts to recover (or "claw back") certain forms of compensation

TABLE OF CONTENTS

EXECUTIVE SUMMARY

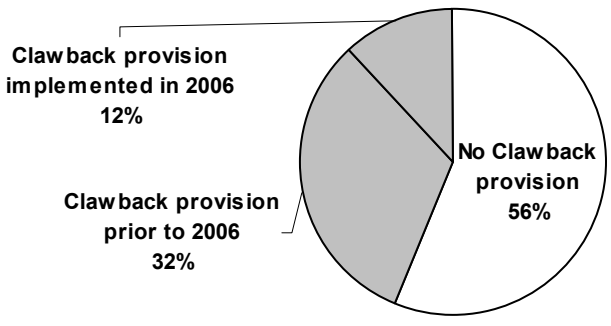
- **More companies are building in recovery provisions into their employment contracts to safeguard against the scenario of fraud-based compensation.[2]**
- **Companies' clawback policies are explicit and publicly disclosed in annual filings.**
- **Clawback policies are becoming broader in scope and intent.**
- **Directors may have a legal obligation to *consider* whether or not to attempt to recoup payments, but do not have an obligation to engage in recovery.**

CLAWBACK POLICY PREVALENCE AND TRENDS

Clawback policies are becoming more prevalent, at least amoung large American companies. Almost half (44%) of the Fortune 100 publicly disclosed a compensation clawback policy in 2007.

Fortune 100 Companies Implementing Clawback Policies[3]

Reflects only 50 of the Fortune 100 that filed prioxies prior to March 25, 2007



N= 50.

EXPANDING BREADTH OF POLICY

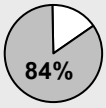
"The breadth of clawback policies has increased. More companies are moving beyond policies which only allow for the recovery of bonuses to include provisions allowing companies to take back unvested equity awards and even equity gains."

Alexander Cwirko-Godycki
Senior Analyst, Equilar, Inc.

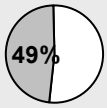
CHARACTERISTICS OF CLAWBACK POLICIES

A Towers-Perrin analysis of clawback policies (below) reveals that policies differ in their application, forcing directors to consider what to include and what to omit when implementing a policy.

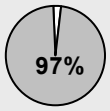
Selected Characteristics of Clawback Policies[4]
Percent of Fortune 100, 2007



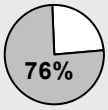
When to Apply Provision— Most companies (84%) indicate that they would apply the provisions if executive misconduct led to a financial restatement.



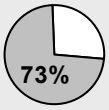
How Broadly to Apply Provision— Almost half (49%) of the companies stated that they authorize clawbacks for other conduct (besides financial restatements) that is determined to be detrimental to the company.



Whether or Not to Apply Toward Long-Term Incentives— In nearly all cases (97%), the company stated that the recoupment or clawback provisions would apply to long-term incentive awards.



Whether or Not to Apply Toward Annual Pay and Equity Awards— Most companies (76%) indicated that the provisions would affect annual incentives. These types of provisions can include the clawback of unexercised stock options and gains from previously exercised option awards.



How Explicit Should the Disclosure Be?— For most organizations (73%), the CD&A section of the proxy statement outlined a general recoupment policy that did not pertain to any specific program or plan. However, some companies—20 altogether—went further and provided an explicit discussion of the clawback or recoupment policies contained in their long-term incentive plan.

FIVE KEY DIRECTOR CONSIDERATIONS

The Full Board of Directors, or a specially tasked Compensation Committee, is responsible for crafting a clawback policy. Directors must consider 4 key areas when designing a clawback policy[5]:

Five Key Considerations For Clawback Policies

1. Which events should trigger the restatement clawback?
Boards must specifically state which events would lead to a clawback claim in order to minimize future uncertainty.[6] Research indicates that recouping past compensation is highly disruptive and difficult to apply due to highly complex compensation contracts and insurance provisions. Boards attempting to recoup funds often spend many years in litigation arguing over contractual nuances and vague definitions of events.[7,8]

FIVE KEY DIRECTOR CONSIDERATIONS (CONTINUED)

2. Which employees or executives will be subject to the clawback?
Boards should consider differently those who unwittingly benefited from fraud versus, those who might have directly contbuted to the misconduct itself. In addition, Boards should also consider holding those not directly causal, but "who permitted the fraud to happen on their watch." For example, a CFO who benefited from fraud, even though he/she was not a party to the fraud.[9]

3. What forms of compensation are vulnerable to being clawed?
Generally the most successful clawback provisions in practice, are those specifically based on performance based bonuses. For example, in 1998, former CEO Lawrence Coss returned roughly a third of his $102 million 1996 bonus to Green Tree Financial Corp. This was after a restatement eliminated the $174 million pretax profit Mr. Coss's bonus was based upon. Dollar General's former CEO, Cal Turner Jr. also decided to return all of his bonuses totaling $6.8 million.[10]

4. Should the clawback extend to past awards or be limited to current or future ones?
The success rate of companies recouping money paid to executives for certain achieved illegitimately is not great. While clawback suits are increasingly common, it is rare for companies or boards to try to force executives to disgorge past compensation.[11]

5. Where should the provision manifest itself from a legal perspective?
Whether or not there is a contractual provision to recoup bonuses in the employment contract, companies have cause of action under Common Law to recoup funds that were obtained by fraud. However, the Common Law claim is weaker than a Contractual Claim, which is why repayment provisions are beginning to appear more frequently in employment contracts.

EXAMPLES OF COMPANY CLAWBACK POLICIES

The following are examples of publicly disclosed compensation clawback policies.

Sprint Nextel Corporation

In addition to any other remedies available to Sprint Nextel (but subject to applicable law), if the Board or any committee of the Board determines that it is appropriate, Sprint Nextel may recover (in whole or in part) any bonus, incentive payment, commission, equity award or other compensation received by an officer of Sprint Nextel at the level of vice president or above to the extent that such bonus, incentive payment, commission, equity award or other compensation is or was based on any financial results or operating metrics that were impacted by the officer's knowing or intentional fraudulent or illegal conduct.

www.sprint.com/governance/documents/execCompensationClawbackPolicy.html

EXAMPLES OF COMPANY CLAWBACK POLICIES (CONTINUED)

The Home Depot, Inc.

To the extent permitted by law, if the Board of Directors, or a committee thereof, determines that any bonus, incentive payment, equity award or other compensation has been awarded or received by an executive officer of the Company, as defined by Rule 16a-1(f) of the Securities Exchange Act of 1934, as amended, and that such compensation was based on any financial results or operating metrics that were satisfied as a result of such officer's knowing or intentional fraudulent or illegal conduct, then the Board or a committee thereof, shall recover from the officer such compensation (in whole or in part) as it deems appropriate under the circumstances. Further, following a restatement of the Company's financial statements, the Company shall recover any compensation received by the CEO and CFO that is required to be recovered by Section 304 of Sarbanes-Oxley Act of 2002.

In determining whether to recover a payment, the Board shall take into account such considerations as it deems appropriate, including whether the assertion of a claim may violate applicable law or prejudice the interests of the Company in any related proceeding or investigation. The Board shall have sole discretion in determining whether an officer's conduct has or has not met any particular standard of conduct under law or Company policy.

http://ir.homedepot.com/governance/guidelines.cfm

News Corporation

To the extent permitted by governing law and any employment arrangements entered into before the adoption of this policy, the Company will require reimbursement of a portion of any performance-based bonus granted to any named executive officer after August 7, 2007 where: a) the bonus payment was predicated upon the achievement of certain financial results that were subsequently the subject of a substantial restatement, b) in the Board's view the officer engaged in fraud or misconduct that caused or partially caused the need for the substantial restatement and c) a lower payment would have been made to the officer based upon the restated financial results. In each such instance, the Company will, to the extent practicable, seek to recover the amount by which the individual officer's annual bonus for the relevant period exceeded the lower payment that would have been made based on the restated financial results, plus a reasonable rate of interest; provided that the Company will not seek to recover bonuses granted more than three years prior to the date the applicable restatement is disclosed.

For purposes of this policy, the term "named executive officers" has the meaning given that term in Item 402(a)(3) of Regulation S-K under the Securities Exchange Act of 1934, as amended, and the term "bonus" means a payout under the News Corporation 2005 Long-Term Incentive Plan

http://www.newscorp.com/corp_gov/socg.html

COMPANIES' EXPERIENCE EXECUTING CLAWBACK POLICIES IN PRACTICE

The following represent examples found in the press of small to mid-cap companies that have pursued and recouped bonuses awarded to executives as the result of fraudulent activities. They are listed by size.

Gemstar

Revenues: $0.6 Billion

In December 2005, Gemstar's CEO, Henry Yuen, was accused of overstating its total revenues by at least $248 million to meet ambitious projections for revenue growth from 1999 to 2002 and earned $72 million from bonuses and stock sales.[12] In January of this year as a result of arbitration proceedings it was concluded that Mr. Yuen is not entitled to $30 million that Gemstar froze when it fired him in 2003, but he actually owes the company $93.6 million in damages, salary and other costs. The assessment comes atop the $22 million in restitution, penalties and interest that a federal court ordered him to pay last May.[13]

Other Gemstar executives were also affected. Former chief financial officer of Gemstar-TV Guide International Inc. has agreed to pay $25,000 to settle civil charges stemming from the company's accounting fraud, according to the Associated Press. The SEC had also charged Gemstar's former co-president, co-chief operating officer, and board member Peter C. Boylan (who also served as co-chairman, chief executive officer, and co-president of Gemstar's wholly owned subsidiary TV Guide Inc.) and Jonathan Orlick, a former general counsel, executive vice president, and board member. Boylan and Orlick previously agreed to pay about $600,000 and $300,000 respectively."[14]

Valeant Pharmaceuticals International

Revenues: $0.9 Billion

Valeant's former CEO, Milan Panic agreed to pay $20 million to Costa Mesa-based Valeant Pharmaceuticals International to settle charges that he received unwarranted bonuses in 2002 as the company's chairman.[15] Last month, Valeant's former CEO, Milan Panic was also ordered by a Deleware judge to repay the drug maker $4.8 million over a bonus tied to a unit's aborted spinoff.[16]

Molex Inc.

Revenues: $2.8 Billion

Last August, fourteen executive officers at Molex Inc., a connector supplier, agreed to repay the company their portion of the $685,000 in total gains they realized as a result of the misdating of stock options found in a recent internal review of the company's stock option granting practices. The company concluded that the dates of option and restricted stock grants to executive officers and other employees in a number of instances differed from the dates grants were approved.[17]

HealthSouth

Revenues: $3.0 Billion

Last November, Richard Scrushy, founder of the HealthSouth Corporation, ousted in 2003 after auditors uncovered a $2.7 billion accounting fraud, agreed to credit $21 million in Scrushy's legal fees against the $52 million he owed for inflated bonuses. Scrushy has agreed to pay the company $31 million as part of a settlement of litigation over his bonuses and legal fees.[18]

COMPANIES' EXPERIENCE EXECUTING CLAWBACK POLICIES IN PRACTICE (CONTINUED)

Computer Associates

Revenues: $3.8 Billion

In the late 1990s, Computer Associates' three top executives were handed a joint bonus of $1.024 billion shortly before a profits warning severely dented its stock. An internal investigation revealed in 2004 that in 2000 more than $2 billion of sales were reported earlier than they should have been – about one-third of its total sales recorded that year.[19] Former Computer Associates CEO, Sanjay Kumar is responsible for repaying the stockholders as a result of a plea deal on restitution that took place on April 13, 2007 in U.S. District Court in Brooklyn. Stockholders are only expected to get a fraction of the money back. Under the terms of restitution agreement reached with the U.S. Attorney's Office for the Eastern District, Kumar must repay $52 million by December 2008.[20]

First Data Corp.

Revenues: $7.0 Billion

Daniel Burnham, a director of First Data Corp. and chairman of its compensation committee, will pay a fine and return part of a six-year-old, $1.75 million cash bonus he received as chairman and CEO of Raytheon Co. First Data announced the fine in a filing with the Securities and Exchange Commission. The SEC has been investigating alleged accounting violations at Raytheon in 2000 and 2001 when Burnham led the company. Burnham neither admitted nor denied the SEC's allegations. The SEC didn't release the amount of the bonus repayment or of the fine." [21]

Royal Group Technologies, Ltd.

Revenues: NA

Royal Group Technologies dismissed Chairman Vic De Zen in December of 2004, who, at the time owed the company more than $1 million. The debt dates back to July, 2003, when Royal Group changed its compensation policy for senior executives, including Mr. De Zen, who was chairman and co-chief executive officer at the time. Under the policy change, Mr. De Zen was supposed to repay $1.8-million in bonuses he had received in 2002. The repayment was going to be made over several years through a reduction in Mr. De Zen's annual bonus. Mr. De Zen resigned as co-CEO in December, 2003, and the company's Board began negotiating a retirement package with him. At the time of his departure, Mr. De Zen still owed $1.1-million of the 2002 bonus and the company's Board had planned to offset that amount from his retirement package."[22]

Dollar General

Revenues: ~$8.6 Billion

After the restatement, Cal Turner Jr. resigned as chief executive and gave back his bonus of $6.8 million – a figure determined by Dollar General's board. Turner has declined to talk about what happened at Dollar General, and attempts to reach the other executives in the SEC investigation were unsuccessful.[23]

SOURCES

[1] "Taking Back What's Yours: Clawbacks Make a Comeback," *Towers-Perrin Monitor*, June 2007.
[2] Gregory, Holly, "The 2006 Summit on Exeutive Compensation," *Audit Committee Leadership Forum*, 23 January 2007.
[3] Morgenson, Gretchen "Making Managers Pay, Literally," *The New York Times*, 25 March 2007.
[4] "Taking Back What's Yours: Clawbacks Make a Comeback," *Towers-Perrin Monitor*, June 2007.
[5] Poerio, Mark and Moran, Crescent, "They Can't Take It With Them," *The National Law Journal*, 21March 2007.
[6] Gregory, 2007.
[7] Dvorak, Phred and Serena Ng, "Check, Please: Reclaiming Pay from Executives is Tough to Do," *The Wall Street Journal Europe*, 22 November 2006.
[8] Poerio, Mark and Moran, Crescent, "They Can't Take It With Them," *The National Law Journal*, 21March 2007.
[9] Gregory, 2007.
[10] Dvorak, et al.
[11] Grant, Elaine Appleton, "Claw-Back Time," *Corporate Counsel*, 01 May 2005.
[12] Dvorak, et al.
[13] Stein, Mark A. "Ouch!"*The New York Times*, 28 January 2007.
[14]Taub, Stephen, "Gemstar Ex-CFO Agrees to Settlement," *CFO.com*, 14 December 2005.
[15] Yi, Daniel, "Ex-Chairman to Repay Valeant $20 Million," *Los Angeles Times*, 04 August 2006.
[16] "Former Executive Must Repay Valeant," *Los Angeles Times*, 03 March 2007.
[17] "Molex Execs to Repay Option Gains," *Electronic News*, 07 August 2006.
[18] "HealthSouth's Scrushy Agrees to Pay Settlement," *Los Angeles Times*, 30 November 2006.
[19] Waters, Richard, "CA Shareholders Reject Bonus Action," *Financial Times*, 26 August 2004.
[20] Kessler, Robert E., "CA'S $1B Man," *Newsday*, 13 April 2007.
[21] "First Data's Burnham Will Pay For Raytheon Missteps," *Cardline*, 31 March 2006.
[22] Waldie, Paul and Derek DeCloet, "Royal Group Faces Hurdle Collecting from De Zen; Dismissal Could Impede Bonus Repayment of more than $1-million from Ex-Chairman," *The Globe and Mail*, 02 December 2004.
[23] Snyder, Naomi, "Former Dollar General Accountant Says He's Sorry," *The Tennessean*, 24 April 2005.

[redacted]

Mr. H. Christopher Owings
Assistant Director
United States Securities and Exchange Commission
Division of Corporation Finance
100 F. Street, N.E.
Washington, D.C. 20549

Re: [redacted]
Annual Report on Form 10-K for the Fiscal Year Ended December 31, 2009
Filed February 26, 2010
Definitive Proxy Statement on Schedule 14A
Filed April 8, 2010
Current Report on Form 8-K
Filed February 18, 2010
[redacted]

Dear Mr. Owings:

On behalf of The [redacted] we are writing in response to your letter dated August 12, 2010, setting forth comments of the Staff of the Division of Corporation Finance of the Securities and Exchange Commission with respect to our Annual Report on Form 10-K for the fiscal year ended December 31, 2009, our Definitive Proxy Statement on Schedule 14A filed April 8, 2010, and our Current Report on Form 8-K filed February 18, 2010. For your convenience, we have reproduced the full text of each of the Staff's comments above our responses below.

Annual Report on Form 10-K

Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations, page 43

1. **We note your disclosure that you "expect capital and investment expenditures to total between $2.05 billion and $2.775 billion in 2010." Please expand your disclosure to describe the general nature of these capital and investment expenditures.**

   Response

   The total expected capital and investment expenditures range of $2.05 billion to $2.775 billion for 2010 on page 72 presents a summarized total as part of a liquidity discussion. The general nature of the majority of these anticipated expenditures have previously been described by segment in *Results of Operations – Segments*, which begins on page 55. The expected capital expenditures

for our [redacted] segment are described on page 56. Anticipated spending related to various expansion projects within our [redacted] and [redacted] is discussed on pages 60 and 64, respectively.

In future filings, when a total expected capital and investment expenditures range is mentioned in this liquidity discussion, we will also include a statement referencing these segment discussions of the general nature of these expected expenditures.

Note 2. Discontinued Operations, page 97

2. **We note your disclosures on pages 52 and 61 that you recognized a gain of $40 million on the sale of your [redacted]. Please tell us how you considered the guidance in FASB ASC 205-20-45-1 in determining that the operations of this plant should not be included within discontinued operations. In doing so, please tell us if you determined the plant represented a component of an entity.**

Response

In evaluating this disposition, we concluded that our [redacted] did not meet the definition of a component of an entity as defined in ASC 205-20-20 and therefore could not qualify for presentation within discontinued operations under ASC 205-20-45-1.

The [redacted] was operated as part of an integrated gathering and processing system and was included in a broader asset group with various offshore gathering systems. When contracts for gathering and processing services were negotiated for this integrated system, management considered the total economic package within the context of the system as a whole (gathering revenues, processing revenues, and natural gas liquids margins). We have retained and continue to operate the offshore gathering systems that were part of the integrated system. We continue to gather natural gas from producers under gathering contracts at market rates and deliver it to the [redacted] for processing. The producers have separate processing contracts with the new owner of the [redacted]. We are not a party to these contracts and have no substantive remaining obligation or other association with the [redacted]. Further, the [redacted] serves as a straddle plant for sections of our [redacted] interstate natural gas pipeline system. Natural gas processed at the [redacted] plant will continue to be transported on our [redacted] pipeline to end-user customers. As a result of the integrated products and services approach utilized during the time we owned the plant, the lowest level of independent, identifiable cash flows was the integrated system. Accordingly, the [redacted] did not qualify as a component of an entity.

The decision to sell the [redacted] separate and apart from the other assets in the integrated system was primarily based on the need to rebuild the plant twice in recent years following hurricanes in the Gulf of Mexico, which we considered incongruent with our operating strategy of providing highly reliable service to our customers.

Note 3. Investing Activities, page 99

3. **We note that you account for your 51% interest in [redacted] using the equity method of accounting due to significant participatory rights of your partner such that you do not control the investment. Please explain to us in more detail the participatory rights of the other member and how you determined that these rights overcome the presumption of consolidation by the majority shareholder. We note your disclosures indicating that you have operational control over the entity.**

Response

[redacted] has two members: us (Operating Member) and another member (Other Member). We own a 51% interest in [redacted] and the Other Member owns the remaining 49%. The operations and activities of [redacted] are governed by a Limited Liability Company Agreement (Agreement). [redacted]'s operations consist of a gathering system located in the [redacted] producing basin, which is experiencing significant production growth. An affiliate (Affiliate) of the Other Member has significant exploration and production operations in the [redacted] and is the predominant customer for which [redacted] currently provides gathering services. Expansion of [redacted]'s gathering system is expected to coincide with the drilling activity of the Affiliate.

Pursuant to the Agreement, except as delegated to the Operating Member, the business and affairs of [redacted] are managed under the direction of the Management Committee (Committee) in which each member has 50% representation and equal voting rights, until such time, if ever, (Voting Change Date) as one member obtains at least 66⅔% interest in [redacted], after which voting would be on a percentage interest basis. All decisions and actions of the Committee require majority approval, the effect of which (until a Voting Change Date) is to require both members' approval. While the Agreement vests in the Operating Member power and authority to conduct the day-to-day operation of [redacted] and the managerial and administrative duties relating thereto, including the operation, maintenance and repair of the gathering system, it also reserves substantive decision-making authority in the Committee.

In evaluating the Agreement, we identified the following matters as substantive participating rights of the Other Member that, prior to a Voting Change Date, require approval of the Committee:

- Adoption or amendment of the annual operating budget and the annual growth capital budget. The operating budget covers revenues, expenses and maintenance capital expenditures. The growth capital budget covers capital expenditures related to expansion of the gathering system.
- Approval of any agreement to perform gathering services that provide for aggregate payments to any one person [redacted], and of any other contracts that provide for aggregate payments to any one person in [redacted].
- Approval of any agreement not in the ordinary course of business, including the issuance, incurrence, guarantee or assumption of any indebtedness by [redacted]

Even following a Voting Change Date, the issuance, incurrence, guarantee or assumption of debt remains a matter requiring unanimous approval, and the following items are among those requiring an affirmative "Super Majority" vote, representing at least 75% of the ownership of the company:

- Release or settlement of any right, claim or lawsuit for an amount in [redacted]
- Approval of the sale, assignment, transfer, lease or other disposition of any portion of [redacted] assets with a value [redacted].
- Approval of the purchase or other acquisition of any asset or business of, or any equity interest or investment in, any person for an amount [redacted].
- Adoption or amendment of the annual operating budget and the annual growth capital budget.
- Approval of any individual or series of related growth capital expenditures [redacted]

The following are other factors we considered in assessing our ability to control [redacted]:

- The small difference in the ownership and economic interests of the two members.
- The ability of either member under the Agreement to require [redacted] to pursue a growth capital project provided it meets or exceeds a specified threshold rate of return.
- The significant business relationship between [redacted] and the Affiliate requires collaboration between us and the Other Member in managing [redacted]
- The fee [redacted] charges the Affiliate for gathering services is a percent of the proceeds received, including the effect of hedging activities, by the Affiliate from the sale of its production. The commodity price risk management strategy, including hedging activities, of the Affiliate is executed by them and can significantly impact [redacted]'s gathering revenues.

Based on our review of the approvals required of the Committee, we concluded that the Other Member has substantive participating rights in [redacted] Considering this and the other factors noted, we believe that we do not control [redacted].

In our disclosures we refer to ourselves as having "operational control" because of the day-to-day decisions we make as Operating Member. To avoid confusion relative to this matter, in future filings we will modify the reference to "operational control," instead indicating we serve as the operator of [redacted].

Note 11. Debt, Leases and Banking Arrangements, page 118

4. **We note from your descriptions of your debt that some of your debt is at a subsidiary level and covenants under these credit agreements may include restrictions on making certain payments such as dividends. Please explain to us how you considered the guidance in Rule 4-08(e) of Regulation S-X and the need to provide Schedule I as discussed in Rule 5-04(c) of Regulation S-X.**

Response

We have considered the guidance in Rule 4-08(e) of Regulation S-X in relation to our subsidiaries' debt and credit agreements, including [redacted] it facility referenced on page 119, and determined that, [redacted] there are no terms that significantly limited our (the registrant's) ability to pay dividends. In this assessment, we evaluated provisions and alternatives that could potentially restrict our subsidiaries' ability to

transfer funds to the parent in the form of loans, advances or cash dividends without the consent of a third party. We considered:

- The public debt issued by our subsidiaries does not contain any terms that would prohibit loans, advances or cash dividends from each respective subsidiary to the parent.
- [redacted], our subsidiary revolving credit agreements include the credit facility available to [redacted] and the credit facility access available to [redacted] While these credit agreements include restrictions on cash dividends during an event of default ([redacted]), they do not include terms that significantly restricted the transfer of funds to the parent in the form of loans or [redacted]
- [redacted] includes certain restrictions on cash dividends, as disclosed on page 119, that exist under certain circumstances ([redacted]). The terms of this agreement did not significantly restrict the transfer of funds to the parent in the form of loans or [redacted]

Regarding the need to provide Schedule I as discussed in Rule 5-04(c) of Regulation S-X, we note that the restricted net assets of our consolidated subsidiaries as of [redacted] were below the [redacted] and thus Schedule I was not required.

Note 19. Subsequent Events, page 143

5. **We note that as a result of your restructuring [redacted] you changed your reportable segments to [redacted]. We additionally note that [redacted] includes the previous [redacted] Please explain to us in more detail why the [redacted] is no longer a separate reportable segment. Please address:**
   - **Whether these are two operating segments that you are aggregating into one reportable segment and how they meet all criteria for aggregation.**
   - **How your CODM is effectively able to manage these two different businesses with only aggregated information.**
   - **The types of reports and information that your CODM reviews on a regular basis, the level of disaggregation and items included.**

Response

Our [redacted] business was initially reported as a separate segment in conjunction with the disposition of our former power business in 2007. The business activities reported within [redacted] following the power business disposition included the remnants of a more substantial energy commodity trading business that existed within our former Power segment. Upon completing the disposition of our former power business, both [redacted] have been managed by the same segment manager. Over time, the legacy activities within [redacted] have decreased while marketing and hedging the natural gas produced by [redacted] have become its primary focus. In recent periods, [redacted] s net operating results have been much less significant relative to

our other segments. Considering this trend of events and in contemplation of our restructuring, our CODM determined that separate management (resource allocation and performance assessment) of [redacted] was no longer necessary. As a result, we revised the presentation of the information regularly provided to our CODM to combine these two businesses into one segment.

Considering that our CODM no longer receives separate information on the results of [redacted], it is no longer an operating segment by definition. Thus we have not aggregated two operating segments.

Following the combination of these businesses, the primary activities of the [redacted] segment relate to producing and selling natural gas. As an integrated unit, our CODM is able to manage it as a single operating and reporting segment.

The types of reports and information that our CODM reviews on a regular basis include:

- Monthly segment profit "flash" results – this report provides a preliminary indication of total monthly segment profit for each of our three reportable segments.
- Monthly Financial Comments – this report includes consolidated financial statements (income statement, balance sheet and statement of cash flows) with comparisons to prior periods and/or annual plan amounts. Information is presented on a level of detail generally consistent with the same financial statements included in our quarterly and annual SEC compliance reports.
- Quarterly and annual SEC compliance reports – the CODM receives both draft and final copies of our Form 10-Q and Form 10-K filings.
- Financial Overview: Executive Summary – this report includes a combination of consolidated historical, annual plan and forecast income statement and cash flow information, generally disaggregated by our reportable segments.
- Board of Directors Reports – these reports are submitted by our Executive Officers (as listed in *Executive Officers of the Registrant* on pages 38 through 40) and provide updates on their respective areas of responsibility, including operational matters, business development opportunities, market updates, and certain operational and financial performance metrics. Consolidated financial performance is summarized in the Chief Financial Officer's report and includes historical, annual plan and forecast financial information disaggregated by our three reportable segments.

6. **We note that your restructuring [redacted] ethod investment being included within your [redacted] reportable segment and the [redacted] being included within [redacted]. Please tell us how you determined it was most appropriate to segregate the investment between two reportable segments as opposed to including the entire investment within a single reportable segment.**

Response

In our [redacted] restructuring, a portion of our 50% ownership interest in [redacted] was contributed to [redacted] our consolidated, publicly-traded, master limited partnership. As a result, this interest in [redacted] is now owned as follows:

- A [redacted] interest owned within [redacted], and
- A [redacted] interest owned by us outside of [redacted]

These separate interests are presented within two different segments due to this split in ownership.

Our W[redacted] segment consists of [redacted]. As the [redacted] interest is owned within [redacted], it is reflected within our W[redacted] segment. The remaining [redacted] interest, which is owned by us outside of [redacted], does not meet the quantitative thresholds for separate segment reporting and is thus reported within the Other segment. No separate results or information for our total investment in [redacted] is presented in any of the reports reviewed by our CODM on a regular basis.

Exhibits

7. **Please ensure that you file all schedules and exhibits to the exhibits to your Annual Report on Form 10-K. See Item 601(b)(10) of Regulations S-K. As an example only, we note that you have not provided the exhibits and schedules to Exhibit 10.24 to the Form 10-K (the Master Professional Services Agreement dated as of June 1, 2004). Please review the agreements filed as exhibits to the Form 10-K, and re-file complete agreements with your next periodic or current report.**

Response

We note the Staff's comment regarding the filing of all schedules and exhibits to the exhibits to our Annual Report on Form 10-K. We will ensure that all such related schedules and exhibits are filed with our Form 10-Q for the period ended September 30, 2010.

Definitive Proxy Statement on Schedule 14A

General

8. **Please provide the disclosure required by Item 407(e)(4) of Regulation S-K.**

Response

Pursuant to Item 407(e)(4) of Regulation S-K, we have identified the members of the Compensation Committee. However, based on the guidance set out in CDI 233.02 and the fact that no other transactions or relationships trigger disclosure, we have omitted any other reference to Item 407(e)(4).

9. **Please provide the disclosure required pursuant to Item 407(e)(3)(iii) of Regulation S-K or tell us why you are not required to do so.**

Response

We believe that the following disclosures that appear in various locations within our 2010 Proxy Statement are fully responsive to Item 407(e)(3)(iii) of Regulation S-K.

Page 10 of our Proxy Statement indicates that:

- our Compensation Committee engaged Frederic W. Cook & Co., an independent executive compensation consulting firm, to:
  - provide competitive market data and advice related to the CEO's compensation level and incentive design;
  - review and evaluate management-developed market data and recommendations on compensation levels, incentive mix, and incentive design for Named Executive Officers (NEOs) and certain other executives (excluding the CEO);
  - develop the criteria used to identify comparator companies for executive compensation and performance comparisons; and
  - provide information on executive compensation trends and their implications to us.

- the compensation consultant similarly provides competitive market data and advice to our Nominating and Governance Committee on non-employee director compensation.

- the compensation consultant reports to the Chairman of the Compensation Committee.

and

- the compensation consultant does not provide any additional services to us.

Page 32 of our Proxy Statement, under the captions "Role of the Compensation Committee" and "Role of the Independent Compensation Consultant," further discusses the work performed by the independent compensation consultant.

Page 41 of our Proxy Statement notes that the independent compensation consultant annually compares our relative performance on various measures, including total stockholder return, earnings per share and cash flow, with our comparator group to ensure we are consistently delivering stockholder value and also uses this analysis to validate our Economic Value Added (EVA®) results.

Corporate Governance and Board Matters, page 5

Corporate Governance, page 5

Transactions with Related Persons, page 7

10. **We note your disclosure that proposed related party transactions involving a member of the board of directors must be reviewed and approved by the full board and that, otherwise, the audit committee reviews proposed transactions with related parties. We also note that the**

"Audit Committee or its chairman, in good faith, may approve only those related person transactions that are in, or not inconsistent with, [redacted] best interests and the best interests of [your] stockholders." Please revise your disclosure to state whether this standard also applies to those cases in which the board of directors evaluates related person transactions. Please also revise your disclosure to discuss the factors that are considered by the board of directors or audit committee in determining whether such transactions are in, or not inconsistent with, the best interests of the company and your stockholders.

Response

We acknowledge the Staff's comment and, in future filings, beginning with the 2011 proxy statement we will include the following disclosure, updated with current year data, as appropriate:

Transactions with Related Persons

The Board has adopted policies and procedures with respect to related person transactions as part of the Audit Committee charter. Any proposed related person transaction involving a member of the Board must be reviewed and approved by the full Board. The Audit Committee reviews proposed transactions with any other related persons, promoters, and certain control persons that are required to be disclosed in our filings with the SEC. If it is impractical to convene an Audit Committee meeting before a related person transaction occurs, the chairman of the committee may review the transaction alone.

No director may participate in any review, consideration or approval of any related person transaction with respect to which such director or any of his or her immediate family members is the related person. The Audit Committee or its chairman, or the Board, as the case may be, in good faith, may approve only those related person transactions that are in, or not inconsistent with, Williams' best interests and the best interests of our stockholders. In conducting a review of whether a transaction is, or is not inconsistent with the best interest of [redacted] and its stockholders, the Audit Committee or its chairman, or the Board, as the case may be, will consider the benefits of the transaction to the Company, the availability of other sources for comparable products or services, the terms of the transaction, the terms available to unrelated third parties and to employees generally, and the nature of the relationship between the Company and the related party, among other things. During 20XX, there were no transactions that required review or approval by the Audit Committee or the full Board.

Form 8-K filed February 18, 2010

11. **We note that you present the non-GAAP financial measure income from continuing operations which you calculate by removing certain "nonrecurring items" from the GAAP measure income from continuing operations attributable to [redacted] Considering certain of the "nonrecurring" items include charges that have occurred in at least the last two years, such as the impairments of certain natural gas properties, please clarify why you believe these items are nonrecurring. If you believe your current presentation is appropriate, please explain your reasoning given that you had these types of charges in both 2008 and 2009 and considering the guidance in Item 10(e)(1)(ii)(B) of**

Regulation S-K. Please also consider the Compliance & Disclosure Interpretation question 102.03 related to Non-GAAP Financial Measures, available at http://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm as guidance on this topic. If you agree that certain items labeled as nonrecurring are actually recurring items, please revise your disclosures in future filings to ensure that those items are not labeled as nonrecurring.

Response

Our future presentations of non-GAAP financial measures, whether or not filed with the SEC, will not label items as non-recurring, infrequent or unusual if such a description is contrary to the guidance in Item 10(e)(1)(ii)(B) of Regulation S-K.

In addition, we acknowledge that:

- The adequacy and accuracy of the disclosure in the filings is the responsibility [redacted]
- Staff comments or changes to disclosure in response to Staff comments do not foreclose the Commission from taking any action with respect to the filings.
- [redacted]. may not assert Staff comments as a defense in any proceeding initiated by the Commission or any person under the federal securities laws of the United States.

Please feel free to contact us with any further questions or comments.

Sincerely,

[redacted]

June 18, 2010

Mr. H. Christopher Owings
Assistant Director
United States Securities and Exchange Commission
Division of Corporation Finance
100 F. Street, N.E.
Washington, D.C. 20549

Re: Williams Pipeline Partners L.P. and Northwest Pipeline GP
Forms 10-K for the Fiscal Year Ended December 31, 2009
Filed February 23, 2010
File No. 001-33917 and 001-7414

Dear Mr. Owings:

On behalf of Williams Pipeline Partners L.P. and Northwest Pipeline GP, we are writing in response to your letter dated June 2, 2010, setting forth comments of the Staff of the Division of Corporation Finance of the Securities and Exchange Commission with respect to their respective Annual Reports on Form 10-K for the fiscal year ended December 31, 2009. For your convenience, we have reproduced the full text of each of the Staff's comments above our responses below.

Williams Pipeline Partners L.P. Form 10-K for the Fiscal Year Ended December 31, 2009

General

1. **Please note that we performed concurrent reviews of the Northwest Pipeline GP ("Northwest") and Williams Pipeline Partners L.P. ("WMZ") Forms 10-K since the Northwest financial statements are included in both documents. To the extent the comments below are applicable to Northwest, please apply them to the financial statements included with the WMZ Form 10-K under Item 3-09 of Regulation S-X and to the financial statements included in the stand-alone Form 10-K of Northwest.**

   Response
   We will apply these comments to both the financial statements included with the WMZ Form 10-K under Item 3-09 of Regulation S-X and to the financial statements included in the stand-alone Form 10-K of Northwest.

Business, page 5

2. **In the third paragraph on page 5 you state that Northwest is your primary asset, but on page 41 you state that it is your only asset. Please revise or advise.**

Response
In future filings we will revise the language to consistently state that Northwest is WMZ's only significant asset.

3. **Please describe the business of each of your subsidiaries. Based on our review of Exhibit 21.1 and your discussion on page 111, it appears that your interest in Northwest Pipeline GP is held through Williams Pipeline Partners Holdings LLC, but there is no mention of this in your Business discussion. Please also describe the business done by Williams Pipeline Operating LLC. See Item 101(a) of Regulation S-K.**

Response
WMZ is a holding company with no independent assets or operations. WMZ owns a 100 percent member interest in Williams Pipeline Operating LLC, a Delaware limited liability company, which in turn owns a 100 percent member interest in Williams Pipeline Partners Holdings LLC, a Delaware limited liability company. Williams Pipeline Partners Holdings LLC owns a 35 percent general partner interest in Northwest, which we account for as an equity investment. WMZ does not have any consolidated subsidiaries other than Williams Pipeline Operating LLC and Williams Pipeline Partners Holdings LLC and these two subsidiaries do not have any operations or hold any other significant assets except as described above. We will include this additional information in Item 1 – Business in any future annual filing on Form 10-K for WMZ.

Management's Discussion and Analysis of Financial Condition and Results of Operations

Critical Accounting Policies, page 45

4. **In future filings, please revise the discussion of your critical accounting policies to focus on the assumptions and uncertainties that underlie your critical accounting estimates. In addition, please include a qualitative and quantitative analysis of the sensitivity of reported results to changes in your assumptions, judgments, and estimates, including the likelihood of obtaining materially different results if different reasonably likely assumptions were applied. For example, if reasonably likely changes in an assumption used in assessing whether you should record your contingencies or environmental liabilities would have a material effect on your financial condition or results of operations, the impact that could result given the range of reasonably likely outcomes should be disclosed and quantified. Refer to Section V of Securities Act Release No. 33-8350.**

Response
In future filings we will revise the discussion of our critical accounting policies to focus on the assumptions and uncertainties that underlie our critical accounting estimates. We will also address, when appropriate, both a qualitative and quantitative analysis of the sensitivity of reported results to changes in our assumptions, judgments, and estimates, including the likelihood of obtaining materially different results if different reasonably likely assumptions were applied.

The following narrative provides an example of how these changes may appear in future filings using WMZ's 2009 filing as a model:

Contingencies

We record liabilities for estimated loss contingencies when we assess that a loss is probable and the amount of the loss can be reasonably estimated. At December 31, 2009 and 2008, we have an accrual for loss contingencies of $800 thousand and $100 thousand, respectively. Revisions to contingent liabilities are generally reflected in income when new or different facts or information become known or circumstances change that affect previous assumptions with respect to the likelihood or amount of loss. Liabilities for contingent losses are based upon our assumptions and estimates pertaining to probability and amount of loss, and incorporate the advice of legal counsel, engineers or other third parties regarding the probable outcomes of the matter. As new developments occur or more information becomes available, our assumptions and estimates of these liabilities may change. If changes in these or other assumptions or the anticipated outcomes we use to estimate contingencies cause a loss to become more likely, it could materially affect future results of operations for any particular quarterly or annual period, but would not be expected to have a material adverse effect on our future liquidity or financial position.

Environmental Liabilities

We record liabilities for estimated environmental assessment and remediation obligations when we assess that a loss is probable and the amount of the loss can be reasonably estimated. These liabilities are based on management's best estimate of the undiscounted future obligation. At December 31, 2009 and 2008, we have an accrual for estimated environmental obligations of $7.8 million and $9.2 million, respectively. This obligation is revised during periods in which new or different facts or information become known or circumstances change that affect the previous assumptions with respect to the likelihood or amount of loss. Estimates are based on evaluations and discussions with legal counsel and independent consultants, the current facts and circumstances related to these environmental matters, assumptions regarding existing laws, and prior experience with remediation activities. Our accrued environmental liabilities could change substantially in the future due to revised assumptions with respect to the nature and extent of any contamination, changes in remedial requirements, technological changes, discovery of new information, and the involvement of and direction taken by the EPA, the FERC and other governmental authorities on these matters. We continue to conduct environmental assessments and are implementing a variety of remedial measures that may result in increases or decreases in the total estimated environmental costs.

We consider prudently incurred environmental assessment and remediation costs and costs associated with compliance with environmental standards to be recoverable through rates and thus not likely having a significant effect on financial condition or results of operations. To date, we have been permitted recovery of environmental costs, and it is our intent to continue seeking recovery of such costs through future rate proceedings.

Consolidated Financial Statements, page 57

Northwest's Report of Independent Registered Public Accounting Firm, page 72

5. **We note the reference in the Northwest audit opinion to a financial statement schedule listed in the Index at Item 15(a). Since this financial statement schedule only appears to be**

included in Northwest's stand-alone Form 10-K, please revise future filings to ensure that the audit opinion does not refer to schedules outside of your Form 10-K.

Response
In future filings we will request our independent auditors modify their report on Northwest to not make reference to schedules outside of WMZ's Form 10-K.

Northwest's Consolidated Financial Statements, page 73

Note 1. Summary of Significant Accounting Policies, page 78
Use of Estimates, page 79

6. **We note that you disclose that the estimates and assumptions which are significant to the underlying amounts included in the financial statements and for which it would be reasonably possible that future events or information could change those estimates include impairment assessments of long-lived assets, depreciation and asset retirement obligations. Please tell us how you considered discussing each of these estimates in your critical accounting policies in MD&A and why you believe these items are not critical accounting policies.**

Response
In determining whether an accounting estimate involved in applying our company's accounting policies would warrant disclosure in MD&A as a critical accounting policy, we consider:

- the levels of subjectivity and judgment involved with such estimates; and
- whether the reasonably likely change in assumptions would result in a material impact on financial condition or operating results.

Our evaluation of our accounting policies related to impairment assessments of long-lived assets, depreciation and asset retirement obligations is as follows:

Impairment Assessments of Long-lived Assets

Our natural gas pipeline system, which represents all of our significant long-lived assets, is regulated by the Federal Energy Regulatory Commission (FERC) which approves transportation and storage rates that allow us to recover the full cost of operating our pipeline system, including a reasonable rate of return. FERC regulation also extends to the certification and construction of new facilities, as well as the acquisition, extension, disposition or abandonment of facilities. Given the regulated nature of our business, the high likelihood of ongoing return on our assets, and the absence of any impairment triggering events or circumstances in periods presented, we believe our impairment assessments of long-lived assets policy does not meet the criteria noted previously and therefore has not been included as a critical accounting policy.

Depreciation

Our depreciation rates are approved by the FERC and remain fixed for the duration of the rate period. While depreciation rates may change with each new rate filing, previous depreciation rate fluctuations have not been significant. While rate cases can occur frequently, we have only

had two separate rate cases in the last 13 years, with the latest becoming effective January 1, 2007. Based upon the regulation of depreciation rates and the consistency of such rates over time, we believe our depreciation policy does not meet the criteria noted previously and therefore has not been included as a critical accounting policy.

Asset Retirement Obligations

Our assessment of asset retirement obligations considers the following factors:

- Estimated useful life of assets
- Estimated retirement costs
- Inflation rates
- Discount rate
- Market risk premium

We record an asset and a liability equal to the present value of each expected future asset retirement obligation (ARO). The ARO asset is depreciated in a manner consistent with the depreciation of the underlying physical asset. We measure changes in the liability due to passage of time by applying an interest method of allocation. This amount is recognized as an increase in the carrying amount of the liability and offset by a regulatory asset, as such amounts are expected to be recovered in future rates. Our estimate utilizes judgments and assumptions regarding the extent of our obligations, the costs to abandon and the timing of abandonment. Our recorded ARO is based on the assumption that the abandonment of our assets generally occurs in approximately 65 years. As new developments occur or more information becomes available, our assumptions and estimates of our expected future ARO may change.

At December 31, 2009, our ARO balance was $86.7 million, which we do not consider to be material relative to our net property, plant and equipment balance of more than $1.9 billion or our consolidated balance sheet as a whole. Furthermore, we are currently recovering for AROs in our FERC-approved rates collected from customers and expect to continue such recovery in the future. Thus changes in our assumptions and estimates are not likely to materially affect our future results of operations or financial position.

Considering our assessment that our ARO is not material, the length of time prior to anticipated retirement, and the probability of recovery in our rates, we currently do not believe this policy meets the criteria noted previously to be included as a critical accounting policy.

Note 10. Asset Retirement Obligations, page 93

7. **We note that you recorded a $27.8 million increase in your asset retirement obligation during fiscal 2008 due to changes in estimates. Please tell us the reasons for this adjustment and disclose the reasons for significant estimate changes in future filings.**

Response

The increase to our asset retirement obligation during fiscal 2008 was attributed to an increase in cost of removal estimates primarily due to higher contractor and fuel costs. Updated estimates were based upon input from third party contractors who specialize in removal of transmission assets.

We will disclose the reasons for significant estimate changes in future filings.

Index to Exhibits, page 116

8. **We note that you have incorporated by reference several agreements as material contracts under Item 601(b) (10) of Regulation S-K; however, it does not appear that you filed complete copies of such agreements. Specifically, it does not appear that you filed all schedules or similar attachments to Exhibit 10.10 – Credit Agreement dated as of May 1, 2006, and Exhibit 10.16 – Credit Agreement dated as of February 17, 2010. With your next current or periodic report, please file complete copies of these agreements, including all schedules or similar attachments. Please note that Item 601(b)(2) of Regulation S-K provides a carve-out for schedules or attachments that are not material to an investment decision, but Item 601(b)(10) does not include a similar provision.**

   Response
   As to Exhibit 10.16 – Credit Agreement dated as of February 17, 2010, all schedules or similar attachments will be filed with our next current or periodic report. As to Exhibit 10.10 – Credit Agreement dated as of May 1, 2006, we are no longer a potential borrower under, or a party to, that agreement and, as a result, it will no longer be listed as an exhibit to our future filings.

Signatures, page 118

9. **We note that there is no conformed signature for La Fleur C. Browne. Please confirm to us whether La Fleur C. Browne signed this filing and ensure that all future filings are signed by and include the conformed signature of any attorney-in-fact.**

   Response
   We confirm that La Fleur C. Browne did sign the WMZ Form 10-K and the absence of her conformed signature on the filing is a typographical error. We will ensure that all future filings are signed by and include the conformed signatures of any attorney-in-fact.

Northwest Pipeline GP Form 10-K for the Fiscal Year Ended December 31, 2009

General

10. **Please apply the above comments regarding Williams Pipeline Partners L.P.'s 10-K to the extent applicable to this filing.**

    Response
    We will apply the above comments regarding WMZ's 10-K to the extent applicable to Northwest's filing.

Properties, page 24

11. **Please state the location and general character of your principal plants or other materially important physical properties. For example, you state that your compressor stations are located on lands owned by you, but you do not provide their locations. See Item 102 of Regulation S-K.**

Response
The following language stating the location and general character of our principal plants or other materially important physical properties will be included in Item 2. Properties in future annual filings:

We own our system in fee simple. However, a substantial portion of our system is constructed and maintained on and across properties owned by others pursuant to rights-of-way, easements, permits, licenses or consents. Our compressor stations, with associated facilities, are located in whole or in part upon lands owned by us and upon sites held under leases or permits issued or approved by public authorities. Land owned by others, but used by us under rights-of-way, easements, permits, leases, licenses, or consents, includes land owned by private parties, federal, state and local governments, quasi-governmental agencies, or Native American tribes.

Our pipeline system, which includes our compressor stations, extends from the San Juan Basin in northwestern New Mexico and southwestern Colorado through the states of Colorado, Utah, Wyoming, Idaho, Oregon and Washington to a point on the Canadian border near Sumas, Washington. The Plymouth LNG facility is located in the state of Washington on lands owned in fee simple by us. We lease our corporate offices in Salt Lake City, Utah.

Various credit arrangements restrict the sale or disposal of a major portion of our pipeline system.

Item 11. Executive Compensation, page 70

12. **In the last paragraph on page 70 you state that Williams charges you an allocated amount for services its employees provide to you. Please describe the method used in allocating these amounts.**

Response
The following language describing the method used in allocating these amounts will be included in future annual filings:

Williams charges us an allocated amount for the services of Williams' employees who dedicate time to our affairs. Such expenses have been allocated to us by Williams primarily based upon the Modified Massachusetts formula, which is a FERC-approved method utilizing a combination of net revenues, gross payroll and gross plant for the allocation base.

A similar description of the allocation method was included in *Note 9. Transactions with Major Customers and Affiliates* within Northwest's financial statements.

In addition, we acknowledge the Staff's comment that we are responsible for the accuracy and adequacy of the disclosures made. We formally acknowledge that:

- The adequacy and accuracy of the disclosure in the filings is the responsibility of Williams Pipeline Partners L.P. and Northwest Pipeline GP respectively.
- Staff comments or changes to disclosure in response to Staff comments do not foreclose the Commission from taking any action with respect to the filings.

- Williams Pipeline Partners L.P. and Northwest Pipeline GP may not assert Staff comments as a defense in any proceeding initiated by the Commission or any person under the federal securities laws of the United States.

Please feel free to contact us with any further questions or comments.

Sincerely,

Ted T. Timmermans
Vice President, Controller, and
Chief Accounting Officer of
Williams Pipeline Partners GP LLC

Rand Clark
Controller of
Northwest Pipeline GP

ISSUER NAME AND DATE	OUT-COME	14a-8(x)	TIMING	ACTION SHAREHOLDER SOUGHT/REASON FOR NO-ACTION/REASON FOR DENIAL	APPEAL	OUTCOME	80-DAY WAIVER
The Procter & Gamble Company, August 4, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED			
Hewlett Packard Company, July 28, 2010	+		14d				
News Corporation, July 27, 2010	-	b,f		EXEC COMP			
General Mills, Inc., July 2, 2010	+	i7		LIMIT SODIUM FOR FLAVOR			
Smithfield Foods, Inc., July 1, 2010	-	b,f		NO REQUEST FOR PROOF OF B/0			
Smithfield Foods, Inc., June 24, 2010	-	b,f		ENVIRONMENTAL (GREENHOUSE EMISSIONS)			
Great Plains Energy Incorporated, June 17, 2010	+	b	14d				
Del Monte Foods Company, June 3, 2010	+	i9		BOD ACTION (CONFLICTS WITH CO. PROPOSAL)			
Symantec Corporation, June 3, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED			
Medtronic, Inc., May 17, 2010	W						
Medtronic, Inc., May 13, 2010	W						
Merck & Co., Inc., May 4, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS			+
PetSmart, Inc., April 27, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS			+
Devon Energy Corporation, April 20, 2010	-	b,f	80d	CO. DIDN'T TIMELY OBJECT			-
SUPERVALU INC., April 20, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL			
CB Richard Ellis Group, Inc., April 15, 2010	+	i7		ORD. BUS. OPS (EXT. REPT RE ANNUAL BUDGET)			-
Chesapeake Energy Corporation, April 13, 2010	-	i3, i7, i10		ENVIRONMENTAL (NOT MATERIALLY FALSE)			
Abercrombie & Fitch Co., April 12, 2010	-	d,i7,i10		SIGNIFICANT POLICY (HUMAN RIGHTS)			
The Kroger Co., April 12, 2010	-	i3,i10		**NOT** SUBST. IMPLEMENTED ('C DOESN'T COMPARE FAVORABLY)			
PetSmart, Inc., April 12, 2010	+	i3		VAGUE AND INDEFINITE (BAR ANIMAL PURCH FROM VIO OF "THE LAW")			
BioSpecifics Technologies Corp., April 5, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS			+
Celgene Corporation, April 5, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED			-
Mentor Graphics Corporation, April 5, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS			-
Altria Group, Inc., April 2, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS (SENT TO EMAIL ADD OF FORMER SEC.)			+
Altria Group, Inc., April 20, 2010					X	-	
Chesapeake Energy Corporation, April 2, 2010	-	i3,i7		ENVIRONMENTAL (SUSTAINABILITY REPT)			
Staples, Inc., April 2, 2010	-	b,f		INTRODUCING BROKER LTR OKAY AS STTMT OF RECORD HOLDER			
Yahoo! Inc., April 2, 2010	+	f	14d				
Chevron Corporation, April 1, 2010	W			HUMAN RIGHTS			
Great Plains Energy Incorporated, April 1, 2010	+	e2	120	REC'D AFTER DEADLINE FOR PROPOSALS			+
Caterpillar Inc., March 31, 2010	-	b,f		CUSTODIAN LTR OKAY AS STTMT OF RECORD HOLDER			
DaVita Inc., March 31, 2010	-	i3		NOT VAGUE OR INDEFINITE (ALLOW SHLDERS TO ACT ON WRITTEN CONSENT)			
InterDigital, Inc., March 31, 2010	+	i10		CONFLICTS WITH CO. PROPOSAL			
Raytheon Company, March 31, 2010	-	i3		NOT VAGUE OR INDEFINITE (ALLOW SHLDERS TO ACT ON WRITTEN CONSENT)			
Target Corporation, March 31, 2010	+	i7		ORD. BUS OPS. (RE CHARITABLE CONTRIBUTIONS TO SPECIFIC ORGANIZATIONS GEN EXCL.)			
The Kroger Co., March 31, 2010	+	i12ii		SIMILAR TO PREVIOUS LOSING PROPOSALS			
Wal-Mart Stores	-	i5,i7		SIGNIFICANT POLICY (HUMANE TREATMENT); SIGNIFICANTLY RELATED			
Caterpillar Inc., March 30, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (CHANGING SUPER MAJORITY REQ'TS)			
Wal-Mart Stores, Inc., March 30, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED			
Wal-Mart Stores, Inc., March 30, 2010	+	i7		ORD. BUS. OPS (SALE OF PARTICULAR PRODUCTS GENERALLY EXCLUDABLE)			
Omnicom Group Inc., March 29, 2010	-	b,f,i2,i3,i6		CHANGING SUPER MAJORITY REQ'TS NOT VIO OF STATE LAW,FAL&MSLD,BEYOND BOD			
Raytheon Company, March 29, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (SP. MTING CAN BE CALLED BY % OF SHLDERS)			
Wal-Mart Stores, Inc., March 29, 2010	-	i7		NOT MICROMGMT (REPT RE POLITICAL ACTIVITIES)			
Ultra Petroleum Corp., March 26, 2010	-	i7		NOT MICROMGMT (REPT RE ENVIRONMENTAL IMPACTS)			
Union Pacific Corporation, March 26, 2010	-	b,f	80d	CO. DIDN'T TIMELY OBJECT (SIMPLE MAJ. VOTING)			-
Wal-Mart Stores, Inc., March 26, 2010	+	i7		ORD. BUS. OPS (SALE OF PARTICULAR PRODUCTS AND SERVICES GENERALLY EXCLUDABLE)			
Wal-Mart Stores, Inc., March 26, 2010	+	e2	120	REC'D AFTER DEADLINE FOR PROPOSALS			
Wal-Mart Stores, Inc., March 26, 2010	+	e2	120	REC'D AFTER DEADLINE FOR PROPOSALS			
The Goldman Sachs Group, Inc., March 25, 2010	+	i6		BEYOND POWER OF BOD TO IMPLEMENT BASED ON CRITERIA IN PROPOSAL			-
Omnicom Group Inc., March 25, 2010	-	i3		**NOT** VAGUE OR INDEFINITE (REQ SHLDER OK FOR DEATH BENEFIT POLICY)			
Omnicom Group Inc., March 24, 2010	+	i6		BEYOND POWER OF BOD TO AMEND BLAWS (ONLY SHLDERS CAN)			
Yahoo! Inc., March 24, 2010	W						

R.R. Donnelley & Sons Company, March 23, 2010	+			NO ACTION LETTER CANNOT BE RETRIEVED.		
R.R. Donnelley & Sons Company, April 5, 2010					X	-
Streamline Health Solutions, Inc., March 23, 2010	+	c		MORE THAN ONE PROPOSAL (RE #OF DIR., DIR. INDEPENDENCE, VOTING THRESHOLD)		
Amazon.com, Inc., March 22, 2010	-	i3		**NOT** VAGUE OR INDEFINITE (ALLOW 10% OF SHLDERS TO CALL SPECIAL MTING)		
Amazon.com, Inc., April 7, 2010				**GRANTED RECONSIDERATION 'C VAGUE WHAT "RIGHTS" PROPOSAL SEEKS TO REGULATE**	X	+
CoBiz Financial Inc., March 22, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (ADVISORY VOTE ON EXEC COMP)		
Continental Airlines, Inc., March 22, 2010	W					
Lowe's Companies, Inc., March 22, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (SP. MTING CAN BE CALLED BY % OF SHLDERS)		
NiSource, Inc., March 22, 2010	+	i1,i2,i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 3 YRS AFTER TERM)		
Exxon Mobil Corporation, March 19, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (MAJ OF SHLDERS TO VOTE BY WRITTEN CONSENT)		
Exxon Mobil Corporation, March 19, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PROPOSAL TO BE INCLUDED IN PROXY		
JPMorgan Chase & Co., March 19, 2010	-	i3, i7		**NOT** VAGUE AND INDEFINITE; SIGNIFICANT POLICY ISSUE (DERIVATIVES & SYSTEMIC RK)		
Xcel Energy Inc., March 19, 2010	-	i3		**NOT** MATERIALLY FALSE AND MISLEADING (ANNUAL ADVISORY SAY ON PAY)		
Comcast Corporation, March 18, 2010	+	i7		ORD. BUS. OPS (ADOPT POLICY TO PROMOTE FREE AND OPEN INTERNET)/NOT SIGNIFICANT SOCIAL POLICY		
Ensco International plc, March 18, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (CHG SUPER MAJORITY OF SHLDERS TO VOTE TO SIMPLE MAJORITY)		
Lowe's Companies, Inc., March 18, 2010	+	i7		ORD. BUS. OPS (RE MANNER IN WHICH SELL PARTICULAR PRODUCTS GEN EXCLUDABLE)		
Northrop Grumman Corporation, March 18, 2010	+	i7		ORD. BUS. OPS (RE PROCEDURES TO TERMINATE EMPLOYEES GEN EXCLUDABLE)		
Comcast Corporation, March 17, 2010	+	i2, i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 2 YRS AFTER TERM)		
King Pharmaceuticals, Inc., March 17, 2010	+	i10		PROPOSAL ALREADY REQ'D UNDER STATE LAW		
Marriott International, Inc., March 17, 2010	+	i7		ORD. BUS. OPS (USE FLOW CONTROL SHOWERHEADS) --MICROMANAGES		
Marriott International, Inc., April 19, 2010					X	-
Pulte Homes, Inc., March 17, 2010	-	i11		**NOT** SUBSTANTIALLY DUPLICATIVE OF 2ND SHLDER'S PROPOSAL (RETAIN EXEC COMP)		
Safeway Inc., March 17, 2010	-	8c,i3,i6,i10		ONLY 1 PROPOSAL; **NOT** VAGUE AND INDEFINITE AND CO. CAN ACT; **NOT** IMPLEMTED		
JPMorgan Chase & Co., March 16, 2010	+	i7		ORD. BUS. OPS (ADOPT POLICY TO STOP ISSUING REFUND ANTICIPATION LOANS)		
Sprint Nextel Corporation, March 16, 2010	+	i7		ORD. BUS. OPS (CAN EXCLUDE PROPS RE ADHERENCE TO ETHICS PRACTICES AND CONDUCT COMPLIANCE PROGS.		
Sprint Nextel Corporation, April 20, 2010					X	-
Ford Motor Company, March 12, 2010	-	i3		**NOT** VAGUE AND INDEFINITE (RE NOT TO FUND PROJ SOLELY RE CARBON DIOX REDUCTION)		
Goldman Sachs Group, Inc., March 12, 2010	+	i7		ORD. BUS OPS (RE GENERAL EMPLOYEE COMPENSATION MATTERS GENERALLY EXCLUDABLE)		
The Home Depot, Inc., March 12, 2010	+	i7		ORD. BUS OPS. (RE SALE OF PARTICULAR PRODUCTS GENERALLY EXCLUDABLE)		
Intel Corporation, March 12, 2010	W					
JPMorgan Chase & Co., March 12, 2010	+	i7		ORD. BUS OPS. RE ASSESS AND PROHIBIT LOANS FOR MOUNTAIN TOP REMOVAL COAL MINING OF CLIENTS (RE CUSTOMER RELATIONS/SALE OF PRODS GENERALLY EXCLUDABLE)		
Marriott International, Inc., March 12, 2010	+	i8		CAN EXCLUDE PROPS RE Q OF BUS JDGMT OF BD MEMBER UP FOR REELECTION		
Medco Health Solutions, Inc., March 12, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
Mylan, Inc., March 12, 2010	+	i2, i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 2 YRS AFTER TERM)		
Noble Romans, Inc., March 12, 2010	+	i6, 8c		LIMITED TO 1 PROPOSAL PER MTING IF CO FILES STTMT OF REASONS TO OMIT SHLDER SUBMITS 2 PROPOSAL		
Sprint Nextel Corporation, March 12, 2010	+	i7		ORD. BUS OPS. (ADOPT POLICY TO PROMOTE OPEN INTERNET-NOT SIGN POLICY ISSUE)		
Ultra Petroleum Corp., March 12, 2010	W					
International Paper Company, March 11, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (10% V. 20% SHLDER VOTE NEC TO CALL SP SHLDER MTING		
The Goldman Sachs Group, Inc., March 11, 2010	-	i3		**NOT** FALSE OR MISLEADING (REVIEW EXEC COMP POLICIES AND REPORT)		
InterDigital, Inc., March 11, 2010	W					
Omnicom Group Inc., March 11, 2010	-	8b,8f,i6		**NOT** BEYOND BOD TO "INITIATE THE APPROPRIATE PROCESS" TO AMEND CHARTER DOCS TO ALLOW NOMINEES TO BE ELECTED BY MAJ OF VOTES CAST		
PG&E Corporation, March 11, 2010	+	8c		**2 PROPOSALS** (LICENSE RENEWAL DISTINCT FROM PROP TO MITIGATE RISKS & PRODUCTION LEVELS		
UAL Corporation, March 11, 2010	+	8f	1yr hold	DIDN'T SATISFY THRESHOLD OWNERSHIP REQ'T FOR 1 YR.		
PG&E Corporation, March 10, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED 'C CO'S GUIDELINES COMPARE FAVORABLY WITH PROP		
The Western Union Company, March 10, 2010	+	8f	14d			
The Western Union Company, March 19, 2010					X	-
Central Federal Corporation, March 8, 2010	+	i7		ORD. BUS OPS. (RE EXPLORE ALTS TO MAX VALUE IN EXTRA ORD AND ORD DEALS GEN EXCL.)		
Comcast Corporation, March 9, 2010	W					
CVS Caremark Corporation, March 9, 2010	+	i2		CONFLICT WITH STATE LAW AND COI (REQUIRE CHMN TO BE INDEPENDENT DIR.)		
The Goldman Sachs Group, Inc., March 9, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP TO BE INCLUDED		
Virtual Radiologic Corporation, March 9, 2010	-	8c		**NOT** SUBMITTED ON BEHALF OF ANOTHER		
Alaska Air Group, Inc., March 8, 2010	+	i7		ORD. BUS OPS. (RE DECISIONS RELATING TO VENDOR RELATIONSHIPS GEN EXCLUDABLE)		

Goldman Sachs Group, Inc., March 8, 2010	+	i7		ORD. BUS OPS. (RE GENERAL EMPLOYEE COMPENSATION MATTERS GEN. EXCLUDABLE)			
Intel Corporation, March 8, 2010	+	8f	500words	PERCENT SYMBOL AND DOLLAR SIGN COUNTS AS A SEPARATE WORD.			
JPMorgan Chase & Co., March 8, 2010	W						
Comcast Corporation, March 5, 2010	-	i3		**NOT** VAGUE OR INDEFINITE (AMEND COI TO REQUIRE INDEPEND DIR TO SERVE AS CHMN)			
JPMorgan Chase & Co., March 5, 2010	+	i3		VAGUE AND INDEFINITE (RE CONTRIBUTIONS USED FOR "GRASSROOTS LOBBYING COMMUNICATIONS")			
JPMorgan Chase & Co., March 26, 2010					X	-	
JPMorgan Chase & Co., March 5, 2010	+	i7		ORD BUS OPS. (RE SELECTION & MGMT OF ENGAGEMENT OF INDEP. AUDITORS GEN EXCL.)			
JPMorgan Chase & Co., March 5, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP TO BE INCLUDED			
NBT Bancorp Inc., March 5, 2010	+	i10		SUBSTANTIALLY DUPLICATIVE OF CO.-SPONSORED AMENDMENT FOR ANNUAL DIR. ELECTION			
Sempra Energy, March 5, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (CHG SUPER MAJORITY REQTS TO SIMPLE MAJORITY VOTING REQTS)			
Union Pacific Corporation, March 5, 2010	+	8f	14d				
Yum! Brands, Inc., March 5, 2010	+	i7		ORD BUS OPS. (RE LEGAL COMPLIANCE PROGRAM-VERIFY SSN/E-VERIFY GENERALLY EXCLUDABLE)			
Casade Financial Corporation, March 4, 2010	+	i7		**CURABLE DEFECT** (RE SEVERANCE PYMTS TO ALL OR ONLY SR. EXEC OFFICERS)			
Casade Financial Corporation, March 4, 2010	+	i3		VAGUE AND INDEFINITE (RE ELIMINATE "NON-ESSENTIAL EXPENDITURES"...)			
Freeport-McMoRan Copper & Gold Inc., March 4, 2010	W						
IDACORP Inc., March 4, 2010	+	8f	14d				
Sprint Nextel Corporation, March 4, 2010	-	i2		**NOT** VIO. OF STATE LAW (PROP SEEKS ACTION "TO EXTENT PERMITTED BY LAW")			
Wells Fargo & Company, March 4, 2010	+	i7		ORD BUS OPS. (RE GENERAL EMPLOYEE COMP (EVEN IF LTD TO TOP 100) GEN EXCL.)			
XTO Energy Inc., March 4, 2010	+	i1		VIO. OF STATE LAW **('C ADVISORY VOTE RE COMP NOT PROPER AT THE SPECIAL MTING)**			-
Bank of America Corporation, March 3, 2010	-	i2, i3, i6		PROP TO ALLOW 10% OF C/S TO CALL SPECIAL MEETINGS)			-
The Allstate Corporation, March 3, 2010	W						
AT&T Inc., March 2, 2010	-	i3		**NOT** V&INDEF (RE EXCLUDING NON-CASH PENSION CREDITS FROM PERFORM AWARD FORMULA)			-
Bank of America Corporation, March 2, 2010	-	i10		SUBSTANTIALLY IMPLEMENTED (RE INITIATE PROCESS TO ADOPT AND DISCLOSE SUCCESSION PLANNING POLICY)			
Verizon Communications, Inc., March 2, 2010	+	i7		ORD. BUS OPS. (RE POLICY ON NET NEUTRALITY) NOT SIGNIFICANT SOCIAL POLICY			
Verizon Communications Inc., March 12, 2010					X	-	
Allegheny Technologies Incorporated, March 1, 2010	+	i6		NOT W/I POWER OF BOD TO ENSURE DIR INDEPENDENCE "AT ALL TIMES" & NO CURE IF VIO)			
AT&T Inc., March 1, 2010	+	i7		ORD. BUS OPS. (RE POLICY ON NET NEUTRALITY) NOT SIGNIFICANT SOCIAL POLICY			
AT&T Inc., March 12, 2010					X	-	
Bank of America Corporation, March 1, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS			+
Ford Motor Company, March 1, 2010	+	i7		ORD. BUS OPS. (RE METHOD TO DISTRIBUTE OR PRESENT INFO TO SHLDERS GEN EXCL.)			
Genzyme Corporation, March 1, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **40%** V. 10% TO CALL SPECIAL MTING)			
Pinnacle West Capital Corporation, March 1, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)			
Bank of America Corporation, February 26, 2010	+	i7		ORD BUS OPS. (RE COMP TO EES GENERALLY (TOP 100) NOT SR. EXEC O&D ONLY)+ DOES NOT FOCUS ON RELATIONSHIP BETWEEN COMP PRACTICES AND EXCESSIVE RISK TAKING.			
EMC Corporation, February 26, 2010	+	8f	14d				
EMC Corporation, March 10, 2010					X	-	
Exelon Corporation, February 26, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (RE REPT RE POLITICAL CONTRIBUTIONS)			
PepsiCo, Inc., February 26, 2010	-	i3, i7		**NOT** F&MLEADING NOR ORD. BUS OPS.**(** RE REPT RE GENERAL POLITICAL ADVOCACY ACTIVITIES NOT MICROMGING)			
Cascade Financial Corporation, February 25, 2010	+	i7		ORD. BUS OPS. (PROP RE GENERAL EMPLOYEE COMP (NOT SR. EXEC O&D) GEN EXCL)			
CVS Caremark Corporation, February 25, 2010	+	i7		ORD. BUS OPS. (PROP RE SALE OF PARTICULAR PRODS GEN EXCLUDABLE)			
The First Bancorp, Inc., February 25, 2010	+	i1		**CURABLE DEFECT** (RE RECAST AS REQUEST TO BOD INSTEAD OF DEMAND FOR REDUCTION IN # OF PREF. SH)			-
JPMorgan Chase & Co., February 25, 2010	+	i7		ORD BUS OPS. (RE COMP TO EES GENERALLY (TOP 100) NOT SR. EXEC O&D ONLY)+ DOES NOT FOCUS ON RELATIONSHIP BETWEEN COMP PRACTICES AND EXCESSIVE RISK TAKING.			
Liz Claiborne, Inc., February 25, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **35%** V. 10% TO CALL SPECIAL MTING)			
The Allstate Corporation, February 24, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING(RE ALLOW MAJ OR SHLDERS VOTE ON WRITTEN CONSENT)			
Bank of America Corporation, February 24, 2010	+	i1		**CURABLE DEFECT** (RECAST AS REQUEST TO BOD INSTEAD OF DEMAND FOR REPT WHICH IS IMPROPER SUBJ FOR SHLDER ACTION UNDER STATE LAW			
Bank of America Corporation, February 24, 2010	+	i7		ORD. BUS OPS. RE ASSESS AND PROHIBIT LOANS FOR MOUNTAIN TOP REMOVAL COAL MINING OF CLIENTS (RE CUSTOMER RELATIONS/SALE OF PRODS GENERALLY EXCLUDABLE)			
The McGraw-Hill Companies, Inc., February 24, 2010	-	i3, i9		**NOT** V&INDEF OR FALSE&M/LEADING(RE ALLOW MAJ OR SHLDERS VOTE ON WRITTEN CONSENT)			
The McGraw-Hill Companies, Inc., March 17, 2010					X	-	
PepsiCo, Inc., February 24, 2010	+	i7		ORD. BUS OPS. PROP RE CHARITABLE CONTRIBS DIRECTED TO SPEC ORGANS GEN EXCLUDABLE)			
Pulte Homes, Inc., February 24, 2010	-	i3		**NOT** V&INDEF (RE AFTER CURRENT EE Ks EXPIRE REQUIRE INDEP DIR. TO SERVE AS CHRMN)			
Sprint Nextel Corporation, February 24, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.			
AT&T Inc., February 23, 2010	-	i3		**NOT** V&INDEF (RE ADVISORY VOTE RE OK OF NAMED EXEC OFFICERS COMP)			
Citigroup Inc., February 23, 2010	-	i7		**SIGNIFICANT POLICY ISSUE** (POLICIES RE COLLATERALIZATION OF DERIVATES & SYS RISK)			

PSB Group, Inc., February 23, 2010	+	8c		**ONE PROPOSAL LIMIT** (APPLIES COLLECTIVELY TO EVERYONE WITH AN INTEREST IN SAME STK)		
Allergan, Inc., February 22, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (CHG SUPER MAJORITY REQTS TO SIMPLE MAJORITY VOTING REQTS)		
Bank of America Corporation, February 22, 2010	+	i3		VAGUE AND INDEFINITE (RE CREATING COMM ON "US ECONOMIC SECURITY")		
Cascade Financial Corporation, February 22, 2010	-	i3, i9		**NOT** V&INDEF (PROP RE REDUCING SALARY 25% FOR ANYONE >$150K UNTIL TARP REPAID AND C/SHLDERS DIVIDENDS RESTORED)-**NOT LTD TO SR. EXEC OFFICERS**		
Cascade Financial Corporation, February 22, 2010	+	i7		ORD. BUS OPS. (FREEZE SALARIES OF STAFF >$100K UNTIL TARP REPD & DIV. RESTORED)-**NOT LTD TO SR. EXEC OFFICERS**		
Cascade Financial Corporation, February 22, 2010	-	i3, i7, i10		**NOT** V&INDEF, ORD. BUS OPS, ETC. (PROHIBIT BONUSES TO EXEC. OFFICERS UNTIL TARP REPD AND DIV RESTORED)		
Citigroup Inc., February 22, 2010	+	i3		VAGUE & INDEF (RE CREATE BD COMM ON "US ECONOMIC SECURITY")		
Comcast Corporation, February 22, 2010	+	i7		ORD. BUS OPS. (ELIM. COMP >$500K FOR ANYONE IN MGMT)-**NOT LTD TO SR. EXEC OFFICERS**		
Comcast Corporation, March 23, 2010					X	-
Continental Airlines, Inc., February 22, 2010	+	8b, 8f	14d			
International Business Machines Corporation, February 22, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
International Business Machines Corporation, March 24, 2010					X	-
Johnson & Johnson, February 22, 2010	+	i7		ORD. BUS OPS. (RE CK SSN/E-VERIFY) PROP RE LEGAL COMPLIANCE PROG GEN EXCLUDABLE		
Merck & Co., Inc., February 22, 2010	+	8b, 8f	14d			
Time Warner, Inc., February 22, 2010	+	i6		NOT FEASIBLE FOR BD TO ENSURE CONTINUOUS COMLIANCE AND NO CURE MECHANISM (PROHIBIT CURRENT OR FORMER CEO'S ON COMP COMM.)		
Verizon Communications Inc., February 22, 2010	-	i3, i10		**NOT** V&INDEF, ETC. (RE SAY ON BONUS, AWARDS, DEATH BENEFITS OF SR. EXEC. OFFICERS)		
American Express Company, February 19, 2010	+	i2, i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 2 YRS AFTER TERM)		
The Charles Schwab Corporation, February 19, 2010	+	i9		CONFLICTS WITH CO. PROP RE EXEC. BONUS PLAN FOR SR. EXEC. OFFICERS		
Gilead Sciences, Inc., February 19, 2010	-	i1,i2, i3,i6		RE REQUEST TO BOD TO TAKE STEPS TO CHG SUPER MAJ. TO SIMPLE MAJ IN CHARTER DOCS.		
Henry Schein, Inc., February 19, 2010	W					
Honeywell International Inc., February 18, 2010	+	i6		**CURABLE DEFECT** (NOT FEASIBLE FOR BD TO ENSURE CONTINUOUS COMLIANCE AND NO CURE MECHANISM (PROHIBIT CURRENT OR FORMER CEO'S ON COMP COMM.)		
Merck & Co., Inc., February 19, 2010	+	8b, 8f	14d			
Merck & Co., Inc., March 29, 2010					X	-
Merck & Co., Inc., February 19, 2010	+	8b, 8f	14d			
Merck & Co., Inc., March 29, 2010					X	-
Verizon Communications Inc., February 19, 2010	+	i2, i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 2 YRS AFTER TERM)		
Wal-Mart Stores, Inc., February 19, 2010	W					
Wal-Mart Stores, Inc., February 19, 2010	W					
Wells Fargo & Company, February 19, 2010	-	i7		**NOT** ORD. BUS OPS. (PROP REQUESTS LIST ON WEBSITE OF CONTRIBUTIONS >$5K)		
Range Resources Corporation, February 18, 2010	W					
Verizon Communications Inc., February 18, 2010	+	i6		NOT FEASIBLE FOR BD TO ENSURE CONTINUOUS COMLIANCE AND NO CURE MECHANISM (PROHIBIT CURRENT OR FORMER CEO'S ON COMP COMM.)		
Questar Corporation, February 17, 2010	W					
The Coca-Cola Company, February 17, 2010	+	i7		ORD. BUS OPS. (REP'T RE POLICY OPTIONS RE BOTTLED WATER)-CUST RELATIONS & PROD. QUALITY GEN EXCLUDABLE		
The Coca-Cola Company, March 3, 2010				SEC CONSIDERS ISSUES RE BOTTLED WATER ORD BUS, NOT SIGNIFICANT SOCIAL POLICY ISSUE	X	-
AT&T Inc., February 16, 2010	+	i3		VAGUE & INDEFINITE (RE REP'T ON CONTRIBUTIONS FOR "GRASSROOTS LOBBYING COMMUNICATIONS"		
AT&T Inc., March 2, 2010					X	-
Bank of America Corporation, February 16, 2010	-	i2, i3, i6		**NOT** V&INDEF, ETC (RE PROP TO ADOPT A CLAWBACK POLICY FROM PRIOR 5 YRS.)		
E.I. du Pont de Nemours and Company, February 16, 2010	+	h3		EXCLUDABLE 'C PROPONENT W/O GD CAUSE FAILED TO APPEAR & PRESENT PROP AT EARLIER AM)		
E. I. DuPont de Nemours and Company, February 16, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.		
E.I. du Pont de Nemours and Company, March 16, 2010					X	-
Exxon Mobil Corporation, February 16, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.		
Exxon Mobil Corporation, February 16, 2010	+	i7		ORD. BUS OPS. (PROP TO LIMIT COMP >$500K TO "MGMT" NOT LTD TO SR. EXEC. OFFICERS)		
Exxon Mobil Corporation, March 23, 2010					X	-
Merck & Co., Inc., February 16, 2010	+	8b, 8f	14d			
NYSE Euronext, February 16, 2010	W					
Allegheny Energy, Inc., February 12, 2010	-	i3		V&INDEFINITE (PROP RE CHMN BE INDEPENDENT AND NOT HAVE SERVED AS CEO)		
AMR Corporation, February 12, 2010	+	8b, 8f	14d	FAILED TO RESPOND TO REQUEST TO PROVE 8b OWNERHSIP		
AMR Corporation, February 12, 2010	+	8b, 8f	14d			

AT&T Inc., February 12, 2010	+/-	i2/8c,i3, i10		2 PROP 1-ALLOW SHLDER ACTS ON WRITTEN CONSENT-VIO STATE LAW; 2-10% SHLDERS CAN CALL SPEC. MTING.		
Exxon Mobil Corporation, February 12, 2010	W					
The Goldman Sachs Group, Inc., February 12, 2010	W			CO. TO INCLUDE PROPOSAL IN PROXY.		
The Goldman Sachs Group, Inc., February 12, 2010	W					
Halliburton Company, February 12, 2010	-	i10		**NOT** SUBSTANTIALLY IMPLEMENTED (PROP TO ALLOW 10% TO CALL SPEC MTING V. 25% REQ'D IN BYLAWS		
Halliburton Company, March 19, 2010					X	-
Halliburton Company, February 12, 2010	-	e2		**PROPONENT ATTEMPTED TIMELY DELIVERY/RESPONSE**		
Halliburton Company, March 19, 2010					X	-
Pioneer Natural Resources Company, February 12, 2010	+	8b, 8f	14d			
Verizon Communications Inc., February 12, 2010	-	8b, 8f, i10		**BANKER CONFIRMATION SUFFICIENT** & **NOT** SUBSTANTIALLY IMPLEMENTED(RE INITIATE PROCESS TO ADOPT AND DISCLOSE SUCCESSION PLANNING POLICY)		
Xcel Energy Inc., February 12, 2010	W					
The Boeing Company, February 6, 2010	-	8c		**3 PROPOSALS** (1-COMPENSATION; 2- SPECIAL MTINGS; 3-INDEP BOD CHRMN)		
Chevron Corporation, February 6, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **15%** V. 10% TO CALL SPECIAL MTING)		
Chevron Corporation, March 1, 2010					X	-
The Allstate Corporation, February 5, 2010	-	i3, i7		**NOT** V&INDEF, MICROMANAGING (PROP RE REVIEW & REPT ON EXEC COMP POLICIES)		
The Boeing Company, February 5, 2010	+	i3		VAGUE & INDEFINITE (CREATE COMM TO REVIEW POLICIES THAT "WILL FOLLOW THE UNIVERSAL DECLARATION OF HUMAN RIGHTS"		
Occidental Petroleum Corporation, February 5, 2010	+	i7		ORD. BUS OPS. (ADOPT POLICY TO DISTRIBUTE RESTTMTS IN SAME MANNER AS ORIGLLY DIST)-PROPOSALS RE METHOD TO DISTRIB FIN OR PRESENT INFO GEN EXCLUDABLE		
State Bancorp, Inc., February 5, 2010	+	8b, 8f	14d	DID NOT RESPOND TO REQUEST		
Great Plains Energy Incorporated, February 4, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		+
JPMorgan Chase & Co., February 4, 2010	W					
The Boeing Company, February 3, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.		
EOG Resources, Inc., February 3, 2010	-	i7		**NOT** ORD. BUS OPS. (RE ENVIRONMENTAL IMPACT REPT NOT MICROMGMT)**I.E., SUBSTANTIAL POLICY ISSUE**		
Goldman Sachs Group, February 3, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
Goldman Sachs Group, Inc., February 22, 2010					X	-
Intel Corporation, February 3, 2010	+	8b, 8f	14d			
Mattel, Inc., February 3, 2010	+	i10		**NOT** SUBSTANTIALLY IMPLEMENTED (REQUEST BOD UNDERTAKE STEPS TO ALLOW SHLDERS VOTE ON WRITTEN CONSENT)		
State Street Corporation, February 3, 2010	+	h3		EXCLUDABLE 'C PROPONENT W/O GD CAUSE FAILED TO APPEAR & PRESENT PROP AT EARLIER AM)		
American Express Company, February 2, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		+
Energen Corporation, February 2, 2010	W					
PG&E Corporation, February 2, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED BY STATE LAW (REQUEST BOD UNDERTAKE STEPS TO ALLOW SHLDERS VOTE ON WRITTEN CONSENT)		
Alpha Natural Resources, Inc., February 1, 2010	W					
Bank of America Corporation, February 1, 2010	-	i3		**NOT** V&INDEF (SEEKS ANNUAL REPT OF "NON DEDUCTIBLE" AMTS CO PAYS TO SR. EXEC OFFICERS)		
The Boeing Company, February 1, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP THAT CO. WILL INCLUDE		
E.I. du Pont de Nemours and Company, February 1, 2010	+	8b, 8f	14d			
Bank of America, January 29, 2010	-	i3, i6		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.		
Bank of America Corporation, March 8, 2010					X	-
The Boeing Company, January 29, 2010	+	i1		**CURABLE DEFECT**(REPT ON REVIEW OF CODE OF CONDUCT RE ETHICAL CRITERIA FOR MILITARY CONTRACTS)-REVISE AS REQUEST OR RECOMMENDATION TO BOD		
Cleco Corporation, January 29, 2010	-	i6		**DOES NOT** LACK AUTHORITY TO CHANGE BYLAW (REQUESTS BOD TAKE STEPS TO ELIMINATE CLASSES OF DIR AND ELECT ANNUALLY)		
Comcast Corporation, January 29, 2010	+	8b, 8f	14d	DID NOT RESPOND TO REQUEST		
Merck & Co., Inc., January 29, 2010	+	i2		WOULD VIO STATE LAW (PROP TO PERMIT MAJORITY VOTE ON WRITTEN CONSENT)		
Time Warner Inc., January 29, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **15%** V. 10% TO CALL SPECIAL MTING)		
Union Pacific Corporation, January 29, 2010	+	8b, 8f	14d			
Verizon Communications Inc., January 28, 2010	-	i10		**NOT** SUBSTANTIALLY IMPLEMENTED (PROP TO ALLOW 10% TO CALL SPEC MTING V. 25% ALREADY REQ'D IN BYLAWS)		
The Boeing Company, January 27, 2010	-	i2, i3, i6		PROP TO ALLOW 10% OF C/S TO CALL SPECIAL MEETINGS)		
Bristol-Myers Squibb Company, January 28, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
Cabot Oil & Gas Corporation, January 28, 2010	-	i7		**NOT** ORD. BUS OPS. (RE ENVIRONMENTAL IMPACT REPT RE FRACTURING NOT MICROMGMT)**I.E., SUBSTANTIAL POLICY ISSUE**		
Express Scripts Inc., January 28, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED(CHG SUPER MAJORITY REQTS TO SIMPLE MAJORITY VOTING REQTS)		
International Paper Company, January 28, 2010	+	8b, 8f	14d			

Portland General Electric Company, January 28, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
Range Resources Corporation, January 28, 2010	W					
Abbott Laboratories, January 27, 2010	+	i12(ii)		SUBSTANTIALLY SIMILAR TO PREVIOUS INCLUDED PROPOSALS (ENCOURAGING TRANSPARENCY RE ANIMAL USED IN RESEARCH AND TESTING)		
Citigroup Inc., January 27, 2010	+	8b, 8c, 8f	14d	**BUT DEFICIENCY NOTICE FROM CITI SENT TO WRONG ADDRESS-PROPONENT GIVEN 7D TO CURE**		
The Dow Chemical Company, January 27, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
Exxon Mobil Corporation, January 27, 2010	+	8b, 8f	14d			
General Dynamics Corporation, January 27, 2010	+	8b, 8f	14d			
CIGNA Corporation, January 26, 2010	+	8b, 8f	14d			
Frontier Communications Corporation, January 26, 2010	+	8b, 8f	14d			
Time Warner Inc., January 26, 2010	+	i6		INFEASIBLE FOR BOD TO IMPLEMENT (PROP FOR BOD TO AMEND BYLAWS TO REQ CHMN TO BE INDEP.) NO MECHANISM TO CURE		
Time Warner Inc., March 23, 2010					X	-
Aetna Inc., January 25, 2010	+	8b, 8f	14d			
Frontier Communications Corporation, January 25, 2010	+	8b, 8f	14d	PROP DID NOT RESPOND TO REQUEST		
General Electric Company, January 23, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED(PROP RE BOD EXPLORE WITH CERTAIN EXEC OFFICERS RENUNICATION OF STK OPTION GRANTS)		
Ball Corporation, January 25, 2010	+	i2, i6		VIO. OF STATE LAW (RE REORGANIZE BOD INTO ONE CLASS OF DIR TO BE ANNUALLY ELECTED		
Ball Corporation, March 12, 2010					X	-
International Business Machines Corporation, January 22, 2010	+	8b, 8f	14d			
Citigroup Inc., January 21, 2010	+	i3		VAGUE & INDEF (RE LIMIT NUMBER OF CONSECUTIVE ELECTIONS TO ELECT A DIR TO THE BOD)-NOT CLEAR A CEO NOT ON THE BOD WOULD BE SUBJECT TO SAME TERM LIMITS.		
Exxon Mobil Corporation, January 21, 2010	+	i6		INFEASIBLE FOR BOD TO IMPLEMENT (PROP FOR BOD TO AMEND BYLAWS TO REQ CHMN TO BE INDEP.) NO MECHANISM TO CURE		
Exxon Mobil Corporation, March 23, 2010					X	-
Halliburton Company, January 21, 2010	-	8e, 8f, h3		**NOT** EXCLUDABLE 'C DIDN'T SEND DEFICIENCY NOTICE; NOR 'C SUBSTANTIALLY SIMILAR TO PROPOSALS WHERE REP DID NOT APPEAR AT AM (PROP RE TO A REPT)		
Textron Inc., January 21, 2010	+	i10		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP THAT CO. WILL INCLUDE		
Verizon Communications Inc., January 21, 2010	-	i3, i9		**NOT** V&INDEF (PROP. RE ADOPT POLICY TO ALLOW STK OPTIONS OF SR. EXEC. OFFICERS TO VEST IFF TOTAL SHLDER RETURN >= PERFORMANCE OF PEERS		
Yum! Brands, Inc., January 21, 2010	W					
Central Pacific Financial Corp., January 20, 2010	+	8b, 8f	14d			
Occidental Petroleum Corporation, January 20, 2010	+	i2		**CURABLE DEFECT** (PROP WOULD CAUSE BREACH OF EXISTING COMP K'S-7D TO REVISE TO APPLY ONLY TO FUTURE COMP K'S)		
Pfizer Inc., January 20, 2010	-	8f, 8b	14d	CAN'T EXCLUDE SHLDER 'C DIDN'T ADDRESS CLAIM THAT PROP'S BROKER PROVIDED VERIFICATION OF ELIGIBILITY		
Pfizer Inc., February 22, 2010				RECONSIDERATION GRANTED ON PROOF THAT PROP FAILED TO PROVE ELIGIBILITY IN 14D	X	+
The Charles Schwab Corporation, January 19, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE PAY FOR PERFORMANCE BASED ON PEERS POLICY)		
Citigroup Inc., January 19, 2010	+	i10		SUBSTIALLY IMPLEMENTED (PROP RE BOD TO ADOPT BYLAW TO REQ INDEP LEAD DIR WHENEVER POSS)		
Danaher Corporation, January 19, 2010	+	8d, 8f	500words			
Dominion Resources, Inc., January 19, 2010	+	i9		CONFLICTS WITH CO. PROP (RE CHG CHARTER TO ALLOW SIMPLE INSTEAD OF SUPER MAJ VOTING)		
Dominion Resources, Inc., March 29, 2010					X	-
Honeywell International Inc., January 19, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP THAT CO. WILL INCLUDE		
MDU Resources Group, Inc., January 16, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (ALLOWING SHLDERS TO VOTE ON CHG IN CHARTER TO ALLOW SIMPLE INSTEAD OF SUPER MAJ VOTING)		
Brocade Communications Systems, Inc., January 15, 2010	W					
Norfolk Southern Corporation, January 15, 2010	-	i7		**NOT** ORD BUS OPS. OR MICROMANAGING (ADOPT GOALS TO REDUCE GREENHOUSE EMISSIONS)		
PPG Industries, Inc., January 15, 2010	-	i3, i7		**NOT** V&INDEF OR ORD. BUS OPS. (REPT HOW RESPONSIBLY DISCLOSES ENVIRON IMPACTS WHERE IT OPERATES)		
Brocade Communications Systems, Inc., January 14, 2010	W					
Coachmen Industries, Inc., January 14, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED ('C SUBJ MATTER CONCLUDED PRIOR TO AM)		
Mattel, Inc., January 14, 2010	+	i12(iii)		SUBST SAME AS 3 PRIOR PROPS(RE REPT ON WORKING CONDITIONS AT CO. FACILITIES AND ITS VENDORS)		
Wells Fargo & Company, January 14, 2010	+	**i13**		RE SPECIFIC AMTS (RE COMP AND BENEFITS OF TOP 300 OFFICERS NOT TO CHG UNTIL C/S DIV REPAID)		
Bank of America Corporation, January 13, 2010	+	i2		WOULD VIO STATE LAW (PROP TO PERMIT MAJORITY VOTE ON WRITTEN CONSENT)		
Bank of America Corporation, February 11, 2010					X	-
International Business Machines Corporation, January 13, 2010	+	i3		VAGUE & INDEFINITE (PROP RE TAKING IMMEDIATE CORRECTIVE ACTION)		
Johnson & Johnson, January 13, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		

Masco Corporation, January 13, 2010	+	i7		ORD. BUS OPS. (RE LIMITING ENGMNT OF AUDITORS TO 5 YRS)-PROP RE SELECTION & MGMT OF ENGMNT GEN EXCLUDABLE		
Oak Valley Bancorp, January 13, 2010	+	i7		ORD. BUS OPS. (RE "MAKE EVERY EFFORT TO REPAY" TARP DEBT)-PROP RE MGMT OF COS. ASSETS AND OBLIGATIONS GENERALLY EXCLUDABLE		
SunTrust Banks, Inc., January 13, 2010	-	i3, i7		**NOT** V&INDEF, ORD. BUS OPS. (REQT FOR BOD REPT RE ENVIRON & SOCIAL IMPACT OF CO BUS STRATEGIES TO ADDRESS CLIMATE CHANGE.)-I.E., **SIGNIFICANT SOCIAL POLICY ISSUE**		
SunTrust Banks, Inc., January 13, 2010	-	i3		**NOT** V&INDEF (PROP FOR BOD TO INITIATE PROCESS TO AMEND CHARTER DOCS TO ALLOW ANNUAL ELECT OF DIR)		
Abbott Laboratories, January 12, 2010	W					
Entergy Corporation, January 12, 2010	+	h3		EXCLUDABLE 'C PROPONENT W/O GD CAUSE FAILED TO APPEAR & PRESENT PROP AT EARLIER AM)		
Entergy Corporation, March 16, 2010					X	-
Pfizer, Inc., January 12, 2010	+	8b, 8f	14d			
EOG Resources, Inc., January 11, 2010	W					
EQT Corporation, January 11, 2010	+	8b, 8f	14d			
Fluor Corporation, January 11, 2010	+	8b, 8f	14d			
Pfizer Inc., January 11, 2010	+	8b, 8f	14d			
First Mariner Bancorp, January 8, 2010	+	i6		INFEASIBLE FOR BOD TO IMPLEMENT (PROP FOR BOD TO ADOPT POLICY TO REQ SPLIT BETW CHMN & CEO)		
Marathon Oil Corporation, January 8, 2010	-	i1, i2		**NOT** VIO. OF STATE LAW (PROP SEEKS ADVISORY SAY ON PAY VOTE OF COMP REPT & POLICIES)		
McDermott International, Inc., January 8, 2010	W					
Reynolds American Inc., January 8, 2010	+	8b, 8f	14d			
Bristol-Myers Squibb Company, January 7, 2010	W			CO TO PROVIDE PROP IN PROXY MATERIALS		
Gannett Co., Inc. , January 7, 2010	+	8b, 8f	14d			
Google, Inc., January 7, 2010	W					
International Business Machines Corporation, January 7, 2010	+	i7		ORD. BUS OPS. (RE RESTATE & ENFORCE ETHICAL BEHAVIOR)-PROP RE GEN ADHERENCE TO ETHICAL COMPLIANCE PRACTICES GENERALLY EXCLUDABLE		
International Business Machines Corporation, February 22, 2010					X	-
Bank Of America Corporation, January 6, 2010	+	i7		ORD. BUS OPS. (PROP RE TERMINATING ACCEPTANCE OF CERTAIN ID CARDS)-PROP RE CUSTOMER RELATIONS OR SALE OF PARTICULAR SERVICES GENERALLY EXCLUDABLE		
Eastman Chemical Company, January 6, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
Fortune Brands, Inc., January 6, 2010	+	i2		VIO. STATE LAW (PROP REQUESTS BOD TO UNDERTAKE TO ALLOW SHLDERS TO VOTE ON WRITTEN CONSENT)		
Mattel, Inc., January 6, 2010	+	i12(i)		SUBST SAME AS PRIOR INCLUDED PROPOSAL (PROP TO ELIM COMP >$500K)		
NiSource, Inc., January 6, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
NiSource Inc., February 22, 2010					X	-
SunTrust Banks, Inc., January 6, 2010	+	i3		VAGUE & INDEF (RE REQUIRE CHMN TO BE INDEP DIR, **BUT REFERS TO ONE SECTION OF B/LAWS AND QUOTES FROM ANOTHER SECTION OF BYLAWS**)		
SunTrust Banks, Inc., February 12, 2010					X	-
Verizon Communications Inc., January 6, 2010	+	8b, 8f	14d			
Verizon Communications Inc., January 6, 2010	-	8b, 8f, i3		**NOT** V&INDEF AND ELIGIBILITY DEMONSTRATED (PROP REQUEST EEO POLICY TO PROHIBIT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY OR EXPRESSION)		
CSX Corporation, January 5, 2010	+	e2	120d	REC'D AFTER DEADLINE FOR PROPOSALS		
CVS Caremark Corporation, January 5, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
CVS CaremarkCorporation, January 26, 2010					X	-
AT&T Inc., January 4, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
Citigroup Inc., January 4, 2010	+	8b, 8f	14d			
Honeywell International Inc., January 4, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **20%** V. 10% TO CALL SPECIAL MTING)		
Honeywell International Inc., January 26, 2010					X	-
International Business Machines Corporation, January 4, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (PROP REQUESTS PERIODIC REPTS ON "SMARTER PLANET" INITIATIVE)		
Medco Health Solutions, Inc., January 4, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **40%** V. 10% TO CALL SPECIAL MTING)		
Medco Health Solutions, Inc., January 26, 2010					X	-
Mylan Inc., January 4, 2010	W					
Safeway Inc., January 4, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
Safeway, Inc., January 26, 2010					X	-
Apache Corporation (no response)				**APACHE CORP. FILED PER 8(j) AND SUED JOHN CHEVEDDEN TO EXCLUDE THE PROPOSAL**		

Number of N/A Requests withdrawn ("W") =	35
Number of N/A Requests Granted ("+") =	198
Percentage of N/A Requests Granted =	**74%**
Number of N/A Requests Denied ("-") =	70
Percentage of N/A Requests Denied =	**26%**

Number of Appeals for Reconsideration or Requests to Refer to Full Commission ("X") =	38	
Appeals Granted ("+") =	2	
Percentage of Appeals Granted =	**5%**	
Appeals Denied ("-") =	36	
Percentage of Appeals Denied =	**95%**	
Number of N/A Requests in which company was denied waiver of 80-day req't ("-") =		12
Number of N/A Requests in which company was granted a waiver of 80-day req't ("+") =		11

ISSUER NAME AND DATE	OUT-COME	14a-8(x)	TIMING	ACTION SHAREHOLDER SOUGHT/REASON FOR NO-ACTION/REASON FOR DENIAL	APPEAL	OUTCOME	80-DAY WAIVER
Citigroup Inc., January 27, 2010	+	8b, 8c, 8f	14d	BUT DEFICIENCY NOTICE FROM CITI SENT TO WRONG ADDRESS-PROPONENT GIVEN 7D TO CURE			
Pfizer Inc., January 20, 2010	-	8b, 8f	14d	CAN'T EXCLUDE SHLDER 'C DIDN'T ADDRESS CLAIM THAT PROP'S BROKER PROVIDED VERIFICATION OF ELIGIBILITY			
Continental Airlines, Inc., February 22, 2010	+	8b, 8f	14d				
Merck & Co., Inc., February 22, 2010	+	8b, 8f	14d				
Merck & Co., Inc., February 19, 2010	+	8b, 8f	14d				
Merck & Co., Inc., February 19, 2010	+	8b, 8f	14d				
Merck & Co., Inc., February 16, 2010	+	8b, 8f	14d				
AMR Corporation, February 12, 2010	+	8b, 8f	14d	FAILED TO RESPOND TO REQUEST TO PROVE 8b OWNERHSIP			
AMR Corporation, February 12, 2010	+	8b, 8f	14d				
Pioneer Natural Resources Company, February 12, 2010	+	8b, 8f	14d				
State Bancorp, Inc., February 5, 2010	+	8b, 8f	14d	DID NOT RESPOND TO REQUEST			
Intel Corporation, February 3, 2010	+	8b, 8f	14d				
E.I. du Pont de Nemours and Company, February 1, 2010	+	8b, 8f	14d				+
Comcast Corporation, January 29, 2010	+	8b, 8f	14d	DID NOT RESPOND TO REQUEST			+
Union Pacific Corporation, January 29, 2010	+	8b, 8f	14d				-
International Paper Company, January 28, 2010	+	8b, 8f	14d				
Exxon Mobil Corporation, January 27, 2010	+	8b, 8f	14d				-
General Dynamics Corporation, January 27, 2010	+	8b, 8f	14d				
CIGNA Corporation, January 26, 2010	+	8b, 8f	14d				
Frontier Communications Corporation, January 26, 2010	+	8b, 8f	14d				
Aetna Inc., January 25, 2010	+	8b, 8f	14d				
Frontier Communications Corporation, January 25, 2010	+	8b, 8f	14d	PROP DID NOT RESPOND TO REQUEST			+
International Business Machines Corporation, January 22, 2010	+	8b, 8f	14d				-
Central Pacific Financial Corp., January 20, 2010	+	8b, 8f	14d				-
Pfizer, Inc., January 12, 2010	+	8b, 8f	14d				+
EQT Corporation, January 11, 2010	+	8b, 8f	14d				
Fluor Corporation, January 11, 2010	+	8b, 8f	14d				
Pfizer Inc., January 11, 2010	+	8b, 8f	14d				
Reynolds American Inc., January 8, 2010	+	8b, 8f	14d				
Gannett Co., Inc. , January 7, 2010	+	8b, 8f	14d				
Verizon Communications Inc., January 6, 2010	+	8b, 8f	14d				+
Citigroup Inc., January 4, 2010	+	8b, 8f	14d				
Union Pacific Corporation, March 5, 2010	+	8b, 8f	14d				-
IDACORP Inc., March 4, 2010	+	8b, 8f	14d				
EMC Corporation, February 26, 2010	+	8b, 8f	14d				
Great Plains Energy Incorporated, June 17, 2010	+	8b, 8f	14d				-
Yahoo! Inc., April 2, 2010	+	8b, 8f	14d				
The Western Union Company, March 10, 2010	+	8b, 8f	14d				
Verizon Communications Inc., February 12, 2010	-	8b, 8f, i10		SUBST. IMPLEMENTED (RE INITIATE PROCESS TO ADOPT AND DISCLOSE SUCCESSION PLANNING POLICY)			
Verizon Communications Inc., January 6, 2010	-	8b, 8f, i3		**NOT** V&INDEF AND ELIGIBILITY DEMONSTRATED (PROP REQUEST EEO POLICY TO PROHIBIT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY OR EXPRESSION)			
Omnicom Group Inc., March 11, 2010	-	8b,8f,i6		**NOT** BEYOND BOD TO "INITIATE THE APPROPRIATE PROCESS" TO AMEND CHARTER DOCS TO ALLOW NOMINEES TO BE ELECTED BY MAJ OF VOTES CAST			
Virtual Radiologic Corporation, March 9, 2010	-	8c		**NOT** SUBMITTED ON BEHALF OF ANOTHER			
The Boeing Company, February 6, 2010	-	8c		**3 PROPOSALS** (1-COMPENSATION; 2- SPECIAL MTINGS; 3-INDEP BOD CHRMN)			
PG&E Corporation, March 11, 2010	+	8c		**2 PROPOSALS** (LICENSE RENEWAL DISTINCT FROM PROP TO MITIGATE RISKS & PRODUCTION LEVELS			
PSB Group, Inc., February 23, 2010	+	8c		**ONE PROPOSAL LIMIT** (APPLIES COLLECTIVELY TO EVERYONE WITH AN INTEREST IN SAME STK)			
Safeway Inc., March 17, 2010	-	8c,i3,i6,i10		ONLY 1 PROPOSAL; **NOT** VAGUE AND INDEFINITE AND CO. CAN ACT; **NOT** IMPLEMTED			
Danaher Corporation, January 19, 2010	+	8d, 8f	500words				
Halliburton Company, January 21, 2010	-	8e, 8f, h3		**NOT** EXCLUDABLE 'C DIDN'T SEND DEFICIENCY NOTICE; NOR 'C SUBSTANTIALLY SIMILAR TO PROPOSALS WHERE REP DID NOT APPEAR AT AM (PROP RE TO A REPT)			
UAL Corporation, March 11, 2010	+	8f	1yr hold	DIDN'T SATISFY THRESHOLD OWNERSHIP REQ'T FOR 1 YR.			

Intel Corporation, March 8, 2010	+	8f	500words	PERCENT SYMBOL AND DOLLAR SIGN COUNTS AS A SEPARATE WORD.		
News Corporation, July 27, 2010	-	b,f		EXEC COMP		
Smithfield Foods, Inc., July 1, 2010	-	b,f		NO REQUEST FOR PROOF OF B/0		
Smithfield Foods, Inc., June 24, 2010	-	b,f		ENVIRONMENTAL (GREENHOUSE EMISSIONS)		
Devon Energy Corporation, April 20, 2010	-	b,f	80d	CO. DIDN'T TIMELY OBJECT		
Staples, Inc., April 2, 2010	-	b,f		INTRODUCING BROKER LTR OKAY AS STTMT OF RECORD HOLDER		
Caterpillar Inc., March 31, 2010	-	b,f		CUSTODIAN LTR OKAY AS STTMT OF RECORD HOLDER		
Union Pacific Corporation, March 26, 2010	-	b,f	80d	CO. DIDN'T TIMELY OBJECT (SIMPLE MAJ. VOTING)		
Omnicom Group Inc., March 29, 2010	-	b,f,i2,i3,i6		CHANGING SUPER MAJORITY REQ'TS NOT VIO OF STATE LAW,FAL&MSLD,BEYOND BOD		
Streamline Health Solutions, Inc., March 23, 2010	+	c		MORE THAN ONE PROPOSAL (RE #OF DIR., DIR. INDEPENDENCE, VOTING THRESHOLD)		
Abercrombie & Fitch Co., April 12, 2010	-	d,i7,i10		SIGNIFICANT POLICY (HUMAN RIGHTS)		
Halliburton Company, February 12, 2010	-	e2		**PROPONENT ATTEMPTED TIMELY DELIVERY/RESPONSE**		
Merck & Co., Inc., May 4, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
PetSmart, Inc., April 27, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
BioSpecifics Technologies Corp., April 5, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
Mentor Graphics Corporation, April 5, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
Altria Group, Inc., April 2, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS (SENT TO EMAIL ADD OF FORMER SEC.)		
Great Plains Energy Incorporated, April 1, 2010	+	e2	120d	REC'D AFTER DEADLINE FOR PROPOSALS		
Wal-Mart Stores, Inc., March 26, 2010	+	e2	120d	REC'D AFTER DEADLINE FOR PROPOSALS		
Wal-Mart Stores, Inc., March 26, 2010	+	e2	120d	REC'D AFTER DEADLINE FOR PROPOSALS		
Medco Health Solutions, Inc., March 12, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
Bank of America Corporation, March 1, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
International Business Machines Corporation, February 22, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
Great Plains Energy Incorporated, February 4, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
American Express Company, February 2, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
Portland General Electric Company, January 28, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
Johnson & Johnson, January 13, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
CSX Corporation, January 5, 2010	+	e2	120d	REC'D AFTER DEADLINE FOR PROPOSALS		
AT&T Inc., January 4, 2010	+	e2		REC'D AFTER DEADLINE FOR PROPOSALS		
E.I. du Pont de Nemours and Company, February 16, 2010	+	h3		EXCLUDABLE 'C PROPONENT W/O GD CAUSE FAILED TO APPEAR & PRESENT PROP AT EARLIER AM)		
State Street Corporation, February 3, 2010	+	h3		EXCLUDABLE 'C PROPONENT W/O GD CAUSE FAILED TO APPEAR & PRESENT PROP AT EARLIER AM)		
Entergy Corporation, January 12, 2010	+	h3		EXCLUDABLE 'C PROPONENT W/O GD CAUSE FAILED TO APPEAR & PRESENT PROP AT EARLIER AM)		
XTO Energy Inc., March 4, 2010	+	i1		VIO. OF STATE LAW **('C ADVISORY VOTE RE COMP NOT PROPER AT THE SPECIAL MTING)**		
The First Bancorp, Inc., February 25, 2010	+	i1		**CURABLE DEFECT** (RE RECAST AS REQUEST TO BOD INSTEAD OF DEMAND FOR REDUCTION IN # OF PREF. SH)		
Bank of America Corporation, February 24, 2010	+	i1		**CURABLE DEFECT** (RECAST AS REQUEST TO BOD INSTEAD OF DEMAND FOR REPT WHICH IS IMPROPER SUBJ FOR SHLDER ACTION UNDER STATE LAW		
The Boeing Company, January 29, 2010	+	i1		**CURABLE DEFECT**(REPT ON REVIEW OF CODE OF CONDUCT RE ETHICAL CRITERIA FOR MILITARY CONTRACTS)-REVISE AS REQUEST OR RECOMMENDATION TO BOD		
Marathon Oil Corporation, January 8, 2010	-	i1, i2		**NOT** VIO. OF STATE LAW (PROP SEEKS ADVISORY SAY ON PAY VOTE OF COMP REPT & POLICIES)		
Gilead Sciences, Inc., February 19, 2010	-	i1,i2, i3,i6		RE REQUEST TO BOD TO TAKE STEPS TO CHG SUPER MAJ. TO SIMPLE MAJ IN CHARTER DOCS.		
NiSource, Inc., March 22, 2010	+	i1,i2,i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 3 YRS AFTER TERM)		
Bank of America Corporation, March 2, 2010	-	i10		SUBSTANTIALLY IMPLEMENTED (RE INITIATE PROCESS TO ADOPT AND DISCLOSE SUCCESSION PLANNING POLICY)		
Halliburton Company, February 12, 2010	-	i10		**NOT** SUBSTANTIALLY IMPLEMENTED (PROP TO ALLOW 10% TO CALL SPEC MTING V. 25% REQ'D IN BYLAWS		
Verizon Communications Inc., January 28, 2010	-	i10		**NOT** SUBSTANTIALLY IMPLEMENTED (PROP TO ALLOW 10% TO CALL SPEC MTING V. 25% ALREADY REQ'D IN BYLAWS)		
The Procter & Gamble Company, August 4, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED		
Symantec Corporation, June 3, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED		
Celgene Corporation, April 5, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED		
InterDigital, Inc., March 31, 2010	+	i10		CONFLICTS WITH CO. PROPOSAL		
Wal-Mart Stores, Inc., March 30, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED		
CoBiz Financial Inc., March 22, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (ADVISORY VOTE ON EXEC COMP)		
Exxon Mobil Corporation, March 19, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (MAJ OF SHLDERS TO VOTE BY WRITTEN CONSENT)		
Ensco International plc, March 18, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (CHG SUPER MAJORITY OF SHLDERS TO VOTE TO SIMPLE MAJORITY)		
King Pharmaceuticals, Inc., March 17, 2010	+	i10		PROPOSAL ALREADY REQ'D UNDER STATE LAW		
PG&E Corporation, March 10, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED 'C CO'S GUIDELINES COMPARE FAVORABLY WITH PROP		
NBT Bancorp Inc., March 5, 2010	+	i10		SUBSTANTIALLY DUPLICATIVE OF CO.-SPONSORED AMENDMENT FOR ANNUAL DIR. ELECTION		
Sempra Energy, March 5, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (CHG SUPER MAJORITY REQTS TO SIMPLE MAJORITY VOTING REQTS)		
Exelon Corporation, February 26, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (RE REPT RE POLITICAL CONTRIBUTIONS)		

Mattel, Inc., February 3, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED(REQUEST BOD UNDERTAKE STEPS TO ALLOW SHLDERS VOTE ON WRITTEN CONSENT)			
PG&E Corporation, February 2, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED(REQUEST BOD UNDERTAKE STEPS TO ALLOW SHLDERS VOTE ON WRITTEN CONSENT)			
Express Scripts Inc., January 28, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED(CHG SUPER MAJORITY REQTS TO SIMPLE MAJORITY VOTING REQTS)			
General Electric Company, January 23, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (PROP RE BOD EXPLORE WITH CERTAIN EXEC OFFICERS RENUNICATION OF STK OPTION GRANTS)			
Textron Inc., January 21, 2010	+	i10		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP THAT CO. WILL INCLUDE			
Citigroup Inc., January 19, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (PROP RE BOD TO ADOPT B/LAW TO REQ INDEP LEAD DIR WHENEVER POSSIBLE)			
MDU Resources Group, Inc., January 16, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (ALLOWING SHLDERS TO VOTE ON CHG IN CHARTER TO ALLOW SIMPLE INSTEAD OF SUPER MAJ VOTING)			
Coachmen Industries, Inc., January 14, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED ('C SUBJ MATTER CONCLUDED PRIOR TO AM)			
International Business Machines Corporation, January 4, 2010	+	i10		SUBSTANTIALLY IMPLEMENTED (PROP REQUESTS PERIODIC REPTS ON "SMARTER PLANET" INITIATIVE)			
Pulte Homes, Inc., March 17, 2010	-	i11		**NOT** SUBSTANTIALLY DUPLICATIVE OF 2ND SHLDER'S PROPOSAL (RETAIN EXEC COMP)			
Exxon Mobil Corporation, March 19, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PROPOSAL TO BE INCLUDED IN PROXY			
The Goldman Sachs Group, Inc., March 9, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP TO BE INCLUDED			
JPMorgan Chase & Co., March 5, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP TO BE INCLUDED			
The Boeing Company, February 1, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP THAT CO. WILL INCLUDE			
Honeywell International Inc., January 19, 2010	+	i11		SUBSTANTIALLY DUPLICATIVE OF PREVIOUSLY SUBMITTED PROP THAT CO. WILL INCLUDE			
Mattel, Inc., January 6, 2010	+	i12 (i)		SUBST SAME AS OTHERS (PROP TO ELIM COMP >$500K)			
Abbott Laboratories, January 27, 2010	+	i12 (ii)		SUBST. SAME AS OTHERS(ENCOURAGING TRANSPARENCY RE ANIMAL USED IN RESEARCH AND TESTING)			
Mattel, Inc., January 14, 2010	+	i12(iii)		SUBST SAME AS OTHERS(RE REPT ON WORKING CONDITIONS AT CO. FACILITIES AND ITS VENDORS)			
The Kroger Co., March 31, 2010	+	i12 (ii)		SIMILAR TO PREVIOUS LOSING PROPOSALS			-
Wells Fargo & Company, January 14, 2010	+	**i13**		ORD BUS OPS (RE COMP AND BENEFITS OF TOP 300 OFFICERS NOT TO CHG UNTIL C/S DIV REPAID)			-
Sprint Nextel Corporation, March 4, 2010	-	i2		**NOT** VIO. OF STATE LAW (PROP SEEKS ACTION "TO EXTENT PERMITTED BY LAW")			
CVS Caremark Corporation, March 9, 2010	+	i2		CONFLICT WITH STATE LAW AND COI (REQUIRE CHMN TO BE INDEPENDENT DIR.)			-
Merck & Co., Inc., January 29, 2010	+	i2		WOULD VIO STATE LAW (PROP TO PERMIT MAJORITY VOTE ON WRITTEN CONSENT)			
Occidental Petroleum Corporation, January 20, 2010	+	i2		**CURABLE DEFECT** (PROP WOULD CAUSE BREACH OF EXISTING COMP K'S-7D TO REVISE TO APPLY ONLY TO FUTURE COMP K'S)			
Bank of America Corporation, January 13, 2010	+	i2		WOULD VIO STATE LAW (PROP TO PERMIT MAJORITY VOTE ON WRITTEN CONSENT)			
Fortune Brands, Inc., January 6, 2010	+	i2		VIO. STATE LAW (PROP REQUESTS BOD TO UNDERTAKE TO ALLOW SHLDERS TO VOTE ON WRITTEN CONSENT)			
Bank of America Corporation, March 3, 2010	-	i2, i3, i6		PROP TO ALLOW 10% OF C/S TO CALL SPECIAL MEETINGS)			
Bank of America Corporation, February 16, 2010	-	i2, i3, i6		**NOT** V&INDEF, ETC (RE PROP TO ADOPT A CLAWBACK POLICY FROM PRIOR 5 YRS.)			
The Boeing Company, January 27, 2010	-	i2, i3, i6		PROP TO ALLOW 10% OF C/S TO CALL SPECIAL MEETINGS)			+
Comcast Corporation, March 17, 2010	+	i2, i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 2 YRS AFTER TERM)			
Mylan, Inc., March 12, 2010	+	i2, i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 2 YRS AFTER TERM)			
American Express Company, February 19, 2010	+	i2, i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 2 YRS AFTER TERM)			
Verizon Communications Inc., February 19, 2010	+	i2, i6		**CURABLE DEFECT** (ADOPT POLICY REQ EXEC TO RETAIN SH FOR 2 YRS AFTER TERM)			
Ball Corporation, January 25, 2010	+	i2, i6		VIO. OF STATE LAW (RE REORGANIZE BOD INTO ONE CLASS OF DIR TO BE ANNUALLY ELECTED			
AT&T Inc., February 12, 2010	**+/-**	i2/8c,i3, i10		**2 PROP** 1-ALLOW SHLDER ACTS ON WRITTEN CONSENT-VIO STATE LAW; 2-10% SHLDERS CAN CALL SPEC. MTING.			
DaVita Inc., March 31, 2010	-	i3		NOT VAGUE OR INDEFINITE (ALLOW SHLDERS TO ACT ON WRITTEN CONSENT)			
Raytheon Company, March 31, 2010	-	i3		NOT VAGUE OR INDEFINITE (ALLOW SHLDERS TO ACT ON WRITTEN CONSENT)			
Omnicom Group Inc., March 25, 2010	-	i3		**NOT** VAGUE OR INDEFINITE (REQ SHLDER OK FOR DEATH BENEFIT POLICY)			
Amazon.com, Inc., March 22, 2010	-	i3		**NOT** VAGUE OR INDEFINITE (ALLOW 10% OF SHLDERS TO CALL SPECIAL MTING)			
Xcel Energy Inc., March 19, 2010	-	i3		**NOT** MATERIALLY FALSE AND MISLEADING (ANNUAL ADVISORY SAY ON PAY)			-
Ford Motor Company, March 12, 2010	-	i3		**NOT** VAGUE AND INDEFINITE (RE NOT TO FUND PROJ SOLELY RE CARBON DIOX REDUCTION)			
The Goldman Sachs Group, Inc., March 11, 2010	-	i3		**NOT** FALSE OR MISLEADING (REVIEW EXEC COMP POLICIES AND REPORT)			
Comcast Corporation, March 5, 2010	-	i3		**NOT** VAGUE OR INDEFINITE (AMEND COI TO REQUIRE INDEPEND DIR TO SERVE AS CHMN)			
AT&T Inc., March 2, 2010	-	i3		**NOT** V&INDEF (RE EXCLUDING NON-CASH PENSION CREDITS FROM PERFORM AWARD FORMULA)			
The Allstate Corporation, February 24, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING(RE ALLOW MAJ OR SHLDERS VOTE ON WRITTEN CONSENT)			
Pulte Homes, Inc., February 24, 2010	-	i3		**NOT** V&INDEF (RE AFTER CURRENT EE Ks EXPIRE REQUIRE INDEP DIR. TO SERVE AS CHRMN)			
Sprint Nextel Corporation, February 24, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.			
AT&T Inc., February 23, 2010	-	i3		**NOT** V&INDEF (RE ADVISORY VOTE RE OK OF NAMED EXEC OFFICERS COMP)			
E. I. DuPont de Nemours and Company, February 16, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.			
Exxon Mobil Corporation, February 16, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.			
Allegheny Energy, Inc., February 12, 2010	-	i3		V&INDEFINITE (PROP RE CHMN BE INDEPENDENT AND NOT HAVE SERVED AS CEO)			

The Boeing Company, February 3, 2010	-	i3		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.		
Bank of America Corporation, February 1, 2010	-	i3		**NOT** V&INDEF (SEEKS ANNUAL REPT OF "NON DEDUCTIBLE" AMTS CO PAYS TO SR. EXEC OFFICERS)		
SunTrust Banks, Inc., January 13, 2010	-	i3		**NOT** V&INDEF (PROP FOR BOD TO INITIATE PROCESS TO AMEND CHARTER DOCS TO ALLOW ANNUAL ELECT OF DIR)		
PetSmart, Inc., April 12, 2010	+	i3		VAGUE AND INDEFINITE (BAR ANIMAL PURCH FROM VIO OF "THE LAW")		
JPMorgan Chase & Co., March 5, 2010	+	i3		VAGUE AND INDEFINITE (RE CONTRIBUTIONS USED FOR "GRASSROOTS LOBBYING COMMUNICATIONS")		
Casade Financial Corporation, March 4, 2010	+	i3		VAGUE AND INDEFINITE (RE ELIMINATE "NON-ESSENTIAL EXPENDITURES"...)		
Bank of America Corporation, February 22, 2010	+	i3		VAGUE AND INDEFINITE (RE CREATING COMM ON "US ECONOMIC SECURITY")		
Citigroup Inc., February 22, 2010	+	i3		VAGUE & INDEF (RE CREATE BD COMM ON "US ECONOMIC SECURITY")		
AT&T Inc., February 16, 2010	+	i3		VAGUE & INDEFINITE (RE REP'T ON CONTRIBUTIONS FOR "GRASSROOTS LOBBYING COMMUNICATIONS"		
The Boeing Company, February 5, 2010	+	i3		VAGUE & INDEFINITE (CREATE COMM TO REVIEW POLICIES THAT "WILL FOLLOW THE UNIVERSAL DECLARATION OF HUMAN RIGHTS"		
Citigroup Inc., January 21, 2010	+	i3		VAGUE & INDEF (RE LIMIT NUMBER OF CONSECUTIVE ELECTIONS TO ELECT A DIR TO THE BOD)-NOT CLEAR A CEO NOT ON THE BOD WOULD BE SUBJECT TO SAME TERM LIMITS.		
International Business Machines Corporation, January 13, 2010	+	i3		VAGUE & INDEFINITE (PROP RE TAKING IMMEDIATE CORRECTIVE ACTION)		+
SunTrust Banks, Inc., January 6, 2010	+	i3		VAGUE & INDEF (RE REQUIRE CHMN TO BE INDEP DIR, **BUT REFERS TO ONE SECTION OF B/LAWS AND QUOTES FROM ANOTHER SECTION OF BYLAWS**)		
Verizon Communications Inc., February 22, 2010	-	i3, i10		**NOT** V&INDEF, ETC. (RE SAY ON BONUS, AWARDS, DEATH BENEFITS OF SR. EXEC. OFFICERS)		
Bank of America, January 29, 2010	-	i3, i6		**NOT** V&INDEF OR FALSE&M/LEADING (ADVISORY VOTE TO OK COMP REPT & POLICIES) PROP DID NOT INCLUDE GEN SENTENCE RE ADVISORY VOTE EFFECTIVE WAY FOR HOLDERS TO ADVISE CO.		
JPMorgan Chase & Co., March 19, 2010	-	i3, i7		**NOT** VAGUE AND INDEFINITE; SIGNIFICANT POLICY ISSUE (DERIVATIVES & SYSTEMIC RK)		
PepsiCo, Inc., February 26, 2010	-	i3, i7		NOT F&MLEADING NOR ORD BUS OPS **(** RE REPT RE GENERAL POLITICAL ADVOCACY ACTIVITIES NOT MICROMGING)		
The Allstate Corporation, February 5, 2010	-	i3, i7		**NOT** V&INDEF, MICROMANAGING (PROP RE REVIEW & REPT ON EXEC COMP POLICIES)		
PPG Industries, Inc., January 15, 2010	-	i3, i7		**NOT** V&INDEF OR ORD. BUS OPS. (REPT HOW RESPONSIBLY DISCLOSES ENVIRON IMPACTS WHERE IT OPERATES)		
SunTrust Banks, Inc., January 13, 2010	-	i3, i7		**NOT** V&INDEF, ORD. BUS OPS. (REQT FOR BOD REPT RE ENVIRON & SOCIAL IMPACT OF CO BUS STRATEGIES TO ADDRESS CLIMATE CHANGE.)-I.E., **SIGNIFICANT SOCIAL POLICY ISSUE**		
Chesapeake Energy Corporation, April 13, 2010	-	i3, i7, i10		ENVIRONMENTAL (NOT MATERIALLY FALSE)		
Cascade Financial Corporation, February 22, 2010	-	i3, i7, i10		**NOT** V&INDEF, ORD. BUS OPS, ETC. (PROHIBIT BONUSES TO EXEC. OFFICERS UNTIL TARP REPD AND DIV RESTORED)		
The McGraw-Hill Companies, Inc., February 24, 2010	-	i3, i9		**NOT** V&INDEF OR FALSE&M/LEADING(RE ALLOW MAJ OR SHLDERS VOTE ON WRITTEN CONSENT)		
Cascade Financial Corporation, February 22, 2010	-	i3, i9		**NOT** V&INDEF (PROP RE REDUCING SALARY 25% FOR ANYONE >$150K UNTIL TARP REPAID AND C/SHLDERS DIVIDENDS RESTORED)-**NOT LTD TO SR. EXEC OFFICERS**		
Verizon Communications Inc., January 21, 2010	-	i3, i9		**NOT** V&INDEF (PROP. RE ADOPT POLICY TO ALLOW STK OPTIONS OF SR. EXEC. OFFICERS TO VEST IFF TOTAL SHLDER RETURN >= PERFORMANCE OF PEERS		
The Kroger Co., April 12, 2010	-	i3,i10		**NOT** SUBST. IMPLEMENTED ('C DOESN'T COMPARE FAVORABLY)		
Chesapeake Energy Corporation, April 2, 2010	-	i3,i7		ENVIRONMENTAL (SUSTAINABILITY REPT)		
Wal-Mart Stores	-	i5,i7		SIGNIFICANT POLICY (HUMANE TREATMENT); SIGNIFICANTLY RELATED		
Cleco Corporation, January 29, 2010	-	i6		DOES NOT LACK AUTH (REQUESTS BOD TAKE STEPS TO ELIMINATE CLASSES OF DIR AND ELECT ANNUALLY)		
The Goldman Sachs Group, Inc., March 25, 2010	+	i6		BEYOND POWER OF BOD TO IMPLEMENT BASED ON CRITERIA IN PROPOSAL		
Omnicom Group Inc., March 24, 2010	+	i6		BEYOND POWER OF BOD TO AMEND BLAWS (ONLY SHLDERS CAN)		
Allegheny Technologies Incorporated, March 1, 2010	+	i6		NOT W/I POWER OF BOD TO ENSURE DIR INDEPENDENCE "AT ALL TIMES" & NO CURE IF VIO)		
Time Warner, Inc., February 22, 2010	+	i6		NOT FEASIBLE FOR BD TO ENSURE CONTINUOUS COMLIANCE AND NO CURE MECHANISM (PROHIBIT CURRENT OR FORMER CEO'S ON COMP COMM.)		
Honeywell International Inc., February 18, 2010	+	i6		**CURABLE DEFECT** (NOT FEASIBLE FOR BD TO ENSURE CONTINUOUS COMLIANCE AND NO CURE MECHANISM (PROHIBIT CURRENT OR FORMER CEO'S ON COMP COMM.)		
Verizon Communications Inc., February 18, 2010	+	i6		NOT FEASIBLE FOR BD TO ENSURE CONTINUOUS COMLIANCE AND NO CURE MECHANISM (PROHIBIT CURRENT OR FORMER CEO'S ON COMP COMM.)		
Time Warner Inc., January 26, 2010	+	i6		INFEASIBLE FOR BOD TO IMPLEMENT (PROP FOR BOD TO AMEND BYLAWS TO REQ CHMN TO BE INDEP.) NO MECHANISM TO CURE		
Exxon Mobil Corporation, January 21, 2010	+	i6		INFEASIBLE FOR BOD TO IMPLEMENT (PROP FOR BOD TO AMEND BYLAWS TO REQ CHMN TO BE INDEP.) NO MECHANISM TO CURE		
First Mariner Bancorp, January 8, 2010	+	i6		INFEASIBLE FOR BOD TO IMPLEMENT (PROP FOR BOD TO ADOPT POLICY TO REQ SPLIT BETW CHMN & CEO)		

Noble Romans, Inc., March 12, 2010	+	i6, 8c		**2 PROPOSALS:** REQ. MAJ OF EXISTING DIR BE INDEPENDENT; CHAIR BE INDEPENDENT-BEYOND BOD; LIMITED TO 1 PROPOSAL PER MTING IF CO FILES STTMT OF REASONS TO OMIT SHLDER SUBMITS 2 PROPOSAL		
Wal-Mart Stores, Inc., March 29, 2010	-	i7		NOT MICROMGMT (REPT RE POLITICAL ACTIVITIES)		
Ultra Petroleum Corp., March 26, 2010	-	i7		NOT MICROMGMT (REPT RE ENVIRONMENTAL IMPACTS)		
Citigroup Inc., February 23, 2010	-	i7		**SIGNIFICANT POLICY ISSUE** (POLICIES RE COLLATERALIZATION OF DERIVATES & SYS RISK)		
Wells Fargo & Company, February 19, 2010	-	i7		**NOT** ORD. BUS OPS. (PROP REQUESTS LIST ON WEBSITE OF CONTRIBUTIONS >$5K)		
EOG Resources, Inc., February 3, 2010	-	i7		**NOT** ORD. BUS OPS. (RE ENVIRONMENTAL IMPACT REPT NOT MICROMGMT)**I.E., SUBSTANTIAL POLICY ISSUE**		
Cabot Oil & Gas Corporation, January 28, 2010	-	i7		**NOT** ORD. BUS OPS. (RE ENVIRONMENTAL IMPACT REPT RE FRACTURING NOT MICROMGMT)**I.E., SUBSTANTIAL POLICY ISSUE**		
Norfolk Southern Corporation, January 15, 2010	-	i7		**NOT** ORD BUS OPS. OR MICROMANAGING (ADOPT GOALS TO REDUCE GREENHOUSE EMISSIONS)		
General Mills, Inc., July 2, 2010	+	i7		LIMIT SODIUM FOR FLAVOR		
CB Richard Ellis Group, Inc., April 15, 2010	+	i7		ORD. BUS. OPS (EXT. REPT RE ANNUAL BUDGET)		
Target Corporation, March 31, 2010	+	i7		ORD. BUS OPS. (RE CHARITABLE CONTRIBUTIONS TO SPECIFIC ORGANIZATIONS GEN EXCL.)		
Wal-Mart Stores, Inc., March 30, 2010	+	i7		ORD. BUS. OPS (SALE OF PARTICULAR PRODUCTS GENERALLY EXCLUDABLE)		
Wal-Mart Stores, Inc., March 26, 2010	+	i7		ORD. BUS. OPS (SALE OF PARTICULAR PRODUCTS AND SERVICES GENERALLY EXCLUDABLE)		
Comcast Corporation, March 18, 2010	+	i7		ORD. BUS. OPS (ADOPT POLICY TO PROMOTE FREE AND OPEN INTERNET)/NOT SIGNIFICANT SOCIAL POLICY		
Lowe's Companies, Inc., March 18, 2010	+	i7		ORD. BUS. OPS (RE MANNER IN WHICH SELL PARTICULAR PRODUCTS GEN EXCLUDABLE)		
Northrop Grumman Corporation, March 18, 2010	+	i7		ORD. BUS. OPS (RE PROCEDURES TO TERMINATE EMPLOYEES GEN EXCLUDABLE)		
Marriott International, Inc., March 17, 2010	+	i7		ORD. BUS. OPS (USE FLOW CONTROL SHOWERHEADS) --MICROMANAGES		
JPMorgan Chase & Co., March 16, 2010	+	i7		ORD. BUS. OPS (ADOPT POLICY TO STOP ISSUING REFUND ANTICIPATION LOANS)		
Sprint Nextel Corporation, March 16, 2010	+	i7		ORD. BUS. OPS (CAN EXCLUDE PROPS RE ADHERENCE TO ETHICS PRACTICES AND CONDUCT COMPLIANCE PROGS.		
Goldman Sachs Group, Inc., March 12, 2010	+	i7		ORD. BUS OPS (RE GENERAL EMPLOYEE COMPENSATION MATTERS GENERALLY EXCLUDABLE)		
The Home Depot, Inc., March 12, 2010	+	i7		ORD. BUS OPS. (RE SALE OF PARTICULAR PRODUCTS GENERALLY EXCLUDABLE)		
JPMorgan Chase & Co., March 12, 2010	+	i7		ORD. BUS OPS. RE ASSESS AND PROHIBIT LOANS FOR MOUNTAIN TOP REMOVAL COAL MINING OF CLIENTS (RE CUSTOMER RELATIONS/SALE OF PRODS GENERALLY EXCLUDABLE)		
Sprint Nextel Corporation, March 12, 2010	+	i7		ORD. BUS OPS. (ADOPT POLICY TO PROMOTE OPEN INTERNET-NOT SIGN POLICY ISSUE)		
Central Federal Corporation, March 8, 2010	+	i7		ORD. BUS OPS. (RE EXPLORE ALTS TO MAX VALUE IN EXTRA ORD AND ORD DEALS GEN EXCL.)		
Alaska Air Group, Inc., March 8, 2010	+	i7		ORD. BUS OPS. (RE DECISIONS RELATING TO VENDOR RELATIONSHIPS GEN EXCLUDABLE)		
Goldman Sachs Group, Inc., March 8, 2010	+	i7		ORD. BUS OPS. (RE GENERAL EMPLOYEE COMPENSATION MATTERS GEN. EXCLUDABLE)		
JPMorgan Chase & Co., March 5, 2010	+	i7		ORD BUS OPS. (RE SELECTION & MGMT OF ENGAGEMENT OF INDEP. AUDITORS GEN EXCL.)		
Yum! Brands, Inc., March 5, 2010	+	i7		ORD BUS OPS. (RE LEGAL COMPLIANCE PROGRAM-VERIFY SSN/E-VERIFY GENERALLY EXCLUDABLE)		
Casade Financial Corporation, March 4, 2010	+	i7		**CURABLE DEFECT** (RE SEVERANCE PYMTS TO ALL OR ONLY SR. EXEC OFFICERS)		
Wells Fargo & Company, March 4, 2010	+	i7		ORD BUS OPS. (RE GENERAL EMPLOYEE COMP (EVEN IF LTD TO TOP 100) GEN EXCL.)		+
Verizon Communications, Inc., March 2, 2010	+	i7		ORD. BUS OPS. (RE POLICY ON NET NEUTRALITY) NOT SIGNIFICANT SOCIAL POLICY		
AT&T Inc., March 1, 2010	+	i7		ORD. BUS OPS. (RE POLICY ON NET NEUTRALITY) NOT SIGNIFICANT SOCIAL POLICY		
Ford Motor Company, March 1, 2010	+	i7		ORD. BUS OPS. (RE METHOD TO DISTRIBUTE OR PRESENT INFO TO SHLDERS GEN EXCL.)		
Bank of America Corporation, February 26, 2010	+	i7		ORD BUS OPS. (RE COMP TO EES GENERALLY (TOP 100) NOT SR. EXEC O&D ONLY)+ DOES NOT FOCUS ON RELATIONSHIP BETWEEN COMP PRACTICES AND EXCESSIVE RISK TAKING.		
Cascade Financial Corporation, February 25, 2010	+	i7		ORD. BUS OPS. (PROP RE GENERAL EMPLOYEE COMP (NOT SR. EXEC O&D) GEN EXCL)		
CVS Caremark Corporation, February 25, 2010	+	i7		ORD. BUS OPS. (PROP RE SALE OF PARTICULAR PRODS GEN EXCLUDABLE)		
JPMorgan Chase & Co., February 25, 2010	+	i7		ORD BUS OPS. (RE COMP TO EES GENERALLY (TOP 100) NOT SR. EXEC O&D ONLY)+ DOES NOT FOCUS ON RELATIONSHIP BETWEEN COMP PRACTICES AND EXCESSIVE RISK TAKING.		
Bank of America Corporation, February 24, 2010	+	i7		ORD. BUS OPS. RE ASSESS AND PROHIBIT LOANS FOR MOUNTAIN TOP REMOVAL COAL MINING OF CLIENTS (RE CUSTOMER RELATIONS/SALE OF PRODS GENERALLY EXCLUDABLE)		
PepsiCo, Inc., February 24, 2010	+	i7		ORD. BUS OPS. PROP RE CHARITABLE CONTRIBS DIRECTED TO SPEC ORGANS GEN EXCLUDABLE)		+
Cascade Financial Corporation, February 22, 2010	+	i7		ORD. BUS OPS. (FREEZE SALARIES OF STAFF >$100K UNTIL TARP REPD & DIV. RESTORED)-**NOT LTD TO SR. EXEC OFFICERS**		
Comcast Corporation, February 22, 2010	+	i7		ORD. BUS OPS. (ELIM. COMP >$500K FOR ANYONE IN MGMT)-**NOT LTD TO SR. EXEC OFFICERS**		
Johnson & Johnson, February 22, 2010	+	i7		ORD. BUS OPS. (RE CK SSN/E-VERIFY) PROP RE LEGAL COMPLIANCE PROG GEN EXCLUDABLE		
The Coca-Cola Company, February 17, 2010	+	i7		ORD. BUS OPS. (REP'T RE POLICY OPTIONS RE BOTTLED WATER)-CUST RELATIONS & PROD. QUALITY GEN EXCLUDABLE		
Exxon Mobil Corporation, February 16, 2010	+	i7		ORD. BUS OPS. (PROP TO LIMIT COMP >$500K TO "MGMT" NOT LTD TO SR. EXEC. OFFICERS)		
Occidental Petroleum Corporation, February 5, 2010	+	i7		ORD. BUS OPS. (ADOPT POLICY TO DISTRIBUTE RESTTMTS IN SAME MANNER AS ORIGLLY DIST)-PROPOSALS RE METHOD TO DISTRIB FIN OR PRESENT INFO GEN EXCLUDABLE		

Masco Corporation, January 13, 2010	+	i7		ORD. BUS OPS. (RE LIMITING ENGMNT OF AUDITORS TO 5 YRS)-PROP RE SELECTION & MGMT OF ENGMNT GEN EXCLUDABLE		
Oak Valley Bancorp, January 13, 2010	+	i7		ORD. BUS OPS. (RE "MAKE EVERY EFFORT TO REPAY" TARP DEBT)-PROP RE MGMT OF COS. ASSETS AND OBLIGATIONS GENERALLY EXCLUDABLE		
International Business Machines Corporation, January 7, 2010	+	i7		ORD. BUS OPS. (RE RESTATE & ENFORCE ETHICAL BEHAVIOR)-PROP RE GEN ADHERENCE TO ETHICAL COMPLIANCE PRACTICES GENERALLY EXCLUDABLE		
Bank Of America Corporation, January 6, 2010	+	i7		ORD. BUS OPS. (PROP RE TERMINATING ACCEPTANCE OF CERTAIN ID CARDS)-PROP RE CUSTOMER RELATIONS OR SALE OF PARTICULAR SERVICES GENERALLY EXCLUDABLE		
Marriott International, Inc., March 12, 2010	+	i8		CAN EXCLUDE PROPS RE Q OF BUS JDGMT OF BD MEMBER UP FOR REELECTION		
Del Monte Foods Company, June 3, 2010	+	i9		BOD ACTION (CONFLICTS WITH CO. PROPOSAL)		
SUPERVALU INC., April 20, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL		
Caterpillar Inc., March 30, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (CHANGING SUPER MAJORITY REQ'TS)		
Raytheon Company, March 29, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (SP. MTING CAN BE CALLED BY % OF SHLDERS)		
Lowe's Companies, Inc., March 22, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (SP. MTING CAN BE CALLED BY % OF SHLDERS)		
International Paper Company, March 11, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (10% V. 20% SHLDER VOTE NEC TO CALL SP SHLDER MTING		
Genzyme Corporation, March 1, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **40%** V. 10% TO CALL SPECIAL MTING)		
Pinnacle West Capital Corporation, March 1, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
Liz Claiborne, Inc., February 25, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **35%** V. 10% TO CALL SPECIAL MTING)		
Allergan, Inc., February 22, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (CHG SUPER MAJORITY REQTS TO SIMPLE MAJORITY VOTING REQTS)		
The Charles Schwab Corporation, February 19, 2010	+	i9		CONFLICTS WITH CO. PROP RE EXEC. BONUS PLAN FOR SR. EXEC. OFFICERS		
Chevron Corporation, February 6, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **15%** V. 10% TO CALL SPECIAL MTING)		
Goldman Sachs Group, February 3, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
Time Warner Inc., January 29, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **15%** V. 10% TO CALL SPECIAL MTING)		
Bristol-Myers Squibb Company, January 28, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
The Dow Chemical Company, January 27, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
The Charles Schwab Corporation, January 19, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE PAY FOR PERFORMANCE BASED ON PEERS POLICY)		
Dominion Resources, Inc., January 19, 2010	+	i9		CONFLICTS WITH CO. PROP (RE CHG CHARTER TO ALLOW SIMPLE INSTEAD OF SUPER MAJ VOTING)		
Eastman Chemical Company, January 6, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
NiSource, Inc., January 6, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
CVS Caremark Corporation, January 5, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
Honeywell International Inc., January 4, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **20%** V. 10% TO CALL SPECIAL MTING)		
Medco Health Solutions, Inc., January 4, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **40%** V. 10% TO CALL SPECIAL MTING)		
Safeway Inc., January 4, 2010	+	i9		CONFLICTS WITH CO. PROPOSAL (RE ALLOW **25%** V. 10% TO CALL SPECIAL MTING)		
Hewlett Packard Company, July 28, 2010	+		14d			
R.R. Donnelley & Sons Company, March 23, 2010	+			NO ACTION LETTER CANNOT BE RETRIEVED.		
Medtronic, Inc., May 17, 2010	W					
Chevron Corporation, April 1, 2010	W			HUMAN RIGHTS		
Yahoo! Inc., March 24, 2010	W					
Continental Airlines, Inc., March 22, 2010	W					
Intel Corporation, March 12, 2010	W					
Ultra Petroleum Corp., March 12, 2010	W					
InterDigital, Inc., March 11, 2010	W					
Comcast Corporation, March 9, 2010	W					
JPMorgan Chase & Co., March 8, 2010	W					
Freeport-McMoRan Copper & Gold Inc., March 4, 2010	W					
The Allstate Corporation, March 3, 2010	W					
Henry Schein, Inc., February 19, 2010	W					
Wal-Mart Stores, Inc., February 19, 2010	W					
Wal-Mart Stores, Inc., February 19, 2010	W					
Range Resources Corporation, February 18, 2010	W					
Questar Corporation, February 17, 2010	W					
NYSE Euronext, February 16, 2010	W					
Exxon Mobil Corporation, February 12, 2010	W					
The Goldman Sachs Group, Inc., February 12, 2010	W			CO. TO INCLUDE PROPOSAL IN PROXY.		
The Goldman Sachs Group, Inc., February 12, 2010	W					
Xcel Energy Inc., February 12, 2010	W					
JPMorgan Chase & Co., February 4, 2010	W					

Energen Corporation, February 2, 2010	W					
Alpha Natural Resources, Inc., February 1, 2010	W					
Range Resources Corporation, January 28, 2010	W					
Yum! Brands, Inc., January 21, 2010	W					
Brocade Communications Systems, Inc., January 15, 2010	W					
Brocade Communications Systems, Inc., January 14, 2010	W					
Abbott Laboratories, January 12, 2010	W					
EOG Resources, Inc., January 11, 2010	W					
McDermott International, Inc., January 8, 2010	W					
Bristol-Myers Squibb Company, January 7, 2010	W			CO TO PROVIDE PROP IN PROXY MATERIALS		
Google, Inc., January 7, 2010	W					
Mylan Inc., January 4, 2010	W					
Medtronic, Inc., May 13, 2010						
Altria Group, Inc., April 20, 2010						
R.R. Donnelley & Sons Company, April 5, 2010					X	-
Amazon.com, Inc., April 7, 2010				**GRANTED RECONSIDERATION 'C VAGUE WHAT "RIGHTS" PROPOSAL SEEKS TO REGULATE**	X	+
Marriott International, Inc., April 19, 2010					X	-
Sprint Nextel Corporation, April 20, 2010					X	-
The Western Union Company, March 19, 2010					X	-
JPMorgan Chase & Co., March 26, 2010					X	-
Verizon Communications Inc., March 12, 2010					X	-
AT&T Inc., March 12, 2010					X	-
EMC Corporation, March 10, 2010					X	-
The McGraw-Hill Companies, Inc., March 17, 2010					X	-
Comcast Corporation, March 23, 2010					X	-
International Business Machines Corporation, March 24, 2010					X	-
Merck & Co., Inc., March 29, 2010					X	-
Merck & Co., Inc., March 29, 2010					X	-
The Coca-Cola Company, March 3, 2010				SEC CONSIDERS ISSUES RE BOTTLED WATER ORD BUS, NOT SIGNIFICANT SOCIAL POLICY ISSUE	X	-
AT&T Inc., March 2, 2010					X	-
E.I. du Pont de Nemours and Company, March 16, 2010					X	-
Exxon Mobil Corporation, March 23, 2010					X	-
Halliburton Company, March 19, 2010					X	-
Halliburton Company, March 19, 2010					X	-
Chevron Corporation, March 1, 2010					X	-
Goldman Sachs Group, Inc., February 22, 2010					X	-
Bank of America Corporation, March 8, 2010					X	-
Time Warner Inc., March 23, 2010					X	-
Ball Corporation, March 12, 2010					X	-
Exxon Mobil Corporation, March 23, 2010					X	-
Pfizer Inc., February 22, 2010				RECONSIDERATION GRANTED ON PROOF THAT PROP FAILED TO PROVE ELIGIBILITY IN 14D	X	+
Dominion Resources, Inc., March 29, 2010					X	-
Bank of America Corporation, February 11, 2010					X	-
Entergy Corporation, March 16, 2010					X	-
International Business Machines Corporation, February 22, 2010					X	-
NiSource Inc., February 22, 2010					X	-
SunTrust Banks, Inc., February 12, 2010					X	-
CVS CaremarkCorporation, January 26, 2010					X	-
Honeywell International Inc., January 26, 2010					X	-
Medco Health Solutions, Inc., January 26, 2010					X	-
Safeway, Inc., January 26, 2010					X	-
Apache Corporation (no response)				**APACHE CORP. SUED JOHN CHEVEDDEN TO EXCLUDE THE PROPOSAL**		

+

Number of N/A Requests withdrawn ("W") =	34	Number of Appeals for Reconsideration or Requests to Refer to Full Commission ("X") =	37
Number of N/A Requests Granted ("+") =	198	Appeals Granted ("+") =	2
Percentage of N/A Requests Granted =	**74%**	Percentage of Appeals Granted =	**5%**

Number of N/A Requests Denied ("-") =	70
Percentage of N/A Requests Denied =	**26%**

Total 8b, 8f arguments =	37
Pct. Granted =	
Total i3 arguments=	35
Pct. Granted =	
Total e2 arguments =	18
Pct. Granted =	
i2	6
Pct. Granted =	
i7	48
Pct. Granted =	
i9	24
Pct. Granted =	
i10	25
Pct. Granted =	
i11	6
Pct. Granted =	
i12	1
Pct. Granted =	

Appeals Denied ("-") =	35
Percentage of Appeals Denied =	**95%**
Number of N/A Requests in which company was denied waiver of 80-day req't ("-") =	12
Number of N/A Requests in which company was granted a waiver of 80-day req't ("+") =	11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

APACHE CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-10-0076
	§	
JOHN CHEVEDDEN,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

This court is asked to decide whether the proof of stock ownership that John Chevedden submitted to Apache Corporation satisfies the requirements of S.E.C. Rule 14a-8(b)(2). This rule requires a shareholder submitting a proposal for the company to include in its proxy materials to prove that he is eligible. A company may exclude a shareholder proposal from its proxy materials if the shareholder fails to present timely and adequate proof of eligibility. Apache seeks a declaratory judgment that it may exclude a proposal submitted by Chevedden from the proxy materials it will distribute to shareholders before Apache's annual shareholder meeting on May 6, 2010. The only issue is whether Chevedden has met the requirements for showing stock ownership under S.E.C. Rule 14a-8(b)(2), 17 C.F.R. § 240.14a-8(b)(2).

Chevedden is not listed as a shareholder in Apache's records. Chevedden sent Apache four letters, three from Ram Trust Services ("RTS"), which Chevedden asserts is his "introducing broker," certifying that Chevedden was the beneficial owner of Apache stock, and another from Northern Trust Company, certifying that it held Apache stock as "master custodian" for RTS. Northern Trust is a participating member of the Depository Trust Company ("DTC"). In its "nominee name," Cede & Co., the DTC is listed as the owner of Apache's shares in the company's

records. Apache's records do not identify the beneficial owners of the shares held in the name of Cede & Co. Chevedden argues that Rule 14a-8(b)(2) was satisfied by a letter from RTS, his "introducing broker." *Id.* Apache argues that Rule 14a-8(b)(2) required Chevedden to prove his stock ownership by obtaining a confirming letter from the DTC or by becoming a registered owner of the shares. Apache has moved for a declaratory judgment that it may exclude Chevedden's shareholder proposal from the proxy materials because he failed to do either. (Docket Entry No. 11). Chevedden has responded and asked for a declaratory judgment that his proposal met the Rule 14a-8(b)(2) requirements. (Docket Entry No. 17).[1] Apache has replied. (Docket Entry No. 18).

Based on the motion, response, and reply; the record; and the applicable law, this court grants Apache's motion for declaratory judgment and denies Chevedden's motion. The ruling is narrow. This court does not rule on what Chevedden had to submit to comply with Rule 14a-8(b)(2). The only ruling is that what Chevedden did submit within the deadline set under that rule did not meet its requirements.

The reasons for this ruling are explained below.

I. Background

A. Proof of Securities Ownership

It has been decades since publicly traded companies printed separate certificates for each share, sold them separately to the individual investors, kept track of subsequent sales of the shares, and maintained comprehensive lists identifying the shareholders, the number of the shares they held, and the duration of their ownership. Nor are securities certificates any longer traded directly by brokers on exchanges, with the shares recorded in the brokers' "street name" in a company's

[1]At a hearing held on February 11, Chevedden objected to this court exercising personal jurisdiction over him. (Docket Entry No. 10). Apache filed a brief on that issue. (Docket Entry No. 12). In his brief on the merits, however, Chevedden stated that he is no longer challenging personal jurisdiction. (Docket Entry No. 17).

records. The volume, speed, and frequency of trading required a different system. In 1975, Congress, amended the Securities Exchange Act of 1934. The amendments were based on four explicit findings:

> (A) The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.
>
> (B) Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors.
>
> (C) New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.
>
> (D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.

15 U.S.C. § 78q-1(a)(1). Congress directed the S.E.C. to create a "national system for prompt and accurate clearance and settlement in securities." 15 U.S.C. § 78q-1(a)(2)(A)(i). Clearing agencies became subject to S.E.C. regulation and uniform procedures. After the amendments were passed, the two national securities exchanges—the New York Stock Exchange and the American Stock Exchange—as well as, the National Association of Securities Dealers, which operated the over-the-counter trading market, merged their subsidiary clearing agencies into one larger entity, called the National Securities Clearing Corporation ("NSCC"). The S.E.C. permitted the NSCC to register as a clearing agency, provided that it established links with the regional clearing agencies. The S.E.C. found that this was "an essential step toward the establishment, at an early date, of a comprehensive

network of linked clearance and settlement systems and branch facilities with the national scope, efficiencies and safeguards envisioned by Congress in enacting the 1975 Amendments."[2]

A parallel development to centralizing clearing operations was the establishment of the Depository Trust Company ("DTC") in 1973. The DTC is the nation's only securities depository.[3] A securities depository is "a large institution that holds only the accounts of 'participant' brokers and banks and serves as a clearinghouse for its participants' securities transactions." *Delaware v. New York*, 507 U.S. 490, 495, 113 S. Ct. 1550 (1993). Although the DTC is also an S.E.C.-registered clearing corporation, 3 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 14.2[2], at 99 n. 48, its primary purpose is to improve trading efficiency by "immobilizing" securities, or retaining possession of securities certificates even as they are traded. According to its website, the DTC holds nearly $34 trillion worth of securities in participants' accounts. When a securities transaction occurs, the DTC changes, in its own records, which participant broker or bank "owns" the securities. The company's records, however, reflect that these securities are owned in street name, under the DTC's "nominee name" of Cede & Company. *Delaware*, 507 U.S. at 495, 113 S. Ct. 1550; *In re Color Tile Inc.*, 475 F.3d 508, 511 (3d Cir. 2007). Neither the company nor the DTC records the identity of the beneficial owner of the shares unless that owner is registered as such.

One result—and major advantage—of this process is "netting." Participating brokers that have engaged in multiple transactions in the same securities in a trading day will report only the net

[2]In the Matter of the Application of the National Securities Clearing Corporation for Registration as a Clearing Agency, Release No. 13163, File No. 6000-15, 1977 WL 173551 (Jan. 13, 1977).

[3]Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 92 GEO. L.J. 1227, 1238 n. 50 (2008).

change in their ownership to the DTC.[4] The DTC and the NSCC are now subsidiaries of the same holding company, the Depository Trust & Clearing Corporation ("DTCC"). The functions of each entity are integrated as well. "The changes in beneficial ownership of securities resulting from transactions that are cleared and settled at NSCC are implemented by book-entry transfers among brokers' accounts at DTC." *Whistler Investments, Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1163 (9th Cir. 2008). Cede & Co. is the shareholder of record for a substantial majority of the outstanding shares of all publicly traded companies. *See In re FleetBoston Financial Corp. Securities Litigation*, 253 F.R.D. 315, 345 n. 32 (D.N.J. 2008) (quotations omitted).

There is at least one intermediary between the DTC and a retail investor such as Chevedden. A participating broker or bank sells securities to the DTC; a participating broker or bank on the other side buys from the DTC. A retail investor could be a direct client of the participating broker or bank, in which case the DTC and the participating broker or bank are the only intermediaries between the investor and the company. Frequently, however, there is a third financial institution, an "introducing" broker, which serves as an intermediary between the retail investor and the participating broker or bank.

One important part of this system is the Non-Objecting Beneficial Shareholders ("NOBO") list. When a company's shares are held in street name, S.E.C. rules require the DTC to provide the company, upon request, with a list of participants that hold its stock. Once the company has this DTC participant list, called a "Cede breakdown," it asks the participating banks and brokers on it to submit the names of beneficial owners to the company. This second list is the NOBO list. This is typically done through a centralized intermediary, Broadridge Financial Solutions, Inc., which

[4]Gene N. Lebrun & Fred H. Miller, *The Law of Letters of Credit and Investment Securities Under the UCC–Modernization and Process*, 43 S.D. L. REV. 14, 28 (1998).

compiles the NOBO list. Beneficial owners may exclude themselves from this list by objecting, which is why the list includes only "Non-Objecting" shareholders. The NOBO list includes the name, address, and ownership position of each nonobjecting beneficial owner. The NOBO list is used to communicated with shareholders, primarily to distribute proxy materials . *See* 17 C.F.R. § 240.14b-1; *Sadler v. NCR Corp.*, 928 F.2d 48, 50 (2d Cir. 1991).[5] Approximately 75% of beneficial owners object to disclosing their information to the company.[6] But while the majority of institutional shareholders object to the disclosure, according to one report, an estimated 75% of individual shareholders do not object to inclusion on the list.[7] Nonetheless, the company will never discover the identity of many of its beneficial owners. The company must communicate with those shareholders through Broadridge and the intermediary financial institutions.

B. Shareholder Proposals

Before a public company holds its annual shareholders' meeting, it must distribute a proxy statement to each shareholder. A proxy statement includes information about items or initiatives on which the shareholders are asked to vote, such as proposed bylaw amendments, compensation or pension plans, or the issuance of new securities. 2 HAZEN, *supra*, § 10.2, at 83-90. The proxy card, on which the shareholder may submit his proxy, and the proxy statement together are the "proxy materials." *See* 17 C.F.R. § 240.14a-8(j).

Within this framework, the rules governing proxy solicitation for director voting are different than those governing proxy solicitation for voting on other proposals. *See* 17 C.F.R. §

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[5] *See also* Alan L. Beller & Janet L. Fisher, *The OBO/NOBO Distinction in Beneficial Ownership, Council of Institutional Investors* (Feb. 2010), *available at* http://www.cii.org.

[6] Kahan & Block, *supra* note 3, at 75.

[7] Katten Munchin Rosenman LLP, *Frequently Asked Questions Regarding the SEC's NOBO-OBO Rules and Companies' Ability to Communicate with Retail Shareholders, available at* http://www.kattenlaw.com.

240.14a-8(i)(6). This case involves a proposed shareholder resolution. A shareholder wishing to submit a proposed shareholder resolution may solicit proxies in two ways. First, he may pay to issue a separate proxy statement, which must satisfy all the disclosure requirements applicable to management's proxy statement. *See* HAZEN, *supra*, § 10.2, at 85-89. Second, a shareholder may force management to include his proposal in management's proxy statement, along with a statement supporting the proposal, at the company's expense. *See id.* § 10.8[1][A] at 136-37. Regulations promulgated under the Securities Exchange Act of 1934 apply to this second method. *See* 17 C.F.R. § 240.14a-8 ("This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders.").

Rule 14a-8 is written in a question-and-answer format. It informs shareholders that "in order to have your proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the [S.E.C.]." *Id.*

Many of these reasons for exclusion are substantive. Among other reasons, a proposal may be excluded if it would cause the company to violate the law, if it relates only to a personal grievance against the company, if it is beyond the company's authority, or if it relates to the company's "ordinary business operations." 17 C.F.R. § 240.14a-8(i). The company may also exclude proposals that violate the procedural requirements set out in the S.E.C. rules. These procedural requirements include a 500-word limit, a filing deadline, and a limit to one proposal per shareholder per meeting. 17 C.F.R. § 240.14a-8(c)-(e). Finally, the company may exclude a proposal if the submitter does not satisfy the eligibility requirements. The requirements limit those

submitting proposals to holders of "at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting." 17 C.F.R. § 240.14a-8(b)(1). The shareholder must have owned at least that amount of securities continuously for one year as of the date he submits the proposal to the company and must continue to do so through the date of the shareholder meeting. *Id.*

Rule 14a-8(b)(2) sets out two ways for a shareholder who is not a registered owner to establish eligibility. Only the first of those ways is relevant here. The rule states:

> If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, *if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own*. In this case, at the time you submit your proposal, *you must prove your eligibility* to the company in one of two ways [only the first of which is relevant]:
>
> > (i) The first way is to submit to the company a *written statement from the "record" holder of your securities (usually a broker or bank)* verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. . . .

17 C.F.R. § 240.14a-8(b)(2) (emphasis added).[8]

If a shareholder's proposal is procedurally deficient or the shareholder has not submitted proper proof of ownership, the company may exclude it only after giving the shareholder notice and

[8]The Rule was amended in 1998, to recast it in question-and-answer format. This amendment added the "usually a bank or broker" language. The prior amendment, in 1987, was accompanied by a note stating that a shareholder should submit " a written statement by a record owner or an independent third party, such as a depository or broker-dealer holding the securities in street name." S.E.C. Release No. 34-25217, 52 FR 489 48977-01, 1987 WL 153779 (Dec. 29, 1987). The notes to the 1998 amendment did not state that a substantive change to Rule 14a-8(b)(2) was intended. S.E.C. Release No. 34-40018, 63 FR 29106-01, 1998 WL 266441 (May 28, 1998).

an opportunity to correct the deficiency. 17 C.F.R. § 240.14a-8(f)(1). The company must notify the shareholder of the problem in writing within 14 days of receiving the proposal and inform the shareholder that he has 14 days to respond. *Id.* If after the response date the company decides to exclude a proposal, it must notify the S.E.C. of its reasons for doing so no later than 80 days before the company files its proxy materials with the S.E.C. 17 C.F.R. § 240.14a-8(j). The shareholder is entitled to file with the S.E.C. his arguments for including the proposal. 17 C.F.R. § 240.14a-8(k). The burden is on the company to demonstrate to the S.E.C. that the proposal is properly excluded. 17 C.F.R. § 240.14a-8(g).

A company may ask the S.E.C. Department of Corporate Finance staff for a no-action letter to support the exclusion of a proposal from proxy materials. Although no-action letters are not required, "virtually all companies that decide to omit a shareholder proposal seek a no-action letter in support of their decision."[9] The S.E.C. receives hundreds of requests for no-action letters each year. HAZEN, *supra*, § 10.8[1][A], at 138. The company submits the proposal and its reasons for exclusion to the S.E.C. staff, seeking a letter stating that the staff will not recommend enforcement action to the S.E.C. if the company chooses to exclude the proposal. The shareholder often responds with his own submission. The staff will issue a brief letter stating either that it will not recommend enforcement action ("no action") or that it is "unable to concur" with the company. This advice comes with a lengthy disclaimer, entitled "Division of Corporate Finance Informal Procedures Regarding Shareholder Proposals." (Docket Entry No. 11, Ex. 11). It states:

> The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must

[9] Donna M. Nagy, *Judicial Reliance on Regulatory Interpretation in S.E.C. No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 989 (1998).

> comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the Company in support of its intention to exclude the proposals from the Company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.
>
> Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes administered by the Commission, including argument as to whether or not activities proposed to be taken would be violative of the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversary procedure.
>
> It is important to note that the staff's and Commission's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly a discretionary determination not to recommend or take Commission enforcement action, does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the management omit the proposal from the company's proxy material.

(*Id.*).

C. Chevedden's Proposal

The events giving rise to this dispute began on November 8, 2009, when Chevedden, a retired Hughes Aircraft employee living in Redondo, Beach, California, sent an e-mail to Cheri Peper, the Corporate Secretary of Apache Corporation. (Docket Entry No. 11, Ex. 1). Apache is an oil and gas company based in Houston and incorporated in Delaware. The November 8 e-mail

attached a "Rule 14a-8 Proposal" and a cover letter. The cover letter was addressed to Raymond Plank, Apache's Chairman, and stated:

> This Rule 14a-8 proposal is respectfully submitted in support of the long-term performance of our company. This proposal is submitted for the next annual shareholder meeting.[10] Rule 14a-8 requirements are intended to be met including the continuous ownership of the required stock value until after the date of the respective shareholder meeting and presentation of the proposal at the annual meeting. This submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.
>
> In the interest of company cost savings and improving the efficiency of the rule 14a-8 process please communicated via email to olmsted7p (at) earthlink.net.
>
> Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of this proposal promptly by email to olmsted7p (at) earthlink.net.

(*Id.* at 2). The proposal was a shareholder resolution that "our board take the steps necessary so that each shareholder voting requirement in our charter and bylaws, that calls for a greater than simple majority vote, be changed to a majority of the votes cast for and against the proposal in compliance with applicable laws." (*Id.* at 3). The resolution called for changing the 80% supermajority requirements for amending particular provisions of the charter and bylaws. (*Id.*). The record does not show an Apache response to this e-mail.

Chevedden sent another Apache another e-mail on Friday, November 27, 2009, this time copying the Office of the Chief Counsel in the S.E.C.'s Division of Corporate Finance. (*Id.*, Ex. 2 at 1). Chevedden wrote: "Please see the attached broker letter. Please advise on Monday whether there are now any rule 14a-8 open items." (*Id.*). The attached broker letter, on the letterhead of Ram

[10]Apache's 2010 annual shareholders' meeting is scheduled for May 6, 2010 in Houston.

Trust Services ("RTS"), was dated November 23, 2009 and signed by Meghan M. Page, Assistant Portfolio Manager. It stated:

> To Whom it May Concern,
>
> I am responding to Mr. Chevedden's requiest to confirm his position in several securities held in his account at Ram Trust Services. Please accept this letter as confirmation that John R. Chevedden has continuously held no less than 50 shares of the following security since November 7, 2008:
>
> • Apache Corp (APA)

(*Id.* at 2).

On December 3, 2009, Peper sent Chevedden a letter, presumably by fax or e-mail. (*Id.*, Ex. 3). The letter informed Chevedden that Apache had received his November 8 letter and the RTS letter. The letter stated:

> Based on our review of the information provided by you, our records and regulatory materials, we have been unable to conclude that the proposal meets the requirements for inclusion in Apache's proxy materials, and unless you can demonstrate that you meet the requirements in the proper time frame, we will be entitled to exclude your proposal from the proxy materials for Apache's 2010 annual meeting.
> . . .
>
> [W]e have been unable to confirm your current ownership of Apache stock, or the length of time that you have held the shares.
>
> Although you have provided us with a letter from RAM Trust Services, the letter does not identify the record holder of the shares or include the necessary verification. Apache has reviewed the list of record owners of the company's common stock, and neither you, nor RAM Trust Services are listed as an owner of Apache common stock. Pursuant to the SEC Rule 14a-8(b), since neither you nor RAM Trust Services is a record holder of the shares you beneficially own verifying that you continually have held the required amount of Apache common stock for at least one year as of the date of your submission of the proposal. As required by Rule 14a-8(f), you must provide us with this statement within 14 days of your receipt of this

> letter. We have attached to this notice of defect a copy of Rule 14a-8 for your convenience.

(*Id.* at 1-2). It is undisputed that neither Chevedden nor RTS appears on Apache's list of registered holders of common stock.

Chevedden responded to the letter by e-mail the same day, again copying the Division of Corporate Finance. The e-mail cited Rule 14a-8, which Chevedden "believed to state that a company must notify the proponent of any defect with 14-days of the receipt of a rule 14a-8 proposal – which was already acknowledged by the company to be almost a month ago." (*Id.*, Ex. 4). Peper responded on December 8, 2009, disagreeing with Chevedden's characterization of the 14-day rule. Peper referred to the language in Rule 14a-8(b)(2) stating that a shareholder must establish his eligibility at the time he submits his proposal, meaning that the 14-day period did not begin until Chevedden completed his submission by sending the November 23 RTS letter on November 27. Apache's December 3 response was within 14 days of that date. Peper then reminded Chevedden that, within 14 days of the December 3 defect letter, he had to submit "a written statement from the record holder of the shares you beneficially own verifying that you continually have held the required amount of Apache common stock for at least one year as of the date of your submission of the proposal." (*Id.*, Ex. 5).

On December 10, 2009, Chevedden sent Peper another e-mail, without copying the S.E.C. staff. This e-mail directed Peper to "see the attached broker letter" and to "advise tomorrow whether there are now any rule 14a-8 open items." (*Id.*, Ex. 6 at 1). The attached letter was dated December 10 and again signed by Meghan Page of RTS. It stated:

> To Whom it May Concern,
>
> As introducing broker for the account of John Chevedden, held with Northern Trust as custodian, Ram Trust Services confirms that John

> Chevedden has continuously held no less than 50 shares of the following security since November 7, 2008:
>
> • Apache Corp (APA)

(*Id.* at 2). It is undisputed that Northern Trust is not a registered shareholder listed in Apache's records.

On January 8, 2010, Apache sent notice to the S.E.C. staff (and to Chevdedden) that it intended to exclude Chevedden's proposal from its proxy materials for the 2010 annual meeting. Apache informed the staff that "[b]ecause an introducing broker is not a record holder of the shares of a company, the Company intends to exclude this proposal unless a U.S. District Court rules that the Company is obligated to include it in its 2010 Proxy Materials." (*Id.*, Ex. 7). Rather than seek a no-action letter from the staff, Apache filed this lawsuit the same day. The S.E.C. staff will not provide no-action letters when litigation is pending.[11] (Docket Entry No. 1).

On January 11, Chevedden sent the S.E.C. staff a response to Apache's letter. He attached the December 10 RTS letter and stated that it "appears to be consistent with the attached precedent of [the no-action letter issued in] *The Hain Celestial Group, Inc.* (October 1, 2008)." (*Id.*, Ex. 8). As discussed more fully below, in *Hain Celestial*, the S.E.C. staff stated that "we are now of the view that a written statement from an introducing broker-dealer constitutes a written statement from the 'record' holder of securities, as that term is used in rule 14a-8(b)(2)(i)." Apache had attached the December 10 letter as an exhibit to its submission to the S.E.C. staff and, in its submission, had attempted to distinguish the *Hain Celestial* no-action letter. (*Id.*, Ex. 7).

[11] Securities and Exchange Commission, Division of Corporate Finance Staff Legal Bulletin No. 14 (July 13, 2001), *available at* http://www.sec.gov/interps/legal/cfslb14.htm.

On January 22, 2010, Carolyn Haynes, an RTS Executive Assistant, e-mailed Peper two letters. The first was from Meghan Page of RTS, addressed to Peper and dated January 22. Page wrote:

> John R. Chevedden owns no fewer than 50 shares of Apache Corporation (APA) and has held them continuously since November 7, 2008.
>
> Mr. Chevedden is a client of Ram Trust Services ("RTS"). RTS acts as his custodian for these shares. Northern Trust Company, a direct participant in the Depository Trust Company, in turn acts as master custodian for RTS. Northern Trust is a member of the Depository Trust Company whose nominee name is Cede & Co.
>
> Mr. Chevedden individually meets the requirements set forth in rule 14a-8(b)(1). To repeat, these shares are held by Northern Trust as master custodian for RTS. All of the shares have been held continuously since at least November 7, 2008, and Mr. Chevedden intends to continue to hold such shares through the date of the Apache Corporation 2010 annual meeting.
>
> I enclose a copy of Northern Trust's letter dated January 22, 2010 as proof of ownership in our account for the requisite time period. Please accept this telefax copy as the original was sent directly to you from Northern Trust.

(*Id.*, Ex. 9 at 2). The Northern Trust letter, signed by Rhonda Epler-Staggs, was also dated January 22 and addressed to Peper. It stated:

> The Northern Trust Company is the custodian for Ram Trust Services. As of November 7, 2009, Ram Trust Services held 183 shares of Apache Corporation CUSIP# 037411105.
>
> The above account has continuously held at least 50 shares of Apache common stock for the period of November 7, 2008 through January 21, 2010.
>
> Northern Trust is a member of the Depository Trust Company whose nominee name is Cede & Co.

(*Id.* at 3). The parties agree that Apache has not received any letter from the DTC or Cede & Co., the registered owner of any Apache stock Chevedden owns. There is nothing in the record to suggest that Apache attempted to obtain a NOBO list to determine whether Chevedden was included. Apache has submitted into the record two lists it obtained from the DTC. These are "Cede breakdowns," one from March 18, 2009 and the other from March 5, 2010, of DTC participating brokers or banks that hold Apache stock on behalf of beneficial owners or on behalf of brokers and their beneficial owners. (Docket Entry No. 18, Exs. 26, 27). Northern Trust appears on both lists. RTS is not a participant in the DTC and as a result is not included on the list. Beneficial owners are also not included.

Because of the impending annual meeting, this case has proceeded on an expedited basis. After filing its complaint on January 8, 2010, Apache filed a motion for a speedy hearing on January 14, informing this court that the proxy materials had to be finalized by March 10, 2010. (Docket Entry No. 3). At the hearing, this court overruled Chevedden's objection to the method of service and set a briefing schedule. (Docket Entry Nos. 10, 14). The parties complied.

Apache filed briefs on February 15, 2010. (Docket Entry Nos. 11, 12). Chevedden responded on March 4, 2010. (Docket Entry No. 17), stating that he was no longer contesting personal jurisdiction. In the response, Chevedden did not argue that Apache's deficiency notice was untimely. With this court's permission, the United States Proxy Exchange filed an *amicus curiae* brief on March 5, 2010. (Docket Entry No. 19). Apache filed a reply. (Docket Entry No. 20). On March 10, 2010, Chevedden submitted a brief styled as a "Motion for Summary Judgment" to this court's case manager by e-mail, with a copy to Apache. Apache filed a response the same day. (Docket Entry No. 20). The only issue before this court is whether, under Rule 14a-8, Chevedden

has provided Apache with proper proof of his eligibility to submit proposals. If he has, Apache must include the proposal in its proxy materials.

II. Analysis

Because most Rule 14a-8 disputes are resolved cooperatively or through the no-action process, there is little case law. *See* 2 HAZEN, *supra*, § 10.8[1][A], at 138. Indeed, the parties have not identified, and research has not revealed, judicial opinions deciding what proof of stock ownership is required for eligibility under Rule 14a-8(b)(2). In this case, unlike others, *see Apache Corp. v. New York City Employees Ret. Sys.*, 621 F. Supp. 2d 444 (S.D. Tex. 2008), the S.E.C. has not been asked to issue a no-action letter. In presenting their arguments, the parties rely on four sources of authority: the Rule; S.E.C. staff legal bulletins; S.E.C. staff no-action letters; and the policy reasons for the Rule.

The text of Rule 14a-8(b)(2), in its question-and-answer format, instructs a shareholder who is not "the registered holder" that "you must prove your eligibility to the company." 17 C.F.R. 240.14a-8(b)(2). The parties agree that Chevedden is not the registered holder of his shares. The rule instructs him to "submit to the company a written statement from the 'record' holder of [his] securities (usually a broker or bank) verifying that" he satisfies the eligibility requirements. *Id.* Apache argues that the unambiguous meaning of this language is that shareholders must submit a letter from the entity actually registered on the company's books. Under this interpretation, Chevedden would have to obtain a letter from the DTC or Cede & Co.

Chevedden points to the language explaining that a "record" holder is "usually a broker or bank." Neither the DTC nor Cede & Co., which "usually" is the registered owner named on a company's shareholder list, is a broker or bank. This suggests that Apache's reading of the word

"record" is too narrow. The parenthetical statement that the "'record' holder" is usually a broker or bank is inconsistent with reading the rule to require a letter from the DTC or Cede & Co.[12] It also weighs against Apache's interpretation that the Rule uses the word "registered" to describe shareholders who do not need take any additional steps to prove eligibility. A "registered" holder's "name appears in the company's records as a shareholder." 17 C.F.R. § 2 40.14a-8(b)(2). If the Rule meant that a shareholder needed a letter from the "street name" holder (usually Cede & Co.) listed in the company records, the Rule would have asked for a letter from the "registered holder," not the "'record' holder." The Rule text does not support Apache's proposed narrow reading.[13]

The next cited source of authority is guidance issued by the S.E.C. staff. Staff Legal Bulletin No. 14, issued on July 14, 2001, is set out in a question-and-answer format. Section C.1.c(1) states:

> Q: Does a written statement from the shareholder's investment adviser verifying that the shareholder held the securities continuously for at least one year before submitting the proposal demonstrate sufficiently continuous ownership of the securities?
>
> A: The written statement must be from the *record holder of the shareholder's securities, which is usually a broker or bank*. Therefore, unless the investment adviser is also the record holder, the statement would be insufficient under the rule.

Securities and Exchange Commission, Division of Corporate Finance Staff Legal Bulletin No. 14 (July 13, 2001) (emphasis added), *available at* http://www.sec.gov/interps/legal/cfslb14.htm. An

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[12]The S.E.C.'s notes to the 1987 Rule amendments provides further support for this conclusion. It stated that, under the prior text of the Rule, proof could be supplied by a "record owner or an independent third party, such as a depository or broker-dealer holding the securities in street name." S.E.C. Release No. 34-25217, 52 FR 489 48977-01, 1987 WL 153779 (Dec. 29, 1987). There is no evidence that the 1998 amendments were intended to make substantive changes to this interpretation.

[13]As Apache states in its reply brief, the S.E.C. rules elsewhere provide a definition of "record holder," but limit the applicability of the definition to Rules 14a-13, 14b-1, and 14b-2. The definition does not apply to Rule 14a-8. 17 C.F.R. § 2 40.14a-1(b)(1).

update, Bulletin No. 14B, issued on September 15, 2004, repeats the Rule language, advising companies to include the language in their notices of defect. S.E.C., Division of Corporate Finance Staff Legal Bulletin No. 14B (Sept. 15, 2004), *available at* http://www.sec.gov/interps/legal/cfslb14b.htm. These bulletins do not add significant clarity. The information that an investment adviser's statement is insufficient unless the adviser is also the record holder—which, again, is "usually a broker or bank"—does not address who is a "'record' holder."

The next source of cited authority is no-action letters issued by the S.E.C. staff. "[N]o-action letters are nonbinding, persuasive authority." *Apache*, 621 F. Supp. 2d at 449 (noting that the proper weight to accord no-action letters was an issue of first impression in the Fifth Circuit and adopting Second Circuit precedent).[14] Even if the S.E.C. staff has spoken, "a court must independently analyze the merits of a dispute." *Apache*, 621 F. Supp. 2d at 449 (citing *New York City Employees' Ret. Sys. v. Brunswick Corp.*, 789 F. Supp. 144, 146 (S.D.N.Y. 1992)). "Because the staff's advice on contested proposals is informal and nonjudicial in nature, it does not have precedential value with respect to identical or similar proposals submitted to other issuers in the future."[15] "[R]egulatory interpretations in no-action letters may nonetheless enlighten a court struggling with ambiguous provisions in federal securities statutes or S.E.C. rules." Nagy, *supra* note 9, at 996. Although this court is not bound by S.E.C. staff determinations made in no-action letters, the letters are "persuasive" authority.

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[14] *See also Amalgamated Clothing & Textile Workers Union v. S.E.C.*, 15 F.3d 254, 257 (2d Cir. 1994); Nagy, *supra* note 9, at 989 (Because "deference principles assume that the responsible administrative agency has authoritatively interpreted a regulatory provision, . . .neither *Chevron* nor *Seminole Rock* mandate judicial deference to regulatory interpretations in staff no-action letters that the Commission has neither reviewed nor affirmed." (quotations and alterations omitted)).

[15] Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, S.E.C. Release No. 34-12599, 1976 WL 160411 (July 7, 1976).

Apache argues that the S.E.C. staff has consistently found that a letter from a broker stating that an individual or institution owned a certain amount of a specific stock on certain dates is insufficient to satisfy Rule 14a-8(b)(2). Apache argues that when companies have asserted their intent to exclude a proposal submitted by a shareholder who has a letter from a broker not listed on the company's shareholder list, the S.E.C. staff will recommend no enforcement action. Apache cites a number of letters that have reached this conclusion. For example, in *JP Morgan Chase & Co*, 2008 WL 486532 (Feb. 15, 2008), Chevedden presented a proposal on behalf of Kenneth Steiner. In response to a deficiency notice based on Rule 14a-8(b), Chevedden submitted a letter from DJF Discount Brokers stating that it was the "introducing broker for the account of Kenneth Steiner . . . held with National Financial Servcies Corp. as custodian" and certifying that Steiner met the ownership requirements. *Id.* at *3. The S.E.C. staff attorney found this broker letter insufficient proof of ownership under the Rule. He wrote:

> While it appears that the proponent provided some indication that he owned shares, it appears that he has not provided a statement from the record holder evidencing documentary support of continuous beneficial ownership of $2,000, or 1% in market value of voting securities, for at least one year prior to submission of the proposal. We note, however, that JPMorgan Chase failed to inform the proponent of what would constitute appropriate documentation under rule 14a-8(b) in JPMorgan Chase's request for additional information from the proponent. Accordingly, unless the proponent provides JPMorgan Chase with appropriate documentary support of ownership, within seven calendar days after receiving this letter, we will not recommend enforcement action to the Commission if JPMorgan Chase omits the proposal from its proxy materials in reliance on rules 14a-8(b) and 14a-8(f).

Id. at *1. Other no-action letters from 2008 and earlier, many issued in response to requests involving Chevedden, have also concluded that letters from introducing brokers are insufficient. *See, e.g., Verizon Communications, Inc.*, 2008 WL 257310 (Jan 25. 2008); *MeadWestvaco Corp,*

2007 WL 817472 (Mar. 12, 2007); *Clear Channel Communications*, 2006 WL 401184 (Feb. 9, 2006); *AMR Corp.*, 2004 WL 892255 (Mar. 15, 2004).

According to Apache, the S.E.C. staff's single deviation from this consistent approach was what Apache calls the "rogue" no-action letter issued in *Hain Celestial Group*, 2008 WL 4717434, (Oct. 1, 2008). In *Hain Celestial*, Chevedden once again wrote on behalf of Kenneth Steiner, who submitted a shareholder proposal. The company sent a deficiency notice based on Rule 14a-8(b). Chevedden then submitted a letter from DJF signed by its president, Mark Filberto. The letter stated that DJF was the introducing broker for Steiner and that his shares were held by National Financial Services as custodian. *Id.* at *5-6. In submitting a no-action request, Hain Celestial made arguments similar to those advanced here by Apache. Hain Celestial cited the *JP Morgan*, *Verizon*, and *MeadWestvaco* no-action letters to argue that a letter from DJF as "introducing broker" was insufficient to satisfy the "record" holder requirement. *Id.* at *6. The S.E.C. staff attorney issued an unusually detailed letter. He wrote:

> We are unable to concur in your view that The Hain Celestial Group may exclude the proposal under rules 14a-8(b) and 14a-8(f). After further consideration and consultation, *we are now of the view that a written statement from an introducing broker-dealer constitutes a written statement from the "record" holder of securities, as that term is used in rule 14a-8(b)(2)(i).* For purposes of the preceding sentence, an introducing broker-dealer is a broker-dealer that is not itself a participant of a registered clearing agency but clears its customers' trades through and establishes accounts on behalf of its customers at a broker-dealer that is a participant of a registered clearing agency and that carries such accounts on a fully disclosed basis. *Because of its relationship with the clearing and carrying broker-dealer through which it effects transactions and establishes accounts for its customers, the introducing broker-dealer is able to verify its customers' beneficial ownership.* Accordingly, we do not believe that The Hain Celestial Group may omit the proposal from its proxy materials in reliance on rules 14a-8(b) and 14a-8(f).

Id.(emphasis added).

Apache argues that this letter is "wrong and should not be followed," that it conflicts with the "unambiguous" requirement in Rule 14a-8(b)(2), and that it is "inconsistent with the staff's long and otherwise unblemished line of no-action letters," issued before and after *Hain Celestial*.

The argument that Rule 14a-8(b)(2) is unambiguous is not persuasive. And a closer examination of S.E.C. staff letters shows that *Hain Celestial* was not a "rogue" position. The *Hain Celestial* no-action letter was neither the first or last letter in which the S.E.C. staff declined to agree that a letter from the registered owner was required under Rule 14a-8(b)(2).

In *AIG*, 2009 WL 772853 (Mar. 13, 2009), for example, the S.E.C. staff wrote that it was "unable to concur" with AIG's position that a proposal advanced by Kenneth Steiner, with Chevedden as his representative, should be excluded under Rule 14a-8(b). Chevedden had submitted a letter from DJF Discount Brokers stating that it was the "introducing broker" for Steiner, that Steiner was the beneficial owner of an appropriate amount of AIG stock for an appropriate length of time, and that National Financial Services Corp. was the "custodian" of Steiner's securities. *Id.* at *4-5. Although the S.E.C. staff did not cite *Hain Celestial*—the no-action letters rarely cite precedent—the refusal to issue a no-action letter was consistent with *Hain Celestial*. Indeed, the facts were similar.

In another *post-Hain Celestial* case in which Chevedden represented Kenneth Steiner and submitted a similar letter from DJF Discount Brokers, the S.E.C. staff also declined to issue a no-action letter. *Schering-Plough Corp.*, 2009 WL 926913 (Apr. 3, 2009). The S.E.C. staff reached the same result in two other cases in which Chevedden was a representative of shareholder proponent William Steiner and had submitted broker letters from DJF Discount Brokers. *Schering-*

Plough Corp., 2009 WL 975142 (Apr. 3, 2009); *Intel Corp.*, 2009 WL 772872 (Mar. 13, 2009). In these three cases, the company's Rule 14a-8(b) objection was that Chevedden, who owned no shares, was the actual proponent of the shareholder proposal, not Steiner. In concluding that there was no basis for exclusion under Rule 14a-8(b), the S.E.C. staff presumably would have had to find that Steiner was the proponent and that the broker letter was sufficient to establish his stock ownership under Rule 14a-8(b)(2).

In an interesting post-*Hain Celestial* case not involving Chevedden, *Comerica Inc.*, 2009 WL 800002 (Mar. 9, 2009), the company sought to exclude a shareholder proposal by the Laborers National Pension Fund because, among other reasons, the Fund had not provided adequate proof of stock ownership. The Fund provided a letter from U.S. Bank confirming that it held an adequate amount of Comerica stock on behalf of the Fund as beneficial owner. In a letter to the S.E.C., the Fund stated:

> Comerica argues that U.S. Bank was not the record holder of any Company stock because the securities were held through CEDE & Co. This argument has consistently been rejected by the Staff and should be rejected here. *See Equity Office Properties Trust* (March 28, 2003); *Dillard Dept. Stores, Inc.* (March 4, 1999).

Comerica Inc., 2009 WL 800002, at *3 (Mar. 9, 2009). The S.E.C. staff found no basis for excluding the proposal under Rule 14a-8(b). The Fund's citations to earlier letters are accurate and helpful. In *Equity Office Properties Trust*, 2003 WL 1738866 (Mar. 28, 2003), the S.E.C. staff found no basis for excluding a shareholder proposal from the Service Employees International Union, which had submitted a letter from Fidelity Investments confirming that the Union was the beneficial owner of shares "held of record by Fidelity Investments through its agent National Financial Services." *Id.* at *15. The Union's letter to the S.E.C. staff observed: "Despite the nearly

universal practice by institutional shareholders of employing an agent such as the Depository Trust Company ("DTC") or NFS, the Rule indicates that the record owner from whom a statement must be obtained is usually a broker or bank. It is unlikely that the Commission was unaware of the ubiquity of agents when it drafted the Rule." The company's letter, which failed to persuade the S.E.C. staff, argued that the Fidelity letter was insufficient because Fidelity was not the registered owner and that it was inappropriate to require the company to determine whether National Financial Services was in fact Fidelity's agent. *Id.* at *14.

Several years earlier, in *Dillard Department Stores, Inc.*, 1999 WL 129804 (Mar. 4, 1999), the S.E.C. staff also stated that it did not believe there was a basis for exclusion under Rule 14a-8(b). The shareholder proponent in that case, an investment fund, submitted a statement from the Amalgamated Bank of New York that the fund's "shares are held of record by the Amalgamated Bank of New York through its agent, CEDE, Inc." *Id.* at *4. Because no letter was submitted from Cede & Co., Dillard's argued to the S.E.C. staff that there was insufficient proof of ownership. In its letter to the S.E.C., the fund argued that it was inconsistent with the text of Rule 14a-8(b)(2) to require a letter from Cede & Co. The argument was that because the Rule placed the term "record" in quotations and stated that the "'record' holder" would usually be a broker or bank, it would be anomalous to require a letter from Cede & Co., which is not a bank or broker and is the registered holder of most securities. "Beneficial owners generally have a relationship with their broker or bank; requiring investors to obtain a letter from an agent of their broker or bank would needlessly complicate the process and encourage the sort of petty games-playing in which Dillard's is engaging here." *Id.* at *3. The S.E.C. staff sided with the fund.

The letters Apache cites to show that the S.EC. staff retreated from its *Hain Celestial* position do not provide support for that proposition. *See EQT Corp.*, 2010 WL 147295 (Jan. 11, 2010); *Microchip Tech., Inc.*, 2009 WL 1526972 (May 26, 2009); *Schering-Plough Corp.*,2009 WL 890012 (Mar. 27, 2009); *Omnicom Group*, 2009 WL 772864 (Mar. 16, 2009). In these cases, the shareholder seeking to have a proposal included in the company's proxy materials received a deficiency notice but either failed to submit documents intended to prove ownership or failed to do so within the 14-day period provided by the rules. Other recent S.E.C. letters finding a basis for exclusion under Rule 14a-8(b)(2) when a broker letter was submitted are consistent in that there were defects in the broker letter that warranted exclusion. *See, e.g., Continental Airlines, Inc.*, 2010 WL 387513 (Feb. 22, 2010) (shares listed in broker letter amounted to less than $2,000 in value); *Pfizer, Inc.*, 2010 WL 738739 (Feb. 22, 2010) (broker letter was never received by company and was dated three days before submission of the proposal, making it incapable of establishing ownership for a year as of the actual submission date); *Intel Corp.*, 2009 WL 5576306 (Feb. 3, 2010) (broker letter was dated 18 days after deficiency notice, received by the proponent 26 days late, and received by the company 31 days late). These no-action letters all involved broker letters that were deficient for reasons other than the nature of the broker submitting them. These no-action letters do not provide a basis for believing that the S.E.C. staff's reading of Rule 14a-8(b)(2) has changed since *Hain Celestial*. *See Pioneer Natural Resources Co.*, 2010 WL 128070 (Feb. 12, 2010) (finding no basis for exclusion when the proponent, a union pension fund, had submitted a broker letter from AmalgaTrust, which was not a registered shareholder, stating that it served as "corporate co-trustee and custodian for the [pension fund] and is the record holder for 1,180 shares of [company] common stock held fore the benefit of the Fund.").

The S.E.C. staff's position in *Hain Celestial* and the similar letters is more consistent with the text of Rule 14a-8(b)(2) than the position Apache advances, that the Rule requires confirming letters from the DTC or Cede & Co. Apache argues that the DTC does offer letters certifying a shareholder's beneficial stock ownership and attaches examples to its reply brief. But these examples show that the DTC will only process letter requests forwarded to it by participants, not by beneficial owners. The record does not show how long it takes shareholders to obtain such letters, especially when they are not direct clients of a DTC participant. The documents Apache attached to its reply brief show that the DTC bases its response to such requests on information supplied by the participant. The responses state that the DTC is a "holder of record" of the company's common stock and that the "DTC is informed by its Participant" that a certain amount of shares "credited to the Participant's DTC account are beneficially owned by [John Doe], "a customer of Participant." (*See* Docket Entry No. 18, Exs. 21-24). The responses provide no indication that the DTC presents information about beneficial owners other than what is submitted by the participant for the purpose of preparing the letter. Nor is there information on how the participant obtains information about beneficial owners when the participant's customer is not the beneficial owner but the broker for the owners. And as a practical matter, because of the "netting" system, in which DTC members report only the net change in their ownership at the end of the day rather than the details of each transaction between members, the DTC could not accurately certify that a participating broker—let alone that broker's client—had held a sufficient number of shares continuously for a year to comply with the Rule. If a participating broker sold all its Apache shares one morning, its continuous ownership would end, but if it bought all the shares back after lunch, the DTC might never know. Finally, as noted, the text of Rule 14a-8(b)(2), which was amended in 1998 (well after ascendency of the

depository system), shows that the Rule does not envision companies receiving letters from the DTC (at least not *solely* from the DTC). It is not a "broker or bank." Rule 14a-8(b)(2) permits but does not require Chevedden to obtain a letter from the DTC.

This court need not decide whether the letter from Northern Trust, the DTC participant, in combination with the letter from RTS, met the Rule's requirements. The January 22 letters from RTS and Northern Trust were untimely. Any letters had to be submitted within 14 days of the December 3, 2009 deficiency notice. The only letters submitted within that period were the November 23 and December 10, 2009 RTS letters. The first letter stated that Chevedden had held no less than 50 shares of Apache stock in his account at RTS since November 7, 2008. The second letter stated that RTS was the "introducing broker for the account of John Chevedden" and that Northern Trust was the custodian of his Apache stock. (*Id.*, Ex. 6 at 2). The second is the type of letter the S.E.C. staff found adequate in *Hain Celestial*.[16] The present record does not permit the same result in this case.

[16]Apache argues that this case is distinguishable from the facts in *Hain Celestial* because RTS was not a broker. Apache is correct that RTS does not appear on the SEC's list of registered broker-dealers, on the FINRA membership list, or on the SIPC membership list. But neither does DJF Discount Brokers, which submitted the broker letter in *Hain Celestial*. RTS's website and customer application indicate that an RTS subsidiary, Atlantic Financial Services of Maine, Inc ("AFS")., acts as the broker for RTS customers' securities transactions. AFS, which shares an address with RTS, is on the SEC, FINRA, and SIPC membership lists. Similarly, DJF's website states that it is a division of R&R Planning Group LTD. R&R appears on the SEC, FINRA, and SIPC membership lists.

The Rule requires shareholders to "prove [their] eligibility."[17] The parties agree that all Chevedden gave Apache as timely, relevant proof of ownership was the December 10 RTS letter. Apache has described its concerns about the reliability of the statements made in the RTS letter. It is not Apache's burden to investigate to confirm the statements or to engage in such steps as obtaining a NOBO list to provide independent verification of Chevedden's status as an Apache shareholder. Because of the limited nature of the NOBO list, Chevedden's absence from the list would not have been definitive. And even if Chevedden were on the list and the list indicated that he owned a sufficient number of shares, that would not have established that he had owned those shares continuously for a year.

RTS is not a participant in the DTC. It is not registered as a broker with the SEC, or the self-regulating industry organizations FINRA and SIPC. Apache argues that RTS is not a broker but an investment adviser, citing its registration as such under Maine law, representations on RAM's website, and federal regulations barring an investment adviser from serving as a broker or custodian except in limited circumstances. (Docket Entry No. 18 at 14-19). Chevedden disputes that RTS has not provided investment advice and that its "sole function is as a custodian." (Docket Entry No. 17 at 3). The record suggests that Atlantic Financial Services of Maine, Inc., a subsidiary of RTS that is also not a DTC participant, may be the relevant broker rather than RTS. Atlantic Financial

[17]Apache points out that it was not until the January 22 letters that Chevedden gave any indication that his shares were held in Cede & Co.'s name. This argument is disingenuous. Without even looking at the shareholder list, the default assumption for a publicly traded company should be that Cede & Co. holds a beneficial owner's shares. DTCC publishes a list of DTC member banks and brokers on its website. The list is a seven-page document, with all the members listed in alphabetical order. Once the December 10 letter identified Northern Trust as custodian, it would have been easy for Apache to look at the list and see that Northern Trust was included. *See* Depository Trust & Clearing Corp., DTC Participant Accounts in Alphabetical Sequence, at 6, *available at* http://www.dtcc.com/downloads/membership/directories/dtc/alpha.pdf. Apache also had the May 2009 "Cede breakdown" listing the DTC participants that owned Apache shares. This list indicated that Northern Trust has a substantial position in Apache. It also appears from the March 2010 Cede breakdown that Apache had access to the DTC website to obtain less formal versions of the Cede breakdown owning participants owning Apache shares at any time.

Services did not submit a letter confirming Chevedden's stock ownership. RTS did not even mention Atlantic Financial Services in any of its letters to Apache. The nature of RTS's corporate structure, including whether RTS is or is not an "investment adviser" is not determinative of eligibility. But the inconsistency between the publicly available information about RTS and the statement in the letter that RTS is a "broker" underscores the inadequacy of the RTS letter, standing alone, to show Chevedden's eligibility under Rule 14a-8(b)(2).

Chevedden's interpretation of the Rule would require companies to accept *any* letter purporting to come from an introducing broker, that names a DTC participating member with a position in the company, regardless of whether the broker was registered or the letter raised questions. Chevedden's interpretation of Rule 14a-8(b)(2) would not require the shareholder to show anything. It would only require him to obtain a letter from a self-described "introducing broker," even if, as here, there are valid reasons to believe the letter is unreliable as evidence of the shareholder's eligibility. By contrast, a separate certification from a DTC participant allows a public company at least to verify that the participant does in fact hold the company's stock by obtaining the Cede breakdown from the DTC, as Apache did in May 2009 and March 2010.

Chevedden did, ultimately, submit a letter from the participant, Northern Trust, along with a letter from RTS. The January 22 Northern Trust letter refers to RTS's account and RTS's stock ownership; the RTS letter submitted that same day linked RTS's account with Northern Trust to Chevedden. Because these letters were submitted well after the deadline, this court does not decide whether they would have been sufficient. The only issue before this court is whether the earlier letters from RTS – an unregistered entity that is not a DTC participant – were sufficient to prove eligibility under Rule 14a-8(b)(2), particularly when the company has identified grounds for

believing that the proof of eligibility is unreliable. This court concludes that the December 2009 RTS letters are not sufficient.

Although section 14 of the Securities Exchange Act of 1934 (governing proxies), under which Rule 14a-8 was promulgated, was intended to "give true vitality to the concept of corporate democracy," *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970), *cert. granted sub nom SEC v. Medical Comm. for Human Rights*, 401 U.S.973, 91 S. Ct. 1191 (1971), *vacated as moot*, 404 U.S. 403, 92 S. Ct. 577 (1972), that does not necessitate a complete surrender of a corporation's rights during proxy season. Rule 14a-8 requires a shareholder seeking to participate to register as a shareholder or prove that he owns a sufficient amount of stock for a sufficient period to be eligible. Although this court concludes that Rule 14a-8(b)(2) is not as restrictive as Apache contends, on the present record, Chevedden has failed to meet the Rule's requirements.

III. Conclusion

Apache's motion for declaratory judgment is granted and Chevedden's motion is denied. Apache may exclude Chevedden's proposal from its proxy materials.

SIGNED on March 10, 2010, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

Federal Register

Thursday,
September 16, 2010

Part II

Securities and Exchange Commission

17 CFR Parts 200, 232, 240 and 249
Facilitating Shareholder Director Nominations; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 200, 232, 240 and 249

[Release Nos. 33–9136; 34–62764; IC–29384; File No. S7–10–09]

RIN 3235–AK27

Facilitating Shareholder Director Nominations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting changes to the Federal proxy rules to facilitate the effective exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of directors. The new rules will require, under certain circumstances, a company's proxy materials to provide shareholders with information about, and the ability to vote for, a shareholder's, or group of shareholders', nominees for director. We believe that these rules will benefit shareholders by improving corporate suffrage, the disclosure provided in connection with corporate proxy solicitations, and communication between shareholders in the proxy process. The new rules apply only where, among other things, relevant state or foreign law does not prohibit shareholders from nominating directors. The new rules will require that specified disclosures be made concerning nominating shareholders or groups and their nominees. In addition, the new rules provide that companies must include in their proxy materials, under certain circumstances, shareholder proposals that seek to establish a procedure in the company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. We also are adopting related changes to certain of our other rules and regulations, including the existing solicitation exemptions from our proxy rules and the beneficial ownership reporting requirements.

DATES: *Effective Date:* November 15, 2010.

Compliance Dates: November 15, 2010, except that companies that qualify as "smaller reporting companies" (as defined in 17 CFR 240.12b–2) as of the effective date of the rule amendments will not be subject to Rule 14a–11 until three years after the effective date.

FOR FURTHER INFORMATION CONTACT: Lillian Brown, Tamara Brightwell, or Ted Yu, Division of Corporation Finance, at (202) 551–3200, or, with regard to investment companies, Kieran G. Brown, Division of Investment Management, at (202) 551–6784, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adding new Rule 82a of Part 200 Subpart D—Information and Requests,[1] and new Rules 14a–11,[2] and 14a–18,[3] and new Regulation 14N[4] and Schedule 14N,[5] and amending Rule 13[6] of Regulation S–T,[7] Rules 13a–11,[8] 13d–1,[9] 14a–2,[10] 14a–4,[11] 14a–5,[12] 14a–6,[13] 14a–8,[14] 14a–9,[15] 14a–12,[16] and 15d–11,[17] Schedule 13G,[18] Schedule 14A,[19] and Form 8–K,[20] under the Securities Exchange Act of 1934.[21] Although we are not amending Schedule 14C[22] under the Exchange Act, the amendments will affect the disclosure provided in Schedule 14C, as Schedule 14C requires disclosure of some items contained in Schedule 14A.

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[1] 17 CFR 200.82a.
[2] 17 CFR 240.14a–11.
[3] 17 CFR 240.14a–18.
[4] 17 CFR 240.14n *et seq.*
[5] 17 CFR 240.14n–101.
[6] 17 CFR 232.13.
[7] 17 CFR 232.10 *et seq.*
[8] 17 CFR 240.13a–11.
[9] 17 CFR 240.13d–1.
[10] 17 CFR 240.14a–2.
[11] 17 CFR 240.14a–4.
[12] 17 CFR 240.14a–5.
[13] 17 CFR 240.14a–6.
[14] 17 CFR 240.14a–8.
[15] 17 CFR 240.14a–9.
[16] 17 CFR 240.14a–12.
[17] 17 CFR 240.15d–11.
[18] 17 CFR 240.13d–102.
[19] 17 CFR 240.14a–101.
[20] 17 CFR 249.308.
[21] 15 U.S.C. 78a *et seq.* (the "Exchange Act"). Part 200 Subpart D—Information and Requests and Regulation S–T are also promulgated under the Securities Act of 1933 [15 U.S.C. 77a *et seq.*] (the "Securities Act").
[22] 17 CFR 240.14c–101.

I. Background and Overview of Amendments

A. Background

On June 10, 2009, we proposed a number of changes to the Federal proxy rules designed to facilitate shareholders' traditional State law rights to nominate and elect directors. Our proposals sought to accomplish this goal in two ways: (1) By facilitating the ability of shareholders with a significant, long-term stake in a company to exercise their rights to nominate and elect directors by establishing a minimum standard for including disclosure concerning, and enabling shareholders to vote for, shareholder director nominees in company proxy materials; and (2) by narrowing the scope of the Commission rule that permitted companies to exclude shareholder proposals that sought to establish a procedure for the inclusion of shareholder nominees in company proxy materials.[23] We recognized at that time that the financial crisis that the nation and markets had experienced heightened the serious concerns of many shareholders about the accountability and responsiveness of some companies and boards of directors to shareholder interests, and that these concerns had resulted in a loss of investor confidence. These concerns also led to questions about whether boards were exercising appropriate oversight of management, whether boards were appropriately focused on shareholder interests, and whether boards need to be more accountable for their decisions regarding issues such as compensation structures and risk management.

A principal way that shareholders can hold boards accountable and influence matters of corporate policy is through the nomination and election of directors. The ability of shareholders to effectively use their power to nominate and elect directors is significantly affected by our proxy regulations because, as has long been recognized, a federally-regulated corporate proxy solicitation is the primary way for public company shareholders to learn about the matters to be decided by the shareholders and to make their views known to company management.[24] As discussed in detail below, in light of these concerns, we reviewed our proxy regulations to determine whether they should be revised to facilitate shareholders' ability to nominate and elect directors. We have taken into consideration the comments received on the proposed amendments as well as subsequent congressional action[25] and are adopting final rules that will, for the first time, require company proxy materials, under certain circumstances, to provide shareholders with information about, and the ability to vote for a shareholder's, or group of shareholders', nominees for director. We also are amending our proxy rules to provide shareholders the ability to include in company proxy materials, under certain circumstances, shareholder proposals that seek to establish a procedure in the company's governing documents for the inclusion of one or more shareholder director

[23] *See Facilitating Shareholder Director Nominations,* Release No. 33–9046, 34–60089 (June 10, 2009) [74 FR 29024] ("Proposal" or "Proposing Release"). The Proposing Release was published for comment in the Federal Register on June 18, 2009, and the initial comment period closed on August 17, 2009. The Commission re-opened the comment period as of December 18, 2009 for thirty days to provide interested persons the opportunity to comment on additional data and related analyses that were included in the public comment file at or following the close of the original comment period. In total, the Commission received approximately 600 comment letters on the proposal. The public comments we received are available on our Web site at *http://www.;sec.gov/comments/s7-10-09/s71009.shtml.* Comments also are available for Web site viewing and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m.

[24] *See, e.g.,* Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce, 78th Cong., 1st Sess., at 17–19 (1943) (Statement of the Honorable Ganson Purcell, Chairman, Securities and Exchange Commission) (explaining the initial Commission rules requiring the inclusion of shareholder proposals in company proxy materials: "We give [a stockholder] the right in the rules to put his proposal before all of his fellow stockholders along with all other proposals * * * so that they can see then what they are and vote accordingly. * * * The rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law, to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on. But those rights have been rendered largely meaningless through the process of dispersion of security ownership through[out] the country. * * * [T]he assurance of these fundamental rights under State laws which have been, as I say, completely ineffective * * * because of the very dispersion of the stockholders' interests throughout the country[;] whereas formerly * * * a stockholder might appear at the meeting and address his fellow stockholders[, t]oday he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has today of expressing his judgment comes at the time he considers the execution of his proxy form, and we believe * * * that this is the time when he should have the full information before him and ability to take action as he sees fit."); *see also* S. Rep. 792, 73d Cong., 2d Sess., 12 (1934) ("[I]t is essential that [the stockholder] be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings.").

[25] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, § 971, 124 Stat. 1376 (2010) ("Dodd-Frank Act").

nominees in the company's proxy materials.

Regulation of the proxy process was one of the original responsibilities that Congress assigned to the Commission as part of its core functions in 1934. The Commission has actively monitored the proxy process since receiving this authority and has considered changes when it appeared that the process was not functioning in a manner that adequately protected the interests of investors.[26] One of the key tenets of the Federal proxy rules on which the Commission has consistently focused is whether the proxy process functions, as nearly as possible, as a replacement for an actual in-person meeting of shareholders.[27] This is important because the proxy process represents shareholders' principal means of participating effectively at an annual or special meeting of shareholders.[28] In our Proposal we noted our concern that the Federal proxy rules may not be facilitating the exercise of shareholders' State law rights to nominate and elect directors. Without the ability to effectively utilize the proxy process, shareholder nominees do not have a realistic prospect of being elected because most, if not all, shareholders return their proxy cards in advance of the shareholder meeting and thus, in essence, cast their votes before the meeting at which they may nominate directors. Recognizing that this failure of the proxy process to facilitate shareholder nomination rights has a practical effect on the right to elect directors, the new rules will enable the proxy process to more closely approximate the conditions of the shareholder meeting. In addition, because companies will be required to include shareholder-nominated candidates for director in company proxy materials, shareholders will receive additional information upon which to base their voting decisions. Finally, we believe these changes will significantly enhance the confidence of shareholders who link the recent financial crisis to a lack of responsiveness of some boards to shareholder interests.[29]

The Commission has, on a number of prior occasions, considered whether its proxy rules needed to be amended to facilitate shareholders' ability to nominate directors by having their nominees included in company proxy materials.[30] Most recently, in June 2009, we proposed amendments to the proxy rules that included both a new proxy rule, Exchange Act Rule 14a–11, that would require a company's proxy materials to provide shareholders with information about, and the ability to vote for, candidates for director nominated by long-term shareholders or groups of long-term shareholders with significant holdings, and amendments to Rule 14a–8(i)(8) to prohibit exclusion of certain shareholder proposals seeking to establish a procedure in the company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. We received significant comment on the proposed amendments. Overall, commenters were sharply divided on the necessity for, and the workability of, the proposed amendments. Supporters of the amendments generally believed that, if adopted, they would facilitate shareholders' ability to exercise their State law right to nominate directors and provide meaningful opportunities to effect changes in the composition of the board.[31] These commenters predicted that the amendments would lead to more accountable, responsive, and effective boards.[32] Many commenters saw a link between the recent economic crisis and shareholders' inability to have nominees included in a company's proxy materials.[33]

Commenters opposed to our Proposal believed that recent corporate governance developments, including increased use of a majority voting standard for the election of directors and certain State law changes, already provide shareholders with meaningful opportunities to participate in director elections.[34] These commenters viewed

[26] For example, the Commission has considered changes to the proxy rules related to the election of directors in recent years. *See Security Holder Director Nominations,* Release No. 34–48626 (October 14, 2003) [68 FR 60784] ("2003 Proposal"); *Shareholder Proposals,* Release No. 34–56160 (July 27, 2007) [72 FR 43466] ("Shareholder Proposals Proposing Release"); *Shareholder Proposals Relating to the Election of Directors,* Release No. 34–56161 (July 27, 2007) [72 FR 43488] ("Election of Directors Proposing Release"); and *Shareholder Proposals Relating to the Election of Directors,* Release No. 34–56914 (December 6, 2007) [72 FR 70450] ("Election of Directors Adopting Release"). When we refer to the "2007 Proposals" and the comments received in 2007, we are referring to the Shareholder Proposals Proposing Release and the Election of Directors Proposing Release and the comments received on those proposals, unless otherwise specified.

[27] Professor Karmel has described the Commission's proxy rules as having the purpose "to make the proxy device the closest practicable substitute for attendance at the [shareholder] meeting." Roberta S. Karmel, *The New Shareholder and Corporate Governance: Voting Power Without Responsibility or Risk: How Should Proxy Reform Address the De-Coupling of Economic and Voting Rights?,* 55 Vill. L. Rev. 93, 104 (2010).

[28] Historically, a shareholder's voting rights generally were exercised at a shareholder meeting. As discussed in the Proposing Release, in passing the Exchange Act, Congress understood that the securities of many companies were held through dispersed ownership, at least in part facilitated by stock exchange listing of shares. Although voting rights in public companies technically continued to be exercised at a meeting, the votes cast at the meeting were by proxy and the voting decision was made during the proxy solicitation process. This structure continues to this day.

[29] *See* letters from American Federation of Labor and Congress of Industrial Organizations ("AFL–CIO"); California Public Employees' Retirement System ("CalPERS"); Council of Institutional Investors ("CII"); Lynne L. Dallas ("L. Dallas"); Los Angeles County Employees Retirement Association ("LACERA"); Laborers' International Union of North America ("LIUNA"); The Nathan Cummings Foundation ("Nathan Cummings Foundation"); Pax World Management Corp. ("Pax World"); Pershing Square Capital Management, L.P. ("Pershing Square"); Relational Investors, LLC ("Relational"); RiskMetrics Group, Inc. ("RiskMetrics"); Shareowner Education Network and Shareowners.org ("Shareowners.org"); Social Investment Forum ("Social Investment Forum"); State of Wisconsin Investment Board ("SWIB"); International Brotherhood of Teamsters ("Teamsters"); Trillium Asset Management Corporation ("Trillium"); Universities Superannuation Scheme—UK ("Universities Superannuation"); Washington State Investment Board ("WSIB").

[30] For a discussion of the Commission's previous actions in this area, *see* the Proposing Release and the 2003 Proposal.

[31] *See* letters from CII; Colorado Public Employees' Retirement Association ("COPERA"); CtW Investment Group ("CtW Investment Group"); L. Dallas; Thomas P. DiNapoli ("T. DiNapoli"); Florida State Board of Administration ("Florida State Board of Administration"); International Corporate Governance Network ("ICGN"); Denise L. Nappier ("D. Nappier"); Ohio Public Employees Retirement System ("OPERS"); Pax World; Teamsters.

[32] *Id.*

[33] *See* letters from AFL–CIO; CalPERS; California State Teachers' Retirement System ("CalSTRS"); CII; L. Dallas; LACERA; LIUNA; Nathan Cummings Foundation; Pax World; Pershing Square; Relational; RiskMetrics; Shareowners.org; Social Investment Forum; SWIB; Teamsters; Trillium; Universities Superannuation; WSIB.

[34] *See* letters from Group of 26 Corporate Secretaries and Governance Professionals ("26 Corporate Secretaries"); 3M Company ("3M"); Advance Auto Parts, Inc. ("Advance Auto Parts"); The Allstate Corporation ("Allstate"); Avis Budget Group, Inc. ("Avis Budget"); American Express Company ("American Express"); Anadarko Petroleum Corporation ("Anadarko"); Association of Corporate Counsel ("Association of Corporate Counsel"); AT&T Inc. ("AT&T"); Lawrence Behr ("L. Behr"); Best Buy Co., Inc. ("Best Buy"); The Boeing Company ("Boeing"); Business Roundtable ("BRT"); Robert N. Burt ("R. Burt"); State Bar of California, Corporations Committee of Business Law Section ("California Bar"); Sean F. Campbell ("S. Campbell"); Carlson ("Carlson"); Caterpillar Inc. ("Caterpillar"); U.S. Chamber of Commerce Center for Capital Markets Competitiveness ("Chamber of Commerce/CMCC"); Chevron Corporation ("Chevron"); CIGNA Corporation ("CIGNA"); W. Don Cornwell ("W. Cornwell"); CSX Corporation ("CSX"); Cummins Inc. ("Cummins"); Davis Polk & Wardwell LLP ("Davis Polk"); Dewey & LeBoeuf ("Dewey"); E.I. du Pont de Nemours and Company ("DuPont"); Eaton Corporation ("Eaton"); Michael Eng ("M. Eng"); FedEx Corporation ("FedEx"); FMC Corporation ("FMC Corp."); FPL Group, Inc. ("FPL Group"); Frontier Communications Corporation ("Frontier"); General Electric Company ("GE"); General Mills, Inc. ("General Mills"); Charles O. Holliday, Jr. ("C. Holliday"); Honeywell International Inc. ("Honeywell"); Constance J.

the amendments as inappropriately intruding into matters traditionally governed by State law or imposing a "one size fits all" rule for all companies and expressed concerns about "special interest" directors, forcing companies to focus on the short-term rather than the creation of long-term shareholder value, and other perceived negative effects of the amendments, if adopted, on boards and companies.[35] Finally, commenters worried about the impact of the proposed amendments on small businesses.[36]

After considering the comments and weighing the competing interests of facilitating shareholders' ability to exercise their State law rights to nominate and elect directors against potential disruption and cost to companies, we are convinced that adopting the proposed amendments to the proxy rules serves our purpose to regulate the proxy process in the public interest and on behalf of investors. We are not persuaded by the arguments of some commenters that the provisions of Rule 14a–11 are unnecessary.[37] Those commenters argued that changes in corporate governance over the past six years have obviated the need for a Federal rule to allow shareholders to place their nominees in company proxy materials and that shareholders should be left to determine whether, on a company-by-company basis, such a rule is necessary at any particular company.

While we recognize that some states, such as Delaware,[38] have amended their state corporate law to enable companies to adopt procedures for the inclusion of shareholder director nominees in company proxy materials,[39] as was

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Horner ("C. Horner"); International Business Machines Corporation ("IBM"); Jones Day ("Jones Day"); Keating Muething & Klekamp PLL ("Keating Muething"); James M. Kilts ("J. Kilts"); Reatha Clark King, Ph.D. ("R. Clark King"); Ned C. Lautenbach ("N. Lautenbach"); MeadWestvaco Corporation ("MeadWestvaco"); MetLife, Inc. ("MetLife"); Motorola, Inc. ("Motorola"); O'Melveny & Myers LLP ("O'Melveny & Myers"); Office Depot, Inc. ("Office Depot"); Pfizer Inc. ("Pfizer"); Protective Life Corporation ("Protective"); Sullivan & Cromwell LLP ("S&C"); Safeway Inc. ("Safeway"); Sara Lee Corporation ("Sara Lee"); Shearman & Sterling LLP ("Shearman & Sterling"); The Sherwin-Williams Company ("Sherwin-Williams"); Sidley Austin LLP ("Sidley Austin"); Simpson Thacher & Bartlett LLP ("Simpson Thacher"); Tesoro Corporation ("Tesoro"); Textron Inc. ("Textron"); Texas Instruments Corporation ("TI"); Gary L. Tooker ("G. Tooker"); UnitedHealth Group Incorporated ("UnitedHealth"); Unitrin, Inc. ("Unitrin"); U.S. Bancorp ("U.S. Bancorp"); Wachtell, Lipton, Rosen & Katz ("Wachtell"); Wells Fargo & Company ("Wells Fargo"); West Chicago Chamber of Commerce & Industry ("West Chicago Chamber"); Weyerhaeuser Company ("Weyerhaeuser"); Xerox Corporation ("Xerox"); Yahoo! ("Yahoo").

[35] *See* letters from 26 Corporate Secretaries; American Bar Association ("ABA"); ACE Limited ("ACE"); Advance Auto Parts; AGL Resources ("AGL"); Aetna Inc. ("Aetna"); Allstate; Alston & Bird LLP ("Alston & Bird"); American Bankers Association ("American Bankers Association"); The American Business Conference ("American Business Conference"); American Electric Power Company, Inc. ("American Electric Power"); Anadarko; Applied Materials, Inc. ("Applied Materials"); Artistic Land Designs LLC ("Artistic Land Designs"); Association of Corporate Counsel; Avis Budget; Atlantic Bingo Supply, Inc. ("Atlantic Bingo"); L. Behr; Best Buy; Biogen Idec Inc. ("Biogen"); James H. Blanchard ("J. Blanchard"); Boeing; Tammy Bonkowski ("T. Bonkowski"); BorgWarner Inc. ("BorgWarner"); Boston Scientific Corporation ("Boston Scientific"); The Brink's Company ("Brink's"); BRT; Burlington Northern Santa Fe Corporation ("Burlington Northern"); R. Burt; California Bar; Callaway Golf Company ("Callaway"); S. Campbell; Carlson; Carolina Mills ("Carolina Mills"); Caterpillar; Chamber of Commerce/CMCC; Chevron; Rebecca Chicko ("R. Chicko"); CIGNA; Comcast Corporation ("Comcast"); Competitive Enterprise Institute's Center for Investors and Entrepreneurs ("Competitive Enterprise Institute"); W. Cornwell; CSX; Edwin Culwell ("E. Culwell"); Cummins; Darden Restaurants, Inc. ("Darden Restaurants"); Daniels Manufacturing Corporation ("Daniels Manufacturing"); Davis Polk; Delaware State Bar Association ("Delaware Bar"); Tom Dermody ("T. Dermody"); Devon Energy Corporation ("Devon"); DTE Energy Company ("DTE Energy"); Eaton; The Edison Electric Institute ("Edison Electric Institute"); Eli Lilly and Company ("Eli Lilly"); Emerson Electric Co. ("Emerson Electric"); M. Eng; Erickson Retirement Communities, LLC ("Erickson"); ExxonMobil Corporation ("ExxonMobil"); FedEx; Financial Services Roundtable ("Financial Services Roundtable"); Flutterby Kissed Unique Treasures ("Flutterby"); FPL Group; Frontier; GE; Allen C. Goolsby ("A. Goolsby"); C. Holliday; IBM; Investment Company Institute ("ICI"); Intelect Corporation ("Intelect"); JPMorgan Chase & Co. ("JPMorgan Chase"); Jones Day; R. Clark King; Leggett & Platt Incorporated ("Leggett"); Teresa Liddell ("T. Liddell"); Little Diversified Architectural Consulting ("Little"); McDonald's Corporation ("McDonald's"); MeadWestvaco; MedFaxx, Inc. ("MedFaxx"); Medical Insurance Services ("Medical Insurance"); MetLife; Mary S. Metz ("M. Metz"); Microsoft Corporation ("Microsoft"); John R. Miller ("J. Miller"); Marcelo Moretti ("M. Moretti"); Motorola; National Association of Corporate Directors ("NACD"); National Association of Manufacturers ("NAM"); National Investor Relations Institute ("NIRI"); O'Melveny & Myers; Office Depot; Omaha Door & Window ("Omaha Door"); The Procter & Gamble Company ("P&G"); PepsiCo, Inc. ("PepsiCo"); Pfizer; Realogy Corporation ("Realogy"); Jared Robert ("J. Robert"); Marissa Robert ("M. Robert"); RPM International Inc. ("RPM"); Ryder System, Inc. ("Ryder"); Safeway; Ralph S. Saul ("R. Saul"); Shearman & Sterling; Sherwin-Williams; Raymond F. Simoneau ("R. Simoneau"); Society of Corporate Secretaries and Governance Professionals, Inc. ("Society of Corporate Secretaries"); The Southern Company ("Southern Company"); Southland Properties, Inc. ("Southland"); The Steele Group ("Steele Group"); Style Crest Enterprises, Inc. ("Style Crest"); Tesoro; Textron; Theragenics Corporation ("Theragenics"); TI; Richard Trummel ("R. Trummel"); Terry Trummel ("T. Trummel"); Viola Trummel ("V. Trummel"); tw telecom inc. ("tw telecom"); Laura D'Andrea Tyson ("L. Tyson"); United Brotherhood of Carpenters and Joiners of America ("United Brotherhood of Carpenters"); UnitedHealth; U.S. Bancorp; VCG Holding Corporation ("VCG"); Wachtell; The Way to Wellness ("Wellness"); Wells Fargo; Whirlpool Corporation ("Whirlpool"); Xerox; Yahoo; Jeff Young ("J. Young").

[36] *See* letters from ABA; American Mailing Service ("American Mailing"); All Cast, Inc. ("All Cast"); Always N Bloom ("Always N Bloom"); American Carpets ("American Carpets"); John Arquilla ("J. Arquilla"); Beth Armburst ("B. Armburst"); Artistic Land Designs; Charles Atkins ("C. Atkins"); Book Celler ("Book Celler"); Kathleen G. Bostwick ("K. Bostwick"); Brighter Day Painting ("Brighter Day Painting"); Colletti and Associates ("Colletti"); Commercial Concepts ("Commercial Concepts"); Complete Home Inspection ("Complete Home Inspection"); Debbie Courtney ("D. Courtney"); Sue Crawford ("S. Crawford"); Crespin's Cleaning, Inc. ("Crespin"); Don's Tractor Repair ("Don's"); Theresa Ebreo ("T. Ebreo"); M. Eng; eWareness, Inc. ("eWareness"); Evans Real Estate Investments, LLC ("Evans"); Fluharty Antiques ("Fluharty"); Flutterby; Fortuna Italian Restaurant & Pizza ("Fortuna Italian Restaurant"); Future Form Inc. ("Future Form Inc."); Glaspell Goals ("Glaspell"); Cheryl Gregory ("C. Gregory"); Healthcare Practice Management, Inc. (Healthcare Practice"); Brian Henderson ("B. Henderson"); Sheri Henning ("S. Henning"); Jaynee Herren ("J. Herren"); Ami Iriarte ("A. Iriarte"); Jeremy J. Jones ("J. Jones"); Juz Kidz Nursery and Preschool ("Juz Kidz"); Kernan Chiropractic Center ("Kernan"); LMS Wine Creators ("LMS Wine"); Tabitha Luna ("T. Luna"); Mansfield Children's Center, Inc. ("Mansfield Children's Center"); Denise McDonald ("D. McDonald"); Meister's Landscaping ("Meister"); Merchants Terminal Corporation ("Merchants Terminal"); Middendorf Bros. Auctioneers and Real Estate ("Middendorf"); Mingo Custom Woods ("Mingo"); Moore Brothers Auto Truck Repair ("Moore Brothers"); Mouton's Salon ("Mouton"); Doug Mozack ("D. Mozack"); Ms. Dee's Lil Darlins Daycare ("Ms. Dee"); Gavin Napolitano ("G. Napolitano"); NK Enterprises ("NK"); Hugh S. Olson ("H. Olson"); Parts and Equipment Supply Co. ("PESC"); Pioneer Heating & Air Conditioning ("Pioneer Heating & Air Conditioning"); RC Furniture Restoration ("RC"); RTW Enterprises Inc. ("RTW"); Debbie Sapp ("D. Sapp"); Southwest Business Brokers ("SBB"); Security Guard IT&T Alarms, Inc. ("SGIA"); Peggy Sicilia ("P. Sicilia"); Slycers Sandwich Shop ("Slycers"); Southern Services ("Southern Services"); Steele Group; Sylvron Travels ("Sylvron"); Theragenics; Erin White Tremaine ("E. Tremaine"); Wagner Health Center ("Wagner"); Wagner Industries ("Wagner Industries"); Wellness; West End Auto Paint & Body ("West End"); Y.M. Inc. ("Y.M."); J. Young.

[37] *See, e.g.,* letters from 26 Corporate Secretaries; 3M; Advance Auto Parts; Allstate; Avis Budget; American Express; Anadarko; Association of Corporate Counsel; AT&T; L. Behr; Best Buy; Boeing; BRT; R. Burt; California Bar; S. Campbell; Carlson; Caterpillar; Chamber of Commerce/CMCC; Chevron; CIGNA; W. Cornwell; CSX; Cummins; Davis Polk; Dewey; DuPont; Eaton; M. Eng; FedEx; FMC Corp.; FPL Group; Frontier; GE; General Mills; Joseph A. Grundfest, Stanford Law School (July 24, 2009) ("Grundfest"); C. Holliday; Honeywell; C. Horner; IBM; Jones Day; Keating Muething; J. Kilts; R. Clark King; N. Lautenbach; MeadWestvaco; Metlife; Motorola; O'Melveny & Myers; Office Depot; Pfizer; Protective; S&C; Safeway; Sara Lee; Shearman & Sterling; Sherwin-Williams; Sidley Austin; Simpson Thacher; Tesoro; Textron; TI; G. Tooker; UnitedHealth; Unitrin; U.S. Bancorp; Wachtell; Wells Fargo; West Chicago Chamber; Weyerhaeuser; Xerox; Yahoo.

[38] We refer to Delaware law frequently because of the large percentage of public companies incorporated under that law. The Delaware Division of Corporations reports that over 50% of U.S. public companies are incorporated in Delaware. *See http://www.corp.delaware.gov.*

[39] Del. Code Ann. tit. 8, § 112. In December 2009, the Committee on Corporate Laws of the American Bar Association Section of Business Law Committee adopted amendments to the Model Act that explicitly authorize bylaws that prescribe

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highlighted by a number of commenters, other states have not.[40] These commenters noted that, as a result, companies not incorporated in Delaware could frustrate shareholder efforts to establish procedures for shareholders to place board nominees in the company's proxy materials by litigating the validity of a shareholder proposal establishing such procedures, or possibly repealing shareholder-adopted bylaws establishing such procedures. In addition, due to the difficulty that shareholders could have in establishing such procedures, we believe that it would be inappropriate to rely solely on an enabling approach to facilitate shareholders' ability to exercise their State law rights to nominate and elect directors. Even if bylaw amendments to permit shareholders to include nominees in company proxy materials were permissible in every state, shareholder proposals to so amend company bylaws could face significant obstacles.

We also considered whether the move by many companies away from plurality voting to a general policy of majority voting in uncontested director elections should lead to a conclusion that our actions are unnecessary or whether we should premise our actions on the failure of a company to adopt majority voting.[41] We agree with commenters[42] who argued that a majority voting standard in director elections does not address the need for a rule to facilitate the inclusion of shareholder nominees for director in company proxy materials. While majority voting impacts shareholders' ability to elect candidates put forth by management, it does not affect shareholders' ability to exercise their right to nominate candidates for director.

We also do not believe that the recent amendments to New York Stock Exchange (NYSE) Rule 452, which eliminated brokers' discretionary voting authority in director elections, negate the need for the rule. Certain commenters specifically noted their concurrence with us on this point.[43] The amendments to NYSE Rule 452 address who exercises the right to vote rather than shareholders' ability to have their nominees put forth for a vote. While these and other changes have been important events, they bolster shareholders' ability to elect directors who are already on the company's proxy card, not their ability to affect who appears on that card. We therefore are convinced that the Federal proxy rules should be amended to better facilitate the exercise of shareholders' rights under State law to nominate directors.

We also considered whether we should amend Rule 14a–8 to narrow the "election exclusion," without also adopting Rule 14a–11. We note that a significant number of commenters supported the proposed amendments to Rule 14a–8(i)(8).[44] We concluded, however, as certain commenters pointed out, that adopting only the proposed amendments to Rule 14a–8(i)(8), without Rule 14a–11, would not achieve the Commission's stated objectives.[45]We believe that the amendments to Rule 14a–8(i)(8) will provide shareholders with an important mechanism for including in company proxy materials proposals that would address the inclusion of shareholder director nominees in the company's proxy materials in ways that supplement Rule 14a–11, such as with a lower ownership threshold, a shorter holding period, or to allow for a greater number of nominees if shareholders of a company support such standards.

We recognize that many commenters advocated that shareholders' ability to include nominees in company proxy materials should be determined *exclusively* by what individual companies or their shareholders affirmatively choose to provide, or that companies or their shareholders should be able to opt out of Rule 14a–11 or otherwise alter its terms for individual companies (the "private ordering" arguments).[46] After careful consideration of the numerous comments advocating this perspective,[47] we believe that the arguments in favor of this perspective are flawed for several reasons.

First, corporate governance is not merely a matter of private ordering. Rights, including shareholder rights, are artifacts of law, and in the realm of corporate governance some rights cannot be bargained away but rather are imposed by statute. There is nothing novel about mandated limitations on private ordering in corporate governance.[48]

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shareholder access to company proxy materials or reimbursement of proxy solicitation expenses. *See* ABA Press Release, "Corporate Laws Committee Adopts New Model Business Corporation Act Amendments to Provide For Proxy Access And Expense Reimbursement," December 17, 2009, *available at http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=848.*

In addition, in 2007, North Dakota amended its corporate code to permit 5% shareholders to provide a company notice of intent to nominate directors and require the company to include each such shareholder nominee in its proxy statement and form of proxy. N.D. Cent. Code § 10–35–08 (2009); *see* North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35 *et al.* (2007).

[40] *See* letters from American Federation of State, County and Municipal Employees ("AFSCME"); AllianceBernstein L.P. ("AllianceBernstein"); Amalgamated Bank LongView Funds ("Amalgamated Bank"); Association of British Insurers ("British Insurers"); CalPERS; CII; The Corporate Library ("Corporate Library"); L. Dallas; Florida State Board of Administration; ICGN; LIUNA; D. Nappier; Paul M. Neuhauser ("P. Neuhauser"); Comment Letter of Nine Securities and Governance Law Firms ("Nine Law Firms"); Pax World; Pershing Square; *theRacetotheBottom.org* ("RacetotheBottom"); RiskMetrics; Schulte Roth & Zabel LLP ("Schulte Roth & Zabel"); Sodali ("Sodali"); Teachers Insurance and Annuity Association of America and College Retirement Equities Fund ("TIAA–CREF"); United States Proxy Exchange ("USPE"); ValueAct Capital, LLC ("ValueAct Capital").

[41] Despite the rate of adoption of a majority voting standard for director elections by companies in the S&P 500, only a small minority of firms in the Russell 3000 index have adopted them. *See* discussion in footnote 69 in the Proposing Release.

[42] *See* letters from AFSCME; AllianceBernstein; CalPERS; CII; L. Dallas; D. Nappier; P. Neuhauser; RiskMetrics; TIAA–CREF. One commenter characterized a majority voting standard as a mechanism for "registering negative sentiment" about an incumbent board nominee, not a mechanism to ensure board accountability. *See* letter from AFSCME.

[43] *See* letters from CII; Sodali; USPE.

[44] For a list of these commenters, *see* footnotes 677, 678, and 679 below.

[45] *See* letters from CII; USPE.

[46] *See* letters from 26 Corporate Secretaries; ABA; ACE; Advance Auto Parts; AGL; Aetna; Allstate; Alston & Bird; American Bankers Association; American Business Conference; American Electric Power; Anadarko; Applied Materials; Artistic Land Designs; Association of Corporate Counsel; Avis Budget; Atlantic Bingo; L. Behr; Best Buy; Biogen; J. Blanchard; Boeing; T. Bonkowski; BorgWarner; Boston Scientific; Brink's; BRT; Burlington Northern; R. Burt; California Bar; Callaway; S. Campbell; Carlson; Carolina Mills; Caterpillar; Chamber of Commerce/CMCC; Chevron; R. Chicko; CIGNA; Comcast; Competitive Enterprise Institute; W. Cornwell; CSX; E. Culwell; Cummins; Darden Restaurants; Daniels Manufacturing; Davis Polk; Delaware Bar; T. Dermody; Devon; DTE Energy; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; M. Eng; Erickson; ExxonMobil; FedEx; Financial Services Roundtable; Flutterby; FPL Group; Frontier; GE; A. Goolsby; Grundfest; C. Holliday; IBM; ICI; Intelect; JPMorgan Chase; Jones Day; R. Clark King; Leggett; T. Liddell; Little; McDonald's; MeadWestvaco; MedFaxx; Medical Insurance; Metlife; M. Metz; Microsoft; J. Miller; M. Moretti; Motorola; NACD; NAM; NIRI; O'Melveny & Myers; Office Depot; Omaha Door; P&G; PepsiCo; Pfizer; Realogy; J. Robert; M. Robert; RPM; Ryder; Safeway; R. Saul; Shearman & Sterling; Sherwin-Williams; R. Simoneau; Society of Corporate Secretaries; Southern Company; Southland; Steele Group; Style Crest; Tesoro; Textron; Theragenics; TI; R. Trummel; T. Trummel; V. Trummel; tw telecom; L. Tyson; United Brotherhood of Carpenters; UnitedHealth; U.S. Bancorp; VCG; Wachtell; Wellness; Wells Fargo; Whirlpool; Xerox; Yahoo; J. Young.

[47] *See id.*

[48] For example, quite a few aspects of Delaware corporation law are mandatory (*i.e.,* not capable of modification by agreement or provision in the certificate of incorporation or bylaws), including: (i) The requirement to hold an annual election of directors (Del. Code Ann., tit. 8, § 211(b); *Jones Apparel Group* v. *Maxwell Shoe Co.,* 883 A.2d 837,

Second, the argument that there is an inconsistency between mandating inclusion of shareholder nominees in company proxy materials and our concern for the rights of shareholders under the Federal securities laws [49] mistakenly assumes that basic protections of, and rights of, particular shareholders provided under the Federal proxy rules should be able to be abrogated by "the shareholders" of a particular corporation, acting in the aggregate. The rules we adopt today provide individual shareholders the ability to have director nominees included in the corporate proxy materials if State law [50] and governing corporate documents permit a shareholder to nominate directors at the shareholder meeting and the requirements of Rule 14a–11 are satisfied. Those rules similarly facilitate the right of individual shareholders to vote for those nominated, whether by management or another shareholder, if the shareholder has voting rights under State law and the company's governing documents. The rules we adopt today reflect our judgment that the proxy rules should better facilitate shareholders' effective exercise of their traditional State law rights to nominate directors and cast their votes for nominees. When the Federal securities laws establish protections or create rights for security holders, they do so individually, not in some aggregated capacity. No provision of the Federal securities laws can be waived by referendum. A rule that would permit some shareholders (even a majority) to restrict the Federal securities law rights of other shareholders would be without precedent and, we believe, a fundamental misreading of basic premises of the Federal securities laws. In addition, allowing some shareholders to impair the ability of other shareholders to have their director nominees included in company proxy materials cannot be reconciled with the purpose of the rules we are adopting today. In our view, it would be no more appropriate to subject a Federal proxy rule that provides the ability to include nominees in the company proxy statement to a shareholder vote than it would be to subject any other aspect of the proxy rules—including the other required disclosures—to abrogation by shareholder vote.

Third, the net effect of our rules will be to expand shareholder choice, not limit it. Our rules will result in a greater number of nominees appearing on a proxy card. Shareholders will continue to have the opportunity to vote solely for management candidates, but our rules will also give shareholders the opportunity to vote for director candidates who otherwise might not have been included in company proxy materials.

In addition to these basic conclusions, we note that there are other significant concerns raised by a private ordering approach. A company-by-company shareholder vote on the applicability of Rule 14a–11 would involve substantial direct and indirect, market-wide costs, and it is possible that boards of directors, or shareholders acting with their explicit or implicit encouragement, might seek such shareholder votes, perhaps repeatedly, at no financial cost to themselves but at considerable cost to the company and its shareholders. Another concern relates to the nature of the shareholder vote on whether to opt out of Rule 14a–11: Specifically, in that context management can draw on the full resources of the corporation to promote the adoption of an opt-out, while disaggregated shareholders have no similarly effective platform from which to advocate against an opt-out.

In addition, the path to shareholder adoption of a procedure to include nominees in company proxy materials is by no means free of obstructions. While shareholders may ordinarily have the State law right to adopt bylaws providing for inclusion of shareholder nominees in company proxy materials even in the absence of an explicit authorizing statute like Delaware's, the existence of that right in the absence of such a statute may be challenged. Moreover, we understand that under Delaware law, the board of directors is ordinarily free, subject to its fiduciary duties, to amend or repeal any shareholder-adopted bylaw.[51] In addition, not all state statutes confer upon shareholders the power to adopt and amend bylaws, and even where shareholders have that power it is frequently limited by requirements in the company's governing documents that bylaw amendments be approved by a supermajority shareholder vote.[52]

After careful consideration of the options that commenters have suggested, we have determined that the most effective way to facilitate shareholders' exercise of their traditional State law rights to nominate and elect directors would be through Rule 14a–11 and the related amendments to the proxy rules that we proposed in June 2009. We have concluded that the ability to include shareholder nominees in company proxy materials pursuant to Rule 14a–11 [53] must be available to shareholders who are entitled under State law to nominate and elect directors, regardless of any provision of State law or a company's governing documents that purports to waive or prohibit the use of Rule 14a–11. In this regard, we note that although the rules we are adopting do not permit a company or its shareholders to opt out of or alter the application of Rule 14a–11, the amendments do contemplate that any additional ability to include shareholder nominees in the company's proxy materials that may be established in a company's governing documents will be permissible under our rules. Moreover, our amendments to Rule 14a–8 will facilitate the presentation of proposals by shareholders to adopt company-

848–849 (Del. Ch. 2004) *citing Rohe* v. *Reliance Training Network, Inc.,* 2000 Del. Ch. LEXIS 108 at *10–*11 (Del. Ch. July 21, 2000)); (ii) the limitation against dividing the board of directors into more than three classes (Del. Code Ann., tit. 8, § 141(d); *see also Jones Apparel*); (iii) the entitlement of stockholders to inspect the list of stockholders and other corporate books and records (Del. Code Ann., tit. 8, §§ 219(a) and 220(b); *Loew's Theatres, Inc.* v. *Commercial Credit Co.,* 243 A.2d 78, 81 (Del. Ch. 1968)); (iv) the right of stockholders to vote as a class on certain amendments to the certificate of incorporation (Del. Code Ann., tit. 8, § 242(b)(2)); (v) appraisal rights (Del. Code Ann., tit. 8, § 262(b)); and (vi) fiduciary duties of corporate directors (*Siegman* v. *Tri-Star Pictures, Inc.,* C.A. No. 9477 (Del. Ch. May 5, 1989, *revised* May 30, 1989), reported at 15 Del. J. Corp. L. 218, 236 (1990); *cf.* Del. Code Ann., tit. 8, § 102(b)(7), permitting elimination of director liability for monetary damages for breach of the duty of care). *See also* Edward P. Welch and Robert S. Saunders, *What We Can Learn From Other Statutory Schemes: Freedom And Its Limits In The Delaware General Corporation Law,* 33 Del. J. Corp. L. 845, 857–859 (2008); Jeffrey N. Gordon, *Contractual Freedom In Corporate Law: Articles & Comments; The Mandatory Structure Of Corporate Law,* 89 Colum. L. Rev. 1549, 1554 n.16 (1989) (identifying several of these and other mandatory aspects of Delaware corporation law).

[49] *See* letters from Grundfest; Form Letter Type A. *Cf.* letter from Nine Law Firms.

[50] In the case of a non-U.S. domiciled issuer that does not qualify as a foreign private issuer (as defined in Exchange Act Rule 3b–4), we will look to the underlying law of the jurisdiction of organization. *See* Rule 14a–11(a).

[51] It has been argued to us, as a basis for excluding a shareholder proposal under Rule 14a–8, that Delaware law does not permit a bylaw to deprive the board of directors of the power to amend or repeal it, where the corporation's certificate of incorporation confers upon the board the power to adopt, amend and repeal bylaws. *See, e.g., CVS Caremark Corp.,* No-Action Letter (March 9, 2010). *See also* Del. Code Ann., tit. 8, § 109(b) and *Centaur Partners, IV* v. *National Intergroup, Inc.,* 582 A.2d 923, 929 (Del. 1990).

[52] *See* Beth Young, The Corporate Library, "The Limits of Private Ordering: Restrictions on Shareholders' Ability to Initiate Governance Change and Distortions of the Shareholder Voting Process" (November 2009), *available at http://www.sec.gov/comments/s7-10-09/s71009-568.pdf. See, e.g.,* Ind. Code § 23–1–39–1; Okla. Stat., tit. 18, § 18–1013.

[53] Throughout this release, when we refer to "a nomination pursuant to Rule 14a–11," a "Rule 14a–11 nomination," or other similar statement, we are referring to a nomination submitted for inclusion in a company's proxy materials pursuant to Rule 14a–11.

specific procedures for including shareholder nominees for director in company proxy materials, and our adoption of new Exchange Act Rule 14a–18 (which requires disclosure concerning the nominating shareholder or group and the nominee or nominees that generally is consistent with that currently required in an election contest) will help assure that investors are adequately informed about shareholder nominations made through such procedures.

In contrast, if State law [54] or a provision of the company's governing documents were ever to prohibit a shareholder from making a nomination (as opposed to including a validly nominated individual in the company's proxy materials), Rule 14a–11 would not require the company to include in its proxy materials information about, and the ability to vote for, any such nominee. The rule defers entirely to State law as to whether shareholders have the right to nominate directors and what voting rights shareholders have in the election of directors.

While we have concluded that we should provide shareholders the means to have nominees included in proxy materials in certain circumstances, we also are mindful that to accomplish this goal the regulatory structure must arrive at a solution that ultimately is workable. Accordingly, we are adopting a number of significant changes to the rules we proposed in order to address the many thoughtful and constructive comments we received on the specifics of our proposed amendments. The changes that we are making to the amendments are described in detail throughout this release. There also were a number of suggested changes that we considered and decided not to adopt, as detailed below.

B. Our Role in the Proxy Process

Several commenters challenged our authority to adopt Rule 14a–11.[55] We considered those comments carefully but continue to believe that we have the authority to adopt Rule 14a–11 under Section 14(a) as originally enacted.[56] In any event, Congress confirmed our authority in this area and removed any doubt that we have authority to adopt a rule such as Rule 14a–11.[57] As described more fully below, Rule 14a–11 is necessary and appropriate in the public interest and for the protection of investors.[58] Additionally, as explained below, the terms and conditions of Rule 14a–11 are also in the interests of shareholders and for the protection of investors.[59] Therefore, this challenge is now moot.

Although our statutory authority to adopt Rule 14a–11 is no longer at issue, the constitutionality of Rule 14a–11 also has been challenged by commenters. We disagree with their arguments.[60] Proxy regulations do not infringe on corporate First Amendment rights both because "management has no interest in corporate property except such interest as derives from the shareholders," and because such regulations "govern speech by a corporation *to itself*" and therefore "do not limit the range of information that the corporation may contribute to the public debate." [61] Even if statements in proxy materials are viewed as more than merely internal communications, this communication is of a commercial—not political—nature, and regulation of such statements through Rule 14a–11 is consistent with applicable First Amendment standards.[62]

C. Summary of the Final Rules

As noted above, we carefully considered the comments and have decided to adopt new Exchange Act Rule 14a–11 with significant modifications in response to the comments. We believe that the new rule will benefit shareholders and protects investors by improving corporate suffrage, the disclosure provided in connection with corporate proxy solicitations, and communication between shareholders in the proxy process. Consistent with the Proposal, Rule 14a–11 will apply only when applicable State law or a company's governing documents do not prohibit shareholders from nominating a candidate for election as a director. In addition, as adopted, the rule will apply to a foreign issuer that is otherwise subject to our proxy rules only when applicable foreign law does not prohibit shareholders from making such nominations. Also consistent with the Proposal, companies may not "opt out" of the rule—either in favor of a different framework for inclusion of shareholder director nominees in company proxy materials or no framework. In addition, as was proposed, the rule will apply regardless of whether any specified event has occurred to trigger the rule and will apply regardless of whether the company is subject to a concurrent proxy contest.[63] Also as proposed, the final rule will apply to companies that are subject to the Exchange Act proxy rules, including investment companies and controlled companies, but will not apply to "debt-only" companies. The rule will apply to smaller reporting companies, but we have decided to delay the rule's application to these companies for three years. We believe that a delayed effective date for smaller reporting companies should allow those companies to observe how the rule operates for other companies and should allow them to better prepare for implementation of the rules. Delayed implementation for these companies also will allow us to evaluate the implementation of Rule 14a–11 by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them. To use Rule 14a–11, a nominating shareholder or group will be required to satisfy an ownership threshold of at least 3% of the voting power of the company's securities entitled to be voted at the meeting. Shareholders will be able to aggregate their shares to meet the threshold. The

[54] In the case of a non-U.S. domiciled issuer that does not qualify as a foreign private issuer, we will look to the underlying law of the jurisdiction of organization. *See* footnote 50 above.

[55] *See* letters from Ameriprise; AT&T; L. Behr; BRT; Burlington Northern; CMCC; Dewey; M. Eng; FedEx; Grundfest; Keating Muething; OPLP; Sidley Austin.

[56] When it adopted Section 14(a) of the Exchange Act, Congress determined that the exercise of shareholder voting rights via the corporate proxy is a matter of Federal concern, and the statute's grant of authority is not limited to regulating disclosure. *Roosevelt* v. *E.I. DuPont de Nemours & Co.,* 958 F.2d 416, 421–422 (D.C. Cir. 1992) (Congress "did not narrowly train [S]ection 14(a) on the interest of stockholders in *receiving information* necessary to the intelligent exercise of their" State law rights; Section 14(a) also "shelters use of the proxy solicitation process as a means by which stockholders * * * may *communicate with each other.*"); *see also, e.g., TSC Indus., Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 n.10 (1976) (Section 14(a) is a grant of "broad statutory authority"). The adoption of Rule 14a–11 reflects our continuing purpose to ensure that proxies are used as a means to enhance the ability of shareholders to make informed choices, especially on the critical subject of who sits on the board of directors.

[57] Dodd-Frank Act § 971(a) and (b). These provisions expressly provide that the Commission may issue rules permitting shareholders to use an issuer's proxy solicitation materials for the purpose of nominating individuals to membership on the board of directors of the issuer.

[58] Exchange Act § 14(a) and Investment Company Act § 20(a).

[59] Dodd-Frank Act § 971(b).

[60] *See* letter from BRT.

[61] *Pacific Gas and Electric Company* v. *Public Utilities Comm'n of California,* 475 U.S. 1, 14 n.10 (1986) (emphasis in original).

[62] Nor does Rule 14a–11 violate the Fifth Amendment, as it does not constitute a regulatory taking. *See, e.g., Lingle* v. *Chevron U.S.A.,* 544 U.S. 528, 546–47 (2005); *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978).

[63] Throughout this release, the terms "proxy contest," "election contest," and "contested election" refer to any election of directors in which another party commences a solicitation in opposition subject to Exchange Act Rule 14a–12(c).

required ownership threshold has been modified from the Proposal, which would have required that a nominating shareholder or group hold 1%, 3%, or 5% of the company's securities entitled to be voted on the election of directors, depending on accelerated filer status or, in the case of registered investment companies, depending on the net assets of the company. The final rule requires that a nominating shareholder or group must hold both investment and voting power, either directly or through any person acting on their behalf, of the securities. In calculating the ownership percentage held, under certain conditions, a nominating shareholder or member of the nominating shareholder group would be able to include securities loaned to a third party in the calculation of ownership. In determining the total voting power held by the nominating shareholder or any member of the nominating shareholder group, securities sold short (as well as securities borrowed that are not otherwise excludable) must be deducted from the amount of securities that may be counted towards the required ownership threshold. In addition, a nominating shareholder (or in the case of a group, each member of the group) will be required to have held the qualifying amount of securities continuously for at least three years as of the date the nominating shareholder or group submits notice of its intent to use Rule 14a–11 (on a filed Schedule 14N), rather than for one year, as was proposed. Consistent with the proposed amendments, we are adopting a requirement that the nominating shareholder or members of the group must continue to own the qualifying amount of securities through the date of the meeting at which directors are elected and provide disclosure concerning their intent with regard to continued ownership of the securities after the election of directors. In addition, the nominating shareholder (or where there is a nominating shareholder group, any member of the nominating shareholder group) may not be holding the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11, and may not have a direct or indirect agreement with the company regarding the nomination of the nominee or nominees prior to filing the Schedule 14N.

The nominating shareholder or group must provide notice to the company of its intent to use Rule 14a–11 no earlier than 150 days prior to the anniversary of the mailing of the prior year's proxy statement and no later than 120 days prior to this date. The final rule differs from the Proposal, which would have required the nominating shareholder or group to provide notice to the company no later than 120 days prior to the anniversary of the mailing of the prior year's proxy statement or in accordance with the company's advance notice provision, if applicable. As was proposed, under the final rule the nominating shareholder or group will be required to file on EDGAR and transmit to the company its notice on Schedule 14N on the same date.

The rule also includes certain requirements applicable to the shareholder nominee. Consistent with the Proposal, the final rule provides that the company will not be required to include any nominee whose candidacy or, if elected, board membership would violate controlling state or Federal law, or the applicable standards of a national securities exchange or national securities association, except with regard to director independence requirements that rely on a subjective determination by the board, and such violation could not be cured during the provided time period.[64] In addition, the rule we are adopting provides that a company will not be required to include any nominee whose candidacy or, if elected, board membership would violate controlling foreign law. As we proposed, the rule does not include any restrictions on the relationships between the nominee and the nominating shareholder or group.

As was proposed, under Rule 14a–11, a company will not be required to include more than one shareholder nominee, or a number of nominees that represents up to 25% of the company's board of directors, whichever is greater. Where there are multiple eligible nominating shareholders, the nominating shareholder or group with the highest percentage of the company's voting power would have its nominees included in the company's proxy materials, rather than the nominating shareholder or group that is first to submit a notice on Schedule 14N, as we had proposed. We also have clarified in the final rule that when a company has a classified (staggered) board, the 25% calculation would still be based on the total number of board seats. In addition, in response to public comment, we have added a provision to the rule designed to prevent the potential unintended consequences of discouraging dialogue and negotiation between company management and nominating shareholders. Under this provision, shareholder nominees of an eligible nominating shareholder or group with the highest qualifying voting power percentage that a company agrees to include as company nominees after the filing of the Schedule 14N would count toward the 25%.

The notice on Schedule 14N will be required to include:

- Disclosure concerning:
  - The amount and percentage of voting power of the company's securities entitled to be voted by the nominating shareholder or group and the length of ownership of those securities;
  - Biographical and other information about the nominating shareholder or group and the shareholder nominee or nominees, similar to the disclosure currently required in a contested election;
  - Whether or not the nominee or nominees satisfy the company's director qualifications, if any (as provided in the company's governing documents);
- Certifications that, after reasonable inquiry and based on the nominating shareholder's or group's knowledge, the:
  - Nominating shareholder (or where there is a nominating shareholder group, each member of the nominating shareholder group) is not holding any of the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11;
  - Nominating shareholder or group otherwise satisfies the requirements of Rule 14a–11, as applicable; and
  - Nominee or nominees satisfy the requirements of Rule 14a–11, as applicable;
- A statement that the nominating shareholder or group members will continue to hold the qualifying amount of securities through the date of the meeting and a statement with regard to the nominating shareholder's or group member's intended ownership of the securities following the election of directors (which may be contingent on the

[64] In the case of an investment company, the nominee may not be an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)). *See* Section II.B.3.b. for a more detailed discussion of the applicability of Rule 14a–11 to registered investment companies.

results of the election of directors); and
- A statement in support of each shareholder nominee, not to exceed 500 words per nominee (the statement would be at the option of the nominating shareholder or group).

These requirements for Schedule 14N are largely consistent with the Proposal, with some modifications made in response to comments. Among the modifications is the new disclosure requirement concerning whether, to the best of the nominating shareholder's or group's knowledge, the nominee or nominees satisfy the company's director qualifications, if any (as provided in the company's governing documents). We also have revised the certifications to require certification not only with regard to control intent, but also with regard to the other nominating shareholder and nominee eligibility requirements.

A company that receives a notice on Schedule 14N from an eligible nominating shareholder or group will be required to include in its proxy statement disclosure concerning the nominating shareholder or group and the shareholder nominee or nominees, and include on its proxy card the names of the shareholder nominees. The nominating shareholder or group will be liable for any statement in the notice on Schedule 14N which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact necessary to make the statements therein not false or misleading, including when that information is subsequently included in the company's proxy statement. The company will not be responsible for this information. These liability provisions are included in the final rules largely as proposed, but with two changes in response to comments. Final Rule 14a–9(c) makes clear that the nominating shareholder or group will be liable for any statement in the Schedule 14N or any other related communication that is false or misleading with respect to any material fact, or that omits to state any material fact necessary to make the statements therein not false or misleading, regardless of whether that information is ultimately included in the company's proxy statement. In addition, consistent with the existing approach in Rule 14a–8, under Rule 14a–11 as adopted, a company will not be responsible for any information provided by the nominating shareholder or group and included in the company's proxy statement. Under the Proposal, a company would not have been responsible for any information provided by the nominating shareholder or group except where the company knows or has reason to know that the information is false or misleading.

A company will not be required to include a nominee or nominees if the nominating shareholder or group or the nominee fails to satisfy the eligibility requirements of Rule 14a–11. A company that determines it may exclude a nominee or nominees must provide a notice to the Commission regarding its intent to exclude the nominee or nominees. The company also may submit a request for the staff's informal view with respect to the company's determination that it may exclude the nominee or nominees (commonly referred to as "no-action" requests). In addition, a company could exclude a nominating shareholder's or group's statement of support if the statement exceeds 500 words per nominee and could seek a no-action letter from the staff with regard to this determination if it so desired. In the event that a nominating shareholder or group or nominee withdraws or is disqualified prior to the time the company commences printing the proxy materials, under certain circumstances companies will be required to include a substitute nominee if there are other eligible nominees. Therefore, companies seeking a no-action letter from the staff with respect to their decision to exclude any Rule 14a–11 nominee or nominees would need to seek a no-action letter on all nominees that they believe they can exclude at the outset.

We also have adopted two new exemptions, slightly modified from the Proposal, to the proxy rules for solicitations in connection with a Rule 14a–11 nomination. The first exemption applies to written and oral solicitations by shareholders who are seeking to form a nominating shareholder group. Reliance on this new exemption will require:
- That the shareholder not be holding the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11;
- Limiting the content of written communications to certain information specified in the rule;
- Filing all written soliciting materials sent to shareholders in reliance on the exemption with the Commission or, in the case of oral communications, a filing under cover of Schedule 14N with the appropriate box checked before or at the same time as the first solicitation in reliance on the new exemption; and
- No solicitations in connection with the subject election of directors other than pursuant to the provisions of Rule 14a–11 and the new exemption described below.

Shareholders that do not want to rely on this new exemption could opt to rely on other exemptions from the proxy rules (*e.g.,* Rule 14a–2(b)(2), which is limited to solicitations of not more than 10 persons).

The second new exemption applies to written and oral solicitations by or on behalf of a nominating shareholder or group whose nominee or nominees are or will be included in the company's proxy materials pursuant to Rule 14a–11 in favor of shareholder nominees or for or against company nominees. Reliance on this new exemption will require:
- That the nominating shareholder or group does not seek the power to act as a proxy for another shareholder;
- Disclosing certain information (including the identity of the nominating shareholder or group, and a prominent legend about availability of the proxy materials) in all written communications;
- Filing all written soliciting materials sent to shareholders in reliance on the exemption with the Commission under cover of Schedule 14N with the appropriate box checked; and
- No solicitations in connection with the subject election of directors other than pursuant to the provisions of Rule 14a–11 and this new exemption.

Consistent with the Proposal, we also are amending our beneficial ownership reporting rules so that shareholders relying on Rule 14a–11 would not become ineligible to file a Schedule 13G, in lieu of filing a Schedule 13D, solely as a result of activities in connection with inclusion of a nominee under Rule 14a–11. Also consistent with the proposed amendments, we are not adopting an exclusion from Exchange Act Section 16 for activities in connection with a nomination under Rule 14a–11 that may trigger a filing requirement by nominating shareholders. In addition, after considering the comments, we are not adopting a specific exclusion from the definition of affiliate for nominating shareholders.

Finally, consistent with the Proposal, we are narrowing the scope of the exclusion in Rule 14a–8(i)(8) relating to the election of directors. The revised rule will provide that companies must include in their proxy materials, under

certain circumstances, shareholder proposals that seek to establish a procedure in the company's governing documents for the inclusion of one or more shareholder director nominees in a company's proxy materials.

As we proposed, the final rules provide that a nominating shareholder that is relying on a procedure under State law or a company's governing documents to include a nominee in a company's proxy materials would be required to provide disclosure concerning the nominating shareholder and nominee or nominees to the company on Schedule 14N and file the Schedule 14N on EDGAR. In response to comment, we have clarified that the disclosure also would be required for nominations made pursuant to foreign law.[65] The disclosure requirements on Schedule 14N for nominations made pursuant to a procedure under state or foreign law, or a company's governing documents largely mirror those for a Rule 14a–11 nomination. As with Rule 14a–11 nominees, a company would include in its proxy materials disclosure concerning the nominating shareholder or group and shareholder nominee similar to the disclosure currently required in a contested election. The nominating shareholder or group would have liability for any statement in the notice on Schedule 14N or in information otherwise provided to the company and included in the company's proxy materials which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact necessary to make the statements therein not false or misleading. The company would not be responsible for the information provided to the company and required to be included in the company proxy statement.

II. Changes to the Proxy Rules

A. Introduction

After careful consideration of the comments received on the Proposal, we are adopting amendments to the proxy rules to facilitate the effective exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of directors. Under the new rules, shareholders meeting certain requirements will have two ways to more fully exercise their right to nominate directors. First, we are adopting a new proxy rule, Rule 14a–11, which will, under certain circumstances, require companies to provide shareholders with information about, and the ability to vote for, a shareholder's, or group of shareholders', nominees for director in the companies' proxy materials. This requirement will apply unless State law, foreign law,[66] or a company's governing documents[67] prohibits shareholders from nominating directors.[68] In addition to the standards provided in new Rule 14a–11, provisions under State law, foreign law, or a company's governing documents[69] could provide an additional avenue for shareholders to submit nominees for inclusion in company proxy materials, but would not act as a substitute for Rule 14a–11. Thus, Rule 14a–11 will continue to be available to shareholders regardless of whether they also can avail themselves of a provision under State law, foreign law, or a company's governing documents.

Second, we are amending Rule 14a–8(i)(8) to preclude companies from relying on Rule 14a–8(i)(8) to exclude from their proxy materials shareholder proposals by qualifying shareholders that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. A company must include such a shareholder proposal under the final rules as long as the procedural requirements of Rule 14a–8 are met and the proposal is not subject to exclusion under one of the other substantive bases. In this regard, a shareholder proposal seeking to limit or remove the availability of Rule 14a–11 would be subject to exclusion under Rule 14a–8.[70]

As described throughout this release, we have made many changes to the final rules in response to comments received. We believe the final rules reflect a careful balancing of the policy, workability, and other comments we received on the Proposal.

B. Exchange Act Rule 14a–11

1. Overview

Based on the comments received in response to our solicitation of public input on the Proposal and on prior releases and in roundtables,[71] we understand that shareholders face significant obstacles to effectively exercising their rights to nominate and elect directors to corporate boards. We have received significant public comment supporting the view that including shareholder nominees for director in company proxy materials would be the most direct and effective method of facilitating shareholders' rights in connection with the nomination and election of directors.[72]

On the other hand, many commenters have expressed concern that mandating shareholder access to company proxy materials would lead to more proxy contests or "politicized elections,"[73] which would be distracting, expensive, time-consuming, and inefficient for companies, boards, and management.[74]

[65] *See* Section II.C.5. below.

[66] *See* discussion in footnote 50 above.

[67] Under State law, a company's governing documents may have various names. When we refer to governing documents throughout the release and rule text, we generally are referring to a company's charter, articles of incorporation, certificate of incorporation, declaration of trust, and/or bylaws, as applicable.

[68] We are not aware of any law in any state or in the District of Columbia or in any country that currently prohibits shareholders from nominating directors. Nonetheless, should any such law be enacted in the future, Rule 14a–11 will not apply.

[69] *See* discussion in Section II.C.5. below.

[70] As would currently be the case if a State law permitted a company to prohibit shareholders from nominating candidates for director, a shareholder proposal seeking to prohibit shareholder nominations for director generally or, conversely, to allow shareholder nominations for director, would not be excludable pursuant to Rule 14a–8(i)(8).

[71] *See* the Proposing Release; the 2003 Proposal; the Election of Directors Proposing Release; and the Shareholder Proposals Proposing Release. *See also* the Roundtable on the Federal Proxy Rules and State Corporation Law and the Roundtable on Proposals of Shareholders *available at http://www.sec.gov/spotlight/proxyprocess.htm.*

[72] *See* letters from CII; COPERA; CtW Investment Group; L. Dallas; T. DiNapoli; Florida State Board of Administration; ICGN; D. Nappier; OPERS; Pax World; Teamsters.

[73] *See* letters from ABA; Advance Auto Parts; Atlas Industries, Inc. ("Atlas"); J. Blanchard; Samuel W. Bodman ("S. Bodman"); Boeing; Brink's; BRT; Burlington Northern; Callaway; Cargill ("Cargill"); Carlson; Carolina Mills; Chamber of Commerce/CMCC; Jaime Chico ("J. Chico"); Consolidated Edison, Inc. ("Con Edison"); Anthony Conte ("A. Conte"); W. Cornwell; Crown Battery Manufacturing Co. ("Crown Battery"); CSX; Darden Restaurants; Eaton; FedEx; FPL Group; Frontier; Hickory Furniture Mart ("Hickory Furniture"); IBM; Keating Muething; Little; Louisiana Agencies LLC ("Louisiana Agencies"); Massey Services, Inc. ("Massey Services"); John B. McCoy ("J. McCoy"); D. McDonald; MedFaxx; Metlife; M. Metz; Norfolk Southern Corporation ("Norfolk Southern"); O3 Strategies, Inc. ("O3 Strategies"); Office Depot; Victor Pelson ("V. Pelson"); PepsiCo; Pfizer; Ryder; Sidley Austin; Southland; Style Crest; Tenet Healthcare Corporation ("Tenet"); TI; tw telecom; L. Tyson; United Brotherhood of Carpenters; T. White.

[74] *See* letters from ABA; Anonymous letter dated June 26, 2009 ("Anonymous #2"); Atlas; AT&T; Book Celler; Carlson; Carolina Mills; Chamber of Commerce/CMCC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick & West LLP ("Fenwick"); GE; General Mills; Glass, Lewis & Co., LLC ("Glass Lewis"); Glaspell Goals ("Glaspell"); Intelect; R. Clark King; Koppers Inc. ("Koppers"); MCO Transport, Inc. ("MCO"); MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; Dana Merilatt ("D. Merilatt"); NAM; NIRI; NK; O3 Strategies; Roppe Holding Company ("Roppe"); Rosen Hotels and Resorts ("Rosen"); Safeway; Sara Lee; Schneider National, Inc. ("Schneider"); Southland; Style Crest; Tenet; TI; tw telecom; Rick VanEngelenhoven ("R. VanEngelenhoven"); Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

Commenters also opined that the increased likelihood of a contested election could discourage experienced and capable individuals from serving on boards, making it more difficult for companies to recruit qualified directors or create boards with the proper mix of experience, skills, and characteristics.[75] The current filing and other requirements applicable to shareholders who wish to propose an alternate slate are, in the view of these commenters, more appropriate than including shareholder nominees for director in company proxy materials.[76]

As we also noted in the Proposing Release, we recognize that there are long-held and deeply felt views on every side of these issues. To the extent shareholders have the right to nominate directors at meetings of shareholders, the Federal proxy rules should facilitate the exercise of this right. We believe the rules we are adopting today will better accomplish this goal and will further our mission of investor protection.

New Rule 14a–11 will require companies to include information about shareholder nominees for director in company proxy statements, and the names of the nominee or nominees as choices on company proxy cards, under specified conditions.[77] The rule will permit companies to exclude a nominee or nominees from the company's proxy materials under certain circumstances, such as when a nominating shareholder or group fails to satisfy the eligibility requirements of the rule. In the following sections we describe, in detail, the final rules, comments received on the Proposal, and changes made in response to the comments.

2. When Rule 14a–11 Will Apply

In this section, we address the rule's application, including when there are conflicting or overlapping provisions under state or foreign law or a company's governing documents, during concurrent proxy contests, and in the absence of any specific triggering events. We also address the reasons why neither an opt-in nor opt-out provision is necessary or appropriate.

a. Interaction With State or Foreign Law

While we are not aware of any law in any state or in the District of Columbia that prohibits shareholders from nominating directors, consistent with the Proposal, a company to which the rule would otherwise apply will not be subject to Rule 14a–11 if applicable State law or the company's governing documents prohibit shareholders from nominating candidates for the board of directors. The final rule also clarifies that, in the case of a non-U.S. domiciled issuer that does not meet the definition of foreign private issuer under the Federal securities laws, the rule will not apply if applicable foreign law prohibits shareholders from nominating a candidate for election as a director.[78] If a company's governing documents prohibit shareholder nominations, shareholders could seek to amend the provision by submitting a shareholder proposal under Rule 14a–8.[79]

Consistent with the Proposal, Rule 14a–11 will apply regardless of whether state or foreign law or a company's governing documents prohibit inclusion of shareholder director nominees in company proxy materials or set share ownership or other terms that are more restrictive than Rule 14a–11 under which shareholder director nominees will be included in company proxy materials. For example, if applicable state or foreign law or a company's governing documents were to require that shareholder nominees be included in company proxy materials only if submitted by a 10% shareholder of the company, a shareholder who does not meet the 10% threshold but does meet the requirements of Rule 14a–11, including the 3% ownership threshold described below, would be able to submit their nominee or nominees for inclusion in the company's proxy materials pursuant to Rule 14a–11. If, on the other hand, applicable state or foreign law or a company's governing documents sets the ownership threshold lower than the 3% ownership threshold required under Rule 14a–11, then Rule 14a–11 would not be available to holders with ownership below the Rule 14a–11 threshold. Those shareholders meeting the lower ownership threshold would have the ability to have their nominees included in the company's proxy materials to whatever extent is provided under applicable state or foreign law or the company's governing documents. In this instance, new Exchange Act Rule 14a–18, discussed in Section II.C.5. below, would require specified disclosures concerning the nominating shareholder or group and the shareholder nominee or nominees.

There also may be situations where applicable state or foreign law or a company's governing documents are more permissive in certain respects, and more restrictive in other respects, than Rule 14a–11. For example, applicable state or foreign law or a company's governing documents could require 10% ownership to have a nominee or nominees included in a company's proxy materials, but allow a shareholder that owns 10% to have nominees up to the full number of board seats included in a company's proxy materials or to otherwise have a change in control intent. While Rule 14a–11 would continue to be available in that case for a shareholder that is eligible to use it, a shareholder could choose to proceed under the alternate procedure and standards. In this instance, a shareholder would be required to clearly evidence its intent to rely either on Rule 14a–11 or on the applicable state or foreign law or company's governing documents, and then meet all of the requirements of whichever procedure it selects.[80] A shareholder could not "pick and choose" different aspects of different procedures. If a shareholder chooses to rely on a provision under applicable state or foreign law or a company's governing documents to include a nominee in a company's proxy materials, it would be required to satisfy the disclosure requirements of new Rule 14a–18.

b. Opt-In Not Required

In the Proposing Release, we requested comment on whether Rule 14a–11 should apply only if shareholders of a company elect to have it apply at their company. While commenters did not specifically address the possibility of shareholders opting into Rule 14a–11, many commenters opposed the Commission's Proposal on the basis that it would create a "one size fits all" Federal rule that intrudes into matters that traditionally have been the province of state or local law.[81] Those

[75] *See* letters from 3M; ABA; American Electric Power; Atlantic Bingo; AT&T; Avis Budget; Biogen; Boeing; BRT; Burlington Northern; Callaway; Carlson; Chamber of Commerce/CMCC; CIGNA; Columbine Health Plan ("Columbine"); Cummins; CSX; John T. Dillon ("J. Dillon"); Emerson Electric; Erickson; ExxonMobil; FedEx; Headwaters Incorporated ("Headwaters"); C. Holliday; IBM; Intelect; R. Clark King; Lange Transport ("Lange"); Louisiana Agencies; MetLife; NIRI; O3 Strategies; V. Pelson; PepsiCo; Pfizer; Roppe; Rosen; Ryder; Sara Lee; Sidley Austin; tw telecom; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[76] *See* letters from Ameriprise; Anonymous #2; Artistic Land Designs; Chamber of Commerce/CMCC; Crown Battery; Evelyn Y. Davis ("E. Davis"); Kernan; Medical Insurance; Mouton; Unitrin; R. VanEngelenhoven; Wells Fargo.

[77] *See* new Exchange Act Rule 14a–11.

[78] *See* letters from S&C; Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis").

[79] *See* footnote 70 above.

[80] New Schedule 14N, which is described further in Section II.B.8. below, includes check boxes where a nominating shareholder or group must specify whether it is seeking to include the nominee or nominees in the company's proxy materials under Rule 14a–11 or pursuant to a provision in State law, foreign law, or a company's governing documents.

[81] *See* letters from 26 Corporate Secretaries; ABA; ACE; Advance Auto Parts; AGL; Aetna; Allstate; Alston & Bird; American Bankers Association;

commenters asked the Commission to permit private ordering so that companies and shareholders could devise, if they chose to, a process for the inclusion of shareholder director nominees in company proxy materials that best suits their particular circumstances. Commenters also expressed fears that the Commission's Proposal, if adopted, would stifle future innovations relating to inclusion of shareholder director nominees in company proxy materials and corporate governance in general.[82] On the other hand, some commenters expressed general support for uniform applicability of proposed Rule 14a–11, unless State law or the company's governing documents prohibit shareholders from nominating candidates to the board.[83]

Though we considered commenters' views concerning a private ordering approach, as discussed in Section I.A. above, we have concluded that our rules should provide shareholders the ability to include director nominees in company proxy materials without the need for shareholders to bear the burdens of overcoming the substantial obstacles to creating that ability on a company-by-company basis. Rule 14a–11 is designed to facilitate the effective exercise of shareholder director nomination and election rights. Requiring shareholders to persuade other shareholders to opt into a system that better facilitates such State law rights would frustrate the benefits that our new rule seeks to promote.

c. No Opt-Out

In the Proposing Release, we sought comment on whether Rule 14a–11 should be inapplicable where a company has or adopts a provision in its governing documents that provides for, or prohibits, the inclusion of shareholder director nominees in the company's proxy materials. We also sought comment on whether Rule 14a–11 should apply in various circumstances, such as where shareholders approve provisions in the governing documents that are more or less restrictive than Rule 14a–11.

Commenters were divided on whether companies and shareholders should be permitted to adopt alternative requirements for shareholder director nominations, or to completely opt out of Rule 14a–11. Many commenters generally supported a provision that would permit companies and shareholders to adopt alternative requirements for shareholder director nominations that could be either more restrictive or less restrictive than those of Rule 14a–11.[84] Among these commenters, some argued that creating a "one-size-fits-all" rule that cannot be altered by companies and shareholders conflicts with the traditional enabling approach of state corporation laws and denies shareholder choice.[85] Some commenters advocated allowing companies to opt out of Rule 14a–11 through a shareholder-approved bylaw (including through a Rule 14a–8 shareholder proposal), with some suggesting that Rule 14a–11 apply initially only to companies that have not opted out through a shareholder-approved process by the time of the first annual meeting held after the adoption of the proposed rules.[86]

On the other hand, several commenters expressed support for the uniform applicability of Rule 14a–11.[87] These commenters expressed general support for the Commission's Proposal that Rule 14a–11 apply to all companies subject to the Federal proxy rules unless State law or the company's governing documents prohibit shareholders from nominating candidates to the board.[88] Several commenters stated they oppose a provision that would permit companies to opt out of Rule 14a–11.[89] Some commenters expressed a general concern that if companies are allowed to opt out of the rule, boards would adopt provisions in a company's governing documents that are so restrictive that it would be impossible for shareholders to have their candidates included in company proxy materials,[90] with one commenter noting that the laws of most states would allow a board to adopt such provisions in a company's bylaws without a shareholder vote.[91] Further, a commenter warned that boards would use corporate funds to defeat shareholders' attempts to change such board-adopted provisions through shareholder proposals.[92] One commenter argued that the "idea that individual corporations should be given the right to 'opt out' of the proposed regulations through bylaws or otherwise is contrary to the Commission's entire regulatory scheme" and referred to Section 14 of the Securities Act,[93] which voids "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this

American Business Conference; American Electric Power; Anadarko; Applied Materials; Artistic Land Designs; Association of Corporate Counsel; Avis Budget; Atlantic Bingo; L. Behr; Best Buy; Biogen; J. Blanchard; Boeing; T. Bonkowski; BorgWarner; Boston Scientific; Brink's; BRT; Burlington Northern; R. Burt; California Bar; Callaway; S. Campbell; Carlson; Carolina Mills; Caterpillar; Chamber of Commerce/CMCC; Chevron; R. Chicko; CIGNA; Comcast; Competitive Enterprise Institute; W. Cornwell; CSX; E. Culwell; Cummins; Darden Restaurants; Daniels Manufacturing; Davis Polk; Delaware Bar; T. Dermody; Devon; DTE Energy; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; M. Eng; Erickson; ExxonMobil; FedEx; Financial Services Roundtable; Flutterby; FPL Group; Frontier; GE; A. Goolsby; Grundfest; C. Holliday; IBM; ICI; Intelect; JPMorgan Chase; Jones Day; R. Clark King; Leggett; T. Liddell; Little; McDonald's; MeadWestvaco; MedFaxx; Medical Insurance; MetLife; M. Metz; Microsoft; J. Miller; M. Moretti; Motorola; NACD; NAM; NIRI; O'Melveny & Myers; Office Depot; Omaha Door; P&G; PepsiCo; Pfizer; Realogy; J. Robert; M. Robert; RPM; Ryder; Safeway; R. Saul; Shearman & Sterling; Sherwin-Williams; R. Simoneau; Society of Corporate Secretaries; Southern Company; Southland; Steele Group; Style Crest; Tesoro; Textron; Theragenics; TI;. R. Trummel; T. Trummel; V. Trummel; tw telecom; L. Tyson; United Brotherhood of Carpenters; UnitedHealth; U.S. Bancorp; VCG; Wachtell; Wellness; Wells Fargo; Whirlpool; Xerox; Yahoo; J. Young.

[82] *See* letters from ABA; BRT; Davis Polk; Delaware Bar; Frontier; IBM; Protective.

[83] *See* letters from 13D Monitor ("13D Monitor"); AFL–CIO; CalPERS; CFA Institute Centre for Market Integrity ("CFA Institute"); CII; Florida State Board of Administration; ICGN; LIUNA; D. Nappier; P. Neuhauser; OPERS; Pax World; RiskMetrics; SWIB; Teamsters; USPE.

[84] *See* letters from ABA; Advance Auto Parts; Aetna; American Bankers Association; American Electric Power; American Express; Applied Materials; Association of Corporate Counsel; Best Buy; BRT; California Bar; Carlson; J. Chico; Cleary Gottlieb Steen & Hamilton LLP ("Cleary"); Comcast; Con Edison; CSX; Cummins; L. Dallas; Davis Polk; Devon; Dupont; ExxonMobil; Financial Services Roundtable; FPL Group; IBM; JPMorgan Chase; Keating Muething; Koppers; Alexander Krakovsky ("A. Krakovsky"); Group of 10 Harvard Business School and Harvard Law School Professors ("Lorsch *et al.*"); Brett H. McDonnell ("B. McDonnell"); Motorola; O'Melveny & Myers; P&G; Pfizer; S&C; Sara Lee; Group of Seven Law Firms ("Seven Law Firms"); Shearman & Sterling; Securities Industry and Financial Markets Association ("SIFMA"); Society of Corporate Secretaries; Southern Company; U.S. Bancorp; Wachtell.

[85] *See* letters from ABA; BRT; Delaware Bar.

[86] *See* letters from DTE Energy (endorsing the opt-out approach described in the letter submitted by the Society of Corporate Secretaries); JPMorgan Chase; P&G; Seven Law Firms; Society of Corporate Secretaries; U.S. Bancorp.

[87] *See* letters from 13D Monitor; AFL–CIO; CalPERS; CFA Institute; CII; Florida State Board of Administration; ICGN; LIUNA; D. Nappier; P. Neuhauser; Pax World; OPERS; RiskMetrics; SWIB; Teamsters; USPE.

[88] *See* letters from 13D Monitor; AFL–CIO; CalPERS; CFA Institute; CII; Florida State Board of Administration; ICGN; LIUNA; D. Nappier; P. Neuhauser; Pax World; OPERS; RiskMetrics; SWIB; Teamsters; USPE.

[89] *See* letters from AFL–CIO; Amalgamated Bank; William Baker ("W. Baker"); Florida State Board of Administration; International Association of Machinists and Aerospace Workers ("IAM"); The Marco Consulting Group ("Marco Consulting"); P. Neuhauser; Nine Law Firms; Norges Bank Investment Management ("Norges Bank"); Relational; Shamrock Capital Advisors, Inc. ("Shamrock"); TIAA–CREF; USPE; ValueAct Capital.

[90] *See* letters from Florida State Board of Administration; P. Neuhauser; Shamrock.

[91] *See* letter from Shamrock.

[92] *See* letter from P. Neuhauser.

[93] Letter from Nine Law Firms.

title or of the rules and regulations of the Commission* * *." [94]

After carefully considering the comments, we have determined that Rule 14a–11 should not provide an exemption for companies that have or adopt a provision in their governing documents that provides for or prohibits the inclusion of shareholder director nominees in the company's proxy materials. Thus, regardless of whether a company has a provision for the inclusion of shareholder nominees in its proxy materials, Rule 14a–11 will apply. As noted, the only exception is if state or foreign law or a company's governing documents prohibits shareholders from making director nominations.

We believe the rights to nominate and elect directors are traditional State law rights of all shareholders and we believe the current proxy rules could better facilitate the effective exercise of these State law rights. We do not believe that it is appropriate for our rules to permit a company's board or a majority of shareholders to elect to opt out of Rule 14a–11 and thus deprive other shareholders of an effective means to exercise their State law right to nominate directors and to freely exercise their franchise rights. Thus, allowing a vote to opt out of the rule would contravene a fundamental rationale of Rule 14a–11—improving the degree to which shareholders participating through the proxy process are able "to control the corporation as effectively as they might have by attending a shareholder meeting." [95]

When shareholders have the right to nominate candidates for director at a shareholder meeting, we believe shareholder choice is enhanced if our rules facilitate the ability of shareholders to nominate candidates for director through the proxy process. Allowing a company or a majority of its shareholders to opt out of the rule would diminish the rights of shareholders who participate by proxy by preventing shareholder nominees from being included in company proxy materials, thus reducing shareholder choice in the critical area of director elections. Similarly, allowing a company or a majority of its shareholders to opt out of the rule would diminish the ability of shareholders to vote for nominees put forth by other shareholders.

In addition, companies and their shareholders do not have the option to elect to opt out of other Federal proxy rules and we do not believe they should have the ability to do so with this rule. In our view, shareholders' electoral rights through the proxy process should not be impaired by a unilateral act of the board of directors, or even by a shareholder vote supported by management. Further, as we describe above, allowing some portion of shareholders to alter the application of Rule 14a–11 would effectively reduce choices for shareholders who do not favor that decision.[96]

Finally, we considered the objections of some commenters to a "one-size-fits-all" rule and concerns that for some companies with various capital structures the rule may raise more complex issues.[97] As we have noted, no Federal proxy rule allows shareholders or boards to alter how the rules apply to companies. The concept that our rules are not subject to company-by-company variation is entirely consistent with our mandate to protect all investors. In this regard, we are not persuaded that we should allow our rules to be altered by shareholders or boards to the potential detriment of other shareholders. We believe that having a uniform standard that applies to all companies subject to the rule will simplify use of the rule for shareholders and allowing different procedures and requirements to be adopted by each company could add significant complexity and cost for shareholders and undermine the purposes of our new rule. While other procedures and standards could be adopted by companies or shareholders to supplement Rule 14a–11, shareholders would benefit from the predictability of the uniform application of Rule 14a–11 at all companies.

It is important to note that while Rule 14a–11 facilitates the existing rights of shareholders and we do not believe the rule should be altered, it is not the exclusive way by which a candidate other than a management nominee may be put to a shareholder vote. Shareholders may continue to choose to conduct traditional proxy contests. Regardless of whether a shareholder uses Rule 14a–11 or conducts a traditional proxy contest to nominate a candidate for director, a company concerned about how such a shareholder nominee fits into its particular capital structure or other unique fact patterns presumably would address that concern in its proxy materials.

d. No Triggering Events

Under the Commission's 2003 Proposal, a company would have been subject to the shareholder director nomination requirements after the occurrence of one or both of two possible triggering events. The first triggering event was that at least one of the company's nominees for the board of directors for whom the company solicited proxies received withhold votes from more than 35% of the votes cast at an annual meeting of shareholders at which directors were elected.[98] The second triggering event was that a shareholder proposal submitted under Rule 14a–8 providing that a company become subject to the proposed shareholder nomination procedure was submitted for a vote of

[94] 15 U.S.C. 77n.

[95] *Business Roundtable* v. *SEC,* 905 F.2d 406, 410 (D.C. Cir. 1990).

[96] Our view in this regard has been sharply criticized. *E.g.,* Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law,* 65 Bus. Law. 361, 370 (2010) (this article also was included as an attachment to the January 18, 2010 letter from Joseph A. Grundfest ("Grundfest II")) ("there is no intellectually credible argument that shareholders are * * * competent to elect directors but incompetent to determine the rules governing the election of directors. There is also no support for the proposition that shareholders can be trusted to relax the mandatory minimum standards established by the Commission, but not to strengthen them."). In our view, these assertions are flawed. This is not an issue of shareholder competence. It is, instead, a recognition that permitting a company or a group of shareholders to prevent shareholders from effectively participating in governing the corporation through participation in the proxy process is fundamentally inconsistent with the goal of Federal proxy regulation. *See Business Roundtable,* 905 F.2d at 410.

[97] *See* letters from 26 Corporate Secretaries; ABA; ACE; Advance Auto Parts; AGL; Aetna; Allstate; Alston & Bird; American Bankers Association; American Business Conference; American Electric Power; Anadarko; Applied Materials; Artistic Land Designs; Association of Corporate Counsel; Avis Budget; Atlantic Bingo; L. Behr; Best Buy; Biogen; J. Blanchard; Boeing; T. Bonkowski; BorgWarner; Boston Scientific; Brink's; BRT; Burlington Northern; R. Burt; California Bar; Callaway; S. Campbell; Carlson; Carolina Mills; Caterpillar; Chamber of Commerce/CMCC; Chevron; R. Chicko; CIGNA; Comcast; Competitive Enterprise Institute; W. Cornwell; CSX; E. Culwell; Cummins; Darden Restaurants; Daniels Manufacturing; Davis Polk; Delaware Bar; T. Dermody; Devon; DTE Energy; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; M. Eng; Erickson; ExxonMobil; FedEx; Financial Services Roundtable; Flutterby; FPL Group; Frontier; GE; A. Goolsby; C. Holliday; IBM; ICI; Intelect; JPMorgan Chase; Jones Day; R. Clark King; Leggett; T. Liddell; Little; McDonald's; MeadWestvaco; MedFaxx; Medical Insurance; Metlife; M. Metz; Microsoft; J. Miller; M. Moretti; Motorola; NACD; NAM; NIRI; O'Melveny & Myers; Office Depot; Omaha Door; P&G; PepsiCo; Pfizer; Realogy; J. Robert; M. Robert; RPM; Ryder; Safeway; R. Saul; Shearman & Sterling; Sherwin-Williams; R. Simoneau; Society of Corporate Secretaries; Southern Company; Southland; Steele Group; Style Crest; Tesoro; Textron; Theragenics; TI;. R. Trummel; T. Trummel; V. Trummel; tw telecom; L. Tyson; United Brotherhood of Carpenters; UnitedHealth; U.S. Bancorp; VCG; Wachtell; Wellness; Wells Fargo; Whirlpool; Xerox; Yahoo; J. Young.

[98] This triggering event could not occur in a contested election to which Rule 14a–12(c) would apply or an election to which the proposed shareholder nomination procedure would have applied.

shareholders at an annual meeting by a shareholder or group of shareholders that held more than 1% of the company's securities entitled to vote on the proposal and the shareholder or group of shareholders held those securities for one year as of the date the proposal was submitted, and the proposal received more than 50% of the votes cast on that proposal at the meeting.[99] In 2003, these triggering events were included because they were believed to be indications that a company had a demonstrated corporate governance issue, such that shareholders should have the opportunity to include director nominees in the company's proxy materials.

Unlike the 2003 Proposal, our current proposal did not include a triggering event requirement in Rule 14a–11. As noted in the Proposing Release, we did not include such a requirement because we were concerned that the Federal proxy rules may be impeding the exercise of shareholders' ability under State law to nominate and elect directors at all companies, not just those with demonstrated governance issues. In addition, we noted our concern, and the concern expressed by commenters on the 2003 Proposal, that the inclusion of triggering events would result in unnecessary complexity and would delay the operation of the rule. However, we solicited comment about whether triggers for the application of Rule 14a–11 would be appropriate.

Many commenters opposed the inclusion of a triggering event requirement,[100] with some commenters expressing concern that triggering events would cause significant delays and introduce undue complexity into the rule.[101] On the other hand, other commenters supported the inclusion of a triggering event requirement, believing that such a requirement would serve as a useful indicator of the companies with demonstrated governance issues (*e.g.,* companies that do not act within a certain time period on a shareholder proposal that received majority support).[102]

We remain concerned that the Federal proxy rules may not be facilitating the exercise of shareholders' ability under State law to nominate and elect directors and this concern is not limited to shareholders' ability to nominate directors at companies with demonstrated governance issues. Indeed, allowing shareholders to include nominees in company proxy materials before there are demonstrated governance failures could have the benefit of increasing director responsiveness and avoiding future governance failures. In addition, we share the concerns of some commenters that inclusion of triggering events would introduce undue complexity to the rule. Therefore, we are adopting the rule as proposed, without a triggering event requirement.

e. Concurrent Proxy Contests

As proposed, Rule 14a–11 would apply regardless of whether a company is engaged in, or anticipates being engaged in, a concurrent proxy contest; however, we requested comment on whether a company should be exempted from complying with Rule 14a–11 if another party commences or evidences its intent to commence a solicitation in opposition subject to Rule 14a–12(c). Of the commenters that responded, a few stated that shareholders of a company that is the subject of a traditional proxy contest should be allowed to use Rule 14a–11 to have nominees included in the company's proxy materials,[103] and others stated that shareholders of a company engaged in a traditional proxy contest should not be allowed to use Rule 14a–11 to have nominees included in the company's proxy materials.[104]

In support of enabling shareholders to use Rule 14a–11 during a traditional proxy contest, one commenter argued that exempting companies subject to a traditional proxy contest from Rule 14a–11 would be inconsistent with the Commission's objective of changing the proxy process to better reflect the rights shareholders would have at a shareholder meeting, and that dissatisfied shareholders who are not seeking a change in control and who otherwise meet the eligibility criteria under Rule 14a–11 would be disenfranchised.[105] The commenter stated that dissatisfied shareholders should not be forced to make a choice between a change in control or "business as usual." Another commenter stated that contested elections have been conducted successfully with more than two slates.[106]

On the other hand, commenters that sought a limitation on use of Rule 14a–11 during a traditional proxy contest were concerned that Rule 14a–11 could have the effect of facilitating a change in control of the company.[107] Commenters noted that under certain staff positions,[108] as well as the Commission's discussion of Rule 14a–4(d)(4), as set forth in the *Proxy Disclosure and Solicitation Enhancements* proposing release,[109] a dissident shareholder could "round out" its short-slate proxy card by seeking authority to vote for Rule 14a–11 shareholder nominees, thereby facilitating a change in control.[110] Further, commenters believed that under the Proposal shareholders that submit nominees in reliance on Rule 14a–11 would not be barred from actively soliciting for the nominees of a shareholder using a traditional proxy contest and, conversely, a shareholder using a traditional proxy contest could actively engage in soliciting activities for Rule 14a–11 shareholder nominees.[111] Commenters also worried that multiple groups of shareholders who simultaneously propose different directors for different purposes could lead to substantial confusion for other shareholders.[112] Commenters warned that shareholder confusion would increase if there are two or more proxy cards with more than twice the number

[99] Only votes for and against a proposal would have been included in the calculation of the shareholder vote.

[100] *See* letters from AFSCME; CalSTRS; CFA Institute; CII; COPERA; T. DiNapoli; Florida State Board of Administration; ICGN; N. Lautenbach; LIUNA; D. Nappier; Nathan Cummings Foundation; OPERS; Pax World; Relational; Sodali; SWIB; TIAA–CREF; G. Tooker; USPE; ValueAct Capital.

[101] *See* letters from AFSCME; CFA Institute; CII; T. DiNapoli; LIUNA.

[102] *See* letters from Automatic Data Processing, Inc. ("ADP"); Alaska Air Group, Inc. ("Alaska Air"); Allstate; American Electric Power; Anadarko; AT&T; Avis Budget; Barclays Global Investors ("Barclays"); Biogen; Boeing; BRT; Burlington Northern; R. Burt; Callaway; Chevron; CIGNA; CNH Global N.V. ("CNH Global"); Comcast; Cummins; Deere & Company ("Deere"); Eaton; ExxonMobil; FedEx; FMC Corp.; FPL Group; Frontier; General Mills; C. Holliday; IBM; ITT Corporation ("ITT"); J. Kilts; Ellen J. Kullman ("E.J. Kullman"); N. Lautenbach; McDonald's; J. Miller; Motorola; Office Depot; O'Melveny & Myers; P&G; PepsiCo; Pfizer; Protective; Ryder; Sara Lee; Sherwin-Williams; Theragenics; TI; tw telecom; G. Tooker; UnitedHealth; Xerox.

[103] *See* letters from CII; Florida State Board of Administration; Sodali; USPE.

[104] *See* letters from ABA; American Express; Biogen; BorgWarner; BRT; Davis Polk; Dewey; Eli Lilly; Fenwick; Honeywell; JPMorgan Chase; Leggett; PepsiCo; Seven Law Firms; Society of Corporate Secretaries; Tenet; U.S. Bancorp; Verizon; Wachtell.

[105] *See* letter from CII.

[106] *See* letter from Florida State Board of Administration.

[107] *See* letters from ABA; BRT; Davis Polk; Eli Lilly; Seven Law Firms; Society of Corporate Secretaries.

[108] *See Eastbourne Capital LLC* No-Action Letter (March 30, 2009) and *Icahn Associates Corp.* No-Action Letter (March 30, 2009).

[109] Release No. 33–9052, 34–60280 (July 10, 2009) [74 FR 35076].

[110] *See* letters from ABA; Eli Lilly; JPMorgan Chase; Society of Corporate Secretaries.

[111] *See* letters from ABA; Society of Corporate Secretaries.

[112] *See* letters from ABA; BRT; Davis Polk; Eli Lilly; PepsiCo; Seven Law Firms; Society of Corporate Secretaries.

of nominees than available slots.[113] According to these commenters, further confusion would result from any assumption by shareholders that the Rule 14a–11 slate is allied with the insurgent slate, despite the Rule 14a–11 representation regarding the lack of control intent.[114] One commenter also argued that, despite the Rule 14a–11 representation regarding the lack of control intent, it is "easy to imagine that in some contested elections, a [R]ule 14a–11 nominee would be the swing vote, tipping the majority of the board and thus control of the company."[115] Citing these same concerns, another commenter recommended that when a company's board receives notice of a traditional proxy contest, the company should be permitted to exclude Rule 14a–11 nominees from the company's proxy materials (and, if the proxy materials have already been distributed, to issue supplemental proxy materials eliminating these nominees from the company's materials).[116]

Finally, some commenters argued that Rule 14a–11 is unnecessary when a company is engaged in a traditional proxy contest because the company's shareholders are already effectively exercising their rights under State law to nominate and elect directors.[117] One commenter stated that if the Commission decides not to prohibit a concurrent vote on Rule 14a–11 nominees and nominees presented through a traditional proxy contest, it should at least provide that the nominees presented through the traditional proxy contest be counted against the number of permissible Rule 14a–11 nominees to reduce the likelihood of a change in control.[118] The commenter stated that if Rule 14a–11 could be used concurrently with a traditional proxy contest, the nominating shareholder should not be allowed to be a "participant" (as defined under Schedule 14A) in the traditional proxy contest or to engage in any soliciting activity for a nominee of another shareholder. The commenter also suggested that dissidents in a traditional proxy contest be precluded from including Rule 14a–11 nominees on their proxy card. Acknowledging the possibility of collusion, shareholder confusion, and change in control, one commenter expressed support for reasonable limitations on a Rule 14a–11 nomination if there is a simultaneous proxy contest.[119]

While we appreciate commenters' concerns, we do not believe that our efforts to facilitate the exercise of shareholders' State law right to nominate directors should be limited by the activities of other persons engaged in a traditional proxy contest. We also believe that, as described below, Rule 14a–11 and the related rule amendments, together with our staff review process, can adequately address concerns about investor confusion and potential abuse of the process by those seeking a change in control. Therefore, we are adopting the rule as proposed, without an exception for companies that are subject to or anticipate being subject to a concurrent proxy contest. In this regard, we agree with those commenters that opposed including a limitation because to do so would be inconsistent with the goals of our rulemaking, which are not limited by the nomination activities of other persons. In addition, we note that there is no current limitation in the Federal proxy rules on the number of proxy contests that can take place simultaneously and we do not believe that there is sufficient reason to provide such a limitation in this circumstance. Companies and shareholders have been able, to date, to successfully navigate multiple slates on those occasions when more than one person undertakes a proxy contest. In addition, we believe that a company can address commenters' concerns through disclosure in its proxy materials. For example, the company may disclose in its proxy statement potential effects of electing non-management nominees (whether those nominees are included in the company's materials or in other soliciting persons' materials), such as the potential to cause the company to violate law or the independence requirements of the exchange listing standards, and allow shareholders to consider that information when making their voting decisions. Similarly, we believe that appropriate disclosure in the company's proxy materials, as well as the dissident's proxy materials, could serve to potentially avoid shareholder confusion about how many nominees a shareholder may vote for and how to mark the card.

We also have not revised Rule 14a–11, as suggested by commenters, to count nominees put forth by persons outside of Rule 14a–11 for purposes of the calculation of the maximum number of nominees required to be included in the company's proxy materials pursuant to Rule 14a–11. We believe that to do so would, like an outright exception, be inconsistent with the goal of our rulemaking—to change the proxy process to better reflect the rights shareholders would have at a shareholder meeting, which are not limited by the nomination activities of other persons.

While we are not adopting an exception from the rule for companies that are, or anticipate being, subject to a concurrent proxy contest, we do understand concerns about the possibility of confusion and abuse in this area absent clear guidance.[120] Accordingly, we have made clear in our discussion, in Section II.B.10. below, that a nominating shareholder or group relying on new Rule 14a–2(b)(7) or (8) to engage in an exempt solicitation to form a nominating shareholder group or in connection with a nomination included in the company's proxy materials pursuant to Rule 14a–11 would lose the exemption if they engage in a non-Rule 14a–11 solicitation for directors or another person's solicitation with regard to the election of directors. In addition, we are adopting an instruction to Rule 14a–11[121] to make clear that, in order to rely on Rule 14a–11 to have a nominee or nominees included in a company's proxy materials, a nominating shareholder or group or any member of the nominating shareholder or group may not be a member of any other group with persons engaged in solicitations or other nominating activities in connection with the subject election of directors; may not separately conduct a solicitation in connection with the subject election of directors other than a Rule 14a–2(b)(8) exempt solicitation in relation to those nominees it has nominated pursuant to Rule 14a–11 or for or against the company's nominees; and may not act as a participant in another person's solicitation in connection with the subject election of directors.

3. Which Companies Are Subject to Rule 14a–11

a. General

In this section, we discuss which companies will be subject to new Rule 14a–11, including the rule's application to investment companies, controlled companies, "debt-only" companies, voluntary registrants, and smaller reporting companies.

New Rule 14a–11 will apply to companies that are subject to the Exchange Act proxy rules, including

[113] *See* letters from ABA; Davis Polk.

[114] *See* Section II.B.4. below for a further discussion of change in control intent and the certifications required by the new rules.

[115] Letter from Davis Polk.

[116] *See* letter from Society of Corporate Secretaries.

[117] *See* letters from BRT; Verizon.

[118] *See* letter from ABA.

[119] *See* letter from P. Neuhauser.

[120] *See, e.g.,* letters from ABA; Seven Law Firms.

[121] *See* Instruction to Rule 14a–11(b).

investment companies registered under Section 8 of the Investment Company Act of 1940.[122] The rule also will apply to controlled companies and those companies that choose to voluntarily register a class of securities under Section 12(g). Smaller reporting companies will be subject to the rule, but on a delayed basis. Consistent with the Proposal, we have excepted from the rule's application companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act. In addition, foreign private issuers are exempt from the Commission's proxy rules with respect to solicitations of their shareholders, so the rule will not apply to these issuers.[123]

b. Investment Companies

Under the Proposal, Rule 14a–11 would apply to registered investment companies. We sought comment on whether Rule 14a–11 should apply to these companies.[124]

Several commenters supported including registered investment companies in the rule.[125] Commenters noted that investment company boards, like other boards, must be responsive and accountable to their shareholders;[126] that some investment company boards are "too cozy" with the company's investment adviser;[127] and that the proposed rule will add competition to the board nomination process, which may create some traction in board negotiations with the company's investment adviser.[128] A number of commenters did not believe that the rule would result in unreasonable cost or an excessive number of contested elections.[129] One commenter suggested that investment company shareholders would use the rule infrequently and then only if the investment company is experiencing a real governance or other failure.[130]

On the other hand, a number of commenters, largely from the investment company industry, opposed the inclusion of registered investment companies in the rule.[131] Commenters asserted that the Commission had not presented any empirical evidence of governance problems with respect to investment companies that would support extending the rule to them and that the trend for investment company boards is to have strong governance practices.[132] Commenters also argued that investment companies are subject to a unique regulatory regime under the Investment Company Act that provides additional protection to investors, such as the requirement to obtain shareholder approval to engage in certain transactions or activities,[133] and that investment companies and their boards have very different functions from non-investment companies and their boards.[134] One commenter noted that the Proposal would be inappropriate and not particularly useful for most open-end management investment companies, because open-end management investment company shares are held on a short-term basis and open-end management investment companies are not typically required to hold annual meetings under State law.[135]

Commenters also were concerned about the costs of the Proposal, particularly for fund complexes that utilize a "unitary" board consisting of one group of individuals who serve on the board of every fund in the complex, or "cluster" boards consisting of two or more groups of individuals that each oversee a different set of funds in the complex.[136] Commenters noted that if a

[122] 15 U.S.C. 80a *et seq.* Registered investment companies currently are required to comply with the proxy rules under the Exchange Act when soliciting proxies, including proxies relating to the election of directors. *See* Investment Company Act Rule 20a–1 [17 CFR 270.20a–1] (requiring registered investment companies to comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to Section 12 of the Exchange Act).

[123] Exchange Act Rule 3a12–3 [17 CFR 240.3a12–3] exempts securities of certain foreign issuers from Section 14(a) of the Exchange Act.

[124] The Commission has considered the impact of this issue on investment companies on prior occasions. *See, e.g.,* 2003 Proposal.

[125] *See, e.g.,* letters from AFSCME; CalPERS; CII; Mutual Fund Directors Forum ("MFDF"); Julian Reid ("J. Reid"); Jennifer S. Taub ("J. Taub"); TIAA–CREF.

[126] *See* letter from MFDF.

[127] Letter from J. Reid.

[128] *See* letter from J. Taub.

[129] *See, e.g.,* letters from AFSCME; J. Taub.

[130] *See* letter from J. Taub.

[131] *See, e.g.,* letters from ABA; American Bar Association (September 18, 2009) ("ABA II"); Barclays; ICI; Investment Company Institute and Independent Directors Counsel ("ICI/IDC"); Independent Directors Council ("IDC"); S&C; T. Rowe Price Associates, Inc. ("T. Rowe Price"); The Vanguard Group, Inc. ("Vanguard"). One commenter opposed the inclusion of business development companies in the rule for the same reasons that it opposed including registered investment companies in the rule. *See* letter from ICI. Business development companies are a category of closed-end investment companies that are not registered under the Investment Company Act, but are subject to certain provisions of that Act. *See* Sections 2(a)(48) and 54–65 of the Investment Company Act [15 U.S.C. 80a–2(a)(48) and 80a–53–64]. We are including business development companies in the rule for the same reasons provided below with respect to registered investment companies.

[132] *See* letters from ICI; ICI/IDC; IDC; T. Rowe Price; S&C. Among other things, commenters noted that 90% of fund complexes have boards that are 75% or more comprised of independent directors and the vast majority of fund boards have an independent director serving as chairman or as lead independent director. *See* letters from ICI/IDC; IDC. Two letters also cited a 1992 report by Commission staff that observed that the governance model embodied by the Investment Company Act is sound and should be retained with limited modifications. *See* letters from ICI; ICI/IDC.

[133] One joint comment letter noted that the Investment Company Act requires investment companies to obtain shareholder approval of contracts with the company's investment adviser and distributor and to change from an open-end, closed-end, or diversified company; to borrow money; to issue senior securities; to underwrite securities issued by other persons; to purchase or sell real estate or commodities; to make loans to other persons, except in accordance with the policy in the company's registration statement; to change the nature of its business so as to cease to be an investment company; or to deviate from a stated policy with respect to concentration of investments in an industry or industries, from any investment policy which is changeable only by shareholder vote, or from any stated fundamental policy. The commenters also noted that investment company shareholders have the right to bring an action against the company's investment adviser for breach of fiduciary duty with respect to receipt of compensation. *See* letter from ICI/IDC.

[134] *See* letters from ABA; Barclays; ICI; ICI/IDC; IDC; T. Rowe Price; S&C; Vanguard. However, we note that, in response to the 2003 Proposal, ABA and ICI indicated that there were no reasons to treat investment companies differently from non-investment companies. *See* letter from Investment Company Institute (December 22, 2003) on File No. S7–19–03; letter from American Bar Association (January 7, 2004) on File No. S7–19–03.

[135] *See* letter from ABA. *See also* letter from S&C (urging that at a minimum Rule 14a–11 should not apply to open-end investment companies, "which do not generally hold regular meetings and for which compliance would be particularly burdensome"). An open-end management investment company is an investment company, other than a unit investment trust or face-amount certificate company, that offers for sale or has outstanding any redeemable security of which it is the issuer. *See* Sections 4 and 5(a)(1) of the Investment Company Act [15 U.S.C. 80a–4 and 80a–5(a)(1)].

[136] *See* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard. Commenters noted that a recent survey of fund complexes representing 93% of the industry's total net assets indicated that 83% of fund complexes had a unitary board structure and 17% of fund complexes had a cluster board structure. *See* letters from ICI/IDC; IDC. However, one comment letter included materials noting that, while the average number of registered investment companies per fund complex is five, the median number of registered investment companies per fund complex is one. *See* letter from ICI/IDC. In cases where the fund complex consists of only one company, commenters' concerns about the loss of the unitary board would not be present.

Commenters also noted that among fund complexes that use unitary or cluster boards there are other aspects of board organization that vary from complex to complex. *See* letter from ICI/IDC. For example, one board may oversee all of the open-end funds in the complex and all but three of its closed-end funds, while a second board oversees the other closed-end funds. Alternatively, one board may oversee the open-end and closed-end fixed income funds advised by one particular adviser, while a second board oversees the open-end and closed-end equity and international funds advised by a second adviser, etc. However, the commenters did not note any specific issues that would be raised by the use of different structures among fund complexes using unitary or cluster boards if the Proposal were to be adopted.

shareholder-nominated director were to be elected to a unitary or cluster board, the investment companies in the fund complex would incur significant additional administrative costs and burdens (*e.g.,* the shareholder-nominated director would have to leave during discussions that pertain to the other investment companies in the complex, board materials would have to be customized for the director, and the fund complex would face challenges in preserving the status of privileged information) and the benefits of the unitary or cluster board that result in the increased effectiveness of such boards would be lost.[137] One commenter also stated that if a shareholder nomination causes an election to be "contested" under rules of the New York Stock Exchange, brokers would not be able to vote client shares on a discretionary basis, making it difficult and more expensive for investment companies to achieve a quorum for a meeting.[138]

After considering these comments, we agree with the commenters who believe that Rule 14a–11 should apply to registered investment companies, as was proposed. The purpose of Rule 14a–11 is to facilitate the exercise of shareholders' traditional State law rights to nominate and elect directors to boards of directors and thereby enable shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest. These State law rights apply to the shareholders of investment companies, including each investment company in a fund complex, regardless of whether or not the fund complex utilizes a unitary or cluster board.[139] Moreover, although investment companies and their boards may have different functions from non-investment companies and their boards, investment company boards, like the boards of other companies, have significant responsibilities in protecting shareholder interests, such as the approval of advisory contracts and fees.[140] Therefore, we are not persuaded that exempting registered investment companies would be consistent with our goals. We also do not believe that the regulatory protections offered by the Investment Company Act (including requirements to obtain shareholder approval to engage in certain transactions and activities), the trend asserted by commenters for investment companies to have good governance practices, or the fact that open-end management investment companies are not required by State law to hold annual meetings serves to decrease the importance of the rights that are granted to shareholders under State law.[141] In fact, the separate regulatory regime to which investment companies are subject emphasizes the importance of investment company directors in dealing with the conflicts of interest created by the external management structure of most investment companies.[142] We also note that some commenters have raised governance concerns regarding the relationship between boards and investment advisers.[143]

We are cognizant of the fact that the rule will impose some costs on investment companies. We believe, however, that policy goals and the benefits of the rule justify these costs. As discussed above, we believe that facilitating the exercise of traditional State law rights to nominate and elect directors is as much of a concern for investment company shareholders as it is for shareholders of non-investment companies. We continue to believe that parts of the proxy process may frustrate the exercise of shareholders' rights to nominate and elect directors arising under State law, and thereby fail to provide fair corporate suffrage. The new rules seek to facilitate shareholders' effective exercise of their rights under State law to both nominate and elect directors. In this regard, we note that commenters have stated that interest in mutual fund governance has increased in recent years.[144]

We recognize that it may be more costly for investment companies to achieve a quorum at shareholder meetings if a shareholder director nomination causes an election to be "contested" under rules of the New York Stock Exchange and brokers cannot vote customer shares on a discretionary basis. Furthermore, for fund complexes that utilize unitary or cluster boards, the election of a shareholder director nominee may, in some circumstances, increase costs and potentially decrease the efficiency of the boards.

We note, however, that these costs are associated with the State law right to nominate and elect directors, and are not costs incurred for including shareholder nominees in the company's proxy statement. With respect to fund complexes utilizing unitary or cluster boards, we note that any increased costs and decreased efficiency of an investment company's board as a result of the fund complex no longer having a unitary or cluster board would occur, if at all, only in the event that investment company shareholders elect the shareholder nominee. Investment companies may include information in the proxy materials making investors aware of the company's views on the perceived benefits of a unitary or cluster board and the potential for increased

[137] Commenters noted that unitary and cluster boards can result in enhanced board efficiency and greater board knowledge of the many aspects of fund operations that are complex-wide in nature. *See, e.g.,* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard. For instance, commenters noted that many of the same regulatory, valuation, compliance, disclosure, accounting, and business issues may arise for all of the funds that the unitary or cluster board oversees and that consistency among funds in the complex greatly enhances both board efficiency and shareholder protection. *See, e.g.,* letter from ICI/IDC. One joint comment letter also suggested that "[b]ecause they are negotiating on behalf of multiple funds, unitary and cluster boards have a greater ability than single fund boards to negotiate with management over matters such as fund expenses; the level of resources devoted to technology; and compliance and audit functions." *See id.*

[138] *See* letter from S&C.

[139] We note that "unitary" or "cluster" boards are not required by State law.

[140] *See Jones v. Harris Assocs.,* 130 S.Ct. 1418, 1423, 176 L. Ed. 2d 265, 273–274 (2010). *See also* S. Rep. No. 91–184; 91st Congress 1st Session; S. 2224 (1969) ("This section is not intended to authorize a court to substitute its business judgment for that of the mutual fund's board of directors in the area of management fees. * * * The directors of a mutual fund, like directors of any other corporation will continue to have * * * overall fiduciary duties as directors for the supervision of all of the affairs of the fund."); letter from ICI/IDC ("The Investment Company Act of 1940 and the rules under it impose significant responsibilities on fund directors in addition to the duties of loyalty and care to which directors are typically bound under State law.").

[141] In the 1992 report cited by two comment letters in footnote 132 above, the Commission staff also observed that the Investment Company Act "establishes a comprehensive regulatory framework predicated upon principles of corporate democracy" and was intended to provide an additional safeguard for investors by according "voting powers to investment company shareholders *beyond those required by State corporate law*." Division of Investment Management, U.S. Securities and Exchange Commission, *Protecting Investors: A Half Century of Investment Company Regulation,* at pp. 251–52, 260 (May 1992) (emphasis added).

[142] *See, e.g.,* Commission Guidance Regarding the Duties and Responsibilities of Investment Company Boards of Directors with Respect to Investment Adviser Portfolio Trading Practices, Release No. IC–28345 (July 30, 2008) [73 FR 45646, 45649 (August 6, 2008)] ("In addition to statutory and common law obligations, fund directors are also subject to specific fiduciary obligations relating to the special nature of funds under the Investment Company Act. * * * A fund board has the responsibility, among other duties, to monitor the conflicts of interest facing the fund's investment adviser and determine how the conflicts should be managed to help ensure that the fund is being operated in the best interest of the fund's shareholders.") (footnotes omitted); Interpretive Matters Concerning Independent Directors of Investment Companies, Release No. IC–24083 (October 14, 1999) [64 FR 59877, 59877–78 (November 3, 1999)] (listing various duties and responsibilities of the independent directors of an investment company and noting that "Each of these duties and responsibilities is vital to the proper functioning of fund operations and, ultimately, the protection of fund shareholders.").

[143] *See* letters from J. Reid; J. Taub.

[144] *See* letters from AFSCME; J. Taub.

costs and decreased efficiency if the shareholder nominees are elected. Moreover, we note that a fund complex can take steps to minimize the cost and burden of a shareholder-nominated director by, for example, entering into a confidentiality agreement in order to preserve the status of confidential information regarding the fund complex.[145]

We believe that the costs imposed on investment companies will be less significant than the costs imposed on other companies for three reasons. First, to the extent investment companies do not hold annual meetings as permitted by State law, investment company shareholders will have less opportunity to use the rule.[146] Second, even when investment company shareholders do have the opportunity to use the rule, the disproportionately large and generally passive retail shareholder base of investment companies will probably mean that the rule will be used less frequently than will be the case with non-investment companies.[147] Third, because we have sought to limit the cost and burden on all companies, including investment companies, by limiting use of Rule 14a–11 to shareholders who have maintained significant continuous holdings in the company for at least three years, and because many funds, such as money market funds, are held by shareholders on a short-term basis,[148] we believe that the situations where shareholders will meet the eligibility requirements will be limited.

Although commenters argued that the election of a shareholder-nominated director to a unitary or cluster board will necessarily result in decreased effectiveness of the board, we disagree. In this regard, one commenter argued that competition in the board nomination process may improve efficiency by providing additional leverage for boards in negotiations with the investment adviser.[149] In any event, we believe that investment company shareholders should have a more meaningful opportunity to exercise their traditional State law rights to elect a non-unitary or non-cluster board if they so choose.

c. Controlled Companies

As proposed, Rule 14a–11 would allow eligible shareholders to submit director nominees at all companies subject to the Exchange Act proxy rules other than companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act. We sought comment on whether Rule 14a–11 also should provide an exception for controlled companies.

In response to our request for comment, one commenter argued that controlled companies should not be excluded from Rule 14a–11,[150] acknowledging that while there may be no mathematical possibility of a shareholder nominee submitted pursuant to Rule 14a–11 being elected at a controlled company, in a controlled company there could be an even greater need for non-controlling shareholders to express their concerns. The commenter noted that a large—even if not a majority—vote by non-controlling shareholders could send an important message to the board. Other commenters noted that controlled companies are commonly structured with dual classes of stock, which allows shareholders of the non-controlling class of stock to elect a set number of directors that is less than the full board.[151] Another commenter noted that dual-class companies with supervoting stock often can benefit the most from having the interests of non-controlling shareholders better represented in the boardroom.[152] This commenter encouraged the Commission to include some means by which minority shareholders of dual-class and parent-controlled companies could meaningfully avail themselves of the rule, even if a different set of eligibility or disclosure requirements is determined to be more appropriate in these cases.

On the other hand, several commenters argued that controlled companies should be excluded from Rule 14a–11.[153] According to these commenters, providing shareholders the ability to include nominees in company proxy materials in this context would be ineffective and needlessly disruptive and costly because there is no prospect that a shareholder nominee would be elected.[154] Two of these commenters also noted that subjecting these companies to Rule 14a–11 would possibly cause investor confusion.[155] These commenters remarked that shareholders would continue to have other avenues to express their views to the company, such as through the Rule 14a–8 process. Commenters who supported an exclusion for controlled companies suggested that for purposes of the exclusion the definition of "controlled company" should be similar to the definition used by the national securities exchanges in connection with director independence requirements.[156] Some commenters suggested that if Rule 14a–11 excluded controlled companies using the same definition as the national securities exchanges in connection with director independence requirements, then the rule should contain an instruction providing that whether more than 50% of the voting power of a company is held by an individual, group, or other company would be determined by any schedules filed under Section 13(d) of the Exchange Act.[157]

After considering the issue further, we are persuaded that Rule 14a–11 should apply to controlled companies, as we proposed. As commenters noted, it is common for companies structured with dual classes of stock to allow shareholders of the non-controlling class to elect a set number of directors that is less than the full board. In that situation, it may be useful for non-controlling shareholders to be able to include shareholder nominations in company proxy materials with respect to the directors the non-controlling class is entitled to elect. In addition, though applying Rule 14a–11 to controlled companies would be unlikely to result in the election of shareholder-nominated directors in cases in which these are not directors elected exclusively by the non-controlling shareholders, we appreciate that shareholders at controlled companies

[145] Two commenters argued in a joint comment letter that there are a number of practical and legal issues that prevent confidentiality agreements from being sufficient to address the issues that arise when a shareholder-nominated director is elected to the board of an investment company in a fund complex using a unitary or cluster board. *See* letter from ICI/IDC. We emphasize that entering into a confidentiality agreement is only one method of preserving the confidentiality of information revealed in board meetings attended by the shareholder-nominated director. The fund complex can have separate meetings and board materials for the board with the shareholder-nominated director, especially if particularly sensitive legal or other matters will be discussed or to protect attorney-client privilege. For a further discussion of this comment, *see* Section IV.E.1.

[146] *See* letters from ABA; MFDF.

[147] *See* letter from J. Taub.

[148] *See* letter from ABA.

[149] *See* letter from J. Taub.

[150] *See* letter from P. Neuhauser.

[151] *See* letters from ABA; Duane Morris; Media General, Inc. ("Media General"); The New York Times Company ("New York Times").

[152] *See* letter from T. Rowe Price.

[153] *See* letters from ABA; AllianceBernstein; Cleary; Seven Law Firms; Duane Morris LLP ("Duane Morris"); Sidley Austin.

[154] *See* letters from ABA; AllianceBernstein; Cleary; Seven Law Firms; Duane Morris; Sidley Austin.

[155] *See* letters from ABA; Seven Law Firms.

[156] *See* letters from ABA; AllianceBernstein; Cleary; Seven Law Firms; Duane Morris; Sidley Austin. *See, e.g.,* New York Stock Exchange Rule 303A.00 and NASDAQ Stock Market LLC Rule 5615(c) (defining "controlled companies" as a company of which more than 50% of the voting power for the election of directors is held by an individual, group or another company).

[157] *See* letters from AllianceBernstein; Duane Morris.

may have other reasons for nominating candidates for director.[158]

d. "Debt Only" Companies

As proposed, Rule 14a–11 would allow eligible shareholders to submit director nominees at all companies subject to the Exchange Act proxy rules other than companies that are subject to the proxy rules solely because they have a class of debt securities registered under Section 12 of the Exchange Act. We sought comment on whether this exclusion from Rule 14a–11 was appropriate.

Commenters that specifically addressed this question agreed with our approach and stated generally that Rule 14a–11 should not apply to companies subject to the Federal proxy rules solely because they have a class of debt securities registered under Exchange Act Section 12.[159] Most of these commenters stated that the ability to submit nominees for inclusion in a company's proxy materials should be limited to holders of equity securities registered under the Exchange Act.[160] One commenter warned that subjecting companies with a registered class of debt securities to Rule 14a–11 would deter private companies from accessing the public debt market and, in any case, private companies typically have shareholder agreements and other arrangements in place that address the election of directors.[161]

We are adopting this exclusion as proposed. We note that this approach was supported by investor and corporate commenters. We believe that Rule 14a–11 should not apply to companies that are subject to the Federal proxy rules solely because they have a class of debt securities registered under Section 12 of the Exchange Act.

e. Application of Exchange Act Rule 14a–11 to Companies That Voluntarily Register a Class of Securities Under Exchange Act Section 12(g)

In the Proposing Release, we noted that Rule 14a–11 would apply to companies that have voluntarily registered a class of equity securities pursuant to Exchange Act Section 12(g); however, we solicited comment on whether Rule 14a–11 should apply to these companies.[162] We also asked whether nominating shareholders of these companies should be subject to the same ownership eligibility thresholds as those shareholders of companies that were required to register a class of equity securities pursuant to Section 12, or whether we should adjust any other aspects of Rule 14a–11 for these companies.

Three commenters stated that Rule 14a–11 should apply to companies that voluntarily register a class of equity securities under Exchange Act Section 12(g).[163] One explained that investors in securities registered under Section 12 should be provided some assurance that the company is subject to various rules safeguarding their interests, such as the proposed rule, and expressed concern that less than uniform application could lead to investor confusion.[164] One commenter stated that nominating shareholders of voluntarily-registered companies should be subject to the same ownership thresholds as shareholders of companies that were required to register a class of securities under Exchange Act Section 12.[165]

We agree with the commenters that Rule 14a–11 generally should apply to those companies that choose to avail themselves of the obligations and benefits of Section 12(g) registration. As Section 12 registrants, these companies are subject to the full panoply of the Exchange Act, including Section 14(a), and their shareholders receive proxy materials in connection with annual and special meetings of shareholders in accordance with the proxy rules. We believe disparate treatment among these Section 12 registrants is unwarranted and shareholders of these companies should enjoy the same protections generally available to shareholders of other companies with a class of equity securities registered pursuant to Section 12. Accordingly, Rule 14a–11 will apply to companies that have voluntarily registered a class of equity securities pursuant to Exchange Act Section 12(g), with the same ownership eligibility thresholds as those of companies that were required to register a class of equity securities pursuant to Section 12.

f. Smaller Reporting Companies

Under the Proposal, Rule 14a–11 would apply to all companies subject to the proxy rules, other than companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12. Thus, Rule 14a–11, as proposed, would apply to smaller reporting companies. We sought comment in the Proposal on what effect, if any, the application of Rule 14a–11 would have on any particular group of companies, and in particular, smaller reporting companies.[166]

A number of commenters stated generally that Rule 14a–11 should not apply to small businesses.[167] One commenter argued that Rule 14a–11 should be limited to accelerated filers and that there should possibly be a transition period where the rule was only applicable to large accelerated filers.[168] That commenter believed that

[158] We note that controlled companies are not excluded from Rule 14a–8 despite the same improbability that a shareholder proposal will receive the approval of the majority of the votes cast at a controlled company. Shareholders may use Rule 14a–8 to submit a proposal to the board even though controlling shareholders may vote against the proposal and prevent it from being approved.

[159] *See* letters from ABA; CII; Cleary; S&C.

[160] *See* letters from ABA; Cleary; S&C.

[161] *See* letter from S&C. This commenter also stated that Rule 14a–11 should not apply to those reporting companies who voluntarily continue to file Exchange Act reports while they are not required to do so under Exchange Act Section 13(a) or Section 15(d). It argued that these voluntary filers should be treated the same as companies with Exchange Act reporting obligations relating solely to debt securities. We note that Rule 14a–11 will not apply to a company filing Exchange Act reports when neither Exchange Act Section 13(a) nor Section 15(d) requires that it do so (for example, to comply with a covenant contained in an indenture relating to outstanding debt securities).

[162] A company must register a class of equity securities under Section 12(g) if, on the last day of its fiscal year, the class of equity securities is held by 500 or more record holders and the company has total assets of more than $10 million. An issuer may, however, register any class of equity securities under Section 12(g) even if these thresholds have not been met. Reporting after this form of voluntary registration is distinguished from a company that continues to file Exchange Act reports when neither Exchange Act Section 13(a) nor Section 15(d) requires that it do so. *See* footnote 161 above.

[163] *See* letters from ABA; CII; USPE.

[164] *See* letter from USPE.

[165] *See* letter from ABA.

[166] The Commission has considered this issue on prior occasions. *See, e.g.,* 2003 Proposal; Division of Corporation Finance, Briefing Paper for Roundtable Discussion on the Proposed Security Holder Director Nominations Rules, February 25, 2004, *available at http://www.sec.gov/spotlight/dir-nominations/dir-nom-briefing.htm.*

[167] *See* letters from ABA; American Mailing; All Cast; Always N Bloom; American Carpets; J. Arquilla; B. Armburst; Artistic Land Designs; C. Atkins; Book Celler; K. Bostwick; Brighter Day Painting; Colletti; Commercial Concepts; Complete Home Inspection; D. Courtney; S. Crawford; Crespin; Don's; T. Ebreo; M. Eng; eWareness; Evans; Fluharty; Flutterby; Fortuna Italian Restaurant; Future Form; Glaspell; C. Gregory; Healthcare Practice; B. Henderson; S. Henning; J. Herren; A. Iriarte; J. Jones; Juz Kidz; Kernan; LMS Wine; T. Luna; Mansfield Children's Center; D. McDonald; Meister; Merchants Terminal; Middendorf; Mingo; Moore Brothers; Mouton; D. Mozack; Ms. Dee; G. Napolitano; NK; H. Olson; PESC; Pioneer Heating & Air Conditioning; RC; RTW; D. Sapp; SBB; SGIA; P. Sicilia; Slycers Sandwich Shop; Southern Services; Steele Group; Sylvron; Theragenics; E. Tremaine; Wagner; Wagner Industries; Wellness; West End; Y.M.; J. Young.

[168] *See* letter from ABA. A large accelerated filer is an issuer that, as of the end of its fiscal year, had an aggregate worldwide market value of voting and non-voting common equity held by its non-affiliates of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for at least 12 calendar months; has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Act; and is not eligible to use

smaller companies would have trouble recruiting directors because the pool of qualified directors is already small for smaller companies, and directors would not want to risk the exposure to a proxy contest. Another commenter argued that we should implement Rule 14a–11 on a pilot basis for large accelerated filers for two years and then revisit whether application of the rule would be appropriate for smaller companies.[169]

Other commenters stated that smaller reporting companies should not be excluded from the application of Rule 14a–11.[170] One commenter agreed with the Commission that exempting small entities would be inconsistent with the stated goals of the Proposal and the costs and burden for such entities would be minimal.[171] Other commenters believed that small companies are "just as likely" to have poorly functioning boards as their larger counterparts.[172] Another commenter argued that Rule 14a–11 would not impose a material burden on any company subject to the proxy rules because companies already have to distribute proxy cards and it would not be an imposition if they were required to add additional nominees to those cards.[173]

In the recently enacted Dodd-Frank Act, Congress confirmed our authority to require inclusion of shareholder nominees for director in company proxy materials.[174] In addition, in Section 971(c) of the Dodd-Frank Act Congress specifically provided the Commission with the authority to exempt an issuer or class of issuers from requirements adopted for the inclusion of shareholder director nominations in company proxy materials. In doing so, this provision instructs the Commission to take into account whether such requirement for the inclusion of shareholder nominees for director in company proxy materials disproportionately burdens small issuers.[175]

After considering the comments, amended Section 14(a), and Section 971(c) of the Dodd-Frank Act, we continue to believe that Rule 14a–11 should apply regardless of company size, as was proposed. As noted above, the purpose of Rule 14a–11 is to facilitate the exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of directors and thereby enable shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest. We are not persuaded that exempting smaller reporting companies would be consistent with these goals. As stated above, we expect the rule changes will further investor protection by facilitating shareholder rights to nominate and elect directors and providing shareholders a greater voice in the governance of the companies in which they invest. We believe shareholders of smaller reporting companies should be afforded these same protections.

Nonetheless, we recognize that smaller reporting companies may have had less experience with existing forms of shareholder involvement in the proxy process (*e.g.,* Rule 14a–8 proposals), and thus may have less developed infrastructures for managing these matters. We believe that a delayed effective date for smaller reporting companies should allow those companies to observe how the rule operates for other companies and should allow them to better prepare for implementation of the rules. We also believe that delayed implementation for these companies will allow us to evaluate the implementation of Rule 14a–11 by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them. Therefore, we are delaying implementation for companies that meet the definition of smaller reporting company in Exchange Act Rule 12b–2.[176] New Rule 14a–11 will become effective for these companies three years after the date that the rules become effective for companies other than smaller reporting companies. In addition, as discussed below, in an effort to limit the cost and burden on all companies subject to the rule, including smaller reporting companies, we have limited use of Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company for an extended period of time. As discussed further below, we have extended the required holding period to at least three years at the time the notice of nomination is filed with the Commission and transmitted to the company. In addition, we have made modifications to the ownership threshold that, in combination with the three-year holding period, we believe should facilitate shareholders' ability to exercise their State law rights to nominate and elect directors without unduly burdening companies, including smaller reporting companies. We proposed a tiered ownership threshold that included a 5% ownership threshold for non-accelerated filers; however, we are adopting a 3% ownership threshold for all companies subject to the rule. In adopting the uniform 3% ownership threshold, we carefully considered, among other factors, the potential that

the requirements for smaller reporting companies for its annual and quarterly reports. *See* Exchange Act Rule 12b–2(2).

[169] *See* letter from Theragenics. *See also* letter from Alston & Bird, recommending that we consider adopting a phase-in approach, whereby companies would be permitted to follow a phase-in schedule for mandatory compliance based on their size, similar to the Commission's rules regarding internal controls reporting and XBRL. *See Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports,* Release No. 33–8238; 34–47968 [69 FR 9722] (June 5, 2003) and *Interactive Data to Improve Financial Reporting,* Release No. 33–9002; 34–59324 [74 FR 6776] (Jan. 30, 2009).

[170] *See* letters from AFSCME; CII; D. Nappier.

[171] *See* letter from CII.

[172] *See* letters from AFSCME; D. Nappier.

[173] *See* letter from USPE.

[174] Dodd-Frank Act §§ 971(a) and (b).

[175] Dodd-Frank Act § 971(c). A comment letter on July 28, 2010 from the Society of Corporate Secretaries & Governance Professionals invoked this new legislation in support of a request to re-open the period for comment on the Proposal as it relates to small companies. As noted, we did specifically request comment in the Proposal on the rule's effect on smaller reporting companies, and we received and have considered numerous comments on this topic. Accordingly, we believe we have substantially achieved the objective stated in that letter, namely to identify and evaluate any "unique and significant challenges that access to the proxy will create for small and mid-sized companies." Moreover, our determination to delay implementation of Rule 14a–11 in respect of smaller companies will further allow us to evaluate the implementation of Rule 14a–11 by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies.

[176] *See* Exchange Act Rule 12b–2. A smaller reporting company is defined as "an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: had a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter, computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity; or in the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than $75 million as of a date within 30 days of the date of the filing of the registration statement, computed by multiplying the aggregate worldwide number of such shares held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of such shares included in the registration statement by the estimated public offering price of the shares; or in the case of an issuer whose public float as calculated under paragraph (1) or (2) of this definition was zero, had annual revenues of less than $50 million during the most recently completed fiscal year for which audited financial statements are available." Whether or not an issuer is a smaller reporting company is determined on an annual basis.

the rule would have a disproportionate impact on small issuers. Despite identifying that concern in the Proposal, however, the comments we received did not substantiate that concern, and comments from companies overwhelmingly supported uniform ownership thresholds for all public companies. Moreover, the data we examined did not indicate any substantial difference in share ownership concentrations between large accelerated filers and non-accelerated filers. Thus, we expect that the eligibility requirements will help achieve the stated objectives of the rule without disproportionately burdening any particular group of companies.

4. Who Can Use Exchange Act Rule 14a–11

a. General

In an effort to facilitate fair corporate suffrage, we could have proposed and adopted a rule pursuant to which the ability to use Rule 14a–11 would be conditioned solely on whether the shareholder lawfully could nominate a director, and not include any ownership thresholds or holding period. However, we believe it is appropriate to take a measured approach that balances competing interests and seeks to ensure investor protection. Accordingly, Rule 14a–11 will be available to shareholders that hold a significant, long-term interest in the company, have provided timely notice of their intent to include a nominee in the company's proxy materials, and provide specified disclosure concerning themselves and their nominees. More specifically, as described in detail in this section, a company will be required to include a shareholder nominee or nominees if the nominating shareholder or group: [177]

- Holds, as of the date of the shareholder notice on Schedule 14N,[178] either individually or in the aggregate,[179] at least 3% of the voting power (calculated as required under the rule) [180] of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) or on a written consent in lieu of a meeting; [181]
- Has held the qualifying amount of securities used to satisfy the minimum ownership threshold continuously for at least three years as of the date of the shareholder notice on Schedule 14N (in the case of a shareholder group, each member of the group must have held the amount of securities that are used to satisfy the ownership threshold continuously for at least three years as of the date of the shareholder notice on Schedule 14N); [182]
- Continues to hold the required amount of securities used to satisfy the ownership threshold through the date of the shareholder meeting; [183]
- Is not holding any of the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11; [184]
- Does not have an agreement with the company regarding the nomination; [185]
- Provides a notice to the company on Schedule 14N, and files the notice with the Commission,[186] 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 no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting; [187] and
- Includes the certifications required in the shareholder notice on Schedule 14N.[188]

b. Ownership Threshold

As proposed, a nominating shareholder or group would have been required to beneficially own 1%, 3%, or 5% of the company's securities entitled to be voted on the election of directors at the shareholder meeting, depending on the company's accelerated filer status or, in the case of registered investment companies, depending on the net assets of the company. We received significant comment on this topic, which we discuss further below, and have made alterations to the final rule to reflect the concerns expressed by commenters.

As adopted, to rely on Rule 14a–11, a nominating shareholder or group will be required to hold, as of the date of the shareholder notice on Schedule 14N, either individually or in the aggregate, at least 3% of the voting power of the company's securities that are entitled to be voted on the election of directors at the annual (or a special meeting in lieu of the annual) meeting of shareholders or on a written consent in lieu of a meeting. The nominating shareholder or group or member of a nominating shareholder group will be required to hold both the power to dispose of and the power to vote the securities, as discussed below. The nominating shareholder or member of a nominating shareholder group also will be required to have held the qualifying amount of securities for at least three years as of the date of the notice on Schedule 14N, and to hold that amount through the date of the election of directors. Each aspect of the ownership requirement is discussed further below.

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[177] In some circumstances, the requirements of Rule 14a–11 applicable to a nominating shareholder group must be satisfied by each member of the group individually (*e.g.,* no member of the group may be holding the company's securities with the purpose of, or with the effect, of changing control of the company or to gain more than the maximum number of nominees that the registrant would be required to include under the rule). *See also* Section II.B.4.

[178] Throughout this release, when we say "as of the date of the notice on Schedule 14N" we mean the date the nominating shareholder or group files the Schedule 14N with the Commission and transmits the notice to the company. *See* Section II.B.8.c.ii. below for a further discussion of the timing requirements for filing a Schedule 14N.

[179] The manner in which a nominating shareholder or group would establish its eligibility to use new Rule 14a–11 is discussed further in Section II.B.4.b.iv. below.

[180] *See* Instruction 3 to new Rule 14a–11(b)(1).

[181] *See* new Rule 14a–11(b)(1).

[182] *See* new Rule 14a–11(b)(2). The three-year holding period requirement applies only to the amount of securities that are used for purposes of determining the ownership threshold.

[183] See new Rule 14a–11(b)(2).

[184] *See* new Rule 14a–11(b)(6).

[185] *See* new Rule 14a–11(b)(7).

[186] *See* Section II.B.8. for a discussion of new Schedule 14N and the disclosures required to be filed. The Schedule 14N may be filed by an individual shareholder that meets the ownership threshold, an individual shareholder that is a member of a nominating shareholder group that is aggregating the individual members' securities to meet the ownership threshold but is choosing to file the notice on Schedule 14N individually, or a nominating shareholder group through their authorized representative, as provided for in Rule 14n–1(b)(1).

[187] The dates would be calculated by determining the release date disclosed in the previous year's proxy statement, increasing the year by one, and counting back 150 calendar days and 120 calendar days for the beginning and end of the window period, respectively. In this regard, we note that the deadline could fall on a Saturday, Sunday or holiday. In such cases, the deadline should be treated as the first business day following the Saturday, Sunday or holiday, similar to the treatment filing deadlines receive under Exchange Act Rule 0–3. *See* Instruction 1 to Rule 14a–11(b)(10). 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 pursuant to new Item 5.08 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. *See* new Rule 14a–11(b)(10) and Instruction 2 to that paragraph. *See* further discussion in Section II.B.8.c.ii.

[188] *See* new Rule 14a–11(b)(11) and Item 8 of new Schedule 14N. Pursuant to new Schedule 14N, the nominating shareholder or group would be required to include in its notice to the company a certification that the nominating shareholder or group satisfies the requirements in Rule 14a–11.

i. Percentage of Securities

We proposed tiered ownership thresholds for large accelerated, accelerated, and non-accelerated filers in an effort to address the possibility that certain companies could be affected disproportionately based on their size.[189] Many commenters criticized the proposed ownership thresholds or recommended generally higher thresholds.[190] Of these, most commenters criticized the tiered ownership thresholds and recommended a uniform ownership threshold generally higher than the proposed thresholds.[191] Many of these commenters questioned whether the data on shareholdings discussed in the Proposal in relation to the proposed thresholds took into account the fact that shareholders could aggregate their holdings in order to use Rule 14a–11.[192] One of these commenters described formation of a nominating group as "the most likely scenario" to qualify for use of Rule 14a–11,[193] and another commenter submitted that with a significant ownership threshold an "inability to aggregate shareholders to reach the ownership threshold is unreasonable."[194]

A few commenters criticized generally the proposed thresholds as too high and recommended lower thresholds.[195] One commenter opposed the tiered ownership thresholds because a number of companies regularly move from one category of filer to another as the aggregate worldwide market value of their voting and non-voting common equity changes from fiscal year to fiscal year, which the commenter believed would lead to uncertainty under the Commission's tiered approach.[196] Commenters from the investment company industry noted that the proposed eligibility thresholds were based on data for non-investment companies and were not supported by empirical data analysis for investment companies.[197]

On the other hand, we also received comment generally supporting the proposed tiered ownership thresholds.[198] One commenter expressed general support for the proposed thresholds and stated that the proposed thresholds would achieve the Commission's and commenter's shared objective of facilitating the exercise of shareholders' nomination rights.[199] Another commenter explained that the thresholds would "ensure[ ] that only those long-term shareholders who are seriously concerned about the governance of portfolio companies will have a seat at the table."[200]

With regard to an appropriate uniform ownership threshold, commenters recommended a number of different possibilities, including:

- At least 1% of the company's outstanding shares for an individual shareholder and 5% for a group of shareholders;[201]
- At least 2% of a company's voting securities;[202]
- 3% of a company's shares;[203]
- 5% of the company's voting securities for an individual shareholder and 10% for a group of shareholders;[204]
- 5% of a company's outstanding shares;[205]
- 5% of a company's outstanding shares for an individual shareholder and a higher but unspecified threshold for a group of shareholders;[206]
- With regard to investment companies, a 5% threshold;[207]
- From 5% to 10% of a company's shares;[208]
- 10% of the company's shares;[209]
- 10% of the company's outstanding shares for an individual shareholder and 15% of the outstanding shares for a group of shareholders;[210]
- 5% to 15% of the company's outstanding shares;[211]

[189] Similarly, we proposed tiered ownership thresholds for registered investment companies with the tiers based on net assets.

[190] *See* letters from 26 Corporate Secretaries; ABA; Australian Council of Superannuation Investors ("ACSI"); ADP; Advance Auto Parts; Aetna; Alaska Air; Alcoa Inc. ("Alcoa"); Allstate; American Express; Anadarko; Applied Materials; Association of Corporate Counsel; AT&T; Avis Budget; Barclays; Best Buy; J. Blanchard; Boeing; BorgWarner; BRT; Burlington Northern; R. Burt; Calvert Group, Ltd. ("Calvert"); Caterpillar; CFA Institute; Chevron; J. Chico; Committee on Investment of Employee Benefit Assets ("CIEBA"); CIGNA; Peter Clapman ("P. Clapman"); Cleary; CNH Global; Comcast; Con Edison; Capital Research and Management Company ("CRMC"); CSX; Cummins; Darden Restaurants; Davis Polk; Deere; Dewey; W. Brinkley Dickerson, Jr. ("W. B. Dickerson"); J. Dillon; DTE Energy; DuPont; Craig Dwight ("C. Dwight"); Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; eWareness; ExxonMobil; FedEx; Financial Services Roundtable; FMC Corp.; FPL Group; GE; General Mills; A. Goolsby; Home Depot; Honeywell; IBM; ICI; Intel; ITT; JPMorgan Chase; J. Kilts; Koppers; E.J. Kullman; N. Lautenbach; Leggett; Lionbridge Technologies, Inc. ("Lionbridge Technologies"); Lorsch *et al.;* M. Metz; McDonald's; MeadWestvaco; J. Miller; Motorola; Norfolk Southern; Northrop Grumman Corporation ("Northrop"); Office Depot; PepsiCo; Pfizer; P&G; Praxair, Inc. ("Praxair"); Protective; Stephen Lange Ranzini ("S. Ranzini"); Rosen; Ryder; Sara Lee; S&C; Seven Law Firms; Shearman & Sterling; Sherwin-Williams; SIFMA; Society of Corporate Secretaries; Southern Company; Tenet; Tesoro; Textron; TI; TIAA–CREF; Tidewater Inc. ("Tidewater"); Tompkins Financial Corporation ("Tompkins"); G. Tooker; T. Rowe Price; tw telecom; L. Tyson; UnitedHealth; U.S. Bancorp; ValueAct Capital; Vanguard; Verizon Communications Inc. ("Verizon"); Bruno de la Villarmois ("B. Villarmois"); Wachtell; Wells Fargo; Weyerhaeuser; Xerox.

[191] *See* letters from ACSI; ADP; Advance Auto Parts; Allstate; American Express; Applied Materials; Association of Corporate Counsel; AT&T; Avis Budget; Barclays; Best Buy; J. Blanchard; Boeing; BRT; Burlington Northern; R. Burt; Calvert; Caterpillar; CFA Institute; J. Chico; CIGNA; CNH Global; Comcast; Con Edison; CSX; Darden Restaurants; Davis Polk; Deere; Dewey; W. B. Dickerson; J. Dillon; DTE Energy; DuPont; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; ExxonMobil; FedEx; Financial Services Roundtable; FMC Corp.; FPL Group; General Mills; Home Depot; IBM; Intel; ITT; JPMorgan Chase; J. Kilts; E.J. Kullman; Lorsch *et al.;* McDonald's; M. Metz; Motorola; N. Lautenbach; Office Depot; PepsiCo; Praxair; Protective; S. Ranzini; Sara Lee; S&C; Seven Law Firms; Shearman & Sterling; Sherwin-Williams; Society of Corporate Secretaries; Southern Company; Tesoro; Textron; TI; TIAA–CREF; Tompkins; G. Tooker; T. Rowe Price; tw telecom; L. Tyson; UnitedHealth; U.S. Bancorp; ValueAct Capital; Vanguard; Verizon; Weyerhaeuser; Xerox.

[192] *See* letters from ABA; ABA II; BRT; Business Roundtable (January 19, 2010) ("BRT II"); Cleary; Davis Polk; Honeywell; SIFMA.

[193] Letter from BRT II.

[194] Letter from California State Teachers' Retirement System (Nov. 18, 2009)("CalSTRS II").

[195] *See* letters from Committee of Concerned Shareholders ("Concerned Shareholders"); L. Dallas; USPE.

[196] *See* letter from Shearman & Sterling.

[197] *See, e.g.,* letters from ICI; S&C; T. Rowe Price.

[198] *See* letters from AFL–CIO; AFSCME; British Insurers; CalPERS; CalSTRS; COPERA; CRMC; Florida State Board of Administration; Glass Lewis; IAM; ICGN; LACERA; Marco Consulting; D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Norges Bank; OPERS; Pax World; RiskMetrics; David E. Romine ("D. Romine"); Shamrock; Sodali; Teamsters; WSIB.

[199] *See* letter from CII.

[200] Letter from AFL–CIO.

[201] *See* letter from Deere.

[202] *See* letter from ADP.

[203] *See* letters from CSI; Calvert; CFA Institute; Labour Union Co-operative Retirement Fund ("LUCRF"); S. Ranzini.

[204] *See* letters from Advance Auto Parts; Alaska Air; American Express; Association of Corporate Counsel; Avis Budget; Best Buy; J. Blanchard; Boeing; BRT; Burlington Northern; Callaway; CIGNA; CNH Global; Comcast; Con Edison; Darden Restaurants; Dewey; J. Dillon; DTE Energy; DuPont; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; ExxonMobil; FedEx; FMC Corp.; FPL Group; General Mills; Home Depot; Intel Corporation ("Intel"); JPMorgan Chase; E.J. Kullman; McDonald's; N. Lautenbach; PepsiCo; Praxair; Protective (recommending this threshold if its proposed 35% withhold vote triggering event is not included; if included, it recommended a 3% threshold); Sara Lee; Seven Law Firms; Sherwin-Williams; Society of Corporate Secretaries; Textron; Tompkins; G. Tooker; Weyerhaeuser; Xerox.

[205] *See* letters from Applied Materials; R. Burt; CSX; Financial Services Roundtable; IBM (recommending 5% as one of the two acceptable thresholds); ITT; J. Kilts; Shearman & Sterling; Southern Company; Tesoro; TIAA–CREF; T. Rowe Price; tw telecom; UnitedHealth; U.S. Bancorp; Verizon.

[206] *See* letters from Applied Materials; U.S. Bancorp.

[207] *See* letters from S&C; TIAA–CREF.

[208] *See* letters from Davis Polk; Lorsch *et al.*

[209] *See* letters from Allstate; Caterpillar; J. Chico; W. B. Dickerson; IBM (recommending 10% as one of the two acceptable thresholds); ICI; M. Metz; Office Depot; L. Tyson; ValueAct Capital; Vanguard.

[210] *See* letter from Motorola.

[211] *See* letter from Barclays.

- 15% of the company's shares; [212] and
- 20% of a company's shares.[213]

Two of the commenters that criticized the proposed threshold as too high recommended that Rule 14a–11 have the same ownership threshold as Rule 14a–8,[214] with one of these commenters expressing the belief that the proposal, with its ownership thresholds, would enable only institutional shareholders to access the corporate ballot.[215] Another of the commenters opposing the proposed thresholds asserted that the threshold for non-accelerated filers is too high and cited figures indicating that a significant number of such filers do not have any shareholders that would satisfy the proposed threshold.[216] This commenter suggested that for an individual shareholder or a group of shareholders, the threshold should be based on the dollar value of the shares held (*e.g.,* $250,000) or a lower percentage of shares (*e.g.,* 0.25%).

After considering the comments, we believe that it is appropriate to apply a uniform 3% ownership threshold to all companies subject to the rule, regardless of whether they are classified as large accelerated, accelerated, or non-accelerated filers under the Federal securities laws. As an initial matter, as we did at the time we issued the Proposing Release, we considered whether and why Rule 14a–11 should include any ownership threshold. Because the Commission's proxy rules seek to enable the corporate proxy process to function, as nearly as possible, as a replacement for in-person participation at a meeting of shareholders, some may argue that once a shareholder has satisfied any procedural requirements to a director nomination that a company is allowed to impose under State law, then that nomination should be included in the company's proxy materials. Each time we consider and adopt amendments to our rules, however, we balance competing interests.

Based on our consideration of these competing interests, including balancing and facilitating shareholders' ability to participate more fully in the nomination and election process against the potential cost and disruption of the amendments, we have determined that requiring a significant ownership threshold is appropriate to use Rule 14a–11. Indeed, we believe that the 3% ownership threshold—combined with the other requirements of the rule—properly addresses the potential practical difficulties of requiring inclusion of shareholder director nominations in a company's proxy materials, and some concerns that both company management and other shareholders may have about the application of Rule 14a–11. Providing this balanced, practical, and measured limitation in Rule 14a–11 is consistent with the approach we have taken in many of our other proxy rules [217] and reflects our desire to proceed cautiously with these new amendments to our rules.

We also considered whether the ownership threshold we adopt for Rule 14a–11 should be tiered based on the size and related filing status (or net assets) of the company, or uniform for all companies, and what percentage of ownership would be most appropriate. We have decided to adopt a uniform standard for all companies for several reasons. First, we determined that a uniform standard would reduce the complexities of Rule 14a–11. As noted by one commenter,[218] the potential for the filing status of a company to change would result in uncertainty about the availability of the provisions of Rule 14a–11 as a result of market fluctuations in share prices, acquisitions, or divestitures. A uniform standard avoids that uncertainty and the resulting potential for the costs and burdens of disputes over the selection of the appropriate tier. Elimination of that uncertainty, moreover, would make the availability of Rule 14a–11 more predictable and therefore more useful for shareholders in planning nominations in reliance on the rule. A uniform standard also will avoid any ability on the part of management to structure corporate actions to modify the impact of Rule 14a–11 by placing the company in a different tier. The concern we expressed in the Proposal—that companies could be disproportionately affected by adoption of the rule based on their size—was not supported by comments of potentially affected companies; to the contrary, comments from companies overwhelmingly supported uniform ownership thresholds.[219] In addition, as discussed below, we are deferring implementation of Rule 14a–11 for smaller reporting companies.[220]

A comparison of the share ownership concentrations in large accelerated filers and non-accelerated filers produced relatively minor observable difference. The results, adjusted to give effect to a three-year holding period requirement, are summarized in the table below: [221]

[212] *See* letter from TI.

[213] *See* letter from AT&T.

[214] *See* letters from Concerned Shareholders; USPE.

[215] *See* letter from Concerned Shareholders.

[216] *See* letter from L. Dallas.

[217] *See, e.g.,* Exchange Act Rule 14a–8(b) (requiring shareholders to have "continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date" they submit a shareholder proposal); Exchange Act Rule 14a–6(g) (requiring a soliciting person that "owns beneficially securities of the class which is the subject of the solicitation with a market value of over $5 million" to file a notice with the Commission); Regulation S–K, Item 404(a) (requiring disclosure of transactions with related parties that exceed $120,000).

[218] *See* letter from Shearman & Sterling.

[219] *See* letters from General Mills; Tesoro; T. Rowe Price; ValueAct Capital; Verizon (explicitly opposing variation in percentage ownership requirement based on issuer size); and letters identified in footnotes 199–211 above (commenters supporting various uniform ownership thresholds).

[220] As noted in Section II.B.3.f., we have adopted a three-year delay in implementation for smaller reporting companies.

[221] The percentages in the table are derived from the data set described in the Proposing Release involving companies that have held meetings between January 1, 2008 and April 15, 2009 (the "Proposing Release data"). *See* Section III.B.3. of the Proposing Release. The percentages have been adjusted, however, because the Proposing Release data did not give effect to any holding period requirement, and we have attempted to estimate what those percentages would have been had they given effect to the three-year holding period we are adopting. By the calculation described below, we have estimated a reasonable adjustment to the reported percentages in the Proposing Release data by using the data presented in a November 24, 2009 memorandum based on the analysis of Schedule 13F filings, data which did give effect to holding period requirements. *See* Memorandum from the Division of Risk, Strategy, and Financial Innovation regarding the Share Ownership and Holding Period Patterns in 13F data (November 24, 2009), *available at http://www.sec.gov/comments/s7-10-09/s71009-576.pdf* (the "November 2009 Memorandum"). The two data sets have overlapping statistics that can be used for comparison and adjustment: Both sets report percentages of a broad sample of public companies and identify percentages of companies having (i) at least one shareholder with holdings of 3% of more, (ii) at least two shareholders with holdings of 3% or more, (iii) at least one shareholder with holdings of 1% or more, and (iv) at least two shareholders with holdings of 1% or more. Comparing the percentages reflected in the November 2009 Memorandum (giving effect to a three-year holding period requirement) with the percentages in the Proposing Release data (not reflecting any holding period requirement), we observe that the percentages reported in the Proposing Release data exceed the percentages reported in the November 2009 memorandum by amounts ranging from 56% to 69%. In order to derive the approximate percentages in the table, we adjusted downward by 62.5% the percentages reported in the Proposing Release data, to account at least approximately for the application of the three-year holding period requirement.

	Non-accelerated filers (approximate percentages)	Large accelerated filers (approximate percentages)
Companies with at least one 1% shareholder	37	37
Companies with at least one 3% shareholder	33	32
Companies with at least one 5% shareholder	22	16
Companies with at least two 1% shareholders	36	37
Companies with at least two 1.5% shareholders	33	33
Companies with at least two 2.5% shareholders	27	25

Our further review of relevant data has persuaded us that applying different ownership thresholds to large accelerated filers and non-accelerated filers is not justified.[222]

As noted above, we have decided to adopt a uniform ownership threshold for all categories of public companies. We determined that a 3% ownership threshold is an appropriate standard for all such companies—not just accelerated filers. We believe that the 3% threshold, while higher for many companies and lower for others than the thresholds advanced in the Proposal, properly balances our belief that Rule 14a–11 should facilitate shareholders' traditional State law rights to nominate and elect directors with the potential costs and impact of the amendments on companies. The ownership threshold we are establishing should not expose issuers to excessively frequent and costly election contests conducted through use of Rule 14a–11, but it is also not so high as to make use of the rule unduly inaccessible as a practical matter.

We selected the uniform 3% threshold based upon comments received, our analysis of the data available to us, and the fact that the rule allows for shareholders to form groups to aggregate their holdings to meet the threshold. We also considered that our amendments to Rule 14a–8 remove barriers to the ability of shareholders to have proposals included in company proxy materials to establish a procedure under a company's governing documents for the inclusion of one or more nominees in the company's proxy materials. Because of these amendments, shareholders who believe the 3% threshold is too high can take steps to seek to establish a lower ownership threshold.[223]

We note that we considered a lower threshold, such as 1%, and a higher threshold, such as 5%, both of which were thresholds in the proposed tiers. Quite a few commenters, including a number who generally supported the adoption of Rule 14a–11, advocated for an ownership threshold higher than the 1% level we proposed for large accelerated filers.[224] One large institutional investor, for example, "strongly urg[ed] the adoption of proposed Rule 14a–11" and argued 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," but also stated the belief that "in order to use company resources to nominate a director, a significant amount of capital must be represented and 5% is an acceptable threshold."[225] Similarly, the manager of a large family of investment companies stated its "support [for] the Commission's intent to facilitate shareholders' rights to participate in the governance process," yet commented that "a 1% threshold is too low, in our opinion, to maintain the critical balance between serving the interests of eligible nominating shareholders and serving the interests of a company's shareholder base at large."[226] That commenter recommended a "flat 5% threshold for all companies" because it "represents significant economic stake." Other commenters recommended a uniform 3% ownership threshold in the interest of avoiding "frivolous or vexatious nominations,"[227] or because it "is not so small that it would allow a board nomination for only a de minimis investment in [a non-accelerated filer]," but "would not be so large as to prevent all but the largest institutional shareowners to submit nominees for [large accelerated filers]."[228]

In light of such comments we have determined not to adopt the 1% threshold we had proposed with respect to large accelerated filers. We also have determined not to adopt, as the uniform standard, the 5% threshold we had proposed for non-accelerated filers. Several commenters from the investor community explicitly opposed a 5% uniform threshold, maintaining that it would as a practical matter exclude all but the largest institutional investors.[229] On the other hand, although some companies supported a uniform 5% threshold,[230] most other companies urged the adoption of a substantially higher threshold, either for individual shareholders or for shareholder groups, or both. For example, companies and their counsel generally believed a higher threshold should apply to group nominations and overwhelmingly recommended a 10% minimum ownership requirement for nominations by shareholder groups.[231] We note, however, that at a 10% threshold for groups, the likelihood of forming a group sufficient to meet the minimum ownership requirement would likely be significantly reduced compared to a 3% threshold. Given a three-year holding period, the data in the November 2009 Memorandum identify combinations

[222] *See* letter from P. Neuhauser (suggesting only two ownership eligibility tiers because data show "almost no difference in ownership characteristics between smaller accelerated filers and non-accelerated filers.").

[223] As noted in Section II.C., we are adopting an amendment to Rule 14a–8(i)(8) to preclude companies from relying on that basis to exclude from their proxy materials shareholder proposals that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. Such a shareholder proposal would, of course, have to satisfy the other requirements of the rule, like other Rule 14a–8 shareholder proposals.

[224] *See* letters from ACSI (advocating a uniform 3% threshold); Calvert (same); LUCRF (same); S. Ranzini (same); TIAA–CREF (advocating a uniform 5% threshold); T. Rowe Price (same).

[225] Letter from TIAA–CREF.

[226] Letter from T. Rowe Price.

[227] Letters from SCSI and LUCRF.

[228] Letter from CFA Institute.

[229] *See* letters from CFA Institute; P. Neuhauser; RiskMetrics.

[230] *See* letters from CSX; ITT; Southern Company; Tesoro; tw telecom; UnitedHealth; Verizon.

[231] *See* letters from Advance Auto Parts; Alaska Air; American Express; Association of Corporate Counsel; Avis Budget; Best Buy; J. Blanchard; Boeing; BRT; Burlington Northern; Callaway; CIGNA; CNH Global; Comcast; Con Edison; Darden Restaurants; Dewey; J. Dillon; DTE Energy; DuPont; Eaton; Edison Electric Institute; Eli Lilly; Emerson Electric; ExxonMobil; FedEx; FMC Corp.; FPL Group; General Mills; Home Depot; Intel; JPMorgan Chase; E.J. Kullman; McDonald's; N. Lautenbach; PepsiCo; Praxair; Protective (recommending this threshold if its proposed 35% withhold vote triggering event is not included; if included, it recommended a 3% threshold); Sara Lee; Seven Law Firms; Sherwin-Williams; Society of Corporate Secretaries; Textron; Tompkins; G. Tooker; Weyerhaeuser; Xerox.

totaling 10% or more but involving five or fewer shareholders as achievable in as little as 7% of public companies, compared to at least 21% of public companies at a 5% threshold and at least 31% of public companies at a 3% threshold. In addition, the data suggest that it would be even more unlikely that a company would have an individual shareholder that would meet a 10% ownership threshold.[232] While some commenters suggested a 5% threshold was appropriate because that amount is consistent with other filing requirements such as Schedule 13D and 13G,[233] we ultimately were not persuaded because the underlying principles of such filing requirements [234] are quite different from those underlying the ownership condition to Rule 14a–11. After considering the comments and available data, we have decided that a 3% ownership threshold—including where shareholders form groups to satisfy the threshold—is an appropriate and workable approach for the rule.

In adopting a uniform 3% threshold for all companies, as opposed to a lower ownership threshold for all companies, we are mindful that the rule will allow shareholders to form a group by aggregating their holdings to meet the ownership threshold.[235] Indeed, as we assumed in the Proposing Release and as some commenters told us, in many cases shareholders will need to form groups to meet the ownership threshold for the purpose of submitting director nominations pursuant to Rule 14a–11.[236] Commenters also pointed to instances of coordinated shareholder activity in recent "vote no" campaigns as support for the ability of shareholders to form groups.[237] We have adopted a number of amendments to our rules that will facilitate the formation of groups for this purpose.[238] We understand the result of our ownership threshold determination may be that shareholders will need to convince other shareholders to support their attempt to use Rule 14a–11. We believe this outcome reduces the potential for excessive costs to be incurred by companies and their shareholders.

The data available to us also suggest that reaching the 3% ownership threshold we are adopting is possible for a significant number of shareholders either individually or by a number of shareholders aggregating their holdings in order to satisfy the ownership requirement. In particular, the data presented in the November 2009 Memorandum indicate that a sizeable percentage (33%) of public companies have at least one institutional investor owning at least 3% of their securities for at least three years, and thus potentially qualified to meet the Rule 14a–11 ownership threshold individually. As noted, however, the data are based on Form 13F filings, which include holders that are custodians and may not be likely users of the rule. The data in the November 2009 Memorandum also suggest that forming nominating shareholder groups with holdings aggregating 3% is achievable at many companies by a relatively small number of shareholders. Even factoring in the requirement of continuous ownership for three years, 31% of public companies have three or more holders with at least 1% share ownership each; and 29% have two or more holders with at least 2% share ownership each.[239] Moreover, neither of these categories includes companies with one holder of 2% and another holder of at least 1%, and none of these percentages includes companies having a relatively small number (*e.g.* four to ten) of holders whose aggregate holdings exceed 3% but whose individual holdings do not bring the company within any of the categories identified in the data.

We are concerned, however, that use of Rule 14a–ndash;11 may not be consistently and realistically viable, even by shareholder groups, if the uniform ownership threshold were set at 5% or higher. At the 5% minimum ownership requirement for individuals as advocated by many of those same commenters, only 20% of public companies had even one shareholder satisfying that requirement. Finally, even applying a 5% threshold for shareholder groups, the data identify combinations involving five or fewer shareholders that add up to 5% or more as theoretically achievable in as few as 21% of public companies—at least 25% fewer than with a 3% threshold.[240]

All of these data thus suggest that a uniform 5% ownership requirement would be substantially more difficult to satisfy than the 3% requirement we are adopting. Moreover, our resulting concern about the viability of a 5% ownership threshold is exacerbated by several limitations on the data reported in the November 2009 Memorandum. While those data do account for the application of a three-year holding period requirement, they may overstate in several ways the potential to meet the ownership threshold. First, they may include controlling shareholders that may be unlikely to rely on Rule 14a–11. Second, the data are based on filings on Form 13F, in which ownership is defined differently than under Rule 14a–11, and thus may yield a higher number of larger shareholdings. Finally, the data include large shareholdings by institutions which report aggregated holdings of securities held for multiple beneficial owners.[241]

Nevertheless, and principally because they give effect to holding period requirements, we considered the data in

[232] The data in the November 2009 Memorandum suggest that just 4% of companies would have at least one shareholder with 10%.

[233] *See, e.g.,* letters from CSX; ITT; Shearman & Sterling; Tesoro; T. Rowe Price; tw telecom.

[234] *See, e.g.,* Release No. 34–26598, Reporting of Beneficial Ownership in Publicly-Held Companies (March 6, 1989) ("The beneficial ownership reporting requirements embodied in Sections 13(d) and 13(g) of the [Exchange Act] and the regulations adopted thereunder are intended to provide to investors and to the subject issuer information about accumulations of securities that may have the ability to change or influence control of the issuer."). *See also* Release No. 34–50699 (proposing to require disclosure of persons holding 5% of an ownership interest in a securities exchange because the principles underlying such disclosure were similar to those underlying other filing requirements: "The 5% reporting threshold and the information proposed to be required to be disclosed about such ownership is modeled on the beneficial ownership reporting requirements of the Williams Act, embodied in Sections 13(d) and 13(g) of the Exchange Act and the rules and regulations thereunder. These Exchange Act provisions are intended to provide information to the issuer and the marketplace about accumulations of securities that may have the potential to change or influence control of an issuer." (footnotes omitted)).

[235] Some commenters suggested that the data on share ownership dispersion referred to in the Proposing Release were insufficient because we did not focus on the possibility that shareholders could form groups to satisfy the minimum ownership requirement. *See* letters from American Bar Association (January 19, 2010) ("ABA III"); BRT II.

[236] *See* letters from AFL–CIO ("[I]t will be necessary to permit aggregation of holdings to prevent the Proposed Access Rule from being usable only by hedge funds."); Florida Board of Administration ("Public funds would need to form a nominating group in order to meet the hurdle in nearly all cases.").

[237] *See* letter from BRT II.

[238] *See, e.g.,* Rule 14a–2(b)(7).

[239] We note that it is unlikely that the ownership test used in calculating the data tracks the definition that we are adopting for Rule 14a–11. As a result, the percentages in the data may be over- or under-inclusive.

[240] At the 10% threshold for groups urged by many commenters, for example, the likelihood of forming a group sufficient to meet the minimum ownership requirement would be more sharply constrained: the data in the November 2009 Memorandum identify combinations totaling 10% or more but involving five or fewer shareholders as theoretically achievable in as little as 7% of public companies.

[241] On the other hand, the data in the November 2009 Memorandum may understate the number of large shareholdings, because the data may exclude smaller holdings in multiple institutions that are subject to common voting control, and in any event, do not include holdings of less than 1% at all, even though such holdings could contribute to the formation of a group eligible to use Rule 14a–11. Likewise, those data do not include securities held by institutions holding less than $100 million in securities because Exchange Act Section 13(f) does not require such institutions to report their holdings. *See* letters from ABA III; BRT II.

the November 2009 Memorandum to be the most pertinent to our selection of a uniform minimum ownership percentage. We received additional data relating to large companies, however, that offer some additional indication about the number of shareholders potentially available to form a group to meet the 3% ownership threshold. One study indicated that in the top 50 companies by market capitalization as of March 31, 2009, the five largest institutional investors held from 9.1% to 33.5% of the shares, and an average of 18.4% of the shares.[242] That same study found that among a sample of 50 large accelerated filers, the median number of shareholders holding at least 1% of the shares for at least one year was 10.5, with 45 of the 50 companies in the sample having at least seven such shareholders.[243] Another study that was reported to us [244] similarly suggests relatively high concentration of share ownership. According to that analysis of S&P 500 companies, 14 institutional investors could satisfy a 1% threshold at more than 100 companies, eight could meet that threshold at over 200 companies, five could meet it at over 300 companies, and three could meet it at 499 of the 500. Information from specific large issuers likewise suggests the achievability of shareholder groups aggregating 3%.[245]

We realize these data likely overstate the number of eligible shareholders or shareholders whose holdings could be grouped to meet the ownership threshold, as these data generally do not appear to reflect any continuous holding requirement.

In any event, our assessment of the percentage of companies with various share ownership concentrations cannot be taken as an assurance that shareholder nominating groups will or will not be formed at any particular combination of percentage ownership and holding period requirements or of the likelihood that persons with large securities holdings would be inclined or disinclined to use Rule 14a–11.[246] Taking all of this information into account, overall we believe that our selection of a 3% ownership threshold strikes an appropriate balance between the benefits of facilitating shareholder participation in the process of electing directors of public companies and the costs and disruption associated with contested elections of directors conducted pursuant to new Rule 14a–11. We also believe, and as noted, many commenters supported, that a threshold tied to a significant commitment to the company is an important feature of our amendments. Of course, to the extent that shareholders believe the 3% threshold is too high our amendments to Rule 14a–8 will facilitate their ability to adopt a lower ownership percentage.[247]

We proposed to apply the same thresholds for registered investment companies and business development companies as for non-investment companies, except that the applicability of the particular thresholds for registered investment companies would have depended on the net assets of the company, rather than the company's accelerated filer status. No commenters recommended a higher threshold for investment companies than for non-investment companies. While some commenters noted the absence of data specifically relating to the impact of various ownership thresholds on investment companies,[248] no commenter supplied any data suggesting the need for an ownership threshold for investment companies different from that applicable to non-investment companies.[249] Although two commenters suggested a 5% ownership threshold for investment companies, both of these commenters also suggested a 5% threshold for non-investment companies.[250]

We believe that it is appropriate to apply to registered investment companies and business development companies the same 3% ownership threshold that we are applying to other companies. We also believe that, similar to non-investment companies, our selection of a 3% ownership threshold strikes an appropriate balance between the benefits of facilitating shareholder participation in the process of electing directors of investment companies and the costs and disruption associated with contested elections of directors conducted pursuant to Rule 14a–11.

We are not adopting the suggestion of commenters that the eligibility thresholds for investment companies be based on the holdings for the fund complex in the case of unitary boards or the cluster in the case of cluster boards.[251] We believe that eligibility should be based on holdings for the investment company, not the entire fund complex or cluster, because under State law, shareholder voting is determined based on the holdings in the investment company. Fund complexes have flexibility to organize their funds into one or more investment companies. Thereafter, State law governs which shareholders vote as a group for directors. Because Rule 14a–11 is intended to facilitate the exercise of traditional State law rights to nominate and elect directors, we believe that the rule should follow State law.

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[242] *See* "Report on Effects of Proposed SEC Rule 14a–11 on Efficiency, Competitiveness and Capital Formation, in Support of Comments by Business Roundtable" by NERA Economic Consulting ("NERA Report"), Appendix Table 1, submitted with the letter from BRT.

[243] *Id.* at 13–14, Figure 2.

[244] *See* letter from JPMorgan Chase.

[245] *See* letters from AT&T (eight shareholders owning 1% or more, although holding periods not identified); AGL Resources (same); CIGNA (20 1%+ shareholders, although holding periods not identified); Cummins (36 1+% shareholders, although holding periods not identified); General Mills (one 5%+ shareholder holding for at least 6 years, over 12 1%+ shareholders, and over 25 0.5%+ shareholders, although holding periods not identified); ITT (14 1%+ shareholders, although holding periods not identified); McDonald's (10 holders owning 1% or more, one shareholder owning 5%, although holding periods not identified); UnitedHealth (four 3%+ shareholders, six 2%+ shareholders, nine 1%+ shareholders, 20 0.5%+ shareholders, 32 0.25% shareholders, applying a 2-year holding period); Weyerhaeuser (three 5%+ shareholders, 20 1%+ shareholders, although holding periods not identified).

[246] *See* letter from Council of Institutional Investors (January 14, 2010) ("CII II"). This comment refers to research indicating that in a small sample of accelerated and non-accelerated filers, the holdings of the ten largest public pension funds, if aggregated, would not exceed 5% and would also be unlikely to meet a 3% threshold, while a 1% threshold could be met. Apart from the sample size, however, this research itself appears limited in that it apparently does not include other types of shareholders and is not adjusted for any holding period.

[247] *See* footnote 223 above.

[248] *See, e.g.,* letters from ICI; S&C; T. Rowe Price.

[249] One joint comment letter provided data regarding the net assets of investment companies and the dollar value of the shares that would be necessary to meet the proposed 1%, 3%, or 5% thresholds. *See* letter from ICI/IDC. The data provided by the commenters suggest that there are a limited number of small investment companies with net assets ranging from $50,000 to $351,000, where the 3% threshold could be met by an investment ranging from $1,500 to $10,530. However, the data also indicate that the vast majority of funds are significantly larger, and would therefore require a significantly larger investment to meet the 3% threshold (*e.g.,* 90% of long-term mutual funds, money market funds, and closed-end funds have total net assets greater than $19 million, $100 million, and $57 million, respectively; the median long-term mutual fund, money market fund, and closed-end fund have total net assets of $216 million, $844 million, and $216 million, respectively).

[250] *See* letters from S&C (recommending "with respect to the ownership thresholds applicable to shareholders of [registered investment companies], a minimum percentage of no less than the 5% threshold recommended in the Seven Law Firm Letter" (to which Sullivan & Cromwell was a party and which recommended that ownership thresholds of non-investment companies be adjusted upwards to 5% for individual shareholders and higher for groups of shareholders)); TIAA–CREF (recommending "that the Commission adopt a 5% ownership requirement across the board regardless of the company's size" and "[w]ith respect to investment companies, * * * that the 5% requirement be applied at the fund complex level rather than at the individual fund level").

[251] *See* letters from Barclays; T. Rowe Price; TIAA–CREF.

ii. Voting Power

We proposed that the ownership threshold be determined as a percentage of the securities entitled to be voted on the election of directors. Some commenters sought clarification of how the ownership threshold would be calculated where companies have multiple classes of stock with varying voting rights.[252] These commenters observed that the proposed rule did not adequately address voting regimes where the voting rights have been separated from the economic rights of ownership.[253] One commenter explained that in situations where ownership of securities does not correlate with voting power,[254] shares will have voting rights disproportionate to the number of shares held, and that creates a disparity between the two classes in terms of the economic value of a single vote.[255] One commenter advised that further clarification was needed for companies with two or more outstanding classes of voting securities with disparate voting rights, including those companies with classes of voting securities and non-voting securities, so that those companies would be treated in a manner consistent with companies that have one class of voting securities.[256]

In proposing that the ownership threshold be determined as a percentage of securities entitled to be voted on the election of directors, our goal was to have the requirement tie to the percentage of votes that could be cast for the director nominees. In response to these commenters, we have revised the rule text to clarify that the ownership threshold will be determined as a percentage of *voting power* of the securities entitled to be voted on the election of directors at the meeting, rather than as a percentage of *securities* entitled to be voted on the election of directors, as was proposed. Accordingly, where a company has multiple classes of stock with unequal voting rights and the classes vote together on the election of directors, then voting power would be calculated based on the collective voting power.[257] If a company has multiple classes of stock that do not vote together in the election of all directors (where, for example, each class elects a subset of directors), then voting power would be determined only on the basis of the voting power of the class or classes of stock that would be voting together on the election of the person or persons sought to be nominated by the nominating shareholder or group, rather than the voting power of all classes of stock.[258] We believe this approach properly bases the availability of Rule 14a–11 on the right to vote for the nominees that may be included in the company's proxy materials, which is both consistent with the intent of the provisions of a company's governing documents and in accord with the principle that class directors are elected by the votes of the holders of the class.

iii. Ownership Position

In the Proposing Release, we solicited comment about whether beneficial ownership is the appropriate standard of ownership to use for purposes of the minimum ownership threshold in the rule or whether another standard would be more appropriate. In this regard, we requested comment about whether a net long requirement should be used and, if so, what other modifications would be required. We received a number of comments addressing the appropriate standard of ownership and supporting the inclusion of a net long requirement.[259] Commenters suggested that we adopt an "ultimate" beneficial owner definition that included, among other things, a requirement that the nominating shareholder or group hold the entire bundle of voting and economic rights to any securities used to determine eligibility under the rule.[260] At least one of these commenters thought the ownership definition should be adopted this way in order to remove the possibility that multiple parties may count the same securities toward their individual securities ownership totals.[261] Moreover, many commenters were concerned that without requiring net long ownership, shareholders could engage in hedging strategies to obtain the requisite amount of ownership while eliminating or reducing their economic exposure.[262] Some commenters expressed the view that shares loaned to a third party should be taken into account when determining whether the nominating shareholder or group satisfies the relevant ownership threshold.[263] Commenters explained that institutional investors who hold shares for the long-term may lend their shares to others periodically while retaining the right to recall those shares to cast votes.[264] Commenters suggested several conditions for counting these shares: the shareholder has a legal right to recall the shares and cast votes;[265] the shareholder discloses in the Schedule 14N an intention to vote the shares;[266] the shareholder holds the shares through the date of the meeting;[267] and the shares are held past the date of the election.[268]

After considering the comments, we have modified in several respects the ownership requirement of Rule 14a–11 so that it is consistent with our intent to limit use of Rule 14a–11 to long-term shareholders with significant ownership interests. First, in order to satisfy the ownership requirement, the nominating shareholder or member of the nominating shareholder group must hold a class of securities subject to the proxy solicitation rules.[269] Limiting Rule 14a–11 nominations to holders of securities that are subject to the proxy rules appropriately excludes from the calculation private classes of voting securities held by persons that would have no expectation that our proxy rules would be available to facilitate their State law nomination rights. Further, if we included securities not covered by

[252] *See* letters from ABA; Duane Morris; Media General; P. Neuhauser; New York Times. These letters illustrated a scenario where one publicly-issued class of stock is entitled to one vote per share, while the privately-held controlling class of stock is entitled to 10 votes per share and both classes vote together on the election of directors.

[253] *See* letters from ABA; P. Neuhauser; Duane Morris; Media General.

[254] *See, e.g.,* discussion in footnote 252 of common ten-to-one voting provisions of a structure with Class A and Class B securities.

[255] *See* letter from ABA.

[256] *See* letter from Duane Morris.

[257] *See* Rule 14a–11(b)(1) and Instruction 3 and the discussion below.

[258] *See* Instruction 3 to Rule 14a–11(b)(1).

[259] *See* letters from 26 Corporate Secretaries; Advance Auto Parts; Aetna; Alaska Air; Alcoa; Alston & Bird; American Express; BorgWarner; BRT; Burlington Northern; CSX; L. Dallas; Dewey; DuPont; FPL Group; Florida State Board of Administration; GE; Honeywell; ICI; JPMorgan Chase; Kirkland & Ellis LLP ("Kirkland & Ellis"); Leggett; P. Neuhauser; PepsiCo; Protective; Seven Law Firms; SIFMA: Society of Corporate Secretaries; T. Rowe Price; tw telecom; UnitedHealth; ValueAct Capital; Xerox.

[260] *See* letters from BRT; Devon; IBM; P. Neuhauser; Society of Corporate Secretaries.

[261] *See* letter from ABA.

[262] *See* letters from 26 Corporate Secretaries; ABA; Advance Auto Parts; Alaska Air; Allstate; Applied Materials; Association of Corporate Counsel; AT&T; J. Blanchard; Biogen; BRT; CIEBA; Cleary; Devon; Dewey; Headwaters; IBM; JPMorgan Chase; PepsiCo; Sara Lee; Seven Law Firms; Shearman & Sterling; Sidley Austin; Society of Corporate Secretaries; Verizon.

[263] *See* letters from AFL–CIO; CalPERS; CII; COPERA; IAM, LIUNA; Marco Consulting; P. Neuhauser; D. Nappier; Sheet Metal Workers National Pension Fund ("Sheet Metal Workers"); SWIB.

[264] *See* letters from AFL–CIO; Marco Consulting; Sheet Metal Workers; SWIB.

[265] *See* letters from CalPERS; CII; COPERA; IAM; LIUNA; D. Nappier.

[266] *See* letters from AFL–CIO; CalPERS; CII; IAM; D. Nappier.

[267] *See* letters from CalPERS; CII; IAM; D. Nappier.

[268] *See* letters from COPERA.

[269] This would include securities registered pursuant to Section 12 of the Exchange Act or subject to Investment Company Act Rule 20a–1.

the proxy rules in the calculation, those securities could dilute the relative holdings of shareholders holding securities that our rules are designed to protect. Second, the nominating shareholder or member of the nominating shareholder group must hold both investment and voting power, either directly or through any person acting on their behalf, of the securities. By requiring that a nominating shareholder or member of a nominating shareholder group hold investment and voting power of the securities that are used for purposes of determining whether the ownership requirement has been met, we are addressing the concerns raised by certain commenters that the provisions of Rule 14a–11 should only be available to shareholders that possess ultimate ownership rights over the shares.

Similar to the provisions in Exchange Act Rule 13d–3,[270] the definition of voting power for purposes of Rule 14a–11 includes the power to vote, or to direct the voting of, such securities and investment power for purposes of Rule 14a–11 includes the power to dispose, or to direct the disposition of, such securities.[271] Unlike the provisions in Rule 13d–3, however, the ownership requirement of Rule 14a–11 includes both voting and investment power—as opposed to just one or the other—and voting and investment power for purposes of Rule 14a–11 does not exist over securities that a nominating shareholder or member of a nominating shareholder group merely has the right to acquire. For example, a nominating shareholder or member of a nominating shareholder group will not be able to count securities that could be acquired, such as securities underlying options that are currently exercisable but have not yet been exercised.

For purposes of meeting the ownership threshold in Rule 14a–11, a nominating shareholder or group will include investment and voting power of the company's securities that is held "either directly or through any person acting on their behalf." We are adopting the ownership provisions with this language to account for the common situation when financial intermediaries, such as banks or brokers, hold securities on behalf of their clients.[272] This additional language also covers relationships, such as parent and subsidiary, when for organizational or tax reasons, among others, investment and voting power is held by an entity that is controlled by another entity. This provision, however, would not include securities that are held in a pooled investment vehicle in which the nominating shareholder or member of a nominating shareholder group does not have voting and investment power over the securities held in the pooled investment vehicle.

Third, we have adopted a provision in the ownership requirement in Rule 14a–11 that, subject to specific conditions, allows for securities that have been loaned to a third party by or on behalf of the nominating shareholder or member of a nominating shareholder group to be considered in the calculation. We recognize that share lending is a common practice, and we believe that loaning securities to a third party is not inconsistent with a long-term investment in a company.[273] To capture only securities where voting power can ultimately be exercised by the nominating shareholder or member of a nominating shareholder group in the election of directors, however, securities that have been loaned by or on behalf of the nominating shareholder or any member of the nominating shareholder group to another person may be counted toward the ownership requirement only if the nominating shareholder or member of the nominating shareholder group:

- Has the right to recall the loaned securities; and
- will recall the loaned securities upon being notified that any of the nominees will be included in the company's proxy materials.

Absent satisfaction of these conditions—in addition to holding the requisite investment power over the loaned securities—we believe it is appropriate to exclude securities that have been loaned to another person from the calculation of voting power because, generally, the person to whom the securities have been loaned has the ability to vote those securities.[274] If the rule were to allow loaned securities that either will not or cannot be recalled to be included for purposes of the ownership calculation, then the voting power of a nominating shareholder or member of a nominating shareholder group may potentially be inflated because the calculation could include votes that the nominating shareholder or member of a nominating shareholder group cannot actually cast.

In determining the total voting power of the company's securities held by or on behalf of the nominating shareholder or any member of the nominating shareholder group, the voting power would be reduced by the voting power of any of the company's securities that the nominating shareholder or any member of a nominating shareholder group has sold in a short sale during the relevant periods.[275] In addition, the rule text explicitly excludes borrowed shares because the rule is intended to be used by holders with a significant long-term commitment to the company, and including shares that are merely borrowed is inconsistent with that purpose. The instruction makes clear that to the extent borrowed securities are not already excluded through the subtraction of securities sold short, borrowed securities would be subtracted in computing the relevant amount. We recognize that by requiring the voting power of securities sold short or borrowed for purposes other than a short sale to be subtracted from the ownership calculation, we are potentially reducing the eligibility of certain shareholders to rely on Rule 14a–11.[276] Nevertheless, as noted above,

[270] 17 CFR § 240.13d–3. Like the approach under Rule 13d–3, we are including and excluding certain securities from the determination of who has voting power for policy reasons. Those inclusions and exceptions and the policy reasons underlying them are discussed throughout this section.

[271] *See* Instruction 3.c. to Rule 14a–11(b)(1).

[272] The rule also clarifies that financial intermediaries, such as banks or brokers, that may hold securities on behalf of their clients could not use the provisions of Rule 14a–11. *See* Instruction 3.c. to Rule 14a–11(b)(1).

[273] *See* letters from AFL–CIO; CalPERS; CII; COPERA; IAM; LIUNA; Marco Consulting; P. Neuhauser; D. Nappier; Sheet Metal Workers; SWIB.

[274] *See* letter from P. Neuhauser.

[275] *See* Instruction 3.b.3 to Rule 14a–11(b)(1). We note that in a typical short sale the person selling the securities short would not have the power to vote the securities subject to the short sale. Nevertheless, the provisions of Rule 14a–11 require that the voting power of the securities subject to the short sale be deducted from the voting power held directly or on behalf of the nominating shareholder or member of the nominating shareholder group to address our concerns about limiting the application of Rule 14a–11 to shareholders that retain significant ownership interests in a company. Likewise, a person whose ownership of shares arises solely from borrowing them for purposes of short sale would be deemed to have no share ownership for purposes of the ownership requirement of Rule 14a–11(b)(1).

[276] The ownership provisions related to short sales do not apply to securities that have been sold in a short sale where the nominating shareholder or member of the nominating shareholder group had no control over such transactions. *See* Instruction 3.b.3. to Rule 14a–11(b)(1) (covering short sales by "the nominating shareholder or any member of the nominating shareholder group, as the case may be, or any person acting on their behalf * * *"). For example, a nominating shareholder would not be required to exclude securities that have been sold short by a pooled investment vehicle in which the nominating shareholder or member of a nominating shareholder group has invested as long as the shareholder does not have the ability to direct the investments held in the pooled investment vehicle. Similarly, securities held by the pooled investment vehicle with respect to which the shareholder does not have the ability to direct the investments held in the pooled investment vehicle would not be

Continued

we believe that eligibility for Rule 14a–11 should be limited to those shareholders that have a significant interest in the company.[277] We agree with commenters who suggested that selling a company's securities short may divest that shareholder of the economic risks of ownership.[278]

For purposes of determining whether the nominating shareholder or any member of a nominating shareholder group has sold a company's securities short, the term "short sale" will have the meaning provided in Exchange Act Rule 200(a).[279] Under that rule, a short sale is "any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller."

In calculating the voting power required to satisfy the 3% voting power eligibility requirement described above, nominating shareholders or members of a nominating shareholder group must first determine the total number of votes that can be derived from their holdings of securities that are subject to the proxy rules. This determination is made as of the date the Schedule 14N is filed. The total number of votes can be increased by the number of votes attributable to securities which have been loaned (subject to the conditions previously noted) and must be reduced by the number of votes attributable to any securities that have been sold in a short sale that is not closed out as of that date or borrowed for purposes other than a short sale. This adjusted number of votes is the qualifying number of votes eligible to be used as the numerator in calculating the percentage held of the company's total voting power. The number of securities to which these qualifying votes are attributable is the amount of securities that must be used for evaluating compliance with the continuous holding period requirements specified in Rule 14a–11(b)(2), and discussed below.

In determining the total voting power of the company's securities, nominating shareholders and members of a nominating shareholder group will be entitled to rely on the most recent quarterly, annual or current report filed by the company unless the nominating shareholder or member of a nominating shareholder group knows or has reason to know that the information in the reports is inaccurate.[280] We believe that a nominating shareholder or member of a nominating shareholder group should be able to rely on the filings made by the company in making the calculation of voting power for purposes of Rule 14a–11 even if the number of securities outstanding has changed since the last report so that a nominating shareholder or member of a nominating shareholder group can easily make a determination about the percentage of voting power that they hold.

iv. Demonstrating Ownership

Under the Proposal, a nominating shareholder or member of a nominating shareholder group would be able to demonstrate ownership in several ways.[281] If the nominating shareholder or member of the nominating shareholder group is the registered holder of the shares, he or she could state as much. In this instance, the company would have the ability to independently verify the shareholder's ownership. Where the nominating shareholder or member of the nominating shareholder group is not the registered holder of the securities, the nominating shareholder or member of the nominating shareholder group would be required to demonstrate ownership by attaching to the Schedule 14N a written statement from the "record" holder of the nominating shareholder's shares (usually a broker or bank) verifying that, at the time of submitting the shareholder notice to the company on Schedule 14N, the nominating shareholder or member of the nominating shareholder group continuously held the securities being used to satisfy the applicable ownership threshold for a period of at least one year.[282] In the alternative, if the nominating shareholder or member of the nominating shareholder group has filed a Schedule 13D, Schedule 13G, Form 3, Form 4, and/or Form 5, or amendments to those documents, the shareholder or group member may so state and attach a copy or incorporate that filing or amendment by reference.

Commenters generally did not object to the proposed methods of demonstrating ownership; however, they did suggest some revisions to the rule. Two commenters believed that the nominating shareholder or group, if requested by the company, should be required to provide evidence from its broker-dealer or custodian certifying that its ownership position meets the requisite threshold through a date that is within five days of the shareholders' meeting.[283] Another commenter recommended a revision to the proposed rule to allow the written statement to be dated no more than seven days prior to the date of submission of the nomination to the company.[284] The commenter explained that it may be difficult for a group of nominating shareholders to obtain letters from the "record" holders on the exact same date they submit the nomination to the company and file a Schedule 14N and cited similar problems in the context of the Rule 14a–8 process as an example. Another commenter recommended more generally that the written statement be dated a short period before the filing of the Schedule 14N.[285] Other commenters submitted various suggestions as to who

included in the amount of holdings of the shareholder.

[277] We recognize that selling a company's securities short is only one of a number of ways that a shareholder can hedge the economic risk of its investment. Indeed, a number of commenters suggested that we adopt a beneficial ownership definition for purposes of Rule 14a–11 that netted all hedging arrangements (derivatives, swaps, *etc.*). We believe, however, that it is appropriate at this time to adopt the ownership threshold for Rule 14a–11 with the provision only relating to short sales as it contributes significantly towards the goal of excluding votes from the ownership calculation securities where the voting and economic interests are separated and does not unduly complicate the rule. Further, by excluding securities that the holder merely has the right to acquire (such as securities underlying options) and securities that have been loaned and cannot be recalled, we have further narrowed the application of the rule to address concerns about separating economic interest and voting power.

[278] *See* letters from 26 Corporate Secretaries; ABA; Advance Auto Parts; Alaska Air; Allstate; Applied Materials; Association of Corporate Counsel; AT&T; J. Blanchard; Biogen; BRT; CIEBA; Cleary; Devon; Dewey; Headwaters; IBM; JPMorgan Chase; PepsiCo; Sara Lee; Seven Law Firms; Shearman & Sterling; Sidley Austin; Society of Corporate Secretaries; Verizon.

[279] 17 CFR 242.200(a). We note that certain of the provisions in Exchange Act Rule 200, including when a "person shall be deemed to own a security" as defined in Rule 200(b), differ from the provisions we have adopted for purposes of Rule 14a–11. For instance, Rule 200(b) extends ownership of a security to options that have been exercised. As noted above, however, we have not extended ownership for purposes of Rule 14a–11 to options. We believe that these different, but not conflicting, approaches are appropriate and reflect the policy objectives for adopting each rule.

[280] *See* Instruction 1 to Rule 14a–11(b)(1). In the case of a registered investment company, in determining the total voting power of the securities that are entitled to be voted on the election of directors for purposes of establishing whether the 3% voting power threshold has been met, the nominating shareholder or group may rely on information set forth in the following documents, unless the nominating shareholder or group knows or has reason to know that the information contained therein is inaccurate: (1) In the case of a series company, a Form 8–K that will be required to be filed in connection with the meeting where directors are to be elected; or (2) in the case of other registered investment companies, the company's most recent annual or semi-annual report filed with the Commission on Form N–CSR. *See* Instruction 2 to Rule 14a–11(b)(1).

[281] *See* Item 5 of proposed Schedule 14N.

[282] *See* the discussion below regarding the holding period we are adopting.

[283] *See* letters from BorgWarner; Society of Corporate Secretaries.

[284] *See* letter from CII.

[285] *See* letter from P. Neuhauser.

should provide the required written statement.[286]

While we are adopting the requirements to demonstrate ownership as proposed, we agree with the commenters that additional clarity is needed with regard to how far in advance of the notice date the statement of the broker or bank may be dated, as well as what type of bank or broker may provide the written statement on behalf of the shareholder. We believe the date should be as close as practicable to the notice date, and believe that seven calendar days should provide a workable time frame that is still close in time to the notice date. Accordingly, we have revised the rule to clarify that the statement from the registered holder, broker, or bank may be dated within seven calendar days prior to the date the nominating shareholder or group submits the notice on Schedule 14N.[287]

Also, to provide additional clarity about these requirements, the final rule includes an example of a form of written statement verifying share ownership that may be used if the nominating shareholder or any member of the nominating shareholder group (i) is not the registered holder of the shares, (ii) is not proving ownership by providing previously filed Schedules 13D or 13G or Forms 3, 4, or 5, and (iii) holds the shares in an account with a broker or bank that is a participant in the Depository Trust Company ("DTC") or a similar clearing agency acting as a securities depository.[288] An instruction to Schedule 14N describes more fully what information should be provided if a nominating shareholder or any member of the nominating shareholder group holds the securities through a broker or bank (*e.g.,* in an omnibus account) that is not a participant in DTC or a similar clearing agency.[289]

We note that satisfying the requirement in Rule 14a–11(b)(3) to demonstrate ownership is different from satisfying the requirement in Rules 14a–11(b)(1) and 14a–11(b)(2) that a shareholder or shareholder group hold the requisite amount of the company's securities that are entitled to be voted on the election of directors for three years, as calculated pursuant to the Instruction to paragraph (b)(2). It is possible for a shareholder to be able to demonstrate ownership pursuant to Rule 14a–11(b)(3), and yet not satisfy the total voting power and holding period requirements in Rules 14a–11(b)(1) and (b)(2).

c. Holding Period

With respect to duration of ownership, we proposed a one-year holding requirement for each nominating shareholder or member of a nominating shareholder group. Although many commenters supported the proposed one-year holding period,[290] the majority of commenters suggested a holding period longer than the proposed one-year period, with many recommending alternative holding periods ranging from 18 months to four years.[291] Some commenters, for example, expressed a belief that increasing the duration of the minimum holding period would ensure that use of Rule 14a–11 is limited to holders of a significant, long-term interest and would dissuade shareholders from using the rule to nominate and elect directors to make short-term gains at the expense of long-term shareholders.[292] A small number of commenters believed that Rule 14a–11 should not include a holding period requirement.[293] One commenter believed that all holders of the same securities should have the same rights under Rule 14a–11 regardless of how long the securities have been held.[294] Another commenter stated that a short-term shareholder has the same risk as long-term shareholders; thus their rights under Rule 14a–11 should be equal.[295]

After considering the comments, we have decided to adopt a three-year holding requirement, rather than the proposed one-year requirement. This decision is based on our belief that holding securities for at least a three-year period better demonstrates a shareholder's long-term commitment and interest in the company.[296] We also based our decision to have a holding period longer than one year on the strong support of a variety of commenters. For instance, we received

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[286] *See* letters from ABA; CII; ICI; P. Neuhauser; Schulte Roth & Zabel; Seven Law Firms; S&C. Litigation subsequent to the Proposal has underscored the utility of clarifying the source of verification of ownership by shareholders who are not themselves registered owners of the shares. *See Apache Corp. v. Chevedden,* 696 F.Supp.2d 723 (S.D.Tex. Mar. 10, 2010) (interpreting the proof of ownership requirement in Rule 14a–8(b)(2)).

[287] We note that a nominating shareholder may have changed brokers or banks during the time period in which it has held the shares it is using to meet the ownership threshold. In such cases, the nominating shareholder would need to obtain a written statement from each broker or bank with respect to the shares held and specify the time period in which the shares were held.

[288] This form of written statement from a bank or broker is a modification to the Proposal, and is provided as a non-exclusive example of an acceptable method of satisfying the requirement in Rule 14a–11(b)(3). *See* Instruction to Item 4 of new Schedule 14N. We note that the written statements would not reflect all aspects of the ownership requirement, such as the percentage of voting power held, and thus, would not be dispositive with regard to whether the nominating shareholder or group satisfied the ownership threshold. For purposes of complying with Rule 14a–11(b)(3), loaned securities may be included in the amount of securities set forth in the written statements. Consistent with the Proposal, a nominating shareholder or group proving ownership by using a previously filed Schedule 13D or 13G or Form 3, 4, or 5 could attach a copy of the filing to the Schedule 14N or incorporate it by reference into the Schedule. We note that the calculation of voting power of a company's securities for purposes of Rule 14a–11 differs from the determination of beneficial ownership for purposes of those schedules and forms. In addition, as adopted, we are clarifying that the schedules or forms used to provide proof of ownership must reflect ownership of the securities as of or before the date on which the three-year eligibility period begins.

[289] *See* the Instruction to Item 4 of new Schedule 14N.

[290] *See* letters from ADP; AFSCME; Callaway; CalPERS; CalSTRS; Calvert; CFA Institute; J. Chico; CII; Corporate Library; Dominican Sisters of Hope ("Dominican Sisters of Hope"); GovernanceMetrics International ("GovernanceMetrics"); ICGN; Lorsch *et al.;* LUCRF; Mercy Investment Program ("Mercy Investment Program"); Motorola; D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Norges Bank; Pax World; RiskMetrics; Shamrock; Shearman & Sterling; Sisters of Mercy Regional Community of Detroit Charitable Trust ("Sisters of Mercy"); Social Investment Forum; Sodali; Tri-State Coalition for Responsible Investment ("Tri-State Coalition"); Trillium; T. Rowe Price; Ursuline Sisters of Tildonk ("Ursuline Sisters of Tildonk"); USPE; ValueAct Capital; Walden Asset Management ("Walden").

[291] *See* letters from 26 Corporate Secretaries; ABA; Advance Auto Parts; Aetna; AFL–CIO; Alaska Air; Alcoa; Allstate; Alston & Bird; Amalgamated Bank; American Express; Anadarko; Applied Materials; Association of Corporate Counsel; AT&T; Avis Budget; Biogen; J. Blanchard; Boeing; BorgWarner; BRT; Burlington Northern; Caterpillar; Chevron; CIEBA; CIGNA; CNH Global; P. Clapman; Comcast; Con Edison; CSX; CtW Investment Group; Cummins; L. Dallas; Darden Restaurants; E. Davis; Deere; Devon; Dewey; DTE Energy; DuPont; Eaton; Eli Lilly; ExxonMobil; FedEx; Fenwick; FMC Corp.; FPL Group; General Mills; Headwaters; Home Depot; Honeywell; IAM; IBM; ICI; Intel; ITT; JPMorgan Chase; Lionbridge Technologies; LIUNA; Marco Consulting; McDonald's; M. Metz; J. Miller; NACD; D. Nappier (expressing a willingness to accept a two-year holding period instead of the proposed one-year holding period); Northrop; Office Depot; OPERS; Pfizer; P&G; Praxair; Protective; RiskMetrics (accepting a two-year holding period as alternative to the proposed one-year holding period); Sara Lee; S&C; Sheet Metal Workers; Sidley Austin; SIFMA; Society of Corporate Secretaries; Southern Company; Teamsters; Tesoro; Textron; Theragenics; TI; TIAA–CREF; Tidewater; Time Warner Cable Inc. ("Time Warner Cable"); tw telecom; L. Tyson; UnitedHealth; U.S. Bancorp; Wells Fargo; Weyerhaeuser; Xerox; Vanguard; Verizon; B. Villiarmois.

[292] *See* letters from BRT; CIEBA; IBM; McDonald's; Society of Corporate Secretaries.

[293] *See* letters from 13D Monitor; ACSI; British Insurers; Ironfire Capital LLC ("Ironfire"); LUCRF.

[294] *See* letter from British Insurers.

[295] *See* letter from 13D Monitor.

[296] One commenter pointed to the Aspen Principles, *available at http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Aspen_Principles_with_signers_April_09.pdf,* suggesting that companies that are often forced to react to short-term investors are constrained from creating valuable goods and services, investing in innovations, and creating jobs. *See also* letter from AFL–CIO.

comments that advised that we should "adopt a more reasonable holding period of at least two years," [297] and "a minimum holding period of at least two years is appropriate" because a "shorter holding period would allow shareholders with a short-term focus to nominate directors who, if elected, would be responsible for dealing with a company's long-term issues." [298] Another commenter stated that "three years would be a more reasonable test with respect to longevity of stock ownership." [299] Although two commenters suggested even longer holding periods,[300] we believe that a three year holding period reflects our goal of limiting use of the rule to significant, long-term holders and appropriately responds to commenters' suggestions regarding the length of the holding period. In this regard, as noted previously, some commenters suggested a two year holding period, but others stated it should be "at least" two years. Given the support expressed for a significant holding period, we believe a three year holding period, rather than one or two years, strikes the appropriate balance in providing shareholders with a significant, long-term interest with the ability to have their nominees included in a company's proxy materials while limiting the possibility of shareholders attempting to use Rule 14a–11 inappropriately, as discussed further below.

We also factored our desire to limit the use of Rule 14a–11 to shareholders who do not possess a change in control intent with regard to the company into our decision to extend the holding period. Although we have, as noted below, adopted specific requirements in Rule 14a–11 to address the control issue, we believe that a longer holding period is another safeguard against shareholders that may attempt to inappropriately use Rule 14a–11 as a means to quickly gain control of a company. Finally, we note that if shareholders believe that the three-year period should be shorter, the amendment that we decided to adopt to Rule 14a–8 will remove barriers to proposals that seek to establish a different procedure with a lesser (or no) holding period condition.

The requirement we are adopting is that shareholders seeking to use Rule 14a–11 to have a nominee or nominees included in a company's proxy materials must have held the minimum amount of securities used to satisfy the 3% ownership threshold continuously for at least three years.[301] Similar to the calculation of voting power discussed above, in order to satisfy the three-year holding requirement, the nominating shareholder or member of the nominating shareholder group must have investment and voting power over the amount of securities, and the amount of securities held during the period will have to be reduced by the amount of securities of the same class that are the subject of short positions or are borrowed for purposes other than a short sale during the period.[302] The rule also allows securities loaned to a third party to be considered held during the period, provided that the nominating shareholder or group has the right to recall the loaned securities during the period.[303] As discussed above, we do not believe that the common practice of lending securities is inconsistent with a long-term investment. While we believe it is important to include both of the recall provisions for purposes of allowing loaned securities to be used in the 3% ownership threshold calculation in Rule 14a–11(b)(1), we believe it is only necessary for the nominating shareholder or member of a nominating shareholder group to have the right to recall the loaned securities to satisfy the three-year holding period requirement.[304] Finally, the rule requires the amount of securities to be adjusted for stock splits, reclassifications or other similar adjustments made by the company during the period.[305]

A commenter suggested that we clarify that a nominating shareholder or each member of the group must have continuously held only the minimum number of shares used to satisfy the ownership requirement.[306] We agree that a nominating shareholder or member of a nominating shareholder group is not required to have continuously held shares in excess of the amount used to attain eligibility for purposes of Rule 14a–11. For example, under Rule 14a–11(b)(2), which requires continuous holding of "the amount of securities that are used for purposes of satisfying the *minimum* ownership required of paragraph (b)(1) * * *," if a nominating shareholder owns 400,000 shares and those shares comprise 4% of the issuer's voting power as of the date of filing of the Schedule 14N, that shareholder is not required to have held 400,000 shares continuously during the preceding three years and through the date of election of directors. Rather, the nominating shareholder would be required to continuously hold the minimum amount of shares required to satisfy the 3% ownership threshold in paragraph (b)(1), assuming no adjustments (in this example, at least 300,000 shares).

We also believe that it is important that any shareholder or member of a nominating shareholder group that intends to submit a nominee to a company for inclusion in the company's proxy materials continue to maintain the qualified minimum amount of securities in the company needed to satisfy the ownership provisions in the rule through the date of the meeting at which the shareholder's or group's nominee is presented to a vote of shareholders. To meet the eligibility criteria in proposed Rule 14a–11(b)(2), a nominating shareholder or member of a nominating shareholder group would have been required to "intend to continue to hold" the securities used to meet the ownership threshold through the date of the meeting. Commenters on the Proposing Release generally supported a holding requirement

[297] Letter from Teamsters.

[298] Letter from BRT.

[299] Letter from Tesoro.

[300] *See* letters from E. Davis; Fenwick.

[301] As proposed, a nominating shareholder or group would have been required to hold "the securities that are used for purposes of determining the applicable ownership threshold" and intend to continue to hold "those securities" through the date of the meeting. *See* proposed Rule 14a–11(b)(2). The Proposal also would have required the nominating shareholder or group to provide a statement that the nominating shareholder or group intends to continue to own the "requisite shares" through the date of the meeting. *See* proposed Rule 14a–18(f). As adopted, we are modifying Rule 14a–11 to require the nominating shareholder or each member of the nominating shareholder group to have held the "amount of securities" that are used for satisfying the ownership requirement and to continue to hold that amount of securities through the date of the meeting, rather than referring to the "requisite securities." In addition, even though the ownership requirement is based on the percentage of voting power held, the requirement refers to "amount" rather than "percentage" so that satisfaction of the ownership requirement can be accurately determined. We believe it would be unduly burdensome to require that a nominating shareholder or group determine whether its holdings exceeded 3% of the company's voting power continuously for a three-year period prior to the filing of the Schedule 14N.

[302] *See* the Instruction to Rule 14a–11(b)(2). For purposes of this calculation, the amount of the short position or borrowed securities at any point in time during the three year holding period would be deducted from the amount of securities otherwise held at that point in time.

[303] *Id.*

[304] *Id.* The recall provisions are discussed in Section II.B.4.b.iii. above. We note that at the time the nominating shareholder or group calculates its ownership and submits a nominee or nominees, it may not be certain that its nominee or nominees will be included in the company's proxy materials. We do not believe it is necessary to require a nominating shareholder or group to recall loaned shares that it has the right to recall and vote prior to the time that the nominating shareholder or group is notified that its nominee or nominees will be included in the company's proxy materials.

[305] *See* the Instruction to Rule 14a–11(b)(2).

[306] *See* letter from AFSCME.

through the date of the meeting,[307] and one commenter suggested that we clarify that shareholders would be required to hold the securities used for determining ownership through the election of directors.[308] We agree with the suggestion and are modifying the language in Rule 14a–11(b)(2) to clarify that a nominating shareholder or member of a nominating shareholder group "must continue to hold" the requisite amount of securities through the date of the meeting.[309] If a nominating shareholder or member of a nominating shareholder group fails to continue to hold the requisite amount of securities as required by the rule, a company could exclude the nominee or nominees submitted by the nominating shareholder or group.[310]

We also are adopting, as proposed, the requirement that a nominating shareholder or member of a nominating shareholder group provide a statement as to the nominating shareholder's or group member's intent to continue to hold the qualifying minimum amount of securities through the date of the meeting.[311] In addition, we proposed that nominating shareholders or members of a nominating shareholder group disclose their intent with regard to continued ownership of their shares after the election (which may be contingent on the election's outcome). As noted above, commenters generally supported the requirement for the nominating shareholder or group to hold the requisite amount of securities through the date of the meeting, although some commenters expressed opposition to the proposed disclosure requirement or any requirement for the nominating shareholder or group to disclose their intent to hold the company's shares after the date of the election.[312] One commenter explained that the nominating shareholder or group may not know its intent at the time the Schedule 14N is filed and, depending on the outcome of the director election, the nominating shareholder or group may, in fact, purchase more stock or sell some stock.[313] Another commenter observed that it is impractical for shareholders to represent that they would hold their position beyond the election and instead favored disclosure in an amended Schedule 14N of any change in the ownership of more than 1% of the voting shares or net economic position during a period after the election (*e.g.,* 60 days).[314] Other commenters supported the proposed disclosure requirement regarding the nominating shareholder's or group's intent to hold shares after the meeting, or recommended that the Commission require instead that the nominating shareholder or group hold the requisite amount of shares for a specific period after the date of the meeting.[315]

We believe that a requirement to hold the securities through the date of the election of directors is appropriate to demonstrate the nominating shareholder's or group member's commitment to the director nominee and the election process. In addition, we are adopting the disclosure requirement, as proposed, concerning the nominating shareholder's or group member's intent with respect to continued ownership of their shares after the election.[316] We are not, however, adopting a requirement for a nominating shareholder or member of a nominating shareholder group to continue to hold their shares for a certain period of time after the date of the election. We believe that disclosure of a nominating shareholder's or group member's intent with respect to continued ownership in a Schedule 14N or amended Schedule 14N will provide investors with the information they need for this purpose.

d. No Change in Control Intent

Under the Proposal, to rely on Rule 14a–11, a nominating shareholder or member of a nominating shareholder group would have been required to provide a certification in the filed Schedule 14N that it did not hold the securities with the purpose, or with the effect, of changing the control of the company or gaining more than a limited number of seats on the board.[317] We noted that this certification, along with the other required disclosures, would assist shareholders in making an informed decision with regard to any nominee or nominees put forth by the nominating shareholder or group, in that the information would enable shareholders to gauge the nominating shareholder's or group's interest in the company, longevity of ownership, and intent with regard to continued ownership in the company.

Most commenters on this aspect of the Proposal agreed generally that Rule 14a–11 should not be available to shareholders seeking to effect a change in control of a company (or to obtain more than a specified number of board seats) and supported a certification requirement regarding the lack of change in control intent.[318] Some

[307] *See* letters from ABA; Advance Auto Parts; Alston & Bird; American Express; Association of Corporate Counsel; J. Blanchard; BorgWarner; CalPERS; CII; Cleary; Comcast; CSX; Dewey; W. B. Dickerson; Florida State Board of Administration; General Mills; Headwaters; JPMorgan Chase; Nathan Cummings Foundation; Protective; Schulte Roth & Zabel; Seven Law Firms; Shearman & Sterling; Society of Corporate Secretaries; tw telecom; ValueAct Capital.

[308] *See* letter from ABA.

[309] For purposes of determining whether the requirement to hold the specified amount of securities from the date of the filing of the Schedule 14N through the date of the election of directors is satisfied, a nominating shareholder or group must hold (as determined pursuant to the instruction to the rule) the qualifying minimum amount of securities, which can include securities that are loaned to a third party if the nominating shareholder or group has the right to recall the securities, and will recall them upon being notified that any of the nominees will be included in the company's proxy materials. Of course, between the date of the filing of the Schedule 14N and the date of the election of directors previously loaned securities may be returned. Likewise, the amount of securities held during the period from the filing of the Schedule 14N through the date of the election of directors must be reduced by the amount of securities of the same class that are sold in a short sale.

[310] *See* new Rule 14a–11(b)(2) and Rule 14a–11(g). The company would be required to provide notice to the staff in accordance with Rule 14a–11(g) and could seek a no-action letter from the staff with regard to the determination to exclude the nominee at that time if the company so wished. In the event that the nominating shareholder's or group's failure to continue to hold the securities comes to light after the company has printed its proxy materials, the company would be permitted to exclude the nominee or nominees and send a revised proxy card to its shareholders. For additional information about a company's obligations in the event a nominee withdraws or is disqualified, *see* Section II.B.7.b. below.

[311] *See* new Rule 14a–11(b)(4) and proposed Rule 14a–18(f).

[312] *See* letters from Alston & Bird; Amalgamated Bank; Calvert; CII; Florida State Board of Administration; P. Neuhauser; Norges Bank; Schulte Roth & Zabel; TIAA–CREF; USPE; ValueAct Capital.

[313] *See* letter from CII.

[314] *See* letter from Cleary.

[315] *See* letters from 26 Corporate Secretaries; ABA; Aetna; AGL; Alaska Air; Alcoa; Anadarko; Applied Materials; Association of Corporate Counsel; Avis Budget; BRT; Burlington Northern; Callaway; Caterpillar; Comcast; L. Dallas; Darden Restaurants; Devon; W. B. Dickerson; Dupont; Eli Lilly; FPL Group; General Mills; Home Depot; Honeywell; Intel; Lionbridge Technologies; Lorsch *et al.;* Keating Muething; Office Depot; PepsiCo; Pfizer; Protective; Sara Lee; SIFMA; Tesoro; Textron; TI; UnitedHealth; U.S. Bancorp; Verizon; Xerox.

[316] *See* new Rule 14a–11(b)(5) and new Item 4(b) of Schedule 14N.

[317] *See* Item 8 of proposed Schedule 14N.

[318] *See* letters from ABA; Advance Auto Parts; American Bankers Association; American Express; Americans for Financial Reform ("Americans for Financial Reform"); BRT; CalSTRS; CII; Cleary; COPERA; Corporate Library; Dewey; Dominican Sisters of Hope; Eli Lilly; Emerson Electric; Florida State Board of Administration; A. Goolsby; GovernanceMetrics; ICI; JPMorgan Chase; Sen. Carl Levin ("C. Levin"); Mercy Investment Program; Metlife; Nathan Cummings Foundation; P. Neuhauser; Protective; RiskMetrics; Seven Law Firms; SIFMA; Sisters of Mercy; Social Investment Forum; Society of Corporate Secretaries; Sodali; SWIB; TIAA–CREF; Trillium; Tri-State Coalition; T. Rowe Price; tw telecom; Ursuline Sisters of Tildonk; Wachtell; Walden; B. Villiarmois.

commenters, however, expressed concern about the lack of a remedy when a certification regarding control intent proves to be false or when a nominating shareholder or group changes its intent.[319] Suggested remedies included excluding the nominee of any nominating shareholder or group that changes intent and barring the nominating shareholder or group from using the rule for the following two annual meetings,[320] requiring disclosure of a change of intent and resignation of the Rule 14a–11 director,[321] and imposing liability under Rule 14a–9.[322]

We are adopting this requirement with some modifications from the Proposal. To rely on Rule 14a–11, the nominating shareholder (or where there is a nominating shareholder group, any member of the nominating shareholder group) must not be holding any of the company's securities with the purpose, or with the effect, of changing control of the company [323] or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11 and must provide a certification to this effect in its filed Schedule 14N.[324]

The final requirement differs from the Proposal in three respects. First, in addition to requiring the certification to address the absence of change in control intent or intent to gain more than the maximum number of seats provided under the rule, we also have added this condition as an explicit requirement to the rule.[325] We believe that this more directly achieves our intent—that the rule not be used by shareholders that have an intent to change the control of the company or gain more than the maximum number of seats specified in the rule.

Second, we have clarified the language of the requirements so that it provides that the rule is available only if the nominating shareholder or group members do not have an intent to change control of the company [326] or gain more seats on the board than the maximum provided for under Rule 14a–11. We slightly revised the language of the requirement to clarify our intended meaning. The Proposal used the language "gain more than a limited number of seats on the board," which was intended to refer to the limitations within the rule on the maximum number of nominees required to be included in the company's proxy materials. The final rule states this more explicitly.

Finally, we have added an instruction to clarify that in order to rely on Rule 14a–11 to include a nominee or nominees in a company's proxy materials, a nominating shareholder or a member of a nominating shareholder group may not be a member of any other group with persons engaged in solicitations or other nominating activities in connection with the subject election of directors; may not separately conduct a solicitation in connection with the subject election of directors other than a Rule 14a–2(b)(8) exempt solicitation in relation to those nominees it has nominated pursuant to Rule 14a–11 or for or against the company's nominees; and may not act as a participant in another person's solicitation in connection with the subject election of directors.[327]

We understand that companies have concerns that shareholders using Rule 14a–11 may inaccurately assert that they do not have a change in control intent, and that this can be a difficult factual issue. If a company determines that it can exclude a nominee based on this eligibility condition, it will be required to notify the nominating shareholder, members of the nominating shareholder group, or, where applicable, the nominating shareholder group's authorized representative, of a deficiency in its notice on Schedule 14N and provide the nominating shareholder or group the opportunity to respond. The company also would be required to submit a notice to the Commission stating its intent to exclude a nominee from its proxy materials (which would be required to include a description of the company's basis for exclusion) and, if it wished to, it could seek the staff's informal view with regard to its determination to exclude the nominee (commonly referred to as a "no-action" request).[328] In addition, a nominating shareholder and each member of a nominating shareholder group will have liability under Rule 14a–9 for a materially false or misleading certification in the Schedule 14N. Questions concerning the nomination also may be resolved by the parties outside the staff process provided in Rule 14a–11(g), including through private litigation where necessary, similar to the way they resolve issues arising in traditional proxy contests.[329] Finally, we note that the Commission also could take enforcement action with respect to companies that inappropriately exclude nominees under Rule 14a–11 or shareholders that provide false certifications in their Schedule 14N. We believe these measures should provide sufficient means to address situations in which a nominating shareholder or member of a nominating shareholder group provides a false certification regarding change in control intent.

e. Agreements With the Company

In the Proposing Release, we noted that a shareholder nomination process that includes limits on the number of nominees that a company is required to include in its proxy materials presents the potential risk of nominating shareholders or groups acting merely as a surrogate for the company or its management in order to block usage of the rule by another nominating shareholder or group. We proposed to address this concern by providing that a nominating shareholder or group using Rule 14a–11 would be required to represent that no agreement between the nominating shareholder or group and the company and its management exists.[330] To avoid any uncertainty about the breadth of this requirement, the Proposal included an instruction noting that prohibited agreements would not include unsuccessful negotiations with the company to have the nominee included in the company's proxy materials as a management nominee, or negotiations that are limited to whether the company is required to include the shareholder

[319] *See* letters from American Bankers Association; Dewey; Emerson Electric; A. Goolsby; Metlife; Protective; Seven Law Firms; SIFMA.

[320] *See* letter from Seven Law Firms.

[321] *See* letter from Protective.

[322] *See* letter from P. Neuhauser.

[323] Although Rule 14a–11 does not contain a requirement that the shareholder nominee or nominees do not have an intent to change the control of the company, a nominating shareholder's or group's ability to meet the requirement and certify that it does not have such an intent will be impacted by the intentions and actions of its nominee or nominees. For example, a nominating shareholder would not be able to certify that it does not hold the company's securities for the purpose, or with the effect, of changing the control of the company if its nominee is engaged in its own proxy contest or tender offer while the Rule 14a–11 nomination is pending.

[324] *See* certifications in Item 8 of new Schedule 14N.

[325] *See* Rule 14a–11(b)(6).

[326] A change in control includes, but is not limited to, an extraordinary corporate action, such as a merger or tender offer.

[327] *See* new Instruction to Rule 14a–11(b).

[328] *See* Section II.B.9.b. below for further discussion of determinations to exclude a nominee or nominees.

[329] *See* Sections II.B.8. and II.B.9. for an explanation of the disclosure requirements applicable to a nomination made pursuant to Rule 14a–11 and the process for excluding a nominee.

[330] In this regard, we also proposed to require a nominating shareholder or group to represent that no relationships or agreements between the nominee and the company and its management exist. This aspect of the rule is discussed in Section II.B.5.c. below.

nominee in the company's proxy materials under Rule 14a–11.

Commenters generally supported the proposed requirement, including the clarifying instruction regarding certain negotiations with the company.[331] One commenter specifically supported the portion of the proposed rule providing that unsuccessful negotiations or negotiations that were limited to whether the company is required to include a shareholder nominee under Rule 14a–11 would not be deemed to be a direct or indirect agreement.[332] One commenter was concerned about possible manipulation by companies and supported a prohibition on agreements.[333] According to that commenter, negotiations that resulted in a nomination being included in the proxy statement should be treated as a company nominee and not a shareholder nominee under Rule 14a–11.

Some commenters encouraged us to allow negotiations that resulted in inclusion of shareholder nominees as management nominees and cautioned that the proposal could discourage constructive dialogue between companies and shareholders.[334] Three commenters opposed limits on some or all relationships between the company and the nominating shareholder, group, or shareholder nominee.[335] These commenters believed that the Commission should not prohibit agreements between a company and a nominating shareholder or group. They warned that restricting the ability of companies to reach agreements with a nominating shareholder or group would limit the dialogue between companies and investors. One commenter suggested that proposed Rule 14a–18(d) be revised to permit a company to agree not to contest the eligibility of a shareholder nominee.[336] The commenter also suggested that if a company settled a threatened election contest by placing a shareholder nominee on the board, additional shareholder nominees should not be permitted for a specified period of time.

After careful review of the comments, we continue to believe that it is appropriate to provide that a nominating shareholder or group will not be eligible to have a nominee or nominees included in a company's proxy materials under Rule 14a–11 if the nominating shareholder, group, or any member of the nominating shareholder group, has any agreement with the company with respect to the nomination. We have revised the rule to make it clearer that this is an eligibility condition by listing it as a condition in the rule, rather than only a representation required in Schedule 14N.[337] We have incorporated, as proposed, the instruction with respect to unsuccessful negotiations (*i.e.* negotiations that do not result in an agreement) regarding whether a company is required to include a nominee in order to make clear that those negotiations would not be disqualifying.

As described above, a nominating shareholder or group will not be eligible to use Rule 14a–11 if there is an agreement with the company regarding the nomination of the nominee.[338] When a nominating shareholder or group files its Schedule 14N, this requirement will apply, and the certification required by Schedule 14N will have the effect of confirming that there are no agreements. We believe this is an important safeguard to prevent actions that could undermine the purpose of the rule. If, after the Schedule 14N is filed, a nominating shareholder or group reached an agreement with the company for the nominee to be included in the company's proxy materials as a management nominee, the nominating shareholder or group would no longer be proceeding under Rule 14a–11. Consequently, there is no need to revise the "no agreements" requirement in Rule 14a–11 to address that fact pattern.

Although we are adopting the "no agreements" requirement largely as proposed, we are persuaded by commenters that we should revise our final rules so that they do not unnecessarily discourage constructive dialogue between shareholders and companies. However, we believe this concern is more appropriately addressed in the method of calculation of the maximum number of permissible nominees, and the question of whether that number should include management nominees that were originally put forward as shareholder nominees under Rule 14a–11. Our revisions to that provision are discussed in Section II.B.6. below.

f. No Requirement To Attend the Annual or Special Meeting

Under Rule 14a–11 as proposed, a nominating shareholder or group would have no obligation to attend the annual or special meeting at which its nominee or nominees is being presented to shareholders for a vote. We received comment on the Proposal, however, suggesting that we require a nominating shareholder or group, or a qualified representative of the nominating shareholder or group, to attend the company's shareholder meeting and nominate its director candidate(s) in person.[339] One commenter explained that this requirement would be consistent with State law requirements for nominations and many companies' advance notice bylaws.[340] Another commenter suggested that, as required under Rule 14a–8(h)(3) for shareholder proposals, if the nominating shareholder or group (or its qualified representative) fails, without good cause, to appear and nominate the candidate, the company should be permitted to exclude from its proxy materials for the following two years all nominees submitted by that nominating shareholder or members of the nominating group.[341]

We have decided not to include a requirement that the nominating shareholder or qualified representative appear at the meeting and present the nominee because we believe that shareholders will have sufficient incentive to take steps to assure that their nominees are voted on at the meeting, whether through attending the meeting or sending a qualified representative, or through other arrangements with the company, and we do not want to add unnecessary complexities and burdens to the rule. We note that State law will control what happens if a candidate is not nominated at the meeting because the person supporting the candidate does not

[331] *See* letters from ADP; BRT; Calvert; CFA Institute; CII; Seven Law Firms; TIAA–CREF; USPE.

[332] *See* letter from CII.

[333] *See* letter from USPE.

[334] *See* letters from BRT; Seven Law Firms; Society of Corporate Secretaries.

[335] *See* letters from ABA; Steve Quinlivan ("S. Quinlivan"); Verizon.

[336] *See* letter from S. Quinlivan.

[337] We note that a nominating shareholder or members of a nominating shareholder group will be required to provide a certification in the Schedule 14N that the requirements of Rule 14a–11 are satisfied, which will include the "no agreements" requirement. A nominating shareholder or member of a nominating shareholder group will be liable, pursuant to Rule 14a–9(c), for a false or misleading certification provided in Schedule 14N.

[338] *See* Rule 14a–11(b)(7). *See also* Rule 14a–11(d)(7) which clarifies that if a nominee, nominating shareholder or any member of a nominating group has an agreement with the company or an affiliate of the company regarding the nomination of a candidate for election, other than as specified in Rule 14a–11(d)(5) or (6), any nominee or nominees from such shareholder or group shall not be counted in calculating the number of shareholder nominees for purposes of Rule 14a–11(d).

[339] *See* letters from ABA; BRT.

[340] *See* letter from ABA.

[341] *See* letter from BRT.

attend the meeting or make other arrangements.[342]

g. No Limit on Resubmission

Under the Proposal, a nominating shareholder's or group's ability to use Rule 14a–11 would not be impacted by prior unsuccessful use of the rule. In response to our request for comment, a number of commenters supported a provision that would render a nominating shareholder or group ineligible to use Rule 14a–11 for a period of time (*e.g.,* one, two, or three years) if the nominating shareholder or group presented a nominee who failed to receive significant shareholder support in a previous election (*e.g.,* 10%, 15%, 25%, or 30%).[343] One commenter indicated that this resubmission threshold would have a dual purpose: (i) when the nominee failed to garner significant support from shareholders, it would be inappropriate to require the company to expend resources repeatedly to include the unsuccessful nominee; [344] and (ii) other shareholders would have an opportunity to submit their own nominations.[345] On the other hand, some commenters opposed a provision that would render a nominating shareholder or group ineligible to use Rule 14a–11 for a period of time if the nominating shareholder or group presented a nominee who failed to receive a specified percentage of shareholder votes at a previous election.[346] One commenter pointed out that management nominees are not subject to similar limits.[347] After consideration of the comments we do not believe it is necessary or appropriate to include a limitation on use of Rule 14a–11 by nominating shareholders or groups that have previously used the rule. We continue to believe that such a limitation would not facilitate shareholders' traditional State law rights and would add unnecessary complexity to the rule's operation.

5. Nominee Eligibility Under Exchange Act Rule 14a–11

a. Consistent With Applicable Law and Regulation

Under the Proposal, a company would have been able to exclude a nominee where the nominee's candidacy or, if elected, board membership would violate controlling State law, Federal law, or rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors, which the rule addresses separately) and such violation could not be cured.[348]

Commenters generally supported this requirement.[349] These commenters suggested that the rule require the nominating shareholder or group to provide any information necessary to ensure compliance with these laws or regulations. Some of these commenters noted that there are various Federal and State laws that govern or affect the ability of a person to serve as a director, such as the Federal Power Act and related FERC regulations, Federal maritime laws and regulations, Department of Defense security clearance requirements, Department of State export licensing requirements, bank holding company laws, FCC licensing requirements, state gaming licensing requirements, Federal Reserve regulations, FDIC regulations, U.S. government procurement regulations, Section 8 of the Clayton Act, Section 1 of the Sherman Act, and Section 5 of the Federal Trade Commission Act.[350] One commenter, for example, explained that banking laws and regulations impose their own eligibility standards for directors.[351] One commenter stated more generally that it does not oppose the proposed requirement that a company would not have to include a shareholder nominee in its proxy materials if the nominee's candidacy or election would violate Federal law or State law and such violation could not be cured.[352] It noted, however, that "there is not a lot of law" that disqualifies a person from serving as a director and described concerns about State law barriers as a "red herring."

On the other hand, one commenter stated that a company should not be allowed to exclude a shareholder nominee from its proxy materials because the election of the nominee would result in the violation of State law or Federal law.[353] The commenter explained that allowing such exclusion "would make it prohibitively expensive for most shareowners to submit nominations under the proposed rule. It would lead to many shareowner nominees being disqualified based on technicalities or invented legal theories."

After considering the comments, we continue to believe that Rule 14a–11 should address Federal law, State law, and applicable exchange requirements (other than the requirements related to objective independence standards, which are addressed separately under the rule). Requiring compliance with basic legal requirements regarding nominees should encourage nominating shareholders to bring forward candidates that may be more likely to be able to be elected and serve as directors, and should reduce disruption and expense for companies of opposing a candidate who could not serve on the board if elected because their service would violate law.[354] Thus, under Rule 14a–11, a nominee will not be eligible to be included in a company's proxy materials if the nominee's candidacy, or if elected, board membership will violate Federal law, State law, or applicable exchange requirements, if any,[355] other than those related to

[342] While state statutes are largely silent on the subject of presentation of nominations, motions or other business at meetings of shareholders, the chairman of the meeting typically has broad discretionary authority over its conduct (*see, e.g.,* Model Business Corporation Act § 7.08(b)). As we understand, it is prevailing practice for the chairman to invite nominations of directors from the meeting floor. *See* David A. Drexler, *et al.,* Delaware Corporation Law and Practice, ¶ 24.05[3] (2009 supp.); Carroll R. Wetzel, *Conduct of a Stockholders' Meeting,* 22 Bus. Law. 303, 313–314 (1967); American Bar Association Corporate Laws Committee and Corporate Governance Committee, Business Law Section, Handbook for the Conduct of Shareholders' Meetings (2d ed. 2010) at 151.

[343] *See* letters from 26 Corporate Secretaries; ABA; ADP; Advance Auto Parts; Aetna; Alcoa; AllianceBernstein; Anadarko; Applied Materials; Avis Budget; Boeing; BorgWarner; BRT; Burlington Northern; Caterpillar; Chevron; CIGNA; Cleary; Comcast; CSX; Darden Restaurants; Deere; Dewey; DTE Energy; Dupont; Eaton; FedEx; Florida State Board of Administration; FMC Corp.; FPL Group; General Mills; Headwaters; Intel; ITT; JPMorgan Chase; Kirkland & Ellis; E.J. Kullman; Leggett; P. Neuhauser; Northrop; PepsiCo; Pfizer; Protective; RiskMetrics; Sara Lee; Seven Law Firms; SIFMA; Society of Corporate Secretaries; Southern Company; T. Rowe Price; tw telecom; U.S. Bancorp; Wells Fargo; Weyerhaeuser; Whirlpool; Xerox.

[344] *See* discussion in Section II.B.5.e. below with regard to resubmission of unsuccessful shareholder nominees.

[345] *See* letter from Society of Corporate Secretaries.

[346] *See* letters from CII; Norges Bank; Solutions; USPE; Walden.

[347] *See* letter from CII.

[348] In the Proposing Release, we described an exception from the provision if the violation could be cured. We inadvertently did not include language for this provision in the proposed regulatory text.

[349] *See* letters from 26 Corporate Secretaries; American Bankers Association; Association of Corporate Counsel; BRT; Dewey; Emerson Electric; Financial Services Roundtable; GE; Intel; JPMorgan Chase; O'Melveny & Myers; Protective; Sidley Austin; Tenet; Xerox.

[350] *See* letters from American Bankers Association; BRT; Emerson Electric; GE; O'Melveny & Myers; Sidley Austin; Tenet.

[351] *See* letter from American Bankers Association.

[352] *See* letter from CII.

[353] *See* letter from USPE.

[354] We note that this condition would not disqualify a nominee unless the violation could not be cured during the time period in which a nominating shareholder or group has to respond to a company's notice of deficiency.

[355] We are not aware of other exchange requirements related to director qualifications, but

independence standards, and such violation could not be cured during the time period provided in the rule.[356]

b. Independence Requirements and Other Director Qualifications

Under the Proposal, the nominating shareholder or each member of the nominating shareholder group would have been required to provide a representation that the shareholder nominee meets the *objective criteria* for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a registrant that is an investment company, a representation that the nominee is not an "interested person" of the registrant, as defined in Section 2(a)(19) of the Investment Company Act.[357] For registrants other than investment companies, the representation would not have been required in instances where a company is not subject to the requirements of a national securities exchange or a national securities association. We also noted that exchange rules regarding director independence generally include some standards that depend on an objective determination of facts and other standards that depend on subjective determinations.[358] Under our Proposal, the representation would not cover subjective determinations. Also, the representation would not cover additional independence or director qualification requirements imposed by a board on its independent members, although we requested comment on whether it should.

Commenters generally supported the requirement regarding the objective independence standards.[359] Institutional and other investors agreed that nominating shareholders should not be required to represent that nominees satisfy the subjective independence standards of the relevant exchange or national securities association, and also agreed that they should not be subject to any director independence or qualification standards set by the board or the nominating committee.[360] One of these commenters expressed agreement with the Proposal that where a company is not subject to the independence standards of an exchange or national securities association, the nominating shareholder or group should not be required to provide disclosure concerning whether nominees would be independent.[361] To the extent that a company has independence standards that are more stringent than those of an exchange, then the commenter would not oppose the application of those standards to the shareholder nominee as long as the standards are objective. Two commenters expressed the view that the Section 2(a)(19) test is more appropriate for investment company directors than the independence standard applied to non-investment company directors,[362] with one noting that the Section 2(a)(19) test is tailored to the types of conflicts of interest faced by investment company directors and that the Section 2(a)(19) provision is critical given that investment companies must have a specified percentage of independent directors to be able to comply with certain statutory and regulatory requirements.[363]

A significant number of commenters from the corporate community stated generally that shareholder nominees should satisfy not just the objective director independence standards of the relevant exchange or national securities associations, but all of the company's director qualifications and independence standards (including, if applicable, more stringent objective independence standards imposed by the board, subjective director independence standards, director qualification standards, board service guidelines, and code of conduct in the company's governance principles and committee charters) applicable to all directors and director nominees.[364] Many commenters warned that exempting shareholder nominees from a company's director independence and qualification standards could cause the company to be exposed to legal issues, lower the quality and diversity of the board, and create difficulties in recruiting qualified directors.[365] Other commenters also believed that exempting shareholder nominees from the subjective director independence standards of the relevant exchange or national securities association would put companies at risk of noncompliance with the exchange's

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should an exchange adopt new requirements, this provision would apply.

[356] As discussed in Section II.B.9.b., a company that intends to exclude a shareholder nominee or nominees will be required to notify the nominating shareholder or group of the basis on which the company plans to exclude the nominee or nominees and the nominating shareholder or group will have 14 calendar days to cure the deficiency (where curable).

[357] Pursuant to proposed Rule 14a–18(c), a nominating shareholder or group would include a representation in its notice to the company that the nominee satisfies the existing independence or "interested person" standards.

[358] *See* proposed Rule 14a–18(c) and the Instruction to paragraph (c). For example, the NYSE listing standards include both subjective and objective components in defining an "independent director." As an example of a subjective determination, Section 303A.02(a) of the NYSE Listed Company Manual provides that no director will qualify as "independent" unless the board of directors "affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company)." On the other hand, Section 303A.02(b) provides that a director is not independent if he or she has any of several specified relationships with the company that can be determined by a "bright-line" objective test. For example, a director is not independent if "the director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service)." Similar to the NYSE rules, the NASDAQ Listing Rules require a company's board to make an affirmative determination that individuals serving as independent directors do not have a relationship with the company that would impair their independence. The NASDAQ rules include certain objective criteria, similar to those provided in NYSE Section 303A.02(b), for making such a determination. *See* NASDAQ Rule 5605(a)(2) and IM–5605.

[359] *See* letters from ABA; ACSI; Advance Auto Parts; Aetna; Alaska Air; Alcoa; Anadarko; Avis Budget; Biogen; The Board Institute ("Board Institute"); BorgWarner; BRT; Burlington Northern; Callaway; CalSTRS; Caterpillar; CIGNA; Cleary; Comcast; Con Edison; CII; COPERA; CSX; Cummins; Darden Restaurants; Deere; Dewey; DTE Energy; Eaton; Edison Electric Institute; Einstein Noah Restaurant Group, Inc. ("Einstein Noah"); Emerson Electric; ExxonMobil; FedEx; FMC Corp.; FPL Group; General Mills; A. Goolsby; Headwaters; Home Depot; Honeywell; Horizon Lines, Inc. ("Horizon"); C. Horner; IBM; Intel; JPMorgan Chase; Keating Muething; E.J. Kullman; LUCRF; McDonald's; Merchants Terminal; Metlife; P. Neuhauser; Norfolk Southern; Northrop; Office Depot; O'Melveny & Myers; P&G; PepsiCo; Pfizer; Protective; S&C; Seven Law Firms; Sidley Austin; SIFMA; Society of Corporate Secretaries; Southern Company; Tenet; Tesoro; Theragenics; TI; TIAA–CREF; Tompkins; tw telecom; UnitedHealth; U.S. Bancorp; ValueAct Capital; Verizon; Wells Fargo; Weyerhaeuser.

[360] *See* letters from ACSI; CalSTRS; CII; COPERA; LUCRF; P. Neuhauser; TIAA–CREF; ValueAct Capital.

[361] *See* letter from CII.

[362] *See* letters from ABA II; ICI.

[363] *See* letter from ICI. One commenter stated that the application of the "interested person" standard of Section 2(a)(19) is unnecessary. *See* letter from Norges Bank.

[364] *See* letters from ABA; Advance Auto Parts; Aetna; Alaska Air; Alcoa; Anadarko; Avis Budget; Biogen; Board Institute; BorgWarner; BRT; Burlington Northern; Callaway; Caterpillar; CIGNA; Cleary; Comcast; Con Edison; CSX; Cummins; Darden Restaurants; Deere; Dewey; DTE Energy; Eaton; Edison Electric Institute; Einstein Noah; Emerson Electric; ExxonMobil; FedEx; FMC Corp.; FPL Group; General Mills; A. Goolsby; Headwaters; Home Depot; Honeywell; Horizon; C. Horner; IBM; Intel; JPMorgan Chase; Keating Muething; E.J. Kullman; McDonald's; Merchants Terminal; Metlife; Norfolk Southern; Northrop; Office Depot; O'Melveny & Myers; P&G; PepsiCo; Pfizer; Protective; S&C; Seven Law Firms; Sidley Austin; SIFMA; Society of Corporate Secretaries; Southern Company; Tenet; Tesoro; Theragenics; TI; Tompkins; tw telecom; UnitedHealth; U.S. Bancorp; Verizon; Wells Fargo; Weyerhaeuser.

[365] *See* letters from Board Institute; BRT; Con Edison; C. Horner; TI; Verizon.

or association's rules regarding independent directors, burden the remaining independent directors with additional duties by forcing them to serve on more board committees, make it more difficult for companies to recruit the independent directors needed for the board committees, and force companies to increase the size of the board and conduct additional searches for directors qualifying as independent.[366]

After carefully considering the comments, we are adopting the requirement largely as proposed. We believe that the Rule 14a–11 process should be limited to nominations of board candidates who meet any objective independence standards of the relevant securities exchange. While we understand the concerns expressed by many commenters from the corporate community, particularly with respect to the risk of noncompliance with listing standards, we continue to believe that the rule should not extend to subjective independence standards. We note that Rule 14a–11 only addresses when a company must include a nominee in its proxy materials—it does not preclude a nominee from ultimately being subject to any subjective determination of independence for board committee positions. We believe the concerns regarding independent directors being forced to take on additional duties, companies needing to increase the size of the board or conducting additional searches for independent directors are best addressed through disclosure. A company could include disclosure in its proxy materials advising shareholders that the shareholder nominee would not meet the company's subjective criteria, as appropriate. This would provide shareholders with the opportunity to make an informed choice with regard to the candidates for director.

We believe that it is in both the company's and shareholders' interest for the company to continue to meet any applicable listing standards, and requiring that Rule 14a–11 nominees meet the objective independence standards will further that interest. It also should help reduce disruption and expense for companies opposing a candidate it believes would cause it to violate applicable listing standards. To clarify that this is an affirmative requirement for Rule 14a–11 nominees, we have revised the rule to include this provision as an eligibility requirement rather than a representation.[367]

A nominating shareholder or group also will be required to provide a statement in Schedule 14N that the nominee or nominees meets the objective independence standards of the applicable exchange rules.[368] For this purpose, the nominee would be required to meet the definition of "independent" that is applicable to directors of the company generally and not any particular definition of independence applicable to members of the audit committee of the company's board of directors.[369] To the extent a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination that the nominee has no material relationship with the listed company), this element of an independence standard would not have to be satisfied.[370] Where a company (other than an investment company) is not subject to the standards of a national securities exchange or national securities association, the requirement would not apply.

While we acknowledge commenters' concerns about nominees not being subject to subjective independence requirements, we believe that including such requirements would create undue uncertainty for shareholders seeking to nominate directors and make it difficult to evaluate the board's conclusion regarding independence. In addition, if a board believes a nominee would not be considered independent under its subjective independence evaluation, it could describe its reasons for that view in its proxy statement. In this regard, we note that in a traditional proxy contest an insurgent's nominee or nominees do not have to comply with any requirements, including the independence requirements applicable to the company.[371] We also agree with the commenter who noted that the "interested person" test under Section 2(a)(19) is tailored to the types of conflicts of interest faced by investment company directors and that the Section 2(a)(19) provision is critical given that investment companies must have a specified percentage of independent directors to be able to comply with certain statutory and regulatory requirements.[372] Accordingly, under the final rule, a company will be required to include a shareholder nominee in its proxy materials if the shareholder nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a company that is an investment company, the nominee is not an "interested person" of the registrant, as defined in Section 2(a)(19) of the Investment Company Act.[373]

As noted above, we did not propose to require a shareholder nominee submitted pursuant to Rule 14a–11 to be subject to the company's director qualification standards. With regard to these standards, we believe that a nominee's compliance with a company's director qualifications is best addressed through disclosure. Under State law, shareholders generally are free to nominate and elect any person to the board of directors, regardless of whether the candidate satisfies a company's qualification requirement at the time of nomination and election.[374] Many commenters recommended a requirement that the shareholder nominee complete the company's standard director questionnaire or otherwise provide information required of other nominees.[375] While we do not

[366] *See* letters from Metlife; O'Melveny & Myers; Seven Law Firms; Wells Fargo.

[367] *See* Rule 14a–11(b)(9).

[368] *See* Item 5(f) of new Schedule 14N.

[369] *See* new instruction to paragraph (b)(9) in Rule 14a–11.

[370] The rule addresses only the requirements under Rule 14a–11 to be included in a company's proxy materials—it would not preclude a nominee from ultimately being subject to the subjective determination test of independence for board committee positions. A company could include disclosure in its proxy materials advising shareholders that the shareholder nominee for director would not meet the company's subjective criteria, as appropriate. If a shareholder nominee is elected and the board determines that the nominee is not independent, the board member presumably would be included in the group of non-independent directors for purposes of applicable listing standards.

[371] If a shareholder nominee did not meet the independence requirements of a listed market, that listed market may provide for a cure period during which time the company may resolve this deficiency. *See, e.g.,* NASDAQ Rule 5810(c)(3)(E) ("If a Company fails to meet the majority board independence requirement in Rule 5605(b)(1) due to one vacancy, or because one director ceases to be independent for reasons beyond his/her reasonable control, the Listing Qualifications Department will promptly notify the Company and inform it has until the earlier of its next annual shareholders meeting or one year from the event that caused the deficiency to cure the deficiency.").

[372] *See* letter from ICI.

[373] *See* new Rule 14a–11(b)(9).

[374] *See, e.g., Triplex Shoe Co.* v. *Rice & Hutchins, Inc.,* 152 A. 342, 375 (Del. 1930). *See also* 1–13 David A. Drexler *et al.,* Delaware Corporation Law and Practice § 13.01 n. 42 (citing *Triplex* for the proposition that "a bylaw requiring a director to be a stockholder required a director to own stock prior to entering into the office of director, not prior to election").

[375] *See* letters from 26 Corporate Secretaries; Advance Auto Parts; Alaska Air; Anadarko; Aetna; American Express; Association of Corporate Counsel; BorgWarner; BRT; Callaway; Caterpillar; Dewey; DTE Energy; Dupont; Emerson Electric; eWareness; ExxonMobil; Financial Services Roundtable; IBM; ICI; McDonald's; O'Melveny &

believe nominees submitted pursuant to Rule 14a–11 should be required to complete a company's director questionnaire, we are persuaded that information should be provided regarding whether the nominee meets the company's director qualifications, if any. Accordingly, although we have not revised the rule to allow exclusion of nominees who do not meet any director qualification requirements, we have adopted a requirement that a nominating shareholder or group disclose under Item 5 of Schedule 14N whether, to the best of their knowledge, the nominating shareholder's or group's nominee meets the company's director qualifications, if any, as set forth in the company's governing documents.[376] The company also may choose to provide disclosure in its proxy statement about whether it believes a nominee satisfies the company's director qualifications, as is currently done in a traditional proxy contest. Where a company's governing documents establish certain qualifications for director nominees that, consistent with State law, would preclude the company from seating a director who does not meet these qualifications, we believe this would be important disclosure for shareholders.

c. Agreements With the Company

As discussed above with regard to the eligibility requirements for a nominating shareholder or group, we recognize that certain limitations of the rule create the potential risk of nominating shareholders or groups acting merely as a surrogate for the company or its management in order to block usage of the rule by another nominating shareholder or group.[377] Under the Proposal as it relates to nominee eligibility, a nominating shareholder or group would have been required to represent that no agreements between the nominee and the company and its management exist regarding the nomination of the nominee.[378] The Proposal included an instruction clarifying that negotiations between a nominating shareholder or group, nominee, and nominating committee or board of a company to have the nominee included in the company's proxy materials, where the negotiations were unsuccessful or were limited to whether the company was required to include the nominee in accordance with Rule 14a–11, would not represent a direct or indirect agreement with the company.[379]

Commenters generally supported this proposed requirement.[380] Most of the comments addressed negotiations or agreements between the nominating shareholder or group and the company rather than the relationship or agreements between a nominee and the company.[381]

Consistent with our approach to agreements with nominating shareholders, we are adopting the requirement that there not be any agreements between the nominee and the company and its management regarding the nomination of the nominee largely as proposed. In this regard, we believe it would undermine the purpose of the rule to allow nominees under Rule 14a–11 to have such agreements with the company because of the potential risk of a nominating shareholder or group acting merely as a surrogate for a company. In order to clarify that this is an affirmative requirement of Rule 14a–11, we have revised the rule to make clear that this is an eligibility condition by listing it as a condition in the rule, rather than only in a representation required in Schedule 14N.

d. Relationship Between the Nominating Shareholder or Group and the Nominee

We did not propose a requirement that the nominee must be independent or unaffiliated with the nominating shareholder or group, but we requested comment on whether we should include such a requirement.[382] A large number of commenters supported generally an independence requirement that would limit some or all relationships between the nominating shareholder or group and its nominee.[383] Commenters explained that an independence requirement would reduce the risk that a successful shareholder nominee would represent only the nominating shareholder or group, avoid potential disruptions and divisiveness from having "special interest" directors, ameliorate the issue of preserving confidentiality within the boardroom and avoiding misuse of material non-public information, and lessen the likelihood that Rule 14a–11 would be used for change in control attempts.[384]

With regard to the degree of independence needed and types of relationships that should be prohibited, numerous commenters recommended a prohibition on any affiliation between the nominating shareholder or group and the shareholder nominee.[385] Some commenters recommended that Rule 14a–11 prohibit a shareholder nominee from being (1) a nominating shareholder, (2) a member of the immediate family of any nominating shareholder, or (3) a partner, officer, director or employee of a nominating shareholder or any of its affiliates.[386] They noted that a similar limitation was included in the 2003 Proposal. Two commenters recommended that the Commission impose the same restrictions and disclosure requirements that were included in the 2003 Proposal.[387]

One commenter noted the Commission's assertion in the Proposing Release that "such limitations may not be appropriate or necessary" because, if elected, a director would be subject to State law fiduciary duties owed to the company.[388] The commenter, however, expressed skepticism that fiduciary obligations would adequately resolve the issue of "special interest" directors. One commenter would not require independence between the nominating shareholder or group and the nominee if the nominating shareholder or group could use Rule 14a–11 to nominate only one candidate; however, if the nominating shareholder or group is allowed to nominate more than one

Myers; PepsiCo; Praxair; Seven Law Firms; Society of Corporate Secretaries; Theragenics; UnitedHealth; U.S. Bancorp; Xerox.

[376] *See* Item 5(e) of new Schedule 14N.

[377] *See* the discussion in Section II.B.4.e. above regarding relationships or agreements between the nominating shareholder or group and the company and its management.

[378] In this regard, we also proposed to require a nominating shareholder or group to represent that no relationships or agreements between the nominee and the company and its management exist. This aspect of the rule is discussed in Section II.B.5.d. below.

[379] *See* instruction to proposed Rule 14a–18(d).

[380] *See* letters from ADP; BRT; Calvert; CFA Institute; CII; Seven Law Firms; TIAA–CREF; USPE.

[381] *See* Section II.B.4.e. above for a further discussion of the comments.

[382] The 2003 Proposal included such a requirement. For a discussion of this aspect of the 2003 Proposal and the comments received, *see* the Proposing Release.

[383] *See* letters from ABA; Advance Auto Parts; Aetna; Alaska Air; Association of Corporate Counsel; Avis Budget; Biogen; Boeing; BorgWarner; Brink's; BRT; Callaway; Caterpillar; CIGNA; Comcast; Cummins; Darden Restaurants; Deere; Dewey; Dupont; Eaton; Eli Lilly; ExxonMobil; FedEx; Financial Services Roundtable; FMC Corp.; FPL Group; General Mills; Headwaters; Honeywell; JPMorgan Chase; E.J. Kullman; Leggett; Norfolk Southern; Office Depot; O'Melveny & Myers; Pax World; Protective; Sara Lee; Seven Law Firms; SIFMA; Society of Corporate Secretaries; Southern Company; Tenet; U.S. Bancorp; Vinson & Elkins LLP ("Vinson & Elkins"); Wells Fargo; Weyerhaeuser.

[384] *See* letters from ABA; Alaska Air; Eli Lilly; Leggett.

[385] *See* letters from Advance Auto Parts; Aetna; Association of Corporate Counsel; Avis Budget; Boeing; Brink's; CIGNA; Cummins; Deere; Eaton; FedEx; FMC Corp.; FPL Group; General Mills; E.J. Kullman; Pax World; Protective; Sara Lee.

[386] *See* letters from Alaska Air; BorgWarner; Caterpillar; JPMorgan Chase; O'Melveny & Myers; Society of Corporate Secretaries.

[387] *See* letters from BRT; Intel.

[388] Letter from BRT.

candidate using Rule 14a–11, then the commenter believed independence between the nominating shareholder or group and the nominees is needed.[389] The commenter asserted that a lack of an independence requirement between multiple nominees and the nominating shareholder could give rise to control issues because the nominees, if elected, could be beholden to a single nominating shareholder or group. In addition, the commenter claimed that a lack of independence could give rise to "single issue" or "special interest" directors, thereby causing balkanization of boards. According to this commenter, if independence is not required, then Schedule 14N should require detailed disclosure about the nature of relationships between the nominating shareholder or group and the nominees.[390]

A few commenters recommended requiring disclosure in the Schedule 14N of any direct or indirect relationships between the nominating shareholder or group and the nominee, including family or employment relationships, ownership interests, commercial relationships and any other arrangements or agreements.[391] One commenter recommended that a nominating shareholder or group provide "[d]isclosure about any agreements or relationships with the Rule 14a–11 nominee other than those relating to the nomination of the nominee." [392]

Other commenters opposed generally any requirement that the nominating shareholder or group be independent from the shareholder nominee.[393] Of these, some commenters recommended the Commission require full disclosure of any affiliations and business relationships instead of an outright prohibition.[394] One commenter noted that no such restriction or prohibition applies to current director candidates, some of whom have various personal and professional links to the company and its executives.[395] Another commenter noted that the NYSE recognized the issue of share ownership when crafting its director independence rules and determined that even significant share ownership should not be dispositive as to a determination of a director's independence.[396] Two commenters opposed a prohibition on any affiliation between the nominating shareholder and its nominee because they believed that fears regarding the election of "special interest" directors are unfounded or exaggerated, as any nominee would have to gain the support of a broad array of shareholders to be elected.[397] One commenter asserted that existing fiduciary duties are an adequate safeguard against "special interest" directors.[398]

We continue to believe that such limitations are not appropriate or necessary. Rather, we believe that Rule 14a–11 should facilitate the exercise of shareholders' traditional State law rights and afford a shareholder or group meeting the requirements of the rule the ability to propose a nominee for director that, in the nominating shareholder's view, better represents the interests of shareholders than those put forward by the nominating committee or board. We note that once a nominee is elected to the board of directors, that director will be subject to State law fiduciary duties and owe the same duty to the corporation as any other director on the board.[399] To the extent a company board is concerned that a director nominee will not represent the views of shareholders, the board could address those points in the company's proxy materials opposing the candidate's election. In addition, we believe the disclosure requirements about the relationships between a nominating shareholder or group and the nominee that we are adopting, combined with the fact that any nominee elected will be subject to fiduciary duties, should help address any "special interest" concerns.

e. No Limit on Resubmission of Shareholder Director Nominees

Under the Proposal, an individual would not be limited in their ability to stand as a nominee under the rule based on prior unsuccessful nominations under the rule. A number of commenters supported a provision under which a shareholder nominee who failed to receive a specified threshold (*e.g.,* 10%, 15%, 25%, or 30%) of support at a previous election would be ineligible to be nominated again pursuant to Rule 14a–11 for a specified period (*e.g.,* one, two, or three years).[400] One commenter reasoned that "[t]his would allow more shareholders to participate in the process and would motivate them to propose high quality candidates." [401] On the other hand, other commenters opposed a provision under which a shareholder nominee who failed to receive significant support at a previous election would be ineligible to be nominated again pursuant to Rule 14a–11 for a specified period.[402] One commenter reasoned that "[s]imilar resubmission requirements aren't applicable to management's candidates, so they shouldn't apply to candidates suggested by shareowners." [403] We agree with those commenters who opposed a provision that would limit the ability of a shareholder nominee to be nominated based on the level of support received in a prior election. We do not believe that such a limitation would facilitate shareholders' traditional State law rights and would add undue complexity to the rule's operation.

6. Maximum Number of Shareholder Nominees To Be Included in Company Proxy Materials

a. General

Under the Proposal, a company would be required to include no more than one shareholder nominee or the number of nominees that represents 25% of the company's board of directors, whichever is greater.[404] Where the term of a director that was nominated

[389] *See* letter from Seven Law Firms.

[390] *Id.* The recommended disclosures included: familial relationships with a nominating shareholder or group member; ownership interests (or other participation) in a nominating shareholder, group member, or affiliates; employment history with a nominating shareholder, group member, or affiliates; prior advisory, consulting or other compensatory relationships with a nominating shareholder, group member, or affiliates; and agreements with a nominating shareholder, group member, or affiliates (other than relating to the nomination).

[391] *See* letters from O'Melveny & Myers; SIFMA; UnitedHealth. *See also* letter from CII.

[392] Letter from IBM.

[393] *See* letters from Amalgamated Bank; CalSTRS; CFA Institute; CII; COPERA; Nathan Cummings Foundation; P. Neuhauser; Norges Bank; Pershing Square; Relational; RiskMetrics; Solutions by Design ("Solutions"); TIAA–CREF; USPE; B. Villiarmois.

[394] *See* letters from CFA Institute; CII; COPERA; P. Neuhauser; Pershing Square; Relational; USPE; B. Villiarmois.

[395] *See* letter from CII.

[396] *See* letter from Relational.

[397] *See* letters from CII; Nathan Cummings Foundation.

[398] *See* letter from TIAA–CREF.

[399] *See* E. Norman Veasey & Christine T. DiGuglielmo, *How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors,* 63 Bus. Law. 761 (2008).

[400] *See* letters from 26 Corporate Secretaries; ABA; Aetna; Anadarko; BorgWarner; BRT; Burlington Northern; Caterpillar; Cummins; Dewey; Headwaters; JPMorgan Chase; Kirkland & Ellis; Leggett; P. Neuhauser; Northrop; PepsiCo; Pfizer; Protective; Sara Lee; SIFMA; Society of Corporate Secretaries; TIAA–CREF; T. Rowe Price; Xerox.

[401] Letter from Northrop.

[402] *See* letters from CII; Corporate Library; Dominican Sisters of Hope; First Affirmative Financial Network LLC ("First Affirmative"); Mercy Investment Program; Sisters of Mercy; Social Investment Forum; Tri-State Coalition; Trillium; Ursuline Sisters of Tildonk; USPE.

[403] Letter from CII.

[404] *See* proposed Rule 14a–11(d)(1). According to information from RiskMetrics, based on a sample of 1,431 public companies, in 2007, the median board size was 9, with boards ranging in size from 4 to 23 members. Approximately 40% of the boards in the sample had 8 or fewer directors, approximately 60% had between 9 and 19 directors, and less than 1% had 20 or more directors.

pursuant to Rule 14a–11 continues past the meeting date, that director would continue to count for purposes of the 25% maximum.

As noted in the Proposing Release, we do not intend for Rule 14a–11 to be available for any shareholder or group that is seeking to change the control of the company or to gain more than a limited number of seats on the board.[405] The existing procedures regarding contested elections of directors are intended to continue to fulfill that purpose.[406] We also noted that by allowing shareholder nominees to be included in a company's proxy materials, part of the cost of the solicitation is essentially shifted from the individual shareholder or group to the company and thus, all of the shareholders.[407] We do not believe that we should require that an election contest conducted by a shareholder to change the control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11 be funded out of corporate assets.

Some commenters supported generally the proposed limit on the number of shareholder nominees.[408] While agreeing that the Commission's proposed limit on the number of shareholder nominees is needed to ensure a more measured approach towards inclusion of shareholder nominees in company proxy materials, one commenter supported the general principle that shareholders should be entitled to nominate as many directors as necessary to focus the board's attention on optimizing company performance, profitability and sustainable returns.[409] On the other hand, many commenters disagreed with the proposed limit or recommended different limits.[410] Some commenters expressed a general concern that the proposed limit would affect a significant portion of the board, disrupt the board, facilitate a change in control of the company, and possibly require companies to integrate numerous new directors into their boards each year.[411] Other commenters wanted more shareholder nominees to be allowed because they feared that a single shareholder-nominated director would be ineffective due to the lack of a second for motions at board meetings, hostile board members, possible exclusion from key committees, and being effectively cut out of key discussions.[412] Commenters' suggestions as to the appropriate limitation on the number of shareholder nominees ranged from a limit of one shareholder nominee, regardless of the size of the board,[413] to at least two nominees, but less than a majority of the board.[414] Other commenters recommended various limits ranging from 10% to 15% of the board.[415]

We carefully considered commenters' concerns regarding the limitation on the number of Rule 14a–11 nominees; however, we are adopting the limitation largely as proposed. We believe the rule we are adopting strikes the appropriate balance in allowing shareholders to more effectively exercise their rights to nominate and elect directors, but does not provide nominating shareholders or groups using the rule with the ability to change control of the company. The limitation on the number of Rule 14a–11 nominees that a company is required to include should also limit costs and disruption as compared to a rule without such a limit. We also believe that a lower threshold, such as 10% or 15%, may result in only one shareholder-nominated director at many companies. In addition, we note that our rule only addresses the inclusion of nominees in the company's proxy materials. After reviewing all of the disclosures provided by the company and the nominating shareholder or group, shareholders will be able to make an informed decision as to whether to vote for and elect a shareholder nominee. We believe that the modifications we are making to the rule, as described below, help to alleviate concerns that the election of shareholder nominees would unduly disrupt the board. As to concerns about the possibility that a single shareholder-nominated director would be ineffective due to actions of other members of the board, the rule is not intended to address the interactions of board members after the election of directors. In this respect, we note that any shareholder-nominated directors and board-nominated directors would be subject to fiduciary duties under State law.

As adopted, Rule 14a–11(d) will not require a company to include more than one shareholder nominee or the number of nominees that represents 25% of the company's board of directors, whichever is greater.[416] Consistent with the Proposal, where a company has a director (or directors) currently serving on its board of directors who was elected as a shareholder nominee pursuant to Rule 14a–11, and the term of that director extends past the date of the meeting of shareholders for which the company is soliciting proxies for the election of directors, the company will not be required to include in its proxy materials more shareholder nominees than could result in the total number of directors serving on the board that were elected as shareholder nominees being greater than one shareholder nominee or 25% of the company's board of

[405] The final rule clarifies the second part of this requirement by specifying that a nominating shareholder or group may not be seeking to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11.

[406] *See, e.g.,* Exchange Act Rule 14a–12(c).

[407] In this regard, we anticipate that shareholders seeking election of nominees included in the company's proxy materials may need to engage in solicitation efforts for which they will incur expenses.

[408] *See* letters from CalPERS; CalSTRS; CFA Institute; ICGN; Nathan Cummings Foundation; P. Neuhauser; Norges Bank; Protective; RiskMetrics; TIAA–CREF; T. Rowe Price; WSIB.

[409] *See* letter from CalPERS.

[410] *See* letters from 13D Monitor; ABA; ACSI; Advance Auto Parts; Aetna; Alcoa; Allstate; American Express; Americans for Financial Reform; Association of Corporate Counsel; Avis Budget; Best Buy; J. Blanchard; Boeing; BorgWarner; BRT; Burlington Northern; R. Burt; Callaway; CalPERS; Caterpillar; CIGNA; CII; Cleary; CNH Global; Comcast; Concerned Shareholders; COPERA; Cummins; L. Dallas; Darden Restaurants; Deere; Dupont; Eaton; Eli Lilly; Dale C. Eshelman ("D. Eshelman"); ExxonMobil; FedEx; FMC Corp.; FPL Group; Frontier; GE; General Mills; Headwaters; C. Holliday; Honeywell; IBM; ICI; ITT; JPMorgan Chase; J. Kilts; E. J. Kullman; N. Lautenbach; Leggett; C. Levin; Lionbridge Technologies; LUCRF; McDonald's; Motorola; Office Depot; O'Melveny & Myers; OPERS; P&G; Nathan Cummings Foundation; Northrop; Pax World; PepsiCo; Sara Lee; S&C; Schulte Roth & Zabel; Sherwin-Williams; Sidley Austin; SIFMA; Society of Corporate Secretaries; Solutions; SWIB; Teamsters; TI; G. Tooker; tw telecom; Universities Superannuation; U.S. Bancorp; Verizon; USPE; B. Villiarmois; Wachtell; Wells Fargo; Weyerhaeuser; WSIB.

[411] *See* letters from BRT (citing a July 2009 survey showing many companies would have to integrate multiple new directors); CII; Eaton; N. Lautenbach; McDonald's; Sherwin-Williams; Sidley Austin; Society of Corporate Secretaries; G. Tooker; WSIB.

[412] *See* letters from CII; L. Dallas; C. Levin; Nathan Cummings Foundation; Universities Superannuation.

[413] *See* letters from Advance Auto Parts; Avis Budget; BRT; Caterpillar; CIGNA; CNH Global; Comcast; Cummins; Darden Restaurants; Deere; Eaton; Eli Lilly; FedEx; FMC Corp.; FPL Group; Frontier; General Mills; ICI; ITT; E. J. Kullman; N. Lautenbach; Leggett; McDonald's; Office Depot; O'Melveny & Myers; PepsiCo; Sherwin-Williams; TI; G. Tooker; tw telecom; Verizon; Wachtell; Weyerhaeuser.

[414] *See* letters from ACSI; Americans for Financial Reform; CalPERS; CII (stating that while it supports the Commission's proposed limit, shareholders should be allowed to nominate two candidates in all cases); COPERA; C. Levin; LUCRF; Nathan Cummings Foundation; SWIB; Teamsters.

[415] *See, e.g.,* Aetna; Association of Corporate Counsel; Barclays; J. Blanchard; BorgWarner; Dewey; ExxonMobil; Headwaters; Honeywell; Lionbridge Technologies; Northrop; Sidley Austin; Society of Corporate Secretaries; U.S. Bancorp.

[416] *See* new Rule 14a–11(d)(1).

directors, whichever is greater.[417] We believe this limitation is appropriate to reduce the possibility of a nominating shareholder or group using Rule 14a–11 as a means to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11 or to effect a change in control of the company by repeatedly nominating additional candidates for director. One commenter requested that we explain how Rule 14a–11 would apply to different board structures, and in particular, classified boards.[418] In the case of a staggered board, the rule provides that the 25% limit will be calculated based on the total number of board seats,[419] not the lesser number that are being voted on because it is the size of the full board, not the number up for election, that would be relevant for considering the effect on control.

We note that in the 2003 Proposal, the Commission proposed to require companies to include a set number of nominees, rather than a percentage of the board.[420] We believe that using a percentage in the rule will promote ease of use and alleviate any concerns that a company may increase its board size in an effort to reduce the effect of a shareholder nominee elected to the board.

We understand the concerns addressed by some commenters that this limitation could result in shareholder-nominated directors being less influential,[421] as well as the concerns of other commenters that the possibility of 25% of the board changing through the Rule 14a–11 process could present significant changes to the board.[422] For the reasons discussed above, we believe the limitation as adopted strikes an appropriate balance and is an appropriate safeguard to assure that the Rule 14a–11 process is not used as a means to effect a change in control.

Though we are adopting this requirement largely as proposed, we have added certain clarifications, which are described below, to address situations at companies where shareholders are able to elect only a subset of the board, revised the standard for determining which nominating shareholder or group will have their nominee or nominees included in the company's proxy materials where there is more than one eligible nominating shareholder or group, and made other modifications designed to facilitate negotiations between companies and nominating shareholders.

b. Different Voting Rights With Regard to Election of Directors

Several commenters responded to the Commission's request for comment about how to calculate the maximum number of candidates a nominating shareholder or group could nominate under Rule 14a–11 when certain directors are not elected by all shareholders. Some commenters noted that controlled companies are commonly structured with dual classes of stock which allow shareholders of the non-controlling class of stock to elect a set number of directors that is less than the full board.[423]

In the context of a company where shareholders are only entitled to elect a subset of the total number of directors, the rule as proposed potentially would have allowed shareholders to nominate more candidates than may be elected by the nominating shareholders. Two commenters argued that Rule 14a–11 should be modified so that the maximum number of shareholder nominees is based on the number of directors that may be elected by the class of securities held by the shareholders making the nomination, as opposed to the number of total directors.[424] Another commenter urged us to revise Rule 14a–11 so that it would be limited to a percentage of the number of directors that are elected by the public shareholders (rather than a percentage of all directors) and would not apply to directors that are elected by shareholders of a class of stock having a right to nominate and elect a specified number or percentage of directors, or preferred shareholders having such right as a result of the company's failure to pay dividends.[425] Another commenter argued that, as proposed, Rule 14a–11 would not allow companies with multiple classes of voting shares the ability to make choices about how to best implement access to the company's proxy to fit their capital structure.[426] One commenter suggested that Rule 14a–11 address how it would apply to companies with multiple classes of stock to prevent shareholders from using the rule to change control of the class of directors those shareholders have the right to elect.[427] Other commenters, by contrast, believed that the maximum number of nominees that companies should be required to include should be based on the total number of director seats, regardless of whether a class of shares only gets to elect a subset of the board.[428]

We also sought comment on how to calculate the maximum number of nominees where the company is contractually obligated to permit a certain shareholder or group to elect a set number of directors to the board. Commenters' views differed on how to calculate the maximum number of nominees a shareholder or shareholder group may nominate in that case. Some commenters believed that the maximum number of nominees should be based on the total board size, regardless of whether a company has granted rights to nominate.[429] One such commenter noted that if Rule 14a–11 contained an exception for board seats subject to contractual rights, companies would have an incentive to enter into contractual agreements in order to evade its application.[430] Other commenters, however, asserted that the maximum number of nominees that shareholders should be permitted to nominate under Rule 14a–11 should be limited to 25% of the "free" seats on the board—that is, only those board seats that are not subject to a contractual nomination right that existed as of the date of the submission and filing of a Schedule 14N.[431] These commenters suggested taking board seats subject to contractual nomination rights "off the table" and basing the 25% calculation on the number of nominees that the nominating committee is free to name. One such commenter remarked that unless board seats subject to contractual nomination rights are excluded,

[417] *See* new Rule 14a–11(d)(2). This requirement is adopted as it was proposed in Rule 14a–11(d)(2). Depending on board size, 25% of the board may not result in a whole number. In those instances, the maximum number of shareholder nominees for director that a registrant will be required to include in its proxy materials will be the closest whole number below 25%. *See* the Instruction to paragraph (d)(1).

[418] *See* letter from ABA.

[419] *See* Rule 14a–11(d)(2).

[420] Comments on the 2003 Proposal provided a range of views regarding the appropriate number of shareholder nominees. Commenters that supported the use of a percentage, or combination of a set number and a percentage, to determine the number of shareholder nominees suggested percentages ranging from 20% to 35%. *See* Comment File No. S7–19–03, *available at http://www.sec.gov/rules/proposed/s71903.shtml.*

[421] *See* letters from CII; L. Dallas; C. Levin; Nathan Cummins Foundation; Universities Superannuation.

[422] *See* letters from BRT (citing a July 2009 survey showing many companies would have to integrate multiple new directors); CII; Eaton; N. Lautenbach; McDonald's; Sherwin-Williams; Sidley Austin; Society of Corporate Secretaries; G. Tooker; WSIB.

[423] *See* letters from ABA; Duane Morris; Media General; New York Times.

[424] *See* letters from Media General; New York Times.

[425] *See* letter from Sidley Austin.

[426] *See* letter from BRT.

[427] *See* letter from Media General.

[428] *See* letters from CII; P. Neuhauser.

[429] *Id.*

[430] *See* letter from P. Neuhauser.

[431] *See* letters from Seven Law Firms; Sidley Austin; ValueAct Capital.

companies may be limited in their ability to offer contractual nominating rights to shareholders without running a heightened risk of change of control, which could result in increased costs of capital and a decrease in the number of strategic alternatives.[432]

We believe that the maximum number of candidates a shareholder can nominate using Rule 14a–11 at companies with multiple classes of stock should be based on the total board size, as is the case at other companies. Thus, we are adopting this requirement as proposed. We believe the changes we are adopting with regard to calculating ownership and voting power, as discussed above, should address concerns about the possibility that the rule could be used to change control of the company or to affect the rights of shareholders as established by a particular company's capital structure.[433] Where shareholders have the right to elect a subset of the full board, however, we believe it is appropriate to provide that the maximum number of nominees a company may be required to include under Rule 14a–11 may not exceed the number of director seats the class of shares held by the nominating shareholder is entitled to elect.[434] We believe the right to nominate is an integral part of the right to elect, therefore we are linking the ability under Rule 14a–11 for a shareholder to nominate directors to instances in which the shareholder can elect directors. Limiting the number of nominations to the number of director seats the class of shares held by the nominating shareholder is entitled to elect presumably would allow to be fully expressed the views of the shareholder about who should sit in the director seats in respect of which the shareholder has nomination rights.

The shareholder nomination provisions in Rule 14a–11 are available only for holders of classes of securities that are subject to the Exchange Act proxy rules, provided that a company is otherwise subject to the rule. If a company subject to Rule 14a–11 has multiple classes of eligible securities, however, the maximum number of candidates a shareholder can nominate will be determined based on the number of director seats the class of shares held by the nominating shareholder is entitled to elect.[435]

[432] *See* letter from Seven Law Firms.

[433] *See* Section II.B.4.b. above.

[434] *See* new Rule 14a–11(d)(3).

[435] *See* new Rule 14a–11(d)(3).

c. Inclusion of Shareholder Nominees in Company Proxy Materials as Company Nominees

As discussed in Section II.B.4.e. above, commenters expressed concern that the rule, as proposed, might discourage constructive dialogue between shareholders and companies.[436] These commenters noted that companies would be discouraged from discussing potential board candidates with shareholders planning to use Rule 14a–11 and including them as management nominees because such nominees would not reduce the maximum number of shareholder nominees that the company would be required to include under Rule 14a–11. Subject to certain safeguards, we believe our rule should not discourage dialogue between nominating shareholders and companies and agree that the rule, as proposed, could have the effect of discouraging constructive dialogue if shareholder nominees nominated by a company as a result of that dialogue do not count toward the maximum number of shareholder nominees a company is required to include in its proxy materials. Consequently, under our final rule, where a company negotiates with the nominating shareholder or group that has filed a Schedule 14N before beginning any discussion with the company about the nomination and that otherwise would be eligible to have its nominees included in the company's proxy materials, and the company agrees to include the nominating shareholder's or group's nominees on the company's proxy card as company nominees, those nominees will count toward the 25% maximum set forth in the rule.[437] As noted, this would only apply where the nominating shareholder or group has filed its notice on Schedule 14N before beginning discussions with the company. Although this limitation may reduce somewhat the utility of this provision, we believe limiting the treatment to situations in which the nominating shareholder or group has filed a Schedule 14N will reduce the possibility that this exception is used by a company to avoid having to include shareholder director nominees submitted by shareholders or groups of shareholders that are not affiliated with or not working on behalf of the company.

In the Proposing Release, we requested comment as to whether it would be appropriate for the rule to take into account incumbent directors who were nominated pursuant to Rule 14a–11 for purposes of determining the maximum number of shareholder nominees, or whether there should be a different means to account for such incumbent directors. One commenter argued that incumbent Rule 14a–11 directors should not count towards the 25% limit.[438] It reasoned that, once elected, the Rule 14a–11 director represents all shareholders and that future use of

Rule 14a–11 by other shareholders should not be restricted. A number of commenters stated that incumbent Rule 14a–11 directors should count towards the maximum number of shareholder nominees allowed under the rule,[439] with some suggesting that this should be the case in limited circumstances, such as when a Rule 14a–11 director is re-nominated by the board or as long as the director continues on the board.[440] Commenters expressed concerns that the method of calculating the maximum number of directors subject to Rule 14a–11 nominations—which as proposed would not include directors previously elected following a Rule 14a–11 nomination unless they are nominated again by a shareholder using Rule 14a–11—would not encourage boards to integrate these directors.[441] Some commenters asserted that failing to count such a director toward the 25% limit would cause boards to be disinclined to include these directors as company nominees in future elections.[442] They viewed this as counterproductive to efficient board integration and functioning.

While we appreciate commenters' views, we are not persuaded that it is appropriate to provide an exception to the general method of calculating the maximum number of Rule 14a–11 nominees in the case of a shareholder-nominated incumbent director that is re-nominated by the company. As noted

[436] *See* letters from BRT; Seven Law Firms; Society of Corporate Secretaries.

[437] *See* new Rule 14a–11(d)(4). In this regard, we note that we would view such an agreement as a termination of a Rule 14a–11 nomination. Thus, the nominating shareholder or group would be required to file an amendment to Schedule 14N to disclose the termination of the nomination as a result of the agreement with the company regarding the inclusion of the nominee or nominees. *See* Item 7 of Schedule 14N and Rule 14n–2.

[438] *See* letter from Florida State Board of Administration.

[439] *See* letters from ABA; Aetna; American Express; BorgWarner; BRT; Chevron; Cleary; Davis Polk; DTE Energy; Dupont; Edison Electric Institute; Eli Lilly; ExxonMobil; FPL Group; Home Depot; ICI; JPMorgan Chase; Metlife; P. Neuhauser; Pfizer; Protective; RiskMetrics; S&C; Seven Law Firms; Sidley Austin; SIFMA; Society of Corporate Secretaries; Verizon; Vinson & Elkins; Wells Fargo.

[440] *See* letters from P. Neuhauser; RiskMetrics.

[441] *See* letters from ABA; BRT; Seven Law Firms.

[442] *See* letters from Davis Polk; Society of Corporate Secretaries.

previously, by adopting Rule 14a–11 we are seeking to facilitate shareholders' ability under State law to nominate and elect directors, not necessarily to enhance shareholder representation on the board. We do not believe that a Commission rule is needed to facilitate the working relationship between the shareholder-nominated director and the company-nominated directors, or to provide an incentive for the board to integrate the shareholder-nominated director into its activities. To the extent that a shareholder nominee is elected to the board, the company-nominated directors and the shareholder-nominated director will have a fiduciary duty to act in the best interests of the company and its shareholders.

7. Priority of Nominations Received by a Company

a. Priority When Multiple Shareholders Submit Nominees

Proposed Rule 14a–11(d)(3) addressed situations where more than one shareholder or group would be eligible to have its nominees included in the company's form of proxy and disclosed in its proxy statement pursuant to the proposed rule. In those situations, the company would have been required to include in its proxy materials the nominee or nominees of the first nominating shareholder or group from which it receives timely notice of intent to nominate a director pursuant to the rule, up to and including the total number of shareholder nominees required to be included by the company. We proposed this standard because we believed that there would be a benefit to enabling companies to begin preparing their proxy materials and coordinating with the nominating shareholder or group immediately upon receiving an eligible nomination rather than requiring companies to wait to see whether another nomination from a larger nominating shareholder or group was submitted before the notice deadline.

Commenters were almost uniformly opposed to the proposed "first-in" standard. A large number of commenters expressed general opposition to the proposed first-in approach, with many presenting their own recommendations.[443] Commenters expressed concern that the first-in approach would rush shareholders to submit nominations.[444] One commenter worried that even if the Commission included a window period for submission of shareholder nominees in the final rule, the first-in approach would encourage a race to file, discourage constructive dialogue between shareholders and management, and encourage a "gamesmanship" attitude among possible nominating shareholders or groups.[445] Another commenter argued that the first-in approach would undercut the Commission's stated objectives in proposing Rule 14a–11.[446] One commenter worried that the "first in" approach would favor large shareholders, who have greater resources to prepare their submission materials, over small shareholders who must aggregate to reach the ownership threshold and need to pool resources to prepare their submission materials.[447]

Some commenters expressed general concern about how companies should handle multiple nominations received on the same date.[448] Two commenters worried that it would be difficult for companies to determine which nomination was received first because nominations could be submitted by various methods (*e.g.,* fax transmission, mail, hand delivery) or arrive on the same date.[449] Another commenter feared that a company that receives several nominations on the same date could choose the nomination submitted by shareholders friendly to management.[450]

Many commenters that opposed the first-in approach suggested alternatives. Of these, the majority preferred to give priority to the largest shareholder or group that submits a nomination.[451] Noting that the 2003 Proposal included this standard and that it received the most support, one commenter argued that what matters most is not who is the fastest to nominate but which shareholder or group has the "greatest stake in the director election and, ultimately, the long-term performance of the company" (with the added benefits of avoiding "gamesmanship" and "administrative challenges").[452] Further, commenters believed that an approach based on the largest holdings would provide sufficient certainty because the number of shares of the largest shareholder or group could be determined from the Schedule 14N filing.[453]

Commenters presented a wide range of views or recommendations for determining priority. Some commenters suggested that when the largest shareholder or group nominates fewer than the maximum number of nominees allowed under Rule 14a–11, then the second largest shareholder or group should have the right to have its nominees included (up to the maximum

[443] *See* letters from 13D Monitor; 26 Corporate Secretaries; ABA; ACSI; Advance Auto Parts; Aetna; AFL–CIO; AFSCME; Allstate; Alston & Bird; Amalgamated Bank; American Bankers Association; Anadarko; Applied Materials; Avis Budget; Blue Collar Investment Advisors ("BCIA"); Best Buy; Boeing; BorgWarner; Brink's; BRT; Burlington Northern; CalPERS; CalSTRS; Caterpillar; CFA Institute; Chevron; CIGNA; CII; Cleary; Con Edison; COPERA; Corporate Library; CSX; Cummins; Darden Restaurants; Deere; Devon; Dewey; T. DiNapoli; Dominican Sisters of Hope; DuPont; Eaton; Emerson Electric; ExxonMobil; FedEx; Financial Services Roundtable; First Affirmative; Florida State Board of Administration; FMC Corp.; FPL Group; Frontier; General Mills; A. Goolsby; Honeywell; IAM; IBM; ICI; Intel; JPMorgan Chase; Kirkland & Ellis; C. Levin; Leggett; LIUNA; LUCRF; Marco Consulting; J. McCoy; McDonald's; Joel M. McTague ("J. McTague"); MeadWestvaco; Mercy Investment Program; Metlife; Motorola; D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Norfolk Southern; Norges Bank; Office Depot; OPERS; PACCAR Inc. ("PACCAR"); Pershing Square; PepsiCo; Pfizer; S. Quinlivan; RacetotheBottom; RiskMetrics; Ryder; Sara Lee; Social Investment Forum; Seven Law Firms; Shearman & Sterling; Sheet Metal Workers; Sidley Austin; SIFMA; Sisters of Mercy; Society of Corporate Secretaries; Sodali; Southern Company; SWIB; Teamsters; Tenet; TI; TIAA–CREF; Tri-State Coalition; Trillium; T. Rowe Price; Textron; tw telecom; Universities Superannuation; Ursuline Sisters of Tildonk; U.S. Bancorp; USPE; ValueAct Capital; Verizon; Wachtell; Walden; Wells Fargo; Weyerhaeuser; Whirlpool; WSIB; Xerox.

[444] *See* letters from ABA; BRT; Con Edison; First Affirmative; C. Levin; Verizon.

[445] Letter from ABA.

[446] *See* letter from BRT.

[447] *See* letter from Con Edison.

[448] *See* letters from IBM; S. Quinlivan; USPE; Verizon; Xerox.

[449] *See* letters from IBM; Verizon.

[450] *See* letter from USPE.

[451] *See* letters from 13D Monitor; 26 Corporate Secretaries; ABA (recommending this approach as one of several recommendations); ACSI; Advance Auto Parts; Aetna; AFL–CIO; AFSCME; Allstate; Amalgamated Bank; Anadarko; Applied Materials; Avis Budget; BCIA; Best Buy; Boeing; BorgWarner; Burlington Northern; CalPERS; CalSTRS; Caterpillar; CFA Institute; Chevron; CIGNA (recommending this approach as an alternative to another recommendation that the shareholder that held the shares the longest be given priority); CII; Cleary; Con Edison; COPERA; Corporate Library; Cummins; Darden Restaurants; Deere; Devon; Dominican Sisters of Hope; DuPont; Eaton; Emerson Electric; ExxonMobil; FedEx; Financial Services Roundtable; First Affirmative; Florida State Board of Administration (supporting this approach as an alternative to the first-in approach); FMC Corp.; Frontier; A. Goolsby; IAM; ICI; JPMorgan Chase; Kirkland & Ellis; C. Levin; Leggett; LIUNA; LUCRF; Marco Consulting; J. McCoy; McDonald's; J. McTague; Mercy Investment Program; Metlife; D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Norfolk Southern; Office Depot; PACCAR; Pershing Square; PepsiCo; Pfizer; RiskMetrics; Ryder; Sara Lee; Shamrock; Social Investment Forum; Sodali; Seven Law Firms; Shearman & Sterling; Sheet Metal Workers; Sidley Austin; SIFMA; Sisters of Mercy; Society of Corporate Secretaries; Southern Company; SWIB; Teamsters; Tenet; TI; TIAA–CREF; Tri-State Coalition; Trillium; T. Rowe Price; Textron; tw telecom; Universities Superannuation; Ursuline Sisters of Tildonk; U.S. Bancorp; Verizon; Wachtell; Walden; Wells Fargo; Whirlpool; WSIB.

[452] Letter from CII.

[453] *See* letters from CII; Society of Corporate Secretaries.

number allowable), and so on.[454] Commenters also suggested that a nominating shareholder or group be required to "rank" their nominees in the order of preference to facilitate any necessary "cutbacks."[455]

A few commenters stated that in the case of competing nominations submitted by shareholders with equally-sized holdings, the shareholder that held the shares for the longest period of time should be allowed to include its nominees.[456] Two commenters recommended that when determining the order of priority, an individual shareholder should have priority over a nominating group.[457]

One commenter recommended that nominees be ordered in accordance with the largest qualifying shareholdings, but subject to the qualification that the Commission impose a cap on either the permitted number of members in a nominating group or on the aggregate holdings of a nominating group and limit each nominating shareholder or group to only one Rule 14a–11 nomination at an annual meeting.[458] If shareholders are not limited to one nomination, then companies should be allowed to order the nominees based on the largest holdings. Alternatively, the commenter recommended awarding Rule 14a–11 nomination slots first to the nominating shareholder or group with the largest holdings, next to the nominating shareholder or group with the longest holding period, then to the next largest holder, and so on.

One commenter stated that priority should be given to the largest nominating shareholder or group based on the number of voting securities over which such shareholder or group has voting control (as opposed to beneficial ownership).[459] Another commenter stated that in the case of nominating groups, the determination of the largest holder should be based on the largest shareholder within the nominating group.[460]

Other commenters recommended that the shareholder or group holding a company's shares for the longest period be permitted to submit nominees under Rule 14a–11.[461] These commenters argued that this approach would be more consistent with the Commission's stated goal of making Rule 14a–11 available to shareholders with a long-term interest.

Some commenters preferred to give priority based on a combination of factors, such as length of ownership and size of ownership stake.[462] Several commenters preferred to let companies (*e.g.,* the nominating committee) choose either the shareholder nominees or the method for deciding which shareholder nominees are included in the proxy materials when there are multiple nominations.[463] Under this approach, companies would disclose the method in the previous year's proxy statement or in a Form 8–K.

A small number of commenters supported the proposed first-in approach.[464] While understanding the concern about "a rush to the courthouse," one commenter indicated that this concern may not necessarily be justified because the " 'first' proponent may have sufficiently prepared beforehand for the nomination process."[465] Further, the commenter believed that "[a]llowing the largest shareholder group to essentially trump the first smaller, but no less committed or relevant, shareholder submission is not good governance." Another commenter believed that the first-in approach would best give effect to the proposed rule.[466] If the standard was based on the amount of securities held instead, the commenter would be concerned that long-term owners of companies with index-tracking portfolios might be frozen out of the process. One commenter believed the first-in approach would provide certainty, but companies should be required to set the dates in calendar form and announce the dates in Form 8–K filings at least 30 days prior to the date of effectiveness.[467]

After considering the comments, we have revised the manner in which the rule addresses multiple qualifying nominations. Rather than a first-in standard, as was proposed, a company will be required to include in its proxy materials the nominee or nominees of the nominating shareholder or group with the highest qualifying voting power percentage.[468] In this regard, in light of the comments received, we are concerned that a first-in standard would result in shareholders rushing to submit nominations, discourage constructive dialogue between shareholders and management, and encourage gamesmanship among possible nominating shareholders or groups. When there are multiple qualifying nominations, giving priority to the shareholder or group with the highest voting power percentage is consistent with our overall approach to facilitate director nominations by shareholders with significant commitments to companies. Finally, we seek to avoid the confusion that could result if multiple nominating shareholders or groups submitted their notices on the same day.

We believe that the standard we are adopting, under which the nominating shareholder or group with the highest qualifying voting power percentage will have its nominees included in the company's proxy materials, up to the maximum of 25% of the board, addresses these concerns. We are persuaded that this standard is more consistent with the other limitations of Rule 14a–11 that seek to balance facilitating shareholder rights to nominate directors with practical considerations.

As adopted, Rule 14a–11 addresses situations where more than one shareholder or group would be eligible to have its nominees included on the company's proxy card and disclosed in its proxy statement pursuant to the rule. Given that we are adopting a highest qualifying voting power percentage standard rather than a first-in standard, the company will determine which shareholders' nominees it must include in its proxy statement and on its proxy card by considering which eligible nominating shareholder or group has the highest qualifying voting power percentage, as opposed to which eligible nominating shareholder or group submitted a timely notice first. A company will be required to include in its proxy statement and on its proxy card the nominee or nominees of the nominating shareholder or group with

[454] *See* letters from Amalgamated Bank; CII; COPERA; P. Neuhauser; Protective; T. Rowe Price.

[455] *See* letters from Amalgamated Bank; CFA Institute; CII; COPERA; P. Neuhauser; Protective; T. Rowe Price.

[456] *See* letters from Allstate; Boeing; Pfizer.

[457] *See* letters from Honeywell; Sara Lee.

[458] *See* letter from ABA.

[459] *See* letter from Kirkland & Ellis.

[460] *See* letter from Seven Law Firms.

[461] *See* letters from BRT; CIGNA (recommending this approach as an alternative to its recommendation that the largest shareholder be given priority); Cummins; Darden Restaurants; FPL Group; General Mills; IBM (recommending this approach as an alternative to its recommendation that the largest shareholder be given priority); Motorola; TIAA–CREF; Xerox.

[462] *See* letters from L. Dallas; T. DiNapoli; Nathan Cummings Foundation; OPERS; Southern Company.

[463] *See* letters from Alston & Bird; CSX; Textron.

[464] *See* letters from Calvert; Florida State Board of Administration; Hermes Equity Ownership Services Ltd. ("Hermes"); Protective.

[465] Letter from Calvert.

[466] See letter from Hermes.

[467] *See* letter from Florida State Board of Administration.

[468] *See* Rule 14a–11(e). Rule 14a–11(e)(4) prescribes a limited variation on this principle where the company has more than one class of voting shares subject to the proxy rules and eligible nominating shareholders or shareholder groups from more than one of those classes submit nominations that exceed the 25% maximum. In this circumstance, priority of nominations will be determined by reference to the relative voting power of the classes in question.

the highest qualifying voting power percentage in the company's securities as of the date of filing the Schedule 14N, up to and including the total number of shareholder nominees required to be included by the company.[469] Where the nominating shareholder or group with highest qualifying voting power percentage that is otherwise eligible to use the rule and that filed a timely notice does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the nominating shareholder or group with the next highest qualifying voting power percentage that is otherwise eligible to use the rule and that filed a timely notice of intent to nominate a director pursuant to the rule would be included in the company's proxy materials, up to and including the total number of shareholder nominees required to be included by the company. This process would continue until the company included the maximum number of nominees it is required to include in its proxy statement and on its proxy card or the company exhausts the list of eligible nominees. If the number of eligible nominees exceeds the maximum number required under Rule 14a–11 and the shareholder or group with the next highest qualifying voting power percentage submitted more nominees than there are remaining available director slots, the nominating shareholder would have the option to specify which of its nominees are to be included in the company's proxy materials.[470]

b. Priority When a Nominating Shareholder or Group or a Nominee Withdraws or Is Disqualified

Under the Proposal, we did not address what would be expected of a company if a nominating shareholder or group or nominee withdraws or is disqualified after the company has provided notice to the nominating shareholder or group of its intent to include the nominee in the company's proxy materials. One commenter asked for guidance on how to handle such situations.[471] Another commenter stated that it opposed allowing a nominating shareholder group to change its composition to correct an identified deficiency, such as a failure of the group to meet the requisite ownership threshold.[472] Two commenters believed that if any member of a nominating shareholder group becomes ineligible due to a failure to own the requisite number of shares, then the entire group and its nominee also should be ineligible to use Rule 14a–11.[473] On the other hand, one commenter recommended that a nominating shareholder group should be allowed to change its composition to correct an identified deficiency, such as the failure of the group to meet the requisite threshold.[474] The commenter also addressed a situation in which a nominating shareholder group qualifies to use Rule 14a–11, provides the necessary notice, submits its nominees, but then becomes disqualified before the meeting at which its nominees would have been put to a shareholder vote. The commenter stated that while it "generally believe[s] that the nominating shareowner should have a short window within which to add a shareowner who would meet all eligibility requirements, a lapse that cannot be cured in that fashion should be remedied by going to the 'second' candidate(s)."

Consistent with the Proposal, under our final rules, neither the composition of the nominating shareholder group nor the shareholder nominee may be changed as a means to correct a deficiency identified in the company's notice to the nominating shareholder or nominating shareholder group—those matters must remain as they were described in the notice to the company.[475] We believe that to allow otherwise could serve to undermine the purpose of the notice deadline provided for in the rule. Thus, a nominating shareholder or group should be sure that it and its nominees meet the requirements of the rule—including the ownership and holding period requirements—before it files its Schedule 14N, as a nominating shareholder or group will not be permitted to add or substitute another shareholder or nominee in order to satisfy the requirements.[476]

In the Proposing Release, we solicited comment on how we should address situations where a nomination is submitted and the nominating shareholder subsequently becomes ineligible under the rule. We also sought comment as to the circumstances under which a second shareholder or group should be able to have its nominees included in a company's proxy materials. Some commenters stated that if a nominating shareholder or group does not remain eligible, the company should be allowed to withdraw the nominating shareholder's or group's candidate from its proxy materials.[477] Some commenters believed that a company should not be required to include a substitute shareholder nominee if the original shareholder nominee is excluded by a company after receiving a no-action letter from the Commission staff regarding the nomination, is withdrawn by the nominating shareholder or group, or otherwise becomes ineligible.[478] These commenters generally argued that a company would not have enough time to seek the exclusion of such a substitute nominee. Still other commenters argued that a nominating shareholder or group should be allowed to submit a new nominee if its original nominee is determined to be ineligible,[479] especially if the company sought and obtained a no-action letter from the staff concerning the company's determination to exclude the nominee.[480] One commenter worried that a prohibition on substitute shareholder nominees would encourage an unduly adversarial approach by both sides.[481] Another commenter recommended that if the first nominating shareholder or group becomes ineligible, then the nominating shareholder or group with the second-largest holdings should be allowed to submit their own nominees.[482]

Our final rule provides that if a nominating shareholder or group withdraws or is disqualified (*e.g.,* because the nominating shareholder or a member of the group[483] failed to

[469] *See* new Rule 14a–11(e) and proposed Rule 14a–11(d)(3).

[470] *See* Instruction 2 to new Rule 14a–11(e).

[471] *See* letter from Best Buy.

[472] *See* letter from ABA.

[473] *See* letters from CFA Institute; Verizon.

[474] *See* letter from CII.

[475] *See* Instruction 2 to Rule 14a–11(g) and proposed Rule 14a–11(f)(6).

[476] In this regard, we note that if a member of a nominating shareholder group withdraws, the nominating shareholder group and its nominee or nominees would continue to be eligible so long as the group continues to meet the requirements of the rule. If the withdrawal of a member of the nominating shareholder group would result in the group failing to meet the ownership threshold, a company would no longer be required to include any nominees submitted by the nominating shareholder group. As another example, if after a nominating shareholder or group submits one nominee for inclusion in a company's proxy materials and the nominee subsequently withdraws or is disqualified, a company will not be required to include a substitute nominee from that nominating shareholder or group.

[477] *See* letters from BorgWarner; Society of Corporate Secretaries.

[478] *See* letters from 26 Corporate Secretaries; ABA; Allstate; American Express; BorgWarner; DTE Energy; Dupont; FPL Group; Honeywell; IBM; Pfizer; RiskMetrics; Seven Law Firms; Society of Corporate Secretaries; Xerox.

[479] *See* letters from AFL–CIO; P. Neuhauser; USPE.

[480] *See* letter from P. Neuhauser.

[481] *See* letter from Universities Superannuation.

[482] *See* letter from CFA Institute.

[483] If one member of a group becomes ineligible to use the rule but the group continues to qualify to use the rule without that member, the group would remain eligible overall.

continue to hold the qualifying amount of securities) after the company provides notice to the nominating shareholder or group of the company's intent to include the nominee or nominees in its proxy materials, the company will be required to include in its proxy statement and form of proxy the nominee or nominees of the nominating shareholder or group with the next highest voting power percentage that is otherwise eligible to use the rule and that filed a timely notice in accordance with the rule, if any.[484] This process would continue until the company included the maximum number of nominees it is required to include in its proxy materials or the company exhausts the list of eligible nominees.

If a nominee withdraws or is disqualified after the company provides notice to the nominating shareholder or group of the company's intent to include the nominee in its proxy materials, the company will be required to include in its proxy materials any other eligible nominee submitted by that nominating shareholder or group.[485] If that nominating shareholder or group did not include any other nominees in its notice filed on Schedule 14N, then the company will be required to include the nominee or nominees of the nominating shareholder or group with the next highest voting power percentage that is otherwise eligible to use the rule and that filed a timely notice in accordance with the rule, if any, until the maximum number of nominees is included in the company's proxy materials or the list of eligible nominees is exhausted.

We believe that these requirements are appropriate in order to give effect to the intent of our rule—to facilitate shareholders' ability to nominate and elect directors. If the nominating shareholder or group with the highest voting power percentage used all available Rule 14a–11 nominations in a company's proxy materials and the nominating shareholder or group with the second highest voting power percentage had its nominees excluded even after one or more nominees from the nominating shareholder or group with the highest voting power percentage withdrew or was disqualified, we believe the purpose of our rule would be undermined. However, in order to address practical considerations, Rule 14a–11(e)(2) provides that once a company has commenced printing its proxy materials it will not be required to include a substitute nominee or nominees. We believe that at that point in the process it would be too difficult and costly for a company to change course to include a new nominee or nominees. If a nominating shareholder or group or nominee withdraws or is disqualified after the company has commenced printing its proxy materials, the company may determine whether it wishes to print (and furnish) additional materials and a proxy card, delete the disqualified or withdrawn nominee, or instead provide disclosure through additional soliciting materials informing shareholders about the change.[486]

8. Notice on Schedule 14N

a. Proposed Notice Requirements

As proposed, in order to submit a nominee for inclusion in the company's proxy statement and form of proxy, Rule 14a–11 would require that the nominating shareholder or group provide a notice on Schedule 14N to the company of its intent to require that the company include that shareholder's or group's nominee or nominees in the company's proxy materials.[487] The shareholder notice on Schedule 14N also would be required to be filed with the Commission on the date it is first sent to the company.

We proposed to require the notice to be provided to the company and filed with the Commission by the date specified in the company's advance notice bylaw provision, or where no such provision is in place, no later than 120 calendar days before the date the company mailed its proxy materials for the prior year's annual meeting. If the company did not hold an annual meeting during the prior year, or if the date of the meeting changes by more than 30 calendar days from the prior year, the nominating shareholder must provide notice a reasonable time before the company mails its proxy materials. The company would be required to disclose the date by which the shareholder must submit the required notice in a Form 8–K filed pursuant to proposed Item 5.07 within four business days after the company determines the anticipated meeting date.[488]

As proposed, the notice on Schedule 14N would include disclosures relating to the nominating shareholder's or group's interest in the company, length of ownership, and eligibility to use Rule 14a–11. The notice on Schedule 14N also would include disclosure required by proposed Rule 14a–18 about the nominating shareholder or group and the nominee for director, as well as disclosure regarding the nature and extent of relationships between the nominating shareholder or group and nominee or nominees and the company. The disclosure provided by the nominating shareholder or group would be similar to the disclosure currently required in a contested election and would be included by the company in its proxy materials.

In addition, as proposed, the notice on Schedule 14N also would include the following representations by the nominating shareholder or group:

- The nominee's candidacy or, if elected, board membership, would not violate controlling State or Federal law, or rules of a national securities exchange or national securities association other than rules relating to director independence;[489]
- The nominating shareholder or group satisfies the eligibility conditions in Rule 14a–11;[490]
- In the case of a company other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a company that is an investment company, the nominee is not an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940;[491] and
- Neither the nominee nor the nominating shareholder (or any member of a nominating shareholder group) has an agreement with the company regarding the nomination of the nominee.[492]

Proposed Item 8 of Schedule 14N would have required a certification from the nominating shareholder or each member of the nominating shareholder

[484] *See* new Rule 14a–11(e)(2).

[485] *See* new Rule 14a–11(e)(3).

[486] We note that pursuant to Exchange Act Rule 14a–4(c)(5) a completed proxy card containing a disqualified or withdrawn nominee or nominees could, under certain circumstances, confer discretionary authority to vote on the election of a substitute director or directors.

[487] *See* proposed Rule 14a–11(c), Rule 14a–18 and Rule 14n–1.

[488] *See* proposed Instruction 2 to Rule 14a–11(a) and proposed Rule 14a–18.

[489] *See* proposed Rule 14a–18(a). Proposed Rule 14a–11 also included this provision as a direct requirement. Thus, a company would not be required to include a shareholder nominee in its proxy materials if the nominee's candidacy or, if elected, board membership would violate controlling State law, Federal law, or rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors).

[490] *See* proposed Rule 14a–18(b) (which referred to the requirements in proposed Rule 14a–11(b)).

[491] *See* proposed Rule 14a–18(c).

[492] *See* proposed Rule 14a–18(d).

group that the securities used for purposes of meeting the ownership threshold in Rule 14a–11 are not held for the purpose, or with the effect, of changing control of the company or to gain more than a limited number of seats on the board.

b. Comments on the Proposed Notice Requirements

Commenters generally supported the proposed content requirements of Schedule 14N on the general principle that the Commission should impose disclosure requirements on nominating shareholders and their nominees.[493] Two of these commenters also stated that additional disclosures or representations are not needed.[494] In addition, some commenters recommended that all nominees be subject to any new disclosure rules adopted by the Commission as part of its proxy disclosure and solicitation enhancements rulemaking.[495] Four commenters asked that companies be allowed to require additional disclosure from a nominating shareholder or group through, for example, the advance notice bylaws, as long as such requirements are consistent with State law.[496] One commenter argued that the nominating shareholder, group, or nominee should provide any disclosure required under a company's governing documents as long as such disclosure is required of all nominees.[497] One commenter asked that all content requirements be set forth in Schedule 14N itself, as it found the structure of the Schedule and the references to disclosure requirements to be unnecessarily complicated.[498] The commenter recommended that we include a requirement that the nominating shareholder or group disclose information about the nature and extent of the relationships between the nominating shareholder, group and the nominee and the company or its affiliates.[499] Another commenter recommended the rules include a representation that the nominee is not controlled by the nominating shareholder or group.[500]

We also sought comment on the proposed representations to be provided by the nominating shareholder or group in Schedule 14N. One commenter stated that the proposed representations are appropriate and no additional representations are needed.[501] This commenter opposed a requirement for a shareholder nominee to make any representation either in addition to, or instead of, those made by the nominating shareholder or group. One commenter stated simply that none of the proposed representations in Schedule 14N should be eliminated.[502] It also observed generally that the shareholder nominee should be required to make the representations (*e.g.,* regarding independence) because he or she would know the facts relating to the representations and therefore should accept responsibility. One commenter opposed the requirement for a representation that a shareholder nomination (or election of the shareholder nominee) would not violate State law, Federal law, or listing standards.[503] The commenter also believed it would be inappropriate to require a representation that the nomination complies with any independence requirement under Federal law, State law, or listing standards.

c. Adopted Notice Requirements

We are adopting the notice requirements substantially as proposed, with differences noted below. In addition, we agree that the rules as proposed could be streamlined to reduce complexity. As adopted, Schedule 14N will contain the disclosure items that were included in the Schedule as proposed, as well as the disclosures proposed in Rule 14a–11, Rule 14a–18 and Rule 14a–19. We believe that the disclosure requirements we are adopting will provide transparency and facilitate shareholders' ability to make an informed voting decision on a shareholder director nominee or nominees without being unnecessarily burdensome on nominating shareholders or groups.

i. Disclosure

Schedule 14N will require a nominating shareholder or group to provide the following information about the nominating shareholder or group and the nominee: [504]

- The name and address of the nominating shareholder or each member of the nominating shareholder group;
- Information regarding the amount and percentage of securities held and entitled to vote on the election of directors at the meeting and the voting power derived from securities that have been loaned or sold in a short sale that remains open, as specified in Instruction 3 to Rule 14a–11(b)(1); [505]
- A written statement from the registered holder of the shares held by the nominating shareholder or each member of the nominating shareholder group, or the brokers or banks through which such shares are held, verifying that, within seven calendar days prior to submitting the notice on Schedule 14N to the company, the shareholder continuously held the qualifying amount of securities for at least three years; [506]
- A written statement of the nominating shareholder's or group's intent to continue to hold the qualifying amount of securities through the shareholder meeting at which directors are elected. Additionally, the nominating shareholder or group would provide a written statement regarding the nominating shareholder's or group's intent with respect to continued ownership after the election; [507]
- A statement that the nominee consents to be named in the company's proxy statement and form of proxy and, if elected, to serve on the board of directors;[508]
- Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b), and (c) and, for investment companies, Item 22(b) of Schedule 14A, as applicable; [509]
- Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure

[493] *See* letters from ABA; Alston & Bird; Americans for Financial Reform; CalSTRS; CFA Institute; CII; Corporate Library; Dominican Sisters of Hope; Florida State Board of Administration; GovernanceMetrics; ICI; Mercy Investment Program; Protective; RiskMetrics; Sisters of Mercy; Tri-State Coalition; Ursuline Sisters of Tildonk; USPE; Walden.

[494] *See* letters from CII; USPE.

[495] *See* letters from ABA; Alaska Air; Robert A. Bassett ("R. Bassett"); BorgWarner; Eli Lilly; NACD; O'Melveny & Myers; Pfizer; Society of Corporate Secretaries; UnitedHealth.

[496] *See* letters from ABA; Chevron; Sidley Austin; SIFMA.

[497] *See* letter from Cleary.

[498] *See* letter from ABA.

[499] *Id.*

[500] *See* letter from IBM.

[501] *See* letter from CII.

[502] *See* letter from ABA.

[503] *See* letter from USPE.

[504] The disclosure requirements proposed in Rule 14a–18(e)–(*l*) are now contained in new Item 4(b) and new Item 5 of Schedule 14N.

[505] See Item 3 of new Schedule 14N.

[506] *See* Item 4(a) of new Schedule 14N. A nominating shareholder would not be required to provide this statement if the nominating shareholder is the registered holder of the shares or is attaching or incorporating by reference a previously filed Schedule 13D, Schedule 13G, Form 3, Form 4, and/or Form 5, or amendments to those documents to prove ownership.

[507] *See* Item 4(b) of new Schedule 14N. These requirements were proposed in Rule 14a–18(f) and Item 5(b) of Schedule 14N.

[508] *See* Item 5(a) of new Schedule 14N and proposed Rule 14a–18(e).

[509] *See* Item 5(b) of new Schedule 14N and proposed Rule 14a–18(g).

requirements of Items 4(b) and 5(b) of Schedule 14A, as applicable;[510]

- Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past ten years, as specified in Item 401(f) of Regulation S–K;[511]
- Disclosure about whether, to the best of the nominating shareholder's or group's knowledge, the nominee meets the director qualifications set forth in the company's governing documents, if any;[512]
- A statement that, to the best of the nominating shareholder's or group's knowledge, in the case of a company other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a company that is an investment company, the nominee is not an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940;[513]
- Disclosure about the nature and extent of the relationships between the nominating shareholder or group, the nominee, and/or the company or any affiliate of the company,[514] such as:
- Any direct or indirect material interest in any contract or agreement between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);
- Any material pending or threatened litigation in which the nominating shareholder or any member of the nominating shareholder group and/or the nominee is a party or a material participant, and that involves the company, any of its officers or directors, or any affiliate of the company; and
- Any other material relationship between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the company or any affiliate of the company not otherwise disclosed;[515]
- Disclosure of any Web site address on which the nominating shareholder or group may publish soliciting materials;[516] and
- If desired to be included in the company's proxy statement, a statement in support of the shareholder nominee or nominees, which may not exceed 500 words per nominee.[517]

The disclosure provided by the nominating shareholder or group in Item 5 of Schedule 14N would be included by the company in its proxy materials,[518] along with the company's disclosure in response to Items 4(b) and 5(b) of Schedule 14A.[519]

In a traditional proxy contest, shareholders receive the disclosure required by Items 4(b), 5(b), 7, and 22, as applicable, of Schedule 14A from both the company and the insurgent when the contest relates to an annual election of directors. The new Schedule 14N disclosure requirements are somewhat more expansive in that they also include the disclosures concerning ownership amount, length of ownership, intent to continue to hold the shares through the date of the meeting and with respect to continued ownership after the meeting, and disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company. We believe that these disclosures will assist shareholders in making an informed voting decision with regard to any nominee or nominees put forth by the nominating shareholder or group using Rule 14a–11, in that the disclosures will enable shareholders to gauge the nominating shareholder's or group's interest in the company, longevity of ownership, and intent with regard to continued ownership in the company. These disclosures also will be important to the company in determining whether the nominating shareholder or group is eligible to rely on Rule 14a–11 to require the company to include a nominee or nominees in the company's proxy materials.

In some cases, the requirements in new Schedule 14N are slightly different than we proposed. We have clarified that the nominating shareholder or group will be required to include disclosure in the Schedule 14N concerning specified relationships between the nominating shareholder or group and the nominee or nominees. As discussed in Section II.B.5.d. above, we received comment suggesting that, in the absence of a limitation on relationships between the nominating shareholder or group and their nominee or nominees, we should adopt a disclosure requirement concerning relationships between the parties.[520] Similarly, and as discussed in Section II.B.5.b., we have added a requirement that a nominating shareholder or group disclose whether, to the best of their knowledge, the nominating shareholder's or group's nominee meets the company's director qualifications, if any, as set forth in the company's governing documents.[521] We added this requirement because we believe that this information will be useful to shareholders in making a voting

[510] *See* Item 5(c) of new Schedule 14N and proposed Rule 14a–18(h). If a nominating shareholder is organized in a form other than a corporation or partnership, comparable disclosure with respect to persons in similar capacities would be required.

[511] *See* Item 5(d) of new Schedule 14N and proposed Rule 14a–18(i). As proposed, the rule would have required disclosure regarding a nominating shareholder's involvement in any legal proceedings during the past five years. Recently, the Commission amended Item 401(f) of Regulation S–K to require disclosure regarding involvement in legal proceedings for the prior ten years. *See Proxy Disclosure Enhancements,* Release No. 33–9089; 34–61175 (Dec. 16, 2009) [74 FR 68334] ("Proxy Disclosure Enhancements Adopting Release"). Accordingly, as adopted, Item 5(d) will require disclosure about a nominating shareholder's involvement in legal proceedings during the past ten years.

[512] *See* Item 5(e) of new Schedule 14N.

[513] *See* Item 5(f) of new Schedule 14N.

[514] We note that this disclosure requirement would apply to relationships between the nominating shareholder or group and the nominee, as well as the relationships between the nominating shareholder or group or the nominee and the company or its affiliates. *See* Item 5(g) of new Schedule 14N.

[515] *See* Item 5(g) of new Schedule 14N and proposed Rule 14a–18(j).

[516] *See* Item 5(h) of new Schedule 14N and proposed Rule 14a–18(k).

[517] *See* Item 5(i) of new Schedule 14N and proposed Rule 14a–18(*l*). This requirement is discussed in more detail in this section. If a nominating shareholder or group submits a statement in support that exceeds 500 words per nominee, a company will be required to include the nominee or nominees, provided that the eligibility requirements are met, but may exclude the statement in support from its proxy materials pursuant to Rule 14a–11(g). In this instance, the company would provide notice to the staff and could, if desired, seek a no-action letter from the staff. *See* new Rule 14a–11(c) and Rule 14a–11(g). The 500 words would be counted in the same manner as words are counted under Rule 14a–8. Any statements that are, in effect, arguments in support of the nomination would constitute part of the supporting statement. Accordingly, any "title" or "heading" that meets this test would be counted toward the 500-word limitation. Inclusion of a Web site address in the supporting statement would not violate the 500-word limitation; rather, the Web site address would be counted as one word for purposes of the 500-word limitation.

[518] *See* Item 7(e) of Schedule 14A. Similarly, if a company receives a nominee for inclusion in its proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the company's governing documents providing for the inclusion of shareholder director nominees in the company's proxy materials, the disclosure provided by the nominating shareholder or group in response to Item 6 of Schedule 14N would be included in the company's proxy materials. *See* Item 7(f) of Schedule 14A.

[519] Instruction 3 to Rule 14a–12(c) clarifies that though inclusion of a nominee pursuant to Rule 14a–11 or solicitations by a nominating shareholder or nominating shareholder group that are made in connection with that nomination would constitute solicitations in opposition subject to Rule 14a–12(c), they would not be treated as such for purposes of Exchange Act Rule 14a–6(a).

[520] *See* letters from CII; IBM; O'Melveny & Myers; SIFMA; UnitedHealth.

[521] *See* Item 5(e) of new Schedule 14N.

decision by enabling them to consider whether shareholder nominees would meet a company's director qualifications. Shareholders will provide this disclosure "to the best of their knowledge" to address the fact that the standards will be company standards and thus could be subject to interpretation.

We also have added an instruction to Item 4 of Schedule 14N to provide a form of written statement that may be used for verifying the amount of securities held by the nominating shareholder, and that the qualifying amount of securities has been held continuously for at least three years.[522] A statement will be required from a nominating shareholder that is not the registered holder of the securities and is not proving ownership by providing previously filed Schedules 13D or 13G, or Forms 3, 4, or 5. We believe that providing a form of written statement will make it easier for nominating shareholders and the persons through which they hold their securities to comply with the requirement and reduce complexity for shareholders and companies in determining whether satisfactory proof of ownership has been provided.[523] In addition, as noted above, Item 5(d) will require disclosure about each nominating shareholder's involvement in legal proceedings during the past ten years rather than the past five years as proposed, consistent with the changes recently adopted by the Commission for board nominees in general.

In connection with our revisions to the rule concerning calculation of ownership, we also have added new Items 3(c) and (d) to the Schedule 14N to require disclosure of the voting power attributable to securities that have been loaned or sold in a short sale that is not closed out, or that have been borrowed for purposes other than a short sale, as specified in Instruction 3 to Rule 14a–11(b)(1).

Finally, as proposed, a nominating shareholder or group could provide a statement in support of a shareholder nominee or nominees, which could not exceed 500 words if the nominating shareholder or group elects to have such a statement included in the company's proxy materials. Two commenters stated that a limit of 500 words would be appropriate,[524] five commenters recommended that a nominating shareholder or group be permitted to include a supporting statement of more than 500 words,[525] and four commenters proposed a limit of either 750 or 1000 words.[526] We believe it is appropriate to allow a nominating shareholder or group to provide a statement in support of the shareholder nominee or nominees which may not exceed 500 words for each nominee, rather than 500 words for all nominees in total,[527] if the nominating shareholder or group elects to have such a statement included in the company's proxy materials. We believe that a limitation of 500 words per nominee is sufficient for a nominating shareholder or group to express their support for a nominee. In this regard, we note that shareholders and companies are familiar with the 500 word limitation, as it is the limit on the number of words that may be used to support a shareholder proposal submitted under Rule 14a–8. While we believe it is appropriate to limit the length of the supporting statement that the company is required to include, we note that if a nominating shareholder or group wishes to provide additional information, it is free to do so in supplemental materials, provided it complies with the requirements of Rule 14a–2(b)(8). If a nominating shareholder or group submits a statement in support that exceeds 500 words per nominee, a company will be required to include the nominee or nominees, provided that the eligibility requirements are met, but the company may exclude the statement in support from its proxy materials provided it provides notice to the staff of its intent to do so.[528]

As noted above, we proposed to require certain representations to be provided in the Schedule 14N, either in the form of representations or as certifications. As adopted, we are including the proposed representations and certifications as direct requirements in Rule 14a–11.[529] Consequently, we have simplified the requirements so that under the final rules a nominating shareholder or group will be required to certify, in its notice on Schedule 14N filed with the Commission, that it does not have a change in control intent or an intent to gain more than the maximum number of board seats provided for under Rule 14a–11 and that the nominating shareholder and the nominee satisfies the applicable requirements of Rule 14a–11.[530] We have retained the certification with regard to no change in control intent or intent to gain more than the maximum number of board seats provided for under Rule 14a–11, even though this is also a direct requirement in Rule 14a–11 as adopted, because we believe it is important to highlight this requirement for nominating shareholders or groups signing the certification. As was proposed, the nominating shareholder or each member of the nominating shareholder group (or authorized representative) will be required to certify when signing the Schedule 14N that, "after reasonable inquiry and to the best of my knowledge and belief," the information in the statement is "true, complete and correct." Though all disclosure in the Schedule 14N would be covered by this representation, we have specifically included it in the certifications concerning compliance with the requirements of Rule 14a–11 as well.

We have revised the rule to delete the provision that had the effect of allowing exclusion of a nominee if any required representation or certification was materially false or misleading.[531] Rather than allowing companies to exclude Rule 14a–11 nominees on that basis, we believe companies should address any concerns regarding false or misleading disclosures through their own disclosures, as in traditional proxy contests. This change will limit the bases on which a company may exclude a nominee,[532] but we emphasize that the nominating shareholder or group will

[522] *See* the Instruction to Item 4 of new Schedule 14N.

[523] In this regard, we note that providing proper proof of ownership has proved to be an area of confusion for some shareholder proponents using Rule 14a–8 who must obtain a written statement from the "record" holder of the proponent's securities. Thus, we believe that providing a form of written statement that may be used to provide proof of ownership for purposes of Rule 14a–11(b)(3) will alleviate any potential confusion that could arise in this context.

[524] *See* letters from CII; Florida State Board of Administration.

[525] *See* letters from ACSI; AFSCME; Hermes; Pax World; USPE.

[526] *See* letters from AFSCME; L. Dallas; P. Neuhauser; USPE.

[527] We are adopting this modification in Item 5(i) of Schedule 14N.

[528] *See* new Rule 14a–11(c) and Rule 14a–11(g).

[529] *See also* Section II.B.4. and Section II.B.5. above, regarding nominating shareholder and nominee eligibility.

[530] *See* new Rule 14a–11(b)(11) and Item 8(a) of new Schedule 14N. We note that in some cases, an authorized representative may file a Schedule 14N for each member of a nominating shareholder group and would provide the required disclosures and certifications. In such cases, each member of the nominating shareholder group represented by the authorized representative will be deemed to have provided the certifications.

[531] *See* proposed Rule 14a–11(a)(5).

[532] *See* Section II.B.9. below for a discussion of the requirements for a company receiving a nomination submitted pursuant to Rule 14a–11 and the process for seeking a staff no-action letter with respect to a company's decision to exclude a nominee. As noted below, assertions that a certification or disclosure provided by a nominating shareholder or group is false or misleading will not be a basis for excluding a nominee or nominees. A company seeking a no-action letter from the staff with regard to a determination to exclude a nominee or nominees would need to assert that a requirement of the rule has not been met.

have Rule 14a–9 liability for any statement included in the Schedule 14N or which it causes to be included in a company's proxy materials which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or that omits to state any material fact necessary to make the statements therein not false or misleading. In addition, as discussed in Section II.E. below, we have provided in the final rules that the company is not responsible for the information provided by the nominating shareholder or group in its Schedule 14N and included by the company in its proxy materials.

ii. Schedule 14N Filing Requirements

We proposed to require the notice to be provided to the company and filed with the Commission by the date specified in the company's advance notice bylaw provision, or where no such provision is in place, no later than 120 calendar days before the date the company mailed its proxy materials for the prior year's annual meeting. A significant number of commenters suggested using a uniform deadline for all companies, as is the case in Rule 14a–8.[533] Many of these commenters believed that the proposed timing requirement would create difficulties for companies with advance notice bylaws providing a later deadline and, thus, would preclude those companies from engaging in the proposed staff process.[534] Some commenters supported the proposed default 120 calendar day deadline,[535] while others argued that the 120 calendar day deadline would provide too little time for companies.[536] Some commenters worried that the proposed deadline would not give sufficient time for companies to resolve any eligibility issues presented by potential nominees, including resolution through the Rule 14a–11 no-action process, Commission appeals, and litigation.[537]

We are adopting a uniform deadline of no later than 120 calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting for all companies subject to the rule.[538] We believe that a uniform deadline will benefit shareholders by providing them with one standard to comply with at all companies and should address concerns of companies that an advance notice bylaw deadline would provide too little time. We also believe that a deadline of 120 calendar days will provide adequate time for companies to take the steps necessary to include or, where appropriate, to exclude a shareholder nominee for director that is submitted pursuant to Rule 14a–11.[539]

In the Proposing Release, we solicited comment as to whether a window period should be provided for the submission of the notice on Schedule 14N and the appropriate time period for the window. A number of commenters recommended a window period during which a nominating shareholder or group could submit its Rule 14a–11 nomination.[540] These commenters believed that including such a requirement would prevent a race to file among shareholders that could discourage dialogue with the board and force the board to address nominations throughout the year.[541] We agree and are adopting a window period for the submission of the notice to the company. Limiting the time period during which Rule 14a–11 nominations could be made should help reduce disruptions that might occur when a company receives shareholder nominations for director submitted pursuant to Rule 14a–11. In this regard, as noted above, commenters generally supported a 30-day window period. We believe that a window of 30 days is sufficient for the submission of the notice on Schedule 14N because it provides shareholders with an opportunity to submit a nomination, as well as the opportunity to consider any nominations that have been submitted and whether the shareholder would like to submit a nomination, either individually or as a group. Therefore, we are adopting a requirement that the notice on Schedule 14N be transmitted to the company and filed with the Commission no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting. As proposed, we are adopting a requirement 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 calendar days from the prior year, then the nominating shareholder must provide notice a reasonable time before the company mails its proxy materials.[542] In that case,

[533] *See* letters from 26 Corporate Secretaries; ABA; Alaska Air; American Express; Anadarko; Boeing; BorgWarner; BRT; Caterpillar; CIGNA; CII; Dewey; Florida State Board of Administration; FPL Group; Honeywell; JPMorgan Chase; Keating Muething; P. Neuhauser; PepsiCo; Pfizer; Praxair; Schulte Roth & Zabel; Seven Law Firms; Shearman & Sterling; Sidley Austin; Society of Corporate Securities; Thompson Hine LLP ("Thompson Hine"); TI; USPE; Wells Fargo; Xerox.

[534] *See* letters from ABA; Alaska Air; BRT; Caterpillar; CIGNA; Dewey; Honeywell; JPMorgan Chase; Keating Muething; PepsiCo; Sidley Austin; Society of Corporate Securities; Thompson Hine; TI; Wells Fargo.

[535] *See* letters from Alaska Air; Boeing; BorgWarner; CII; Dewey; JPMorgan Chase; P. Neuhauser; O'Melveny & Myers; PepsiCo; Praxair; Seven Law Firms; Shearman & Sterling; Society of Corporate Secretaries; Thompson Hine; USPE.

[536] *See* letters from 26 Corporate Secretaries; ABA; Alcoa; Allstate; American Express; Boeing; BRT; Con Edison; Davis Polk; FPL Group; JPMorgan Chase; McDonald's; P. Neuhauser; Pfizer; Protective; RiskMetrics; Seven Law Firms; TI; Xerox.

[537] *See* letters from ABA; BRT; Con Edison; TI.

[538] *See* new Rule 14a–11(b)(10). The Schedule 14N would, of course, have to contain all required disclosure as of the date of filing.

[539] We note that as with Rule 14a–8, Rule 14a–11 requires a company to provide notice to the Commission if it intends to exclude a nominee. Also as with Rule 14a–8, if a company determines that it may exclude a nominee, the rule does not require the company to seek a no-action letter from the staff with regard to the determination to exclude the nominee. In this regard, we note that the 120-day deadline in Rule 14a–8 appears to provide companies with sufficient time in which to consider complex matters. For example, companies routinely consider whether a proposal submitted pursuant to Rule 14a–8 would cause the company to violate Federal or State law and submit requests for no-action letters, along with detailed legal opinions, with respect to those proposals. We believe that a company will consider nominees submitted pursuant to Rule 14a–11 in a similar manner. Thus, we believe a deadline of 120 calendar days before the date that the company mailed its proxy materials the prior year is sufficient.

[540] *See* letters from 26 Corporate Secretaries; Aetna; Allstate; Boeing; BorgWarner; L. Dallas; DuPont; Florida State Board of Administration; FPL Group; Kirkland & Ellis; Leggett; P. Neuhauser; PepsiCo; Pfizer; S. Quinlivan; RiskMetrics; Schulte Roth & Zabel; Shearman & Sterling; SIFMA; Society of Corporate Secretaries; Southern Company; TI; USPE; Wells Fargo; Xerox.

[541] The commenters generally mentioned various 30-day ranges that we requested comment on (*e.g.,* no earlier than 180 days and no later than 150 days before the date that the company mailed its proxy materials for the prior year's annual meeting; 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; no earlier than 120 calendar days and no later than 90 calendar days prior to the anniversary of the company's last annual meeting). One commenter suggested that the Commission limit the nomination process to a 45-day window period commencing four months after the company's annual shareholder meeting. *See* letter from Aetna. Another commenter suggested that nominations be submitted within a 30-day period commencing five months after the company's annual meeting. *See* letter from SIFMA. We believe that starting the period for nominations earlier than 150 calendar days before the anniversary of the date the company mailed its proxy materials for the prior year's annual meeting would not provide the current board with sufficient opportunity to perform its duties and demonstrate its performance, nor would it provide shareholders with enough time to evaluate the board's performance, to make an informed decision with respect to a potential nomination.

[542] In addition, if a company is holding a special meeting in lieu of an annual meeting, the nominating shareholder must provide notice a reasonable time before the company mails its proxy materials.

the company will be required to disclose the date by which the shareholder must submit the required notice in a Form 8–K filed pursuant to new Item 5.08 within four business days after the company determines the anticipated meeting date.[543]

As noted, the notice on Schedule 14N must be transmitted to the company[544] and filed with the Commission on the same day.[545] Consistent with the Proposal, the Schedule 14N must be filed with the Commission on EDGAR. To file the Schedule 14N on EDGAR, a nominating shareholder or group and any nominee will need to have or obtain EDGAR filing codes and user identification numbers, which may be obtained by filing electronically a Form ID in advance of filing the Schedule 14N.[546] We encourage nominating shareholders and groups to take the steps necessary to obtain an EDGAR filing code and CIK code well in advance of the deadline for filing a notice on Schedule 14N.

The Schedule 14N will:

- Include a cover page in the form set forth in Schedule 14N with the appropriate box on the cover page marked to specify that the filing relates to a Rule 14a–11 nomination;[547]
- Be made under the subject company's Exchange Act file number (or in the case of a registered investment company, under the subject company's Investment Company Act file number); and
- Be made on the date the notice is first transmitted to the company.

We are adopting, as proposed, a requirement that the Schedule 14N be amended promptly for any material change to the disclosure and certifications provided in the originally-filed Schedule 14N.[548] In this regard, we would view withdrawal of a nominating shareholder or group (or any member of the group), or of a director nominee, and the reasons for any such withdrawal, as a material change. For example, such a withdrawal could be material because it may result in a group no longer meeting the required ownership threshold under Rule 14a–11. We also would view as material entering into an agreement between the company and the nominating shareholder or group for the company to include a nominee in the company's proxy materials as a company nominee.[549] The nominating shareholder or group also will be required, as proposed, to file a final amendment to the Schedule 14N disclosing within 10 days of the final results of the election being announced by the company the nominating shareholder's or group's intention with regard to continued ownership of its shares.[550] As discussed above, the nominating shareholder or group would be required to disclose its intent with regard to continued ownership of the company's securities in its original notice on Schedule 14N.[551] Filing an amendment to the Schedule 14N within 10 days after the announcement of the final results of the election will provide shareholders with information as to whether the outcome of the election may have altered the intent of the nominating shareholder or group and what further plans the nominating shareholder or group may have with regard to the company.

As was proposed,[552] the Schedule 14N may be signed either by each person on whose behalf the statement is filed or his or her authorized representative. We assume that in many cases group members will choose to appoint an authorized representative from among the group. If the statement is signed on behalf of a person by his authorized representative other than an executive officer or general partner of the filing person, evidence of the representative's authority to sign on behalf of such person must be filed with the statement, provided, however, that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference.

The Schedule 14N, as filed with the Commission, as well as any amendments to the Schedule 14N, will be subject to the liability provisions of Exchange Act Rule 14a–9 pursuant to new paragraph (c) to the rule.[553]

9. Requirements for a Company That Receives a Notice From a Nominating Shareholder or Group

a. Procedure if Company Plans To Include Rule 14a–11 Nominee

In the Proposing Release, we proposed a process for a company to follow once it received a nomination submitted pursuant to Rule 14a–11. Upon receipt of a shareholder's or group's notice of its intent to require the company to include in its proxy materials a shareholder nominee or nominees pursuant to Rule 14a–11, the company would determine whether it would include the nominee or whether it believed it would be desirable to, and that the company had a basis upon which it could rely to, exclude a nominee. If a company determined it would include the nominee, the company would notify in writing the nominating shareholder or group no later than 30 calendar days before the

[543] *See* new Rule 14a–11(b)(10). *See also* proposed Instruction 2 to Rule 14a–11(a) and Rule 14a–18. This would be similar to the requirement currently included in Rule 14a–5(f), which specifies that, where the date of the next annual meeting is advanced or delayed by more than 30 calendar days from the date of the annual meeting to which the proxy statement relates, the company must disclose the new meeting date in the company's earliest possible quarterly report on Form 10–Q. Although registered investment companies generally are not required to file Form 8–K, we are requiring them to file a Form 8–K disclosing the date by which the shareholder notice must be provided 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 calendar days from the prior year. For a further discussion of the Form 8–K filing requirement for registered investment companies, *see* Section II.D.1.

[544] Rule 14n–3 specifies that the Schedule 14N must be transmitted to the company at its principal executive office.

[545] *See* new Rule 14n–1. In this regard, we are adopting an amendment to Rule 13(a)(4) of Regulation S–T, as proposed, to provide that a Schedule 14N will be deemed to be filed on the same business day if it is filed on or before 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect. This will allow nominating shareholders additional time to file the notice on Schedule 14N and transmit the notice to the company.

[546] To file the Schedule 14N on EDGAR, a nominating shareholder or group and any nominee that does not already have EDGAR filing codes, and to which the Commission has not previously assigned a user identification number, which we call a "Central Index Key (CIK)" code, will need to obtain the codes by filing electronically a Form ID (17 CFR 293.63; 249.446; and 274.402) at *https://www.filermanagement.edgarfiling.sec.gov*. The applicant also will be required to submit a notarized authenticating document. If the authenticating document is prepared before the applicant makes the Form ID filing, the authenticating document may be uploaded as a Portable Document Format (PDF) attachment to the electronic filing. An applicant also may submit the authenticating document by faxing it to the Commission within two business days before or after electronically filing the Form ID. The authenticating document would need to be manually signed by the applicant over the applicant's typed signature, include the information contained in the Form ID, and confirm the authenticity of the Form ID. If the authenticating document is filed after electronically filing the Form ID, it would need to include the accession number assigned to the electronically filed Form ID as a result of its filing. *See* 17 CFR 232.10(b)(2).

[547] The Schedule 14N also would be used for disclosure concerning the inclusion of shareholder nominees in company proxy materials when made pursuant to an applicable state or foreign law provision or a company's governing documents. *See* new Rule 14a–18 and proposed Rule 14a–19, as discussed in Section II.C.5. below.

[548] *See* new Rule 14n–2(a).

[549] We note that if this occurs, the nominee would no longer be a Rule 14a–11 nominee. *See* Section II.B.6.c. for a discussion of how this would affect the calculation of the maximum number of Rule 14a–11 nominees.

[550] *See* new Rule 14n–2(b).

[551] *See* Item 4(b) of new Schedule 14N.

[552] While the proposed Schedule 14N included the instruction regarding the signing of the Schedule by an authorized representative, we did not discuss this aspect of the proposed rule text in the narrative portion of the release.

[553] For further discussion, *see* Section II.E.

company files its definitive proxy statement and form of proxy with the Commission that it will include the nominee or nominees.[554] The company would be required to provide this notice in a manner that provides evidence of timely receipt by the nominating shareholder or group.

We are adopting this requirement as proposed, with a clarification regarding the timing of the company's transmission of the notice and receipt by the nominating shareholder or group.[555] As adopted, if a company will include a shareholder nominee, a company will be required to notify the nominating shareholder or group (or their authorized representative). Rather than including the proposed requirement that the company must provide the notice in a manner that evidences timely receipt by the shareholder, we are adopting a requirement that the notification must be postmarked or transmitted electronically no later than 30 calendar days before it files its definitive proxy materials with the Commission.[556] We believe this will provide for ease of use and administration because it should be clear when the notice was transmitted. We also note that it is consistent with the transmission standard we are adopting for submitting a notice of intent with respect to a nomination pursuant to Rule 14a–11(b)(10). We note that while we are not adopting a requirement regarding the evidence of timely receipt by the nominating shareholder or group, we believe it is in a company's interest to send the notice to the nominating shareholder or group in a manner that will allow the company to demonstrate that the nominating shareholder or group received the notice, as doing so may avoid potential disputes.

b. Procedure if Company Plans To Exclude Rule 14a–11 Nominee

The Proposal also included a process for a company to follow if it determined that it could exclude a nominee submitted pursuant to Rule 14a–11.[557] As proposed, a company could determine that it is not required under Rule 14a–11 to include a nominee from a nominating shareholder or group in its proxy materials if:

- Proposed Rule 14a–11 is not applicable to the company;
- The nominating shareholder or group has not complied with the requirements of Rule 14a–11;
- The nominee does not meet the requirements of Rule 14a–11;
- Any representation required to be included in the notice to the company is false or misleading in any material respect; or
- The company has received more nominees than it is required to include by proposed Rule 14a–11 and the nominating shareholder or group is not entitled to have its nominee included under the criteria proposed in Rule 14a–11(d)(3).[558]

Under the Proposal, the nominating shareholder or group would need to be notified of the company's determination not to include the shareholder nominee in sufficient time to consider the validity of any determination to exclude the nominee and respond to such a notice.[559] In this regard, we noted the time-sensitive nature of Rule 14a–11 and the interpretive issues that may arise in applying the new rule. After the company provided such a notice to a nominating shareholder or group and afforded the nominating shareholder or group the opportunity to respond, the company would be required to provide a notice to the Commission regarding its intent not to include a shareholder nominee in its proxy materials. The company could seek a no-action letter from the staff with respect to its decision to exclude the nominee.[560]

The proposed process would have afforded a nominating shareholder or group the opportunity to remedy certain eligibility or procedural deficiencies in a nomination.[561] The various time deadlines set out in the proposed process were determined by considering the appropriate balance between companies' needs in meeting printing and filing deadlines for their shareholder meetings with shareholders' need for adequate time to satisfy the requirements of the rule.[562] Specifically, as proposed, a company determining that the nominating shareholder or group or nominee or nominees has not satisfied the eligibility requirements could exclude the shareholder nominee or nominees, subject to the following requirements:

- The company would notify in writing the nominating shareholder or group of its determination. The notice would be required to be postmarked or transmitted electronically no later than 14 calendar days after the company receives the shareholder notice of intent to nominate. The company would have to provide the notice in a manner that provides evidence of receipt by the nominating shareholder or group;[563]
- The company's notice to the nominating shareholder or group that it determined that the company may exclude a shareholder nominee or nominees would be required to include an explanation of the company's basis for determining that it may exclude the nominee or nominees;[564]
- The nominating shareholder or group would have 14 calendar days after receipt of the written notice of deficiency to respond to the notice and correct any eligibility or procedural deficiencies identified in the notice. The nominating shareholder or group would have to provide the response in a manner that provides evidence of its receipt by the company;[565]
- If, upon review of the nominating shareholder's or group's response, the company determines that the company still may exclude the shareholder nominee or nominees, after providing the requisite notice of and time for the nominating shareholder or group to remedy any eligibility or procedural deficiencies in the nomination, the company would be required to provide notice of the basis for its determination to the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The Commission staff could permit the company to make its submission later

[554] *See* proposed Rule 14a–11(f)(2).

[555] *See* new Rule 14a–11(g)(1) and Instruction 1 to Rule 14a–11(g).

[556] This 30-day deadline for this notice should provide a nominating shareholder or group with sufficient time to engage in soliciting activities with respect to its nominee or nominees, if it has not done so already, or pursue any legal remedies that may be available if the company determines it will exclude the nominating shareholder's or group's nominee or nominees.

[557] The process was modeled after the staff no-action process used in connection with shareholder proposals under Rule 14a–8.

[558] *See* proposed Rule 14a–11(a). More specifically, under the proposal a company would not be required to include a nominee where (1) applicable State law or the company's governing documents prohibit the company's shareholders from nominating a candidate for director; (2) the nominee's candidacy, or if elected, board membership, would violate controlling State law, Federal law or rules of a national securities exchange or national securities association; (3) the nominating shareholder or group does not meet the rule's eligibility requirements; (4) the nominating shareholder's or group's notice is deficient; (5) any representation in the nominating shareholder's or group's notice is false in any material respect; or (6) the nominee is not required to be included in the company's proxy materials due to the proposed limitation on the number of nominees required to be included.

[559] *See* proposed Rule 14a–11(f).

[560] *See* proposed Rule 14a–11(f)(7)–(14).

[561] *See* proposed Rule 14a–11(f)(3)–(6).

[562] We considered the timing requirements and deadlines in Rule 14a–8 when crafting the proposed requirements and deadlines for Rule 14a–11; however, due to the potential complexity of the nomination process, we determined in the proposal that it would be appropriate to provide additional time for the process.

[563] *See* proposed Rule 14a–11(f)(3).

[564] *See* proposed Rule 14a–11(f)(4).

[565] *See* proposed Rule 14a–11(f)(5).

than 80 calendar days before the company files its definitive proxy statement and form of proxy if the company demonstrates good cause for missing the deadline;[566]

- The company's notice to the Commission would be required to include:
- Identification of the nominating shareholder or each member of the nominating shareholder group, as applicable;
- The name of the nominee or nominees;
- An explanation of the company's basis for determining that it may exclude the nominee or nominees; and
- A supporting opinion of counsel when the company's basis for excluding a nominee or nominees relies on a matter of State law;[567]
- The company would be required to file its notice of intent to exclude with the Commission and simultaneously provide a copy to the nominating shareholder or each member of the nominating shareholder or group;[568]
- The nominating shareholder or group could submit a response to the company's notice to the Commission. The response would be required to be postmarked or transmitted electronically no later than 14 calendar days after the nominating shareholder's or group's receipt of the company's notice to the Commission. The nominating shareholder or group would be required to provide a copy of its response to the Commission simultaneously to the company;[569]
- If requested by the company, the Commission staff would, at its discretion, provide an informal statement of its views (commonly known as a no-action letter) to the company and the nominating shareholder or group;[570]
- The company would provide the nominating shareholder or group with notice, no later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission, of whether it will include or exclude the shareholder nominee or nominees.[571]

Some commenters supported the proposed staff review process for handling disputes regarding a company's determination to exclude a shareholder nominee.[572] Other commenters expressed concerns about the staff's expertise and ability to handle disputes in a timely manner.[573] With respect to the timing requirements in the proposed process, two commenters supported the proposed 14-day time period for the company to respond to a nominating shareholder's or group's notice.[574] A number of commenters criticized the proposed 14-day time period as too short or requested a longer time period for the company to respond.[575] Commenters explained that boards would need time to consider various issues, such as if the election of a shareholder nominee would trigger issues under the laws and regulations relevant to the company's business (*e.g.,* antitrust laws, government procurement, security clearances and export control) as well as under listing standards and State law.[576] Two commenters supported the proposed 14-day time period for a nominating shareholder or group to respond to a company's notice of deficiency.[577] Two commenters worried the 14-day time period would give too little time for a response and recommended instead a 21-day time period.[578] One commenter warned that the Commission is underestimating the number of boards that would challenge shareholder nominees and the level of intensity of these challenges.[579] This commenter suggested that such challenges and possible litigation would demand significant time and resources from the Commission's staff.[580] Commenters also argued that challenges to Rule 14a–11 nominations likely would raise highly complex issues that fall outside the scope of the staff's expertise (*e.g.,* whether a candidacy would violate State law).[581] One commenter pointed to difficulties arising from the "dueling" legal opinions situation in the Rule 14a–8 no-action process.[582] A couple commenters believed that courts, rather than the staff, would be better able to resolve disputes regarding shareholder director nominations.[583]

After considering the comments, we believe that it is in shareholders' and companies' interest to have a process available for seeking to resolve certain disputes regarding nominations submitted pursuant to Rule 14a–11.[584] Therefore, the rules we are adopting set out the process by which a company would determine whether to include a shareholder nominee and notify the nominating shareholder or group (or their authorized representative) of its determination.[585] The rules also include a process by which a company would notify a nominating shareholder or group (or their authorized representative) of a deficiency in its notice on Schedule 14N, the nominating shareholder or group would have the opportunity to respond, and the company would send a notice to the Commission if the company intends to exclude a shareholder nominee from its proxy materials. Consistent with the Proposal, a company making the determination to exclude a shareholder nominee will be required to submit a notice to the Commission regarding its determination, and it may also choose to avail itself of the process to seek a no-action letter from the staff with respect to its decision.[586] While we understand the concerns raised by commenters regarding the rule's timing requirements, we believe the requirements are appropriate in light of the need to facilitate the process between a company and its shareholders in time for an annual meeting.[587] In

[566] *See* proposed Rule 14a–11(f)(7).
[567] *See* proposed Rule 14a–11(f)(8).
[568] *See* proposed Rule 14a–11(f)(10).
[569] *See* proposed Rule 14a–11(f)(11).
[570] *See* proposed Rule 14a–11(f)(12).
[571] *See* proposed Rule 14a–11(f)(13).
[572] *See* letters from CFA Institute; CII; P. Neuhauser; Schulte Roth & Zabel; Universities Superannuation.
[573] *See* letters from ABA; Anadarko; BRT; Cleary; Davis Polk; Delaware Bar; ExxonMobil; E.J. Kullman; Protective; S. Quinlivan; Seven Law Firms; Weyerhaeuser.
[574] *See* letters from CFA Institute; CII.
[575] *See* letters from 26 Corporate Secretaries; Boeing; Con Edison; Honeywell; Kirkland & Ellis; Pfizer; Protective; UnitedHealth; USPE; Wells Fargo; Whirlpool.
[576] *See* letters from Boeing; Honeywell.
[577] *See* letters from CFA Institute; CII.
[578] *See* letters from Protective; USPE.
[579] *See* letter from BRT.
[580] *Id.*
[581] *See* letters from ABA; BRT.
[582] *See* letter from ABA.
[583] *See* letters from ABA; Delaware Bar.
[584] In this regard, we note that the staff process for aiding in the resolution of disputes related to nominations made pursuant to Rule 14a–11 is non-exclusive. As discussed throughout this release, a company can seek the staff's view with regard to its determination to exclude a nominee from its proxy materials, but it is not required to do so. A company could engage in negotiations with a nominating shareholder or group and ultimately reach a resolution outside of the staff process, or the parties could avail themselves of other alternatives, such as litigation.
[585] Other than the modifications to the standards relating to transmission and receipt of notices and responses, which are described below, we are adopting the process as proposed.
[586] We encourage companies and shareholders to attempt to resolve disputes independently. To the extent that a company and nominating shareholder or group are able to resolve an issue at any point during the staff process, the company should withdraw its request for a no-action letter from the staff.
[587] The final rule does not include the proposed 30-calendar day notice requirement when a company determines to exclude a nominee. We believe this requirement is rendered unnecessary by the requirement in paragraph (g)(3) of Rule 14a–11 that the company provide notice to the Commission staff and nominating shareholder or group no later than 80 calendar days before the company files its definitive proxy statement and form of proxy. In addition, if a company seeks the staff's informal view with respect to the company's determination to exclude a nominee, promptly following receipt

addition, the staff is committed to timely addressing these matters.

We are changing and clarifying the requirements related to the timing of sending and receiving notifications. As proposed, if a company determined that it could exclude a shareholder nominee, it would be required to notify the nominating shareholder or group and the notification would be required to be postmarked or transmitted electronically no later than 14 calendar days after the company received the notice on Schedule 14N. The proposed rule stated that the company would be responsible for providing the notice in a manner that evidences timely receipt by the nominating shareholder or group. The proposed rule also included similar requirements for a response to the notice by the nominating shareholder or group. As adopted, the rules will keep the deadlines as they were proposed but will use a transmission standard in determining the deadlines, similar to the standard discussed above for new Rule 14a–11(g)(1). We believe using such a uniform standard for all notification aspects of the rule will provide clarity and ease of use. Under the final rule, a company's notification must be postmarked or transmitted electronically no later than 14 calendar days after the close of the window period for submission of nominations pursuant to Rule 14a–11. We believe this change from the Proposal is appropriate because it will allow shareholders to submit their nominations, and companies to receive all the nominations, before requiring a company to send a notice to the nominating shareholder or group (or their authorized representative) as to whether it will include or exclude a nominee. Thus, a company will be able to make an informed decision with respect to individual nominations because it will be able to evaluate and respond to all the nominations it has received at one time, rather than evaluating and responding to the nominations as they are received. This approach should help reduce the possibility of any confusion that could result from requiring a company to respond to each nomination no later than 14 days after it is transmitted.[588] A nominating shareholder's or group's response to the company's notice must be postmarked or transmitted electronically no later than 14 calendar days after receipt of the company's notification. We note that a timely transmission standard applies in both instances; however, we urge companies to send the notification, and nominating shareholders or groups to send a response, in a manner that will allow them to demonstrate when the communication is received, as doing so may avoid potential disputes.

Under new Rule 14a–11(g), a company may exclude a shareholder nominee because:

- Rule 14a–11 is not applicable to the company;
- The nominating shareholder or group or nominee failed to satisfy the eligibility requirements in Rule 14a–11(b);) [589] or
- Including the nominee or nominees would result in the company exceeding the maximum number of nominees it is required to include in its proxy statement and form of proxy.[590]

In addition, a company would be permitted to exclude a statement in support of a nominee or nominees if the statement in support exceeds 500 words for each nominee.[591] In such cases, a company would be required to include the nominee or nominees, provided the eligibility requirements were satisfied, but would be permitted to exclude the statement in support. Although we did not propose to allow for exclusion of a supporting statement that exceeds the length specified in the rule, we believe that it is appropriate to provide the ability to do so in the final rule.[592]

We note that, in a change from the Proposal, under the final rule a company may not exclude a nominee or a statement in support on the basis that, in the company's view, the Schedule 14N (which will include the statement in support) contains materially false or misleading statements. Nominating shareholders and groups will have liability for any materially false or misleading information or for making a false or misleading certification in the notice filed on Schedule 14N, and companies will not be responsible for this information.[593] We believe that such disputes concerning whether information is false or misleading should be handled through disclosure, and if necessary, through private litigation, rather than through exclusion of the nominee under our rule. A company and the nominating shareholder or group will be in possession of the facts and circumstances regarding any disputes that arise about the truthfulness or accuracy of information or representations made by a nominating shareholder or group; thus, they will be in a better position than the staff to resolve those disputes. In addition, we note that in traditional proxy contests, companies and insurgents regularly use disclosure to communicate with a company's shareholders about an insurgent's nominee(s) and provide related information, including disclosure disputing the information provided by the other party. We believe that it is appropriate for companies and nominating shareholders engaged in the Rule 14a–11 nomination process to work together to resolve these types of issues. While we encourage private parties to resolve disputes under this provision, the Commission could, of course, bring enforcement actions in appropriate instances. All filings associated with a nomination included in the company's proxy materials pursuant to Rule 14a–11, including the Schedule 14N, the company's proxy statement and any additional soliciting materials provided by the company or the nominating shareholder, will be subject to the staff's proxy contest review procedures and, as noted, will be subject to the Rule 14a–9 prohibition

of the staff's response a company would be required to provide a notice to the nominating shareholder or group stating whether it will include or exclude the nominee.

[588] For example, suppose a company decided it did not have a reason to exclude a nominee submitted by a nominating shareholder during the first week of the window period. If we were to require that a company must respond to a nomination no later than 14 days after it was transmitted, the company would be required to respond to the nominating shareholder or group before the window period closed, and the company would inform the nominating shareholder that it intends to include the nominee. If, subsequent to the company sending a notice to the nominating shareholder of its intent to include the nominee, a nominating shareholder with a higher qualifying ownership percentage submits a nomination for the maximum number of nominees the company would be required to include under the rule, the company would be required to include those nominees assuming that the company determined that it did not have a reason to exclude the nominees. In that situation, confusion could result because, under the rule, the company would no longer be required to include the nominee submitted by the nominating shareholder during the first week of the window period, even though the company had informed the nominating shareholder it would include its nominee.

[589] Specifically, the final rule provides that a company could exclude a shareholder nominee because the nominating shareholder or group, or the nominee, fails to satisfy the applicable eligibility requirements in Rule 14a–11(b). In this regard, we note that the nominating shareholder or each member of the nominating shareholder group (or authorized representative) would be required to certify that, after reasonable inquiry and to the best of its knowledge and belief, the nominating shareholder or member of the nominating shareholder or group and the nominee satisfied the applicable requirements of Rule 14a–11(b).

[590] *See* new Rule 14a–11(d).

[591] *See* new Rule 14a–11(c).

[592] In this regard, we note that this is consistent with Rule 14a–8, which specifies that a company may exclude a proposal if the proposal, including any accompanying supporting statement, exceeds 500 words.

[593] *See* new Rule 14a–9(c) and Rule 14a–11(f).

against materially false or misleading statements.

In the Proposing Release, we noted that:

- Unless otherwise provided in Rule 14a–11 (*e.g.,* the nominating shareholder's or group's obligation to demonstrate that it responded to a company's notice of deficiency, where applicable, within 14 calendar days after receipt of the notice of deficiency), the burden would be on the company to demonstrate that it may exclude a nominee or nominees; and
- All materials submitted to the Commission in relation to proposed Rule 14a–11(g) would be publicly available upon submission.

We are adopting these aspects of the rules as proposed. We did not receive significant comment on these aspects of the proposed rules, although two commenters requested that companies bear the burden of proof when objecting to a nominee.[594] The rule, as adopted and proposed, specifies that the burden is on the company to demonstrate that it may exclude a nominee or statement of support, unless otherwise specified.[595] In addition, as we discussed in the Proposing Release, the staff's responses to the submissions made pursuant to new Rule 14a–11(g) would reflect only informal views. The staff determinations reached in these responses would not, and cannot, adjudicate the merits of a company's position with respect to exclusion of a shareholder nominee under Rule 14a–11. Accordingly, a discretionary staff determination would not preclude an interested person from pursuing a judicial determination regarding the application of Rule 14a–11.

As noted above, if a nominee withdraws or is disqualified, a company will be required to include an otherwise eligible nominee submitted by the shareholder or group with the next highest qualifying ownership percentage, if any. The company would be required to continue replacing withdrawn or disqualified nominees until it included the maximum number of nominees it is required to include in its proxy materials or the list of shareholder nominees is exhausted. As described above, a company will be required to give notice that it plans to exclude a nominee for any nominee that it intends to exclude, and the notice must include the reasons for the exclusion. If a company anticipates that it would seek a no-action letter from the staff with respect to its decision to exclude any Rule 14a–11 nominee or nominees, it should seek a no-action letter with regard to all nominees that it wishes to exclude at the outset and should assert all available bases for exclusion at that time. For example, if a company receives more nominees than it is required to include, its reasons for exclusion would note that basis. In addition, if the company believes it has other bases to exclude the nominee, it should note those other bases in its notice and include the other bases in its request for a no-action letter.

c. Timing of Process

The process generally would operate as follows:

Due date	Action required
No earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting.	Nominating shareholder or group must provide notice on Schedule 14N to the company and file the Schedule 14N with the Commission.
No later than 14 calendar days after the close of the window period for submission of nominations.	Company must notify the nominating shareholder or group (or its authorized representative) of any determination not to include the nominee or nominees.
No later than 14 calendar days after the nominating shareholder's or group's receipt of the company's deficiency notice.	Nominating shareholder or group must respond to the company's deficiency notice and, where applicable, cure any defects in the nomination.
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the Commission.	Company must provide notice of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the Commission and, if desired, seek a no-action letter from the staff with regard to its determination.
No later than 14 calendar days after the nominating shareholder's or group's receipt of the company's notice to the Commission.	Nominating shareholder or group may submit a response to the company's notice to the Commission staff.
As soon as practicable	If requested by the company, Commission staff would, at its discretion, provide an informal statement of its views to the company and the nominating shareholder or group.
Promptly following receipt of the staff's informal statement of its views	Company must provide notice to the nominating shareholder or group stating whether it will include or exclude the nominee.

d. Information Required in Company Proxy Materials

i. Proxy Statement

As discussed in Section II.B.8. above, we proposed and are adopting a requirement that a company that is including a shareholder director nominee in its proxy statement and form of proxy pursuant to Rule 14a–11 include certain disclosure about the nominating shareholder or group and the nominee in the company proxy statement. This disclosure will be provided by the nominating shareholder or group in its notice on Schedule 14N in response to Item 5 of that Schedule and will be included in the company's proxy statement pursuant to Item 7(e) (and, in the case of investment companies, Item 22(b)(18)) of Schedule 14A.[596] As we proposed, the company will not be responsible for the disclosure; rather, the nominating shareholder or group will have liability for any materially false or misleading statements.[597]

As discussed in Section II.B.8., the disclosures to be included in the company's proxy statement include:

- A statement that the nominee consents to be named in the company's proxy statement and form of proxy and, if elected, to serve on the company's board of directors;
- Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b),

[594] *See* letters from CII; Universities Superannuation.

[595] In the Proposal, we noted that the exclusion of a nominee or nominees where the exclusion was not permissible would result in a violation of the rule. We are adopting that provision as proposed.

[596] Refer to Section II.B.8. for a discussion of comments received on the proposed disclosure and changes made in response to these comments. We did not receive comment specifically on new Items 7(e) or 22(b)(18) of Schedule 14A.

[597] *See* new Rule 14a–11(f).

5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A, as applicable;

- Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required of a participant in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A, as applicable;
- Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past ten years, as specified in Item 401(f) of Regulation S–K;
- Disclosure about whether, to the best of the nominating shareholder's or group's knowledge, the nominee meets the director qualifications set forth in the company's governing documents, if any;
- A statement that, to the best of the nominating shareholder's or group's knowledge, in the case of a registrant other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the company, if any, or, in the case of a registrant that is an investment company, the nominee is not an "interested person" of the registrant as defined in Section 2(a)(19) of the Investment Company Act of 1940;
- The following information regarding the nature and extent of the relationships between the nominating shareholder or group, the nominee, and/or the company or any affiliate of the company:
- Any direct or indirect material interest in any contract or agreement between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);
- Any material pending or threatened litigation in which the nominating shareholder or any member of the nominating shareholder group and/or the nominee is a party or a material participant, and that involves the company, any of its officers or directors, or any affiliate of the company;
- Any other material relationship between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the company or any affiliate of the company not otherwise disclosed; and
- The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any.

The disclosures set out in Items 4(b) and 5(b) of Schedule 14A are specifically tailored to contested elections and currently are provided by both companies and insurgents in traditional proxy contests. The disclosures required pursuant to Item 4(b) include:

- Who is making the solicitation and the methods of solicitation;
- If employees of the soliciting party are engaged in the solicitation, what types of employees are engaged in the solicitation and the manner and nature of their employment;
- If specially engaged employees are engaged in the solicitation, the material features of the engagement, the cost, and the number of employees;
- The total amount estimated to be spent and the total expenditures to date for the solicitation;
- Who will bear the cost of the solicitation; and
- The terms of any settlement between the company and the soliciting parties, including the cost to the company.

The disclosures included pursuant to Item 5(b) include:

- Any substantial interest of the soliciting party in the matter to be voted on;
- Certain biographical information about the soliciting party, such as name and business address, principal occupation, and any criminal convictions in the past 10 years;
- The amount of company securities beneficially owned and owned of record;
- Dates and amounts of any securities purchased or sold within the past two years and the amount of funds borrowed and owed to purchase the securities;
- Whether the soliciting person is or was within the past year a party to any contracts, arrangements or understandings with respect to the company's securities and the terms of the contract, arrangement or understanding;
- Beneficial ownership of company securities by any associate of the soliciting person;
- Beneficial ownership by the soliciting person of any parent or subsidiary of the company;
- Disclosure responsive to Item 404(a) of Regulation S–K with regard to the soliciting person and any associate;
- Disclosure of any arrangements concerning future employment or transactions with the company; and
- Any substantial interest in the vote, either by security holdings or otherwise, held by a party to an arrangement or understanding related to a director nominee.

The company also will include in its proxy statement disclosure about the management nominees responsive to Items 4(b), 5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A, as applicable, as well as disclosure concerning the persons making the solicitation for the management nominees responsive to Items 4(b) and 5(b) of Schedule 14A, as applicable. We did not amend the disclosure requirements in this regard, as companies are already required to make these disclosures in the context of a "solicitation in opposition," under Rule 14a–12(c).[598]

In addition, as discussed in Section II.B.8., we proposed and adopted a requirement that the company include in its proxy statement the nominating shareholder's or group's statement in support of the shareholder nominee or nominees, if the nominating shareholder or group elects to have such statement included in the company's proxy materials. As discussed in Section II.B.8., we had proposed that this statement not exceed 500 words total, but in response to commenters' concerns, we have revised this provision in the final rule to enable a nominating shareholder or group to include up to 500 words for each nominee. The company also would have the option to include a statement of support for the management nominees.[599]

ii. Form of Proxy

Under the Proposal, a company that is required to include a shareholder nominee or nominees on its form of proxy could identify the shareholder nominees as such and recommend

[598] We have clarified in new Instruction 3 to Rule 14a–12 that inclusion of a shareholder director nominee pursuant to Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents as they relate to the inclusion of shareholder director nominees in the company's proxy materials, or solicitations that are made in connection with that nomination, constitute solicitations subject to Rule 14a–12(c), except for purposes of the requirement for the company to file their proxy statement in preliminary form pursuant to Rule 14a–6(a).

[599] In the Proxy Disclosure Enhancements Adopting Release, we amended our rules to require disclosure about directors that will provide investors with more meaningful disclosure to enable them to determine whether and why a director or nominee is an appropriate choice for a particular company. The information is required in the company's proxy statement for each director nominee and each director who will continue to serve after the shareholder meeting. Under revised Item 401 of Regulation S–K, a nominating shareholder or group will be required to discuss the particular experience, qualifications, attributes or skills of the nominee or nominees that led the nominating shareholder or group to conclude that the person should be put forward as a candidate for director on the company's board of directors.

whether shareholders should vote for, against, or withhold votes on those nominees and management nominees on the form of proxy.[600] In addition, the company could determine the order in which its nominees and any shareholder nominees are listed in the form of proxy. The company would otherwise be required to present the nominees in an impartial manner in accordance with Rule 14a–4.

Under the current rules, a company may provide shareholders with the option to vote for or withhold authority to vote for the company's nominees as a group, provided that shareholders also are given a means to withhold authority for specific nominees in the group. In our view, as we stated in the Proposal, this option would not be appropriate where the company's form of proxy includes shareholder nominees, as grouping the company's nominees may make it easier to vote for all of the company's nominees than to vote for the shareholder nominees in addition to some of the company nominees. Accordingly, when a shareholder nominee is included (either pursuant to Rule 14a–11, an applicable State law provision, or a company's governing documents), we proposed an amendment to Rule 14a–4 to provide that a company may not give shareholders the option of voting for or withholding authority to vote for the company nominees as a group, but instead must require that shareholders vote on each nominee separately.

Commenters were mixed on the appropriate presentation of nominees on the form of proxy. Several commenters supported the proposed amendments to Rule 14a–4 to prohibit the option of voting for management's slate as a whole,[601] with one of these commenters characterizing the current option of "elect all directors" as "a convenience in uncontested director elections" but warning that providing that option in contested elections "tilts the scales unduly in favor of management."[602] The commenter believed that shareholders would not have any difficulty in identifying the management nominees and disagreed with the argument that a form of proxy listing all nominees would be confusing. As a possible solution, the commenter suggested a legend such as "There are six candidates. Vote for no more than five." Another commenter argued that the advantage of voting for each individual nominee is the de facto plurality voting standard that would result.[603] Numerous commenters opposed the proposed amendments to Rule 14a–4 and argued that the form of proxy should allow shareholders to vote for the entire slate of management nominees.[604] Many of these commenters believed that such an option is needed to minimize shareholder confusion,[605] with several commenters justifying such an option on the basis that boards expend considerable efforts in selecting the complete slate of management nominees (*e.g.,* considering issues as the independence of the board as whole).[606] One commenter stated that individual shareholders (unlike large institutional investors who have outsourced the actual proxy voting process for their portfolio) would be discouraged from voting if the proxy voting process becomes overly tedious as a result of the inability to vote for (or withhold votes for) a group of nominees.[607] The commenter analogized to the shareholders' voting options for shareholder proposals, where shareholders are allowed to vote on all matters as recommended by management through the exercise of discretionary voting authority. It noted that, under the existing proxy rules, companies often allow shareholders to vote "For All, except" and then allow them to identify the specific nominees for whom the proxy is not authorized to vote. The commenter recommended that companies be permitted to have this same option when there are shareholder nominees included in the proxy materials (with a clear statement in the form of proxy that the shareholder should indicate a vote for the shareholder nominee in the space provided for that nominee). One commenter argued that the ability to vote on the entire slate is essential in the event that the proposed rules are applied to investment companies, as such entities have a far higher proportion of retail shareholders than most operating companies and consequently have more difficulty in achieving a quorum.[608]

We are adopting this aspect of the Proposal largely as proposed,[609] because we continue to believe that grouping the company's nominees and permitting them to be voted on as a group would make it easier to vote for all of the company's nominees than to vote for the shareholder nominees in addition to some of the company nominees. This would result in an advantage to the management nominees and would be inconsistent with an impartial approach and the goals of Rule 14a–11. The final rule clarifies that the change would apply not only when a nominee is included pursuant to Rule 14a–11, applicable State law, or a company's governing documents, but also where a nominee is included pursuant to a provision in foreign law.

We believe that potential confusion that may result from not providing the option to vote for the company's slate can be mitigated to the extent that companies provide clear voting instructions, particularly with respect to the number of candidates for which a shareholder can vote. In addition, we do not believe that requiring shareholders to vote for candidates individually, rather than as a group, creates a burden that will result in discouraging shareholders from voting at all in director elections. In this regard, we note that a company could clearly designate the nominees on its form of proxy as company nominees or shareholder nominees.

e. No Preliminary Proxy Statement

Under the Proposal, inclusion of a shareholder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the Proposal made clear that inclusion of a shareholder nominee would not be deemed a solicitation in opposition.[610] We did not receive a significant amount of comment on this aspect of the rule, although two commenters agreed that inclusion of a Rule 14a–11 shareholder nominee should not require the company to file preliminary proxy

[600] This would be similar to the current practice with regard to shareholder proposals submitted pursuant to Rule 14a–8 where companies identify the shareholder proposals and provide a recommendation to shareholders as to how they should vote on each of those proposals.

[601] *See* letters from CII; COPERA; P. Neuhauser; RiskMetrics; USPE.

[602] Letter from CII.

[603] *See* letter from RiskMetrics.

[604] *See* letters from 26 Corporate Secretaries; ABA; Aetna; Alcoa; American Express; Anadarko; Boeing; BorgWarner; BRT; ExxonMobil; Fenwick; Honeywell; ICI; Intel; JPMorgan Chase; Pfizer; Seven Law Firms; Society of Corporate Secretaries; Tenet; U.S. Bancorp.

[605] *See* letters from Aetna; American Express; Boeing; BorgWarner; JPMorgan Chase; Seven Law Firms; Society of Corporate Secretaries; U.S. Bancorp.

[606] *See* letters from BorgWarner; Pfizer; Society of Corporate Secretaries; Tenet.

[607] *See* letter from ABA.

[608] *See* letter from ICI.

[609] *See* new Rule 14a–4(b)(2)(iv). We anticipate that companies would continue to be able to solicit discretionary authority to vote a shareholder's shares for the company nominees, as well as to cumulate votes for the company nominees in accordance with applicable State law, where such State law or the company's governing documents provide for cumulative voting.

[610] *See* proposed revisions to Rule 14a–6(a)(4) and Note 3 to that rule.

materials.[611] We are adopting this provision largely as proposed. As adopted, a company would not be required to file a preliminary proxy statement in connection with a nomination made pursuant to Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents.[612]

10. Application of the Other Proxy Rules to Solicitations by the Nominating Shareholder or Group

a. Rule 14a–2(b)(7)

As noted in the Proposing Release, we anticipate that shareholders may engage in communications with other shareholders in an effort to form a nominating shareholder group to aggregate their holdings to meet the applicable minimum ownership threshold to nominate a director. While consistent with the purpose of Rule 14a–11, such communications would be deemed solicitations under the proxy rules. Accordingly, we proposed an exemption from the proxy rules for written communications made in connection with using proposed Rule 14a–11[613] that are limited in content and filed with the Commission.[614] As noted in the Proposal, we believed this limited exemption would facilitate shareholders' use of proposed Rule 14a–11 and remove concerns shareholders seeking to use the rule may have regarding certain communications with other shareholders regarding their intent to submit a nomination pursuant to the rule.

Some commenters supported the proposed exemption for soliciting activities by shareholders seeking to form a group for purposes of Rule 14a–11.[615] One of these commenters stated that because "many institutional investors lack incentives to invest actively in seeking governance benefits that would be shared by their fellow shareholders," the rule should avoid imposing unnecessary hurdles or costs on shareholders organizing or joining a nominating group.[616] Another supporter of the exemption stated that soliciting activities to form a group for the purpose of submitting nominations under Rule 14a–11, State law, or a company's governing documents generally should be exempt, with no filing requirement prior to giving the company notice and filing a Schedule 14N.[617] Another commenter also recommended that any exemption also cover solicitations for nominations submitted under State law or a company's governing documents.[618] Finally, one commenter expressed support for the proposed exemption so shareholders could communicate with other investors to explain their nominee's qualifications and the rationale for submitting their nominations as long as they file all materials with the Commission and do not solicit proxies on behalf of their nominees.[619]

On the other hand, several commenters opposed the creation of a new exemption for soliciting activities to form a nominating group.[620] Two of these commenters stated that the proposed exemption in Rule 14a–2(b)(7) is unnecessary, given the existing exemptions available to nominating shareholders (*e.g.,* Rule 14a–2(b)(2) exemption for communications with up to 10 shareholders and Rule 14a–2(b)(6) for communications in an electronic shareholder forum).[621] One commenter indicated that a solicitation to form a "control" group could have significant implications affecting control of a company if there are no limits on the number of shareholders or aggregated holdings of a nominating group.[622] The commenter asserted that, absent these limits, a shareholder could build a nominating group with hundreds of shareholders owning far in excess of the ownership threshold needed to use Rule 14a–11. The commenter warned that the proposed exemption could facilitate avoidance of the proposed requirements of Rule 14a–11 because the exempt solicitations could be the first stage of a campaign against incumbent directors and in favor of shareholder nominees. This commenter also believed that the exemption should not apply to solicitations undertaken by shareholders to form a nominating shareholder group in order to submit nominees pursuant to State law or a company's governing documents.[623]

Commenters also suggested the following changes to the proposed exemption:

- The exemption should not be available if the shareholder or any member of the nominating group uses another available exemption for a nomination to be presented at the same shareholder meeting;[624]
- The exemption should not be available for a "data gathering strategy" in which a shareholder is "testing the waters" for other purposes, such as for a traditional proxy contest;[625]
- The shareholder should certify that it has a bona fide intent to present a Rule 14a–11 nomination and the shareholder should be prohibited from nominating directors at the same meeting through means other than Rule 14a–11;[626] and
- The exemption should not be available if the company or another shareholder has publicly announced that the company would be facing a traditional proxy contest.[627]

One commenter stated generally that allowing the "permitted activity among shareholders wishing to nominate a director" would "increase the need for the Commission to police group activity that may be undertaken with an undisclosed control intent."[628]

Two commenters agreed with the Commission that the Rule 14a–2(b)(7) exemption should not be available for solicitations conducted through oral communications.[629] These commenters warned that there would be no way to ensure that orally-communicated information is being provided to shareholders in a consistent manner and in accordance with the rule's requirements. One commenter recommended specific changes to the rule to clarify that the exemption is not available for oral communications.[630] On the other hand, several commenters believed that oral communications should be exempt.[631] Some commenters pointed out that such communications are exempt in other contexts and are difficult to monitor in any case.[632] To mitigate the risk of inappropriate communications, one commenter suggested that the Commission require that oral communications made in reliance on the exemption not be inconsistent with any communications

[611] *See* letters from ABA; CII.

[612] *See also* discussion in footnote 598 above.

[613] Under the Proposal, the exemption would not apply to solicitations made when seeking to have a nominee included in a company's proxy materials pursuant to a procedure specified in the company's governing documents or pursuant to applicable State law (as opposed to pursuant to Rule 14a–11).

[614] *See* proposed Rule 14a–2(b)(7)(i).

[615] *See* letters from Group of 80 Professors of Law, Business, Economics and Finance ("Bebchuk, *et al.*"); CalSTRS; CII; P. Neuhauser; RiskMetrics; Schulte Roth & Zabel; USPE.

[616] Letter from Bebchuk, *et al.*

[617] *See* letter from CII.

[618] *See* letter from P. Neuhauser.

[619] *See* letter from RiskMetrics.

[620] *See* letters from ABA; Anadarko; BRT; Seven Law Firms.

[621] *See* letters from ABA; Seven Law Firms.

[622] *See* letter from ABA.

[623] *Id.*

[624] *See* letters from ABA; Seven Law Firms.

[625] *Id.*

[626] *See* letter from ABA.

[627] *See* letters from ABA; Seven Law Firms.

[628] Letter from Biogen.

[629] *See* letters from ABA; Seven Law Firms.

[630] *See* letter from Seven Law Firms.

[631] *See* letters from CII; Cleary; P. Neuhauser; Schulte Roth & Zabel; USPE.

[632] *See* letters from CII; USPE.

previously filed by the shareholder in connection with the nomination.[633]

Two commenters expressed general support for the proposal requiring that a nominating shareholder or group file any soliciting materials published, sent or given to shareholders pursuant to the exemption no later than the date that the material is first published, sent, or given.[634] One commenter argued that if the Commission retains the requirement that solicitations be in writing, then it should relax the "date of first use" filing deadline (with a three business day deadline being its preference).[635] One commenter supported the filing requirement ofRule 14a–2(b)(7)(ii) for soliciting materials published, sent or given to shareholders solicited to become part of a nominating group,[636] while three commenters opposed the filing requirement.[637] Of those opposing the requirement, one commenter noted that under the Williams Act, persons contemplating an actual change in control are not required to publicly disclose their activities until a group owning 5% of the company's shares has been formed.[638] One commenter stated that it is possible that a group of shareholders ultimately may decide not to submit a shareholder nominee.[639] Therefore, this commenter believed, any requirement for filings before the group submits a nominee would place an unfair disadvantage on the process of first determining if a nomination is the right course of action, and if so, who the nominee should be. Another commenter suggested that the filing requirement be triggered on the date the shareholder proposes a nominee, not on the date of solicitation.[640] The commenter believed that a shareholder should not be burdened with the filing requirement at the initial stages of determining the feasibility of forming a group.

Three commenters recommended that communications made for the purpose of forming a nominating shareholder group should be permitted to identify possible or proposed nominees,[641] with one commenter adding the condition that the nominee first agree to being named.[642] Two commenters recommended the following additional disclosure in any written soliciting materials used in reliance on the Rule 14a–2(b)(7) exemption:

- The period that the soliciting shareholder held the specified number of shares;
- A description of any short positions or other hedging arrangements through which the soliciting shareholder reduced or otherwise altered its economic stake in the company;
- A description of any contracts, arrangements, understandings or relationships between the soliciting shareholder and any other person with respect to any securities of the company; and
- A description of any plans or proposals of the shareholder or group with respect to the organization, business or operations of the company.[643]

One commenter added that the required disclosure should be consistent with that required by Items 4 and 6 of Schedule 13D,[644] while another commenter stated that shareholders should be permitted to include a brief statement of the reasons for the formation of the nominating group.[645]

After considering the comments, we are adopting the proposed exemption with certain modifications, including modifications to enable shareholders to communicate orally, to require the filing of a cover page in the form set forth in Schedule 14N (with the appropriate box on the cover page marked) no later than when the solicitation commences, and to clarify the circumstances under which the exemption will be available.[646] We believe that this limited exemption will facilitate shareholders' use of Rule 14a–11 and remove concerns shareholders seeking to use the rule may have regarding certain communications with other shareholders regarding their intent to submit a nomination pursuant to the rule.

New Rule 14a–2(b)(7) provides an exemption from the generally applicable disclosure, filing, and other requirements of the proxy rules for solicitations by or on behalf of any shareholder in connection with the formation of a nominating shareholder group, provided that the shareholder is not holding the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11(d). In addition, any written communication may include no more than:

- A statement of the shareholder's intent to form a nominating shareholder group in order to nominate a director under Rule 14a–11;
- Identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;
- The percentage of voting power of the company's securities that are entitled to be voted on the election of directors that each soliciting shareholder holds or the aggregate percentage held by any group to which the shareholder belongs; and
- The means by which shareholders may contact the soliciting party.

Any written soliciting material published, sent or given to shareholders in accordance with the terms of this provision must be filed with the Commission by the nominating shareholder or group, under the company's Exchange Act file number (or in the case of a registered investment company, under the company's Investment Company Act file number), no later than the date the material is first published, sent or given to shareholders. The soliciting material would be required to be filed with a cover page in the form set forth in Schedule 14N, with the appropriate box on the cover page marked to identify the filing as soliciting material pursuant to Rule 14a–2(b)(7).[647] This requirement is largely consistent with the Proposal; however, under the final rule, the solicitation will be filed on Schedule 14N rather than as definitive additional

[633] *See* letter from Cleary.
[634] *See* letters from ABA; CII.
[635] *See* letter from Schulte Roth & Zabel.
[636] *See* letter from ABA.
[637] *See* letters from CalSTRS; COPERA; P. Neuhauser.
[638] *See* letter from P. Neuhauser.
[639] *See* letter from COPERA.
[640] *See* letter from CalSTRS.
[641] *See* letters from ABA; CII; USPE.
[642] *See* letter from ABA.
[643] *See* letters from ABA; Seven Law Firms.
[644] *See* letter from ABA.
[645] *See* letter from Schulte Roth & Zabel.
[646] Shareholders also would have the option to structure their solicitations in connection with the formation of a nominating shareholder group, whether written or oral, to comply with an existing exemption from the proxy rules, including the exemption for solicitations of no more than 10 shareholders (Exchange Act Rule 14a–2(b)(2)) and the exemption for certain communications that take place in an electronic shareholder forum (Exchange Act Rule 14a–2(b)(6)). For example, a shareholder could rely on Rule 14a–2(b)(2) to solicit no more than 10 shareholders in an effort to form a nominating shareholder group. If the shareholder's efforts did not result in the formation of a group large enough to meet the ownership thresholds, the shareholder could then rely on Rule 14a–2(b)(7) to continue its efforts to form a nominating shareholder group for the purpose of submitting a nomination pursuant to Rule 14a–11.
[647] Materials filed in connection with the new solicitation exemptions will be filed under a cover page of Schedule 14N and will appear as a Schedule 14N–S on EDGAR. *See* new Rule 14a–2(b)(7)(ii). We note that written communications include electronic communications, such as e-mails and Web site postings, and scripts used in connection with oral solicitations.

soliciting materials on Schedule 14A, as was proposed. We have made this change to avoid confusion between soliciting materials filed in connection with the formation of a nominating shareholder group under Rule 14a–11 (or in connection with a Rule 14a–11 nomination), as discussed further below, and other proxy materials that may be filed by companies or by participants in a traditional proxy contest.

We also have expanded the exemption to cover oral solicitations. As noted in the Proposal, we originally proposed to limit the exclusion to written communications to address our concern that oral communications could not easily satisfy the filing requirement (which would make it more difficult to monitor use of the exemption). However, after further consideration, we agree with commenters that oral communications should be included within the exemption because it is likely that shareholders will need to speak to each other in order to effectively form a nominating shareholder group. Oral communications will not be limited in content in the way that written communications are limited. In an effort to better monitor and avoid abuse under the exemption, however, a shareholder seeking to form a nominating shareholder group in reliance on the exemption in Rule 14a–2(b)(7) will be required to file a Schedule 14N notice of commencement of the oral solicitation. Because there are no limits on the number of holders that can be solicited in reliance on the new rule, or the contents of the oral communications, we believe it is important for our staff and the markets to be aware of the commencement of these activities.

The Schedule 14N filing for oral solicitations will consist of a cover page in the form set forth in Schedule 14N, with the appropriate box on the cover page marked to identify the filing as a notice of solicitation pursuant to Rule 14a–2(b)(7). This filing would be made under the company's Exchange Act file number (or in the case of a registered investment company, under the company's Investment Company Act file number), no later than the date of the first communication made in reliance on the rule.

As noted above, some commenters were opposed to the filing requirement for solicitations for various reasons. We have decided to adopt the filing requirement because we believe it is important to provide companies and shareholders with information about potential nominations under Rule 14a–11 when the new solicitation exemption is used to pursue such a nomination. We do not believe that the filing requirement is burdensome, particularly in light of the fact that we are providing shareholders with the opportunity to engage in activities for which they would otherwise need to file a proxy statement or have another exemption available.

More generally, we understand commenters' concerns regarding the solicitation exemptions, including the exemption for oral communications when seeking to form a group, being used as a means to engage in a contest for control, but we believe that requiring a nominating shareholder or group to file a Schedule 14N to provide notice of such communications, along with the other limitations in the rule we are adopting, should mitigate these concerns. In response to commenters' concerns, we have clarified in the rule that a shareholder or group that chooses to rely on new Rule 14a–2(b)(7) would lose that exemption if they subsequently engaged in a non-Rule 14a–11 nomination or solicitation in connection with the subject election of directors other than solicitations exempt under Rule 14a–2(b)(8), or if they become a member of a group, as determined under Section 13(d)(3) of the Exchange Act and Rule 13d–5(b)(1), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors.[648] This could result in the shareholder or group being deemed to have engaged in a non-exempt solicitation in violation of the proxy rules. In addition, we have clarified that, consistent with Rule 14a–11, the exemption is available only where the shareholder is not holding the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11(d). Thus, we do not believe that it is likely that a shareholder or group will use the exemption as a means to engage in a contest for control.

Consistent with the Proposal, neither this exemption nor the exemption set forth in Rule 14a–2(b)(8) (discussed below) will apply to solicitations made when seeking to have a nominee included in a company's proxy materials pursuant to a procedure specified in the company's governing documents (as opposed to pursuant to Rule 14a–11). As we noted in the Proposal, in this instance, companies and/or shareholders would have determined the parameters of the shareholder's or group's access to the company's proxy materials. Given the range of possible criteria companies and/or shareholders could establish for nominations, we continue to believe it would not be appropriate to extend the exemption to those circumstances. Also consistent with the Proposal, we have not extended the exemption to nominations made pursuant to applicable State law provisions,[649] again because State law could establish any number of possible criteria for nominations. A shareholder would need to determine whether one of the existing exemptions applies to their solicitation conducted in connection with a nomination made pursuant to a company's governing documents or State law.

b. Rule 14a–2(b)(8)

Both the nominating shareholder or group and the company may wish to solicit in favor of their nominees for director by various means, including orally, by U.S. mail, electronic mail, and Web site postings. While the company ultimately would file a proxy statement and therefore could rely on the existing proxy rules to solicit outside the proxy statement,[650] shareholders could be limited in their soliciting activities under the current proxy rules. Accordingly, our Proposal included a new exemption to the proxy rules for solicitations by or on behalf of a nominating shareholder or group in support of its nominee who is included in the company's proxy statement and form of proxy.

As proposed, the exemption would be available only where the shareholder is not seeking proxy authority. In addition, any written communications would be required to include specified disclosures, including:

- The identity of the nominating shareholder or group;
- A description of his or her direct or indirect interests, by security holdings or otherwise; and
- A legend advising shareholders that a shareholder nominee is or will be included in the company's proxy statement and that they should read the company's proxy statement when available and that the proxy statement, other soliciting material, and any other relevant documents are or will be available at no charge on the Commission's Web site.

[648] *See* new Instruction to Rule 14a–2(b)(7).

[649] Similarly, the exemption would not be available for solicitations in connection with nominations made pursuant to foreign law provisions.

[650] *See* Exchange Act Rule 14a–12.

Under the Proposal, written soliciting materials also would be required to be filed with the Commission under the company's Exchange Act file number no later than the date the material is first published, sent or given to shareholders.[651] The soliciting material would be required to include a cover page in the form set forth in Schedule 14A, with the appropriate box on the cover page marked.[652]

Three commenters supported the proposed Rule 14a–2(b)(8) exemption for soliciting activities by or on behalf of a nominating shareholder or group in support of the shareholder nominees included in a company's proxy materials, with soliciting materials filed no later than the date that the materials are first used.[653] Two of these commenters explained that because management would solicit votes against the shareholder nominees and for their own nominees, the nominating shareholder, group, and shareholder nominees should have the same ability to solicit, so long as they do not request proxy authority.[654] Another commenter stated that the exemption should apply to solicitations for nominations made pursuant to Rule 14a–11, State law, or a company's governing documents.[655] The commenter opposed any limitations on the soliciting activities by a nominating shareholder or group and viewed such soliciting activities as the same as a company's disclosure opposing a shareholder proposal. One commenter supported the Rule 14a–2(b)(8) exemption for solicitations by a nominating shareholder or group in favor of a shareholder nominee who is included in a company's proxy materials (or against a management nominee), but recommended that the rule specify that the exemption only applies to solicitations in favor of a shareholder nominee (or against a board nominee) that occur after the distribution of the company's proxy materials—this would help avoid confusion and misunderstandings about whether solicitation may occur before the company's proxy materials are available.[656] This commenter also recommended that the exemption not be available if the company or another shareholder has publicly announced that the company would be facing a traditional proxy contest, even from an unrelated shareholder. The commenter also believed that the exemption should be available for any written solicitation by or on behalf of a nominating shareholder or group in support of a nominee included in a company's proxy materials pursuant to State law or the company's governing documents, as long as the nominating shareholder or group does not use a form of proxy that differs from that of the company, does not furnish or otherwise request a form of revocation, abstention, consent or authorization, and files its solicitation material for its nominees (or against the management nominees) with the Commission on the date of first use.

To the extent that it is not included in either the company's proxy materials or Schedule 14N, the commenter also recommended that additional disclosure be required to be included in solicitations made pursuant to Rule 14a–2(b)(8).[657] Another commenter also stated that Rule 14a–2(b)(8) should apply only to solicitations in favor of a shareholder nominee that occur after the mailing of a company's proxy materials.[658] Further, the commenter explained that solicitations should not occur at a time when shareholders do not have access to the more complete and balanced disclosure about all of the nominees in a company's proxy materials.

As adopted, Rule 14a–2(b)(8) provides an exemption from the generally applicable disclosure, filing, and other requirements of the proxy rules for solicitations by or on behalf of a nominating shareholder or group, provided that:

- The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization;[659]
- Each written communication includes:[660]
  - The identity of the nominating shareholder or group and a description of his or her direct or indirect interests, by security holdings or otherwise;
  - A prominent legend in clear, plain language advising shareholders that a shareholder nominee is or will be included in the company's proxy statement and that they should read the company's proxy statement when available because it includes important information. The legend also must explain to shareholders that they can find the proxy statement, other soliciting material, and any other relevant documents at no charge on the Commission's Web site; and
- Any soliciting material published, sent or given to shareholders in accordance with this exemption must be filed by the nominating shareholder or group with the Commission on Schedule 14N, under the company's Exchange Act file number or, in the case of an investment company registered under the Investment Company Act of 1940, under the company's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material would at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the company is listed and registered. The soliciting material would be required to include a cover page in the form set forth in Schedule 14N, with the appropriate box on the cover page marked.[661]

We are adopting certain modifications to Rule 14a–2(b)(8) from the Proposal to clarify when a party may begin to rely on the exemption and to require that all soliciting material be filed on new Schedule 14N.[662] The exemption is otherwise consistent with the Proposal.

We have added a new instruction to the exemption clarifying that a

[651] For a registered investment company, the filing would be made under the company's Investment Company Act file number.

[652] *See* proposed Rule 14a–2(b)(8)(iii).

[653] *See* letters from CII; COPERA; P. Neuhauser.

[654] *See* letters from COPERA; P. Neuhauser.

[655] *See* letter from CII.

[656] *See* letter from ABA.

[657] The recommended disclosures included: the period that the soliciting shareholder held the specified number of shares; a description of any short positions or other hedging arrangements through which the soliciting shareholder reduced or otherwise altered its economic stake in the company; a description of any contracts, arrangements, understandings or relationships between the soliciting shareholder and any other person with respect to any securities of the company; and a description of any plans or proposals of the shareholder or group with respect to the organization, business or operations of the company.

[658] *See* letter from Seven Law Firms.

[659] *See* new Rule 14a–2(b)(8)(i). The language in this provision generally follows the language in Rule 14a–2(b)(1) and, therefore, we interpret both provisions in the same manner. In this regard, we note the discussion in the *Proxy Disclosure and Solicitation Enhancements* proposing release of our view of the scope of the term "form of revocation" within the meaning of Rule 14a–2(b)(1) and the proposed amendment to that rule to clarify that the term does not include an unmarked copy of the company's proxy card that is requested to be returned directly to management. *See* Securities Act Release No. 33–9052; 34–60280 (July 10, 2009) [74 FR 35076]. If we act on the proposed amendments to Rule 14a–2(b)(1), we would expect to make conforming changes to Rule 14a–2(b)(8).

[660] *See* new Rule 14a–2(b)(8)(ii).

[661] *See* new Rule 14a–2(b)(8)(iii).

[662] As noted above, the soliciting material will be filed under cover of Schedule 14N and will appear as Schedule 14N–S on EDGAR.

nominating shareholder or group may rely on the exemption provided in Rule 14a–2(b)(8) after receiving notice from the company in accordance with Rule 14a–11(g)(1) or (g)(3)(iv) that the company will include the nominating shareholder's or group's nominee or nominees.[663] As proposed, a nominating shareholder or group would not have been able to rely on the exemption until their nominee or nominees are actually included in the company's proxy materials. We received little comment on the appropriate timing for commencement of soliciting activities under the proposed exemption, with one commenter suggesting that Rule 14a–2(b)(8) apply only to solicitations that occur after the mailing of a company's proxy materials,[664] and another suggesting generally that there should be no limitations on soliciting activities by nominating shareholders or groups.[665]

After further consideration, we have determined that a nominating shareholder or group should be able to begin soliciting once there is certainty as to whether their nominees will be included in the company's proxy materials rather than being required to wait for the company to furnish its proxy materials. In this regard, we note that the exemption is consistent with the treatment of insurgent soliciting materials in a traditional proxy contest, as an insurgent may rely on Rule 14a–12(a) to engage in soliciting activities before furnishing shareholders with a proxy statement provided that the soliciting party provides certain disclosure and files a definitive proxy statement before or at the same time as the forms of proxy, consent or authorization are furnished to or requested from shareholders.[666] We have included the requirement that the nominating shareholder or group have received notice that their nominee or nominees will be included in the company's proxy materials before commencing solicitations to avoid confusion and potential abuse of the exemption.

We also have modified the filing requirements for written soliciting materials. Similar to the filing requirements for relying on Rule 14a–2(b)(7), any written soliciting material published, sent or given to shareholders in accordance with the terms of Rule 14a–2(b)(8) must be filed with the Commission on a Schedule 14N, under the company's Exchange Act file number (or in the case of a registered investment company, under the company's Investment Company Act file number), no later than the date the material is first published, sent or given to shareholders. The soliciting material would be required to be filed with a cover page in the form set forth in Schedule 14N, with the appropriate box on the cover page marked to identify the filing as soliciting material pursuant to Rule 14a–2(b)(8). This requirement is largely consistent with the Proposal, however, under the final rule, the solicitation will be filed on Schedule 14N rather than as definitive additional soliciting materials on Schedule 14A, as was proposed. As noted above, we received comment supporting the filing of soliciting materials,[667] however, the commenters did not specifically address whether the filing should be made under cover of Schedule 14N or Schedule 14A. As discussed above with respect to filings made pursuant to Rule 14a–2(b)(7),we have made the change to Schedule 14N to avoid confusion between soliciting materials filed in connection with the formation of a nominating shareholder group under Rule 14a–11 (or in connection with a Rule 14a–11 nomination) and other proxy materials that may be filed by companies or by participants in a traditional proxy contest.

As described in Section II.B.2.e. above, the rules we are adopting today will not prohibit shareholders from submitting Rule 14a–11 nominations for inclusion in company proxy materials when a proxy contest is being conducted by another person concurrently. We are, however, adding a clarification to new Rule 14a–2(b)(8), similar to Rule 14a–2(b)(7), in response to commenters' concern that the exemptions could be used as the first stage of a contest for control. As adopted, the exemption will be lost if a shareholder or group subsequently engages in a non-Rule 14a–11 nomination or solicitation in connection with the subject election of directors or if they become a member of a group, as determined under Section 13(d)(3) of the Exchange Act and Rule 13d–5(b)(1), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors. The risk of losing the Rule 14a–2(b)(8) exemption and potential liability for engaging in non-exempt solicitations should prevent nominating shareholders or groups from soliciting in relation to any other person's nominees.[668] Further, as discussed in Sections II.B.2.e. and II.B.10.a. above, under Rule 14a–11 a company will not be required to include a nominee or nominees if the nominating shareholder or group is a member of any other group with persons engaged in solicitations in connection with the subject election of directors or other nominating activities; separately conducts a solicitation in connection with the subject election of directors other than a Rule 14a–2(b)(8) exempt solicitation in relation to those nominees it has nominated pursuant to Rule 14a–11 or for or against the company's nominees; or is acting as a participant in another person's solicitation in connection with the subject election of directors. All of these restrictions are designed to address commenters' concerns about collusion and potential abuse of the process. We also believe these restrictions are consistent with the desire to limit Rule 14a–11 to those shareholders or groups that do not have an intent to change the control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11. Finally, we have clarified in an instruction to Rule 14a–2(b)(8)[669] that Rule 14a–2(b)(8) is the only exemption upon which Rule 14a–11 nominating shareholders or groups may rely for their soliciting activities in support of nominees that are or will be included in the company's proxy materials or for or against company nominees. This will help ensure that these persons will not seek proxy authority and will file written communications in connection with their soliciting efforts and, we believe, will help to address some of commenters' concerns with regard to confusion and potential abuse of the exemption.

Consistent with the Proposal and as discussed above with regard to Rule 14a–2(b)(7), the exemption will not apply to solicitations made when seeking to have a nominee included in a company's proxy materials pursuant to a procedure specified in the company's governing documents (as opposed to pursuant to Rule 14a–11). As we noted in the Proposal, in this instance, companies and/or shareholders would have determined the parameters of the shareholder's or group's access to the company's proxy materials. Given the range of possible criteria that companies and/or shareholders could establish for nominations, we continue to believe it would not be appropriate to extend the exemption to those circumstances. Also

[663] *See* Instruction 1 to Rule 14a–2(b)(8).
[664] *See* letter from ABA.
[665] *See* letter from CII.
[666] *See* Exchange Act Rule 14a–12(a).
[667] *See* letters from CII; COPERA; P. Neuhauser.
[668] *See* Instruction 3 to Rule 14a–2(b)(8).
[669] *See* Instruction 2 to Rule 14a–2(b)(8).

consistent with the Proposal, we have not extended the exemption to nominations made pursuant to applicable State law provisions, again because State law could establish any number of possible criteria for nominations.[670] A shareholder would need to determine whether one of the existing exemptions applies to their solicitation conducted in connection with a nomination made pursuant to a company's governing documents or State law.

11. 2011 Proxy Season Transition Issues

Rule 14a–11 contains a window period for submission of shareholder nominees for inclusion in company proxy materials of no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting.[671] Shareholders seeking to use new Rule 14a–11 would be able to do so if the window period for submitting nominees for a particular company is open after the effective date of the rules. For some companies, the window period may open and close before the effective date of the new rules. In those cases, shareholders would not be permitted to submit nominees pursuant to Rule 14a–11 for inclusion in the company's proxy materials for the 2011 proxy season. For other companies, the window period may open before the effective date of the rules, but close after the effective date. In those cases, shareholders would be able to submit a nominee between the effective date and the close of the window period.

C. Exchange Act Rule 14a–8(i)(8)

1. Background

Currently, Rule 14a–8(i)(8) allows a company to exclude from its proxy statement a shareholder proposal that relates to a nomination or an election for membership on the company's board of directors or a procedure for such nomination or election. This provision currently permits the exclusion of a proposal that would result in an immediate election contest or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings.

When the Commission adopted the current language of Rule 14a–8(i)(8) in December 2007,[672] it noted that many disclosures are required for election contests that are not provided for in Rule 14a–8.[673] In this regard, several Commission rules, including Exchange Act Rule 14a–12, regulate contested proxy solicitations to assure that investors receive disclosure to enable them to make informed voting decisions in elections. The requirements to provide these disclosures to shareholders from whom proxy authority is sought are grounded in Rule 14a–3, which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information in Schedule 14A. Items 4(b) and 5(b) of Schedule 14A require numerous specified disclosures if the solicitation is subject to Rule 14a–12(c), and Item 7 of Schedule 14A also requires important specified disclosures for any director nominee. Finally, all of these disclosures are covered by the prohibition on making a solicitation containing materially false or misleading statements or omissions that is found in Rule 14a–9.

2. Proposed Amendment

In the Proposal, we proposed an amendment to Rule 14a–8(i)(8), the election exclusion, to enable shareholders, under certain circumstances, to require companies to include in their proxy materials 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 proposed Rule 14a–11.[674] The purpose of the proposed amendment was to further facilitate shareholders' rights to nominate directors and promote fair corporate suffrage, while still providing appropriate disclosure and liability protections.

Under the proposed amendment, the shareholder proposal would have to meet the procedural requirements of Rule 14a–8 (*e.g.,* the proposal could be excluded if the shareholder proponent did not meet the ownership threshold under Rule 14a–8) and not be subject to one of the other substantive bases for exclusion in the rule.[675] The proposed revision of 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.[676]

In the Proposal, we stated that we continued to believe that, under certain circumstances, companies should have the right to exclude proposals related to particular elections and nominations for director from company proxy materials where those proposals could result in an election contest between company and shareholder nominees without the important protections provided for in the proxy rules. Therefore, while proposing the revision to Rule 14a–8(i)(8) as discussed above, we also proposed to codify certain prior staff interpretations with respect to the types of proposals that would continue to be excludable pursuant to Rule 14a–8(i)(8). As proposed, a company would be permitted to exclude a proposal under Rule 14a–8(i)(8) if it:

- Would disqualify a nominee who is standing for election;
- Would remove a director from office before his or her term expired;
- Questions the competence, business judgment, or character of one or more nominees or directors;
- Nominates a specific individual for election to the board of directors, other than pursuant to Rule 14a–11, an applicable State law provision, or a company's governing documents; or
- Otherwise could affect the outcome of the upcoming election of directors.

[670] Similarly, the exemption would not be available for solicitations in connection with nominations made pursuant to foreign law provisions.

[671] *See* Rule 14a–11(b)(10) and discussion in Section II.B.8.c.ii. above.

[672] *See* Election of Directors Adopting Release.

[673] *See* Election of Directors Adopting Release.

[674] Under the Proposal, Rule 14a–8(i)(8) would allow shareholders to propose additional means, other than Rule 14a–11, for inclusion of shareholder nominees in company proxy materials. Therefore, under the Proposal, a shareholder proposal that sought to provide an additional means for including shareholder nominees in the company's proxy materials pursuant to the company's governing documents would not be deemed to conflict with Rule 14a–11 simply because it would establish different eligibility thresholds or require more extensive disclosures about a nominee or nominating shareholder than would be required under Rule 14a–11. A shareholder proposal would conflict with proposed Rule 14a–11, however, to the extent that the proposal would purport to prevent a shareholder or shareholder group that met the requirements of proposed Rule 14a–11 from having their nominee for director included in the company's proxy materials.

[675] Currently, Rule 14a–8 requires that a shareholder proponent have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for a period of at least one year by the date the proponent submits the proposal. *See* Rule 14a–8(b). These requirements would remain the same.

[676] In this regard, the proposed revision to Rule 14a–8(i)(8) would not make a distinction between binding and non-binding proposals.

The proposed codification was not intended to change the staff's prior interpretations or limit the application of the exclusion; it was intended to provide more clarity to companies and shareholders regarding the application of the exclusion.

3. Comments on the Proposal

The proposal to amend Rule 14a–8 to revise the election exclusion received widespread support. Numerous commenters expressed general support for the proposed amendments to Rule 14a–8(i)(8), with many of the commenters supporting the Commission's proposal as a whole [677] and other commenters supporting the amendments while opposing Rule 14a–11.[678] Some commenters expressly supported the adoption of both Rule 14a–11 and amendments to Rule 14a–8(i)(8).[679] Some commenters indicated that the adoption of only the proposed amendments to Rule 14a–8(i)(8), without Rule 14a–11, would not address current shortcomings in corporate governance and achieve the Commission's stated objectives.[680] Of the commenters that supported the Rule 14a–8 amendments but opposed Rule 14a–11, many believed the amendments to Rule 14a–8 would allow procedures for the inclusion of shareholder nominees in company proxy materials to evolve and private ordering under State law to continue, unfettered by the complexities of a Federal standard that would apply uniformly to differently situated companies operating under diverse State law regimes.[681]

While supporting the amendments to Rule 14a–8(i)(8), some commenters expressed concerns about certain aspects of the amendments or recommended certain changes.[682] Two commenters expressed concerns about the codification of staff policies and interpretations under the current version of Rule 14a–8(i)(8).[683] One commenter expressed concerns that the proposed amendments to Rule 14a–8(i)(8) are broader than necessary to allow proposals seeking to establish access to a company's proxy materials and have the potential of significantly changing the administration of Rule 14a–8(i)(8) with respect to other types of proposals.[684] The commenter also noted that the fact that only four types of proposals have been addressed by the staff in the Rule 14a–8 process could be attributed to the fact that the current standard under Rule 14a–8(i)(8) operated to avoid other impermissible proposals from being presented in the first place. If the current standard is repealed, this commenter worried that the staff would have no basis upon which to assess proposals that attempt to circumvent or supplement the Commission's proxy solicitation rules. The commenter believed that eliminating the current standard would go beyond what is needed to permit shareholders to submit proposals seeking to amend, or request an amendment to, a company's governing documents to establish a procedure for including shareholder-nominated candidates for director in a company's proxy materials. The commenter suggested retaining the current standard in Rule 14a–8(i)(8) and amending the language only to specifically authorize proposals seeking to establish access to a company's proxy materials and require the disclosure provided in proposed Rule 14a–19.

4. Final Rule Amendment

As noted above in Section I.A., we do not believe that adopting changes to Rule 14a–8(i)(8) alone, without adopting Rule 14a–11, will achieve our goal of facilitating shareholders' ability to exercise their traditional State law rights to nominate directors. We believe that revising Rule 14a–8 will provide an additional avenue for shareholders to indirectly exercise those rights; therefore, the final rules include a revision to Rule 14a–8(i)(8). As adopted, companies will no longer be able to rely on Rule 14a–8(i)(8) to exclude a proposal seeking to establish a procedure in a company's governing documents for the inclusion of one or more shareholder nominees for director in the company's proxy materials.[685]

[677] *See* letters from 13D Monitor; ACSI; AFL–CIO; AFSCME; Joseph Ahearn ("J. Ahearn"); Rahim Ali ("R. Ali"); AllianceBernstein; Amalgamated Bank; Americans for Financial Reform; Australian Reward Investment Alliance ("ARIA"); AUST(Q) Superannuation ("AUST(Q)"); W. Baker; Barclays; BCIA; Bebchuk, *et al.;* R. Blake; William B. Bledsoe ("W. Bledsoe"); Brigham and Associates, LLC ("Brigham"); British Insurers; Ethan S. Burger ("E. Burger"); J. Burke; CalPERS; CalSTRS; Calvert; Cbus ("Cbus"); CFA Institute; John P. Chaney ("J. Chaney"); The Christopher Reynolds Foundation of New York ("Christopher Reynolds Foundation"); CII; COPERA; Corporate Library; Central Pension Fund of the International Union of Operating Engineers ("CPF"); CRMC; L. Dallas; Mike G. Dill ("M. Dill"); T. DiNapoli; Dominican Sisters of Hope; Andrew H. Dral ("A. Dral"); D. Eshelman; First Affirmative; Florida State Board of Administration; Martin Fox ("M. Fox"); Raymond E. Frechette ("R. Frechette"); Glass Lewis; James J. Givens ("J. Givens"); Governance for Owners ("Governance for Owners"); GovernanceMetrics; Michael D. Grabowski ("M. Grabowski"); Greenlining Institute ("Greenlining"); Hermes; HESTA Super Fund ("HESTA"); Sheryl Hogan ("S. Hogan"); David G. Hood ("D. Hood"); IAM; ICGN; Frank Coleman Inman ("F. Inman"); Ironfire; Melinda Katz ("M. Katz"); Michael E. Kelley ("M. Kelley"); Peter C. Kelly ("P. Kelly"); Key Equity Investors, Inc. ("Key Equity Investors"); Victor Kimball ("V. Kimball"); Jeffery Kondracki ("J. Kondracki"); A. Krakovsky; Paul E. Kritzer ("P. Kritzer"); LACERA; C. Levin; Lanny D. Levin ("L. Levin"); LIUNA; LUCRF; Marco Consulting; Maine Securities Corporation ("Maine Securities"); B. McDonnell; James McRitchie ("J. McRitchie"); Mercy Investment Program; M. Metz; David B. Moore ("D. Moore"); Karen L. Morris ("K. Morris"); Robert Moulton-Ely ("R. Moulton-Ely"); Motor Trades Association of Australia Superannuation Fund Pty Limited ("MTAA"); Murray & Murray & Co., LPA ("Murray & Murray"); William J. Nassif ("W. Nassif"); Tom Nappi ("T. Nappi"); D. Nappier; Nathan Cummings Foundation; P. Neuhauser; Nine Law Firms; New Jersey State Investment Council ("NJSIC"); Norges Bank; Non-Government School Superannuation Fund ("Non-Government"); Ontario Teachers' Pension Plan Board ("Ontario Teachers"); OPERS; Thomas Paine ("T. Paine"); Pax World; Pershing Square; Karl Putnam ("K. Putnam"); S. Ranzini; RacetotheBottom; Joan Reekie ("J. Reekie"); Relational; RiskMetrics; D. Roberts; D. Romine; Joseph Rozbicki ("J. Rozbicki"); Schulte Roth & Zabel; Shamrock; Shareowners.org; Sheet Metal Workers; Sisters of Mercy; Social Investment Forum; Sodali; Solutions; Laszlo Sterbinszky ("L. Sterbinszky"); Stringer Photography ("Stringer"); SWIB; J. Taub; Teamsters; Aleta Thielmeyer ("A. Thielmeyer"); TIAA–CREF; Trillium; TriState Coalition; T. Rowe Price; L. Tyson; Ursuline Sisters of Tildonk; Universities Supernnuation; USPE; ValueAct Capital; The Value Alliance and Corporate Governance Alliance ("Value Alliance"); R. VanEngelenhoven; Walden; B. Wilson; Leslie Wolfe ("L. Wolfe"); Steve Wolfe ("S. Wolfe"); Neil Wollman ("N. Wollman"); WSIB; Marcelo Zinn ("M. Zinn").

[678] *See* letters from 26 Corporate Secretaries; 3M; ABA; Advance Auto Parts; Aetna; AGL; Alcoa; Allstate; Alston & Bird; Ameriprise; American Bankers Association; American Express; Anadarko; Applied Materials; Association of Corporate Counsel; Avis Budget; Best Buy; Boeing; Boston Scientific; Brink's; BRT; Burlington Northern; California Bar; Callaway; Caterpillar; Chevron; P. Clapman; Comcast; CSX; Cummins; Davis Polk; Deere; Devon; DTE Energy; DuPont; Eaton; Einstein Noah; Eli Lilly; ExxonMobil; FedEx; Financial Services Roundtable; FMC Corp.; FPL Group; Frontier; GE; General Mills; A. Goolsby; C. Holliday; Home Depot; Honeywell; IBM; ICI; Intel; JPMorgan Chase; E. J. Kullman; N. Lautenbach; MetLife; Microsoft; J. Miller; Motorola; NACD; NIRI; O'Melveny & Myers; Office Depot; P&G; PepsiCo; Pfizer; Piedmont; Praxair; Protective; Ryder; S&C; Safeway; Seven Law Firms; Shearman & Sterling; Sherwin-Williams; SIFMA; Simpson Thacher; Society of Corporate Secretaries; Southern Company; Tenet; Tesoro; Textron; Theragenics; Tidewater; Tompkins; G. Tooker; tw telecom; United Brotherhood of Carpenters; U.S. Bancorp; The Valspar Corporation ("Valspar"); Wachtell; Wells Fargo; Xerox.

[679] *See* letters from AFL–CIO; CFA Institute; CII; Governance for Owners; C. Levin; Marco Consulting; SWIB.

[680] *See* letters from CII; USPE.

[681] *See* letters from American Express; Brink's; BRT; CSX; Davis Polk; DuPont; C. Holliday; GE; General Mills; MetLife; Safeway; Tenet; Verizon.

[682] *See* letters from ABA; BorgWarner; CII; J. McRitchie; P. Neuhauser; O'Melveny & Myers; Seven Law Firms.

[683] *See* letters from ABA; Seven Law Firms.

[684] *See* letter from ABA.

[685] As we stated in the Proposing Release, a proposal would continue to be subject to exclusion under other provisions of Rule 14a–8. For example, a proposal would be excludable 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),

Continued

In addition, we are adopting the proposed amendment to codify the prior staff interpretations largely as proposed. As adopted, companies will be permitted to exclude a shareholder proposal pursuant to Rule 14a–8(i)(8) if it:

- Would disqualify a nominee who is standing for election;
- Would remove a director from office before his or her term expired;
- Questions the competence, business judgment, or character of one or more nominees or directors;
- Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or
- Otherwise could affect the outcome of the upcoming election of directors.[686]

We believe that shareholders and companies will benefit from the enhanced clarity that the amended rule will provide concerning the application of the rule. We do not believe that the amendments will result in confusion with regard to the rule's application because the amendments do not change the manner in which Rule 14a–8(i)(8) has been, and will continue to be, interpreted by the staff with respect to other types of proposals.

The amendments to Rule 14a–8(i)(8) could result in shareholders proposing amendments to a company's governing documents that would establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees for director in company proxy materials. These proposals could seek to include a number of provisions relating to nominating directors for inclusion in company proxy materials, and disclosures related to such nominations, that require a different ownership threshold, holding period, or other qualifications or representations than those contained in Rule 14a–11. To the extent that shareholders are successful in adopting amendments to a company's governing documents to establish procedures for the inclusion of one or more shareholder nominees for director in the company's proxy materials, we note that the provision would be an additional avenue for shareholders to submit nominees for inclusion in company proxy materials, not a substitute for, or restriction on, Rule 14a–11. While such amendments proposed by shareholders through Rule 14a–8 would not be excludable under Rule 14a–8(i)(8) as amended, a company may seek to exclude such a proposal on another basis. For example, to the extent a proposal sought to limit the application of Rule 14a–11, a company could seek to exclude the proposal pursuant to Rule 14a–8(i)(3) on the basis that it is contrary to the proxy rules. We considered whether permitting proposals to allow additional means for shareholder director nominees to be included in company proxy materials would create confusion or lack of certainty for companies and their shareholders in light of the final provisions of Rule 14a–11. In the end, however, we have concluded that this possibility of confusion can be addressed through disclosure and is more than offset by the benefits of facilitating shareholders' ability to determine that their companies should have additional provisions allowing for inclusion of shareholder nominees in company proxy materials.

One commenter opposed the application of proposed Rule 14a–8(i)(8) to investment companies for the same reasons that it opposed the application of proposed Rule 14a–11 to investment companies.[687] We have decided to make amended Rule 14a–8(i)(8) applicable to investment companies for the same reasons that we are making Rule 14a–11 applicable to investment companies. Rule 14a–8(i)(8) is intended to further facilitate shareholders' traditional State law rights to nominate directors, which apply to the shareholders of investment companies. As discussed above, we do not believe that the regulatory protections offered by the Investment Company Act or the fact that open-end management investment companies are not required by State law to hold annual meetings serves to decrease the importance of the rights that are granted to shareholders under State law. For further discussion of our reasons for applying the rule to investment companies, see Section II.B.3.b.

5. Disclosure Requirements

We did not propose any new disclosure requirements for a shareholder that submits a proposal that would amend, or that requests an amendment to, a company's governing documents to address the company's nomination procedures for inclusion of shareholder nominees in company proxy materials or disclosures related to those shareholder provisions.[688] We solicited comment on whether additional disclosure from a shareholder submitting such a proposal would be appropriate. Three commenters opposed requiring disclosure from shareholders who submit such a proposal pursuant to Rule 14a–8 that differs from disclosure required of shareholders who submit other types of Rule 14a–8 proposals.[689] Three commenters recommended generally that a shareholder who submits a Rule 14a–8 proposal regarding a procedure to include shareholder nominees for director in a company's proxy materials should be required to provide additional disclosure (*e.g.,* disclosure about its long-term interest in the company and intentions regarding the shareholder proposal) so that other shareholders could make a fully-informed voting decision.[690] They argued that disclosure at the time of a nomination pursuant to such a procedure would relate only to the election of specific nominees; it would not provide shareholders with enough information to make a voting decision on the proposed procedure and its effect.

As we stated in the Proposing Release, it is our view that disclosure at the time a nominee is submitted and an actual vote is taken on a shareholder nominee is sufficient. Therefore, we are not adopting any new disclosure requirements for a shareholder simply submitting such a proposal because we believe that a shareholder may simply want to amend the company's procedures for including shareholder nominees in company proxy materials, but may not intend to nominate any particular individual.[691]

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if the proposal or supporting statement was contrary to any of the Commission's proxy rules.

[686] We note that the rule text adopted differs slightly from the proposed rule text as a result of technical modifications we made to better reflect our intent with respect to the rule. We are adopting amended Rule 14a–8(i)(8) with the language "seeks to include a specific individual in the company's proxy materials for election to the board of directors" rather than "nominates a specific individual for election to the board of directors, other than pursuant to Rule 14a–11, an applicable State law provision, or a company's governing documents." The change in the language from "nominates" to "seeks to include" more accurately reflects the fact that Rule 14a–8 cannot be used as a means to nominate a candidate for election to the board of directors. We also deleted the language regarding Rule 14a–11, an applicable State law provision, or a company's governing documents because we believe it is unnecessary.

[687] *See* letter from ICI.

[688] Shareholders submitting a proposal that seeks to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials would be subject to Rule 14a–8's current requirements. *See* footnote 685 above.

[689] *See* letters from CII; Florida State Board of Administration; United Brotherhood of Carpenters.

[690] *See* letters from ICI; Keating Muething; O'Melveny & Myers.

[691] This approach is different from the disclosure requirements the Commission proposed in the Shareholder Proposals Release in 2007; however, it is consistent with the overall requirements relating to the submission of shareholder proposals—

In proposing amendments to Rule 14a–8(i)(8), we noted that the amendments could result in shareholder proposals that would establish procedures for nominating directors and disclosures related to such nominations that require a different ownership threshold, holding period, or other qualifications or representations than those proposed in Rule 14a–11. In addition, a state could set forth in its corporate code,[692] or a company may choose to amend its governing documents, to establish nomination or disclosure provisions in addition to those provided pursuant to Rule 14a–11 (*e.g.,* a company could choose to allow shareholders to have their nominees included in the company's proxy materials regardless of ownership—in that instance, the company's provision would apply for certain shareholders who otherwise could not have their nominees included in the company's proxy materials pursuant to Rule 14a–11). Accordingly, we proposed amendments to our proxy rules to address the disclosure requirements when a nomination is made pursuant to such a provision.[693]

As proposed, Rule 14a–19 would apply to a shareholder nomination for director for inclusion in the company's proxy materials made pursuant to procedures established pursuant to State law or by a company's governing documents. The proposed rule would require a nominating shareholder or group to include in its shareholder notice on Schedule 14N (which, under the Proposal, also would be filed with the Commission on the date provided to the company) disclosures about the nominating shareholder or group and their nominee that are similar to what would be required in an election contest.[694]

Specifically, the notice on Schedule 14N, as proposed, would be required to include:

- A statement that the nominee consents to be named in the company's proxy statement and to serve on the board if elected, for inclusion in the company's proxy statement;[695]
- Disclosure about the nominee complying with the requirements of Item 4(b), Item 5(b), and Items 7(a), (b) and (c) and, for investment companies, Item 22(b) of Exchange Act Schedule 14A, as applicable, for inclusion in the company's proxy statement;[696]
- Disclosure about the nominating shareholder or members of a nominating shareholder group consistent with the disclosure currently required pursuant to Item 4(b) and Item 5(b) of Schedule 14A;[697]
- Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K. Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A;[698]
- The following disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company:
  - Any direct or indirect material interest in any contract or agreement between the nominating shareholder or group or the nominee and the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);
  - Any material pending or threatened litigation in which the nominating shareholder or group or nominee is a party or a material participant, and that involves the company, any of its officers or directors, or any affiliate of the company; and
  - Any other material relationship between the nominating shareholder or group or the nominee and the company or any affiliate of the company not otherwise disclosed;[699] and
- Disclosure of any Web site address on which the nominating shareholder or group may publish soliciting materials.[700]

These disclosures would be included in the company's proxy materials pursuant to proposed new Item 7(f) of Schedule 14A, or in the case of investment companies, proposed Item 22(b)(19) of Schedule 14A.

In addition, under the Proposal, the nominating shareholder or group would be required to identify the shareholder or group making the nomination and the amount of their ownership in the company on Schedule 14N. The filing would be required to include, among other disclosures:

- The name and address of the nominating shareholder or each member of the nominating shareholder group; and
- Information regarding the aggregate number and percentage of the securities entitled to be voted, including the amount beneficially owned and the number of shares over which the nominating shareholder or each member of the nominating shareholder group has or shares voting or disposition power.

We did not receive a significant amount of comment specifically addressing proposed Rule 14a–19. One commenter believed that the disclosure requirements of Rules 14a–18 and 14a–19 should be virtually identical.[701] The commenter highlighted certain discrepancies, such as the intent to retain the requisite shares through, and subsequent to, the date of election. Another commenter saw no need for a separate rule to deal with nominations submitted under State law or a company's governing documents and therefore urged the Commission not to adopt Rule 14a–19.[702] The commenter believed there are no policy grounds to justify disparate treatment of nominations submitted under State law or a company's governing documents. It warned that a separate rule would only create confusion. Another commenter

generally, shareholder proponents are not required to provide any specific type of disclosure along with their proposal.

[692] *See* North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35–08 (2009). In 2007, North Dakota amended its corporate code to permit five percent shareholders to provide a company notice of intent to nominate directors and require the company to include each such shareholder nominee in its proxy statement and form of proxy. *See* N.D. Cent. Code § 10–35 *et al.* (2007).

[693] *See* proposed Rule 14a–19.

[694] *See* proposed Rule 14a–19.

[695] *See* proposed Rule 14a–19(a).

[696] *See* proposed Rule 14a–19(b). This information would identify the nominee, describe certain legal proceedings, if any, related to the nominee, and describe certain of the nominee's transactions and relationships with the company. *See* Items 7(a), (b), and (c) of Schedule 14A. This information also would include biographical information and information concerning interests of the nominee. *See* Item 5(b) of Schedule 14A. With respect to a nominee for director of an investment company, the disclosure would include certain basic information about the nominee and any arrangement or understanding between the nominee and any other person pursuant to which he was selected as a nominee; information about the positions, interests, and transactions and relationships of the nominee and his immediate family members with the company and persons related to the company; information about the amount of equity securities of funds in a fund complex owned by the nominee; and information describing certain legal proceedings related to the nominee, including legal proceedings in which the nominee is a party adverse to, or has a material interest adverse to, the company or any of its affiliated persons. *See* paragraph (b) of Item 22 of Schedule 14A.

[697] *See* proposed Rule 14a–19(c).

[698] *See* proposed Rule 14a–19(d).

[699] *See* proposed Rule 14a–19(e).

[700] *See* proposed Rule 14a–19(f).

[701] *See* letter from P. Neuhauser.

[702] *See* letter from Cleary.

suggested that we extend the disclosure requirement to nominations submitted pursuant to a provision under foreign law.[703]

As we stated in the Proposing Release, we believe the proposed additional disclosure requirements are necessary to provide shareholders with full and fair disclosure of information that is material when a choice among directors to be elected is presented; thus, we are adopting the disclosure requirement largely as proposed.[704] As noted above, one commenter suggested that the disclosure standard should apply to nominations made pursuant to foreign law. We agree that the disclosure is necessary regardless of the source of the ability to nominate candidates for director. We therefore have clarified that the disclosure requirement extends not only to nominations made pursuant to State law or a company's governing documents, but also pursuant to foreign law (in the case of a non-U.S. domiciled company that does not qualify as a foreign private issuer). We continue to believe that these disclosures will assist shareholders in making an informed voting decision with regard to any nominee or nominees put forth by the nominating shareholder or group, in that the disclosures would enable shareholders to gauge the nominating shareholder's or group's interest in the company. We understand the concern that a separate disclosure rule for nominations made pursuant to State or foreign law provisions, or a company's governing documents could create confusion. We note, however, that certain disclosure provisions or certifications applicable to Rule 14a–11 nominations may not be applicable to nominations made pursuant to other provisions. For example, State or foreign law provisions, or the company's governing documents may require different ownership thresholds or holding periods. Therefore, we believe it is necessary to have separate disclosure requirements for nominations made pursuant to State or foreign law, or a company's governing documents. As with disclosures made in connection with a Rule 14a–11 nomination, the nominating shareholder or group would be liable for any materially false or misleading statements in these disclosures pursuant to new paragraph (c) of Rule 14a–9.[705]

As noted above, we have restructured Rule 14a–11, Rule 14a–18, and Schedule 14N. Similarly, while we are adopting the disclosure requirements largely as proposed in Rule 14a–19,[706] they are now included in Item 6 of Schedule 14N. In addition, because we moved the disclosure requirements for Rule 14a–11 from proposed Rule 14a–18 into Schedule 14N, the requirements for shareholders submitting nominations pursuant to a provision in State law or a company's governing documents are being adopted as new Rule 14a–18.

Under the Proposal, a shareholder submitting a nomination pursuant to a State law provision or a provision in a company's governing documents would be required to file a Schedule 14N (with the disclosures required by that Schedule) by the date specified in the advance notice provision, or where no such provision is in place, no later than 120 calendar days before the date the company mailed its proxy materials for the prior year's annual meeting.[707] We are adopting this requirement as proposed. We note that it is likely that a State or foreign law provision or a provision in a company's governing documents will provide a deadline for submission of nominations made pursuant to those provisions. While we believe that shareholders submitting nominations pursuant to those provisions should provide the disclosure required by Schedule 14N, we believe it is appropriate to defer to the deadline, if any, set forth in those provisions. In this regard, we note that timing concerns present in the Rule 14a–11 nomination context (*e.g.,* timing requirements for engaging in the staff no-action process) are not present in this context.

D. Other Rule Changes

1. Disclosure of Dates and Voting Information

As proposed, if a 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, within four business days of determining the anticipated meeting date a company would be required to file a Form 8–K to disclose the date by which a nominating shareholder or group must submit notice to include a nominee in the company's proxy materials pursuant to Rule 14a–11.[708] The date disclosed as the deadline for such shareholder nominations for director would be required to be a reasonable time before the company mails its proxy materials for the meeting. We also proposed to require a registered investment company that is a series company to file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting and the total number of the company's shares that are outstanding and entitled to vote for the election of directors (or if votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating votes) at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.

We did not receive much comment on this aspect of the rule. One commenter urged the Commission not to require the Form 8–K filing for investment companies, which generally are not required to file Form 8–K.[709] The commenter favored instead a requirement for investment companies to inform shareholders through another method (or combination of methods) of disclosure reasonably designed to provide notice of the date, including via a press release or posting information on the company's Web site. One commenter supported the proposed instruction to Item 5.07 of Form 8–K.[710]

We are adopting this requirement substantially as proposed, although the requirement will be in new Item 5.08 of Form 8–K. A company will be required to file a Form 8–K, within four business days of determining the anticipated date of the meeting, disclosing the date by which a nominating shareholder or group must submit notice to include a nominee in the company's proxy

[703] *See* letter from Curtis.

[704] As noted in footnote 511 above, the applicable disclosure requirement in Item 401(f) of Regulation S–K was amended in the Proxy Disclosure Enhancements Adopting Release to require disclosure regarding legal proceedings for the past 10 years as opposed to past five years. Thus, disclosure would be required about a nominee's or nominating shareholder's participation in legal proceedings during the past 10 years. We also are making clarifying changes to the disclosure required regarding the nature and extent of relationships between the nominating shareholder or group and/or nominee and/or the company or its affiliates. *See* footnote 514 and accompanying text in Section II.B.8.c.i. above.

[705] *See* proposed Rule 14a–9(c).

[706] As adopted, Item 6(d) of Schedule 14N will require disclosure about a nominating shareholder's involvement in legal proceedings during the past ten years, rather than five years as was proposed. This is due to the Commission's recent amendment of Item 401(f) of Regulation S–K. *See* footnotes 511 and 704 above.

[707] If a company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder or group must provide notice a reasonable time before the registrant mails its proxy materials.

[708] *See* proposed Item 5.07 to Form 8–K.

[709] *See* letter from ICI.

[710] *See* letter from ABA.

materials pursuant to Rule 14a–11, which date shall be a reasonable time before the registrant mails its proxy materials for the meeting.[711] We also have clarified that where a company is required to include shareholder director nominees in the company's proxy materials pursuant to an applicable state or foreign law provision, or a provision in the company's governing documents then the company is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the Schedule 14N required pursuant to Rule 14a–18.

A registered investment company that is a series company also must disclose the total number of the company's shares that are outstanding and entitled to vote for the election of directors (or if votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at the shareholder meeting as of the end of the most recent calendar quarter.[712] We believe it is important to provide shareholders with information regarding the deadline for submitting such nominations in the event that the date of the meeting at which the election of directors will take place changes significantly. Moreover, we have decided to require registered investment companies to make the disclosures on Form 8–K, as proposed, rather than through another method or combination of methods because we believe that the information that we are requiring is important information that should be filed with the Commission and accessible on EDGAR rather than merely disclosed on a Web site or in a press release.[713]

Exchange Act Rule 14a–5 requires registrants to disclose in a proxy statement the deadlines for submitting shareholder proposals and matters submitted pursuant to advance notice bylaws. We are amending Rule 14a–5 to also require companies to disclose the deadline for submitting nominees for inclusion in the company's proxy materials for the company's next annual meeting of shareholders. This provision will apply with respect to inclusion of nominations in a company's proxy materials pursuant to Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents.[714] We believe that it is necessary to conform the existing requirements in Rule 14a–5, consistent with the proposal to give adequate notice to shareholders about their ability to submit a nominee or nominees for inclusion in a company's proxy materials pursuant to Rule 14a–11. The change should help to avoid any potential confusion regarding the date by which shareholders seeking to have a nominee included in a company's proxy materials would need to submit a Schedule 14N pursuant to Rule 14a–11 or Rule 14a–18.

2. Beneficial Ownership Reporting Requirements

As adopted, Rule 14a–11 requires that a nominating shareholder or group hold at least 3% of the voting power of the company's securities entitled to be voted on the election of directors. Although unnecessary to be able to use the rule, it is possible that in aggregating shares to meet the ownership requirement, a nominating shareholder or group will trigger the reporting requirements of Regulation 13D–G, which requires that a shareholder or group that beneficially owns more than 5% of a voting class of any equity security registered pursuant to Section 12 file beneficial ownership reports.[715] Therefore, nominating shareholders will need to consider whether they have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b)(1) that is required to file beneficial ownership reports. Any person (which includes a group as defined in Rule 13d–5(b)(1)) who is directly or indirectly the beneficial owner of more than 5% of a class of equity securities registered under Exchange Act Section 12 must report that ownership by filing an Exchange Act Schedule 13D with the Commission.[716] There are exceptions to this requirement, however, that permit such a person to report that ownership on Schedule 13G rather than Schedule 13D. One exception permits filings on Schedule 13G for a specified list of qualified institutional investors who have acquired the securities in the ordinary course of their business and with neither the purpose nor the effect of changing or influencing control of the company.[717] A second exception applies to persons who beneficially own more than 5% of a subject class of securities if they acquired the securities with neither the purpose nor the effect of changing or influencing control of the company and they are not directly or indirectly the beneficial owner of 20% or more of the subject class of securities.[718]

Central to Schedule 13G eligibility under the exceptions discussed above is that the shareholder be a passive investor that has acquired the securities without the purpose, or the effect, of changing or influencing control of the company. In addition, shareholders who are filing as qualified institutional investors must have acquired the securities in the ordinary course of their business. Typically, persons who seek to nominate candidates for a company's board of directors would be unable to meet these eligibility requirements to file on Schedule 13G. As we stated in the Proposing Release, however, we believe that the formation of a shareholder group solely for the purpose of nominating one or more directors pursuant to proposed Rule 14a–11, the nomination of one or more directors pursuant to proposed Rule 14a–11, or soliciting activities in connection with such a nomination (including soliciting in opposition to a company's nominees) should not result in a nominating shareholder or nominating shareholder group losing its eligibility to file on Schedule 13G. As a result, we proposed to revise the requirement that the first and second categories of persons who may report their ownership on Schedule 13G must have acquired the securities without the purpose or effect of changing or influencing control of the company and, in the case of Rule 13d–1(b), in the ordinary course of business, to provide an exception for activities solely in connection with a nomination under Rule 14a–11.

[711] *See* new Item 5.08 of Form 8–K and new General Instruction B.1. to Form 8–K. A late filing of such form would result in the registrant not being current or timely for purposes of rules and regulations related to form eligibility and the resale of securities. The company would be deemed current once the Form 8–K is filed.

[712] *See* General Instruction B.1 and Item 5.08(b) of Form 8–K; Rules 13a–11(b)(3) and 15d–11(b)(3); and Instruction 2 to Rule 14a–11(b)(1). In the case of registered investment companies, nominating shareholders may rely on the information contained in the Form 8–K filed in connection with the meeting, unless the nominating shareholder or group knows or has reason to know that the information contained therein is inaccurate. *See* discussion in footnote 280.

[713] We are not adopting the proposed requirement that a registered investment company that is a series company file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting. We proposed this requirement in connection with our proposal to use tiered thresholds based on net assets to determine eligibility under Rule 14a–11. Since the rule we are adopting does not use tiered thresholds, the proposed requirement is no longer necessary.

[714] *See* new Rule 14a–5(e)(3).

[715] The term equity security also includes any equity security of any insurance company which would have been required to be registered pursuant to Section 12 of the Exchange Act except for the exemption contained in Section 12(g)(2)(G) of the Act or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940. *See* Exchange Act Rule 13d–1(i).

[716] *See* Exchange Act Rule 13d–1.

[717] *See* Exchange Act Rule 13d–1(b).

[718] *See* Exchange Act Rule 13d–1(c).

Comments on the proposal were mixed. Some commenters generally supported the proposed exceptions from the Schedule 13D filing obligation for a nominating shareholder or group conducting activities solely in connection with a Rule 14a–11 nomination so that it would be eligible to report on Schedule 13G rather than Schedule 13D.[719] One such commenter added that the exceptions also should be available to a nominating shareholder or group submitting nominees pursuant to State law or a company's governing documents.[720] One commenter predicted the amendment would encourage use of Rule 14a–11 by large shareholders who are knowledgeable about the company but may be reluctant to take action that may jeopardize their Schedule 13G filer status.[721] One commenter observed more generally that a Schedule 13D filing is unnecessary if the filing requirement of Rule 14a–2(b)(7) is retained because such filings would provide sufficient notice to the market.[722] Even if such filing requirement is not retained, the commenter believed that a Schedule 13D is unnecessary because the underlying assumption of Rule 14a–11 is that there is no control intent.

On the other hand, other commenters opposed generally the proposed exceptions from the Schedule 13D filing obligation.[723] Some of these commenters expressed reservations about creating a broad exemption or carve-out from Exchange Act Section 13(d) "control" concepts.[724] One commenter noted that Rules 13d–1(b), (c) and (e) track the use of the phrase "changing or influencing control of the issuer" from Exchange Act Section 13(d)(5).[725] This commenter did not believe there is a persuasive basis for the Commission to provide that, under all circumstances, a shareholder or group seeking to nominate a director, in opposition to the election of incumbent directors, is not seeking to "influence" control of the company. One commenter stated that most election contests would fall within the concept of "influencing the control of the issuer" because they focus on the governance, strategic direction and policy initiatives of the company.[726] Another commenter noted that the Schedule 14N certifications require only that a nominating shareholder has no intention of "changing control" of the company, but does not require the nominating shareholder to certify that it has no intention of "influencing control."[727] Several commenters expressed concerns about inadequate disclosures that would result from the proposed exceptions or pointed to the useful disclosure required by Schedule 13D.[728] One commenter observed that if a nominating shareholder or group has no plans regarding significant changes in the company or relationships with other parties regarding securities of the company, a Schedule 13D filing would not require significant information from a nominating shareholder or group beyond that required by Schedule 14N.[729] This commenter noted that if a nominating shareholder or group, however, has more complicated relationships or intentions relating to the company or its securities, the Schedule 13D filing would provide additional information that shareholders would find useful.[730]

We continue to believe that it is appropriate to provide an exception for activities solely in connection with a nomination pursuant to Rule 14a–11 to allow a nominating shareholder or group to report on Schedule 13G. Accordingly, we are adopting, as proposed, the exception from the requirement to file a Schedule 13D (and therefore permitting filing on Schedule 13G) for activities undertaken solely in connection with a nomination under Rule 14a–11. In addition, we are adopting a change to the certifications in Schedule 13G to reflect this exception.[731]

It is important to note that any activity other than those provided for under Rule 14a–11 would make the exception inapplicable. For example, approaching a company's board and urging them to consider strategic alternatives (*e.g.,* sale of non-core assets or a leveraged recapitalization) would constitute activities outside of the Rule 14a–11 nomination, and any nominating shareholder or group engaging in such activities most likely would be ineligible to file on Schedule 13G. The rule changes will not apply to nominating shareholders or groups that submit a nomination pursuant to an applicable state or foreign law provision, or a company's governing documents because in those instances the applicable provisions may not limit the number of board seats for which a shareholder or group could nominate candidates or include a requirement that the nominating shareholder or group lack intent to change the control of the issuer or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under Rule 14a–11 (as is the case under Rule 14a–11). Accordingly, we do not believe it would be appropriate to make a general determination by rule as to whether a nominating shareholder or group under an applicable state or foreign law provision, or a company's governing documents would be eligible to file on Schedule 13G. Instead, this would be a fact-specific inquiry.

We believe that the disclosures about the nominating shareholder or group required by Rule 14a–11 and Schedule 14N are adequate to allow shareholders to make an informed decision and to keep the market apprised of developments regarding board nomination activities, and do not believe that requiring the additional disclosures in Schedule 13D is necessary for activities solely in connection with a nomination under Rule 14a–11. Because this exception is only available for purposes of the nomination, a nominating shareholder or group would need to reassess its eligibility to continue to report on Schedule 13G as a passive or qualified institutional investor after the election. For example, if a nominating shareholder is also the nominee and is successfully elected to the board, then the shareholder would likely be ineligible to continue filing on Schedule 13G due to its ability as a director to directly or indirectly influence the management and policies of the company. We believe the limited scope of the exemption addresses commenters'

[719] *See* letters from CalSTRS; CFA Institute; CII; Florida State Board of Administration; ICI; Schulte Roth & Zabel. Another commenter, ICGN, did not expressly address the proposed amendment but asked the Commission to clarify the definition of "group" so that shareholders would not be dissuaded from acting collectively to use Rule 14a–11 out of concern that a Schedule 13D filing obligation would arise.

[720] *See* letter from CII. In contrast, two commenters stated that the proposed exceptions should not be extended outside the context of Rule 14a–11, and agreed that it would not be possible to address the eligibility standards in provisions of State law or a company's governing documents or ensure that there is no change in control attempt. *See* letters from ABA; Alston & Bird.

[721] *See* letter from Schulte Roth & Zabel.

[722] *See* letter from P. Neuhauser.

[723] *See* letters from ABA; Alston & Bird; BRT; Cleary; Microsoft; Seven Law Firms; Shearman & Sterling; Society of Corporate Secretaries; Vinson & Elkins.

[724] *See* letters from ABA; Cleary; Microsoft; Seven Law Firm; Shearman & Sterling.

[725] *See* letter from ABA.

[726] *See* letter from Seven Law Firms.

[727] *See* letter from ABA.

[728] *See* letters from ABA; Alston & Bird; BRT; Seven Law Firms; Society of Corporate Secretaries; Vinson & Elkins.

[729] *See* letter from ABA.

[730] *Id*

[731] We did not propose the change to the certifications in Schedule 13G; however, we believe this conforming change is necessary to reflect the intent of the exception.

concerns about nominating shareholders or groups influencing control of the issuer while reporting on Schedule 13G.

3. Exchange Act Section 16

Section 16[732] applies to every person who is the beneficial owner of more than 10% of any class of equity security registered under Exchange Act Section 12 ("10% owners"), and each officer and director (collectively with 10% owners, "insiders") of the issuer of such security. We did not propose an exemption from Section 16 for groups formed solely for the purpose of nominating a director pursuant to Rule 14a–11.[733] In the Proposal, we explained that we believed the existing analysis of whether a group has formed[734] and whether Section 16 applies[735] should continue to apply. We also explained that because the proposed ownership thresholds for Rule 14a–11 were significantly lower than 10%, we did not believe that the lack of an exclusion would have a deterrent effect on the formation of groups, and therefore did not believe it was necessary to propose an exclusion from Section 16.

We also noted in the Proposal that some shareholders, particularly institutions and other entities, may be concerned that successful use of Rule 14a–11 to include a director nominee in company proxy materials may result in the nominating person also being deemed a director under the "deputization" theory developed by courts in Section 16(b) short-swing profit recovery cases.[736] Under this theory it is possible for a person to be deemed a director subject to Section 16, even though the issuer has not formally elected or otherwise named that person a director. We did not propose standards for establishing the independence of the nominee from the nominating shareholder, or members of the nominating shareholder group.

Although we did not propose an exemption from Section 16, we requested comment on, among other things, whether a nominating shareholder group should be excluded from Section 16 and whether subjecting such groups to Section 16 would be a disincentive to using Rule 14a–11. A few commenters recommended that the Commission create an exemption from Section 16 for a group of shareholders that aggregated their holdings in order to submit a nominee pursuant to Rule 14a–11.[737] Commenters reasoned that members of a nominating group that owns more than 10% of the shares could not reasonably be considered company "insiders."[738] These commenters noted that the group would exist for the sole purpose of nominating a candidate and, absent special facts, would have no access to inside information about the company. Thus, these commenters argued that the statutory purpose of Section 16—the prevention of insider trading—would not be relevant to such groups. Other commenters did not support an exemption from Section 16.[739] Some of these commenters further agreed that no standard should be adopted regarding application of the judicial doctrine concerning "deputized directors."[740]

After considering the comments, we continue to believe that an exclusion from Section 16 is not appropriate for groups formed solely for the purpose of nominating a director pursuant to Rule 14a–11, soliciting in connection with the election of that nominee, or having that nominee elected as director. We also believe that it is not necessary to change the existing analysis of whether a group has formed and whether Section 16 applies. Because the ownership threshold we are adopting for Rule 14a–11 eligibility is significantly less than 10%, shareholders will be able to form groups with holdings sufficient to meet the Rule 14a–11 threshold without reaching the 10% threshold in Section 16. Thus, we do not believe that Section 16 commonly will be a deterrent to use of Rule 14a–11. As such, we believe that shareholders forming a group to submit a nominee for director pursuant to Rule 14a–11 should be analyzed in the same way as any other group for purposes of determining whether group members are 10% owners subject to Section 16. Similarly, we are not adopting standards regarding application of the "deputized director" doctrine, which will be left to existing case law and courts.

4. Nominating Shareholder or Group Status as Affiliates of the Company

We proposed that Rule 14a–11(a) contain a safe harbor providing that a nominating shareholder would not be deemed an "affiliate" of the company under the Securities Act or the Exchange Act solely as a result of using Rule 14a–11.[741] Under the Proposal, this safe harbor would apply not only to the nomination of a candidate, but also where that candidate is elected, provided that the nominating shareholder or group does not have an agreement or relationship with that director otherwise than relating to the nomination. We were concerned that, without such a safe harbor, some nominating shareholders may be deterred from using Rule 14a–11.

We solicited comment on the appropriateness of the proposed safe harbor and posed some specific questions concerning its application. We also asked whether we should include a similar safe harbor provision for nominating shareholders that submit a nominee for inclusion in a company's proxy materials pursuant to an applicable State law provision or a company's governing documents rather than using the proposed rule.

Three commenters provided statements of general support for the proposed safe harbor.[742] One commenter believed that a safe harbor also would be warranted for shareholders submitting nominees pursuant to State law or a company's governing documents.[743] Another commenter believed the safe harbor should not be available once the shareholder nominee is elected.[744] One commenter recommended that Instruction 1 to Rule 14a–11(a) clarify that the presence of agreements, other than those relating only to the nomination, between a nominating shareholder and a candidate or director

[732] 15 U.S.C. 78p.

[733] As discussed in the Proposing Release, the Commission had previously proposed, in 2003, that a group formed solely for the purpose of nominating a director pursuant to Rule 14a–11, soliciting in connection with the election of that nominee, or having that nominee elected as a director be exempted from Exchange Act Section 16 reporting.

[734] *See* Exchange Act Rule 13d–5(b) [17 CFR 240.13d–5(b)].

[735] *See* Exchange Act Rule 16a–1(a)(1) [17 CFR 240.16a–1(a)(1)].

[736] *See Feder v. Martin Marietta Corp.,* 406 F.2d 260 (2d Cir. 1969), *cert. denied,* 396 U.S. 1036 (1970); *Blau v. Lehman,* 368 U.S. 403 (1962); and *Rattner v. Lehman,* 193 F.2d 564 (2d Cir. 1952). The judicial decisions in which this theory was applied do not establish precise standards for determining when "deputization" may exist. However, the express purpose of Section 16(b) is to prevent the unfair use of information by insiders through their relationships to the issuer. Accordingly, one factor that courts may consider in determining if Section 16(b) liability applies is whether, by virtue of the "deputization" relationship, the "deputizing" entity's transactions in issuer securities may benefit from the deputized director's access to inside information.

[737] *See* letters from ICI; Schulte Roth & Zabel; ValueAct Capital.

[738] *See* letters from ICI; Schulte Roth & Zabel.

[739] *See* letters from ABA; Alston & Bird; CII; Seven Law Firms.

[740] *See* letters from ABA; CII; Seven Law Firms.

[741] This safe harbor was set forth in Instruction 1 to proposed Rule 14a–11(a). The safe harbor was intended to operate such that the determination of whether a shareholder or group is an "affiliate" of the company would continue to be made based upon all of the facts and circumstances regarding the relationship of the shareholder or group to the company, but a shareholder or group would not be deemed an affiliate "solely" by virtue of having nominated that director.

[742] *See* letters from CII; Protective; Schulte Roth & Zabel.

[743] *See* letter from CII.

[744] *See* letter from Protective.

would not necessarily confer affiliate status on the nominating shareholder, and that Rule 14a–11 is not intended to change the current law regarding affiliate status.[745]

Two commenters opposed the safe harbor.[746] One commenter believed that we should not adopt such a safe harbor without addressing the issue of affiliate status more broadly.[747] It argued that as long as the Commission follows the historical, facts-and-circumstances analysis for the determination of affiliate status in other contexts, it also should follow this practice in the context of Rule 14a–11. Both commenters opposing the safe harbor also did not believe that proposed Instruction 1 to Rule 14a–11(a) would significantly reduce the interpretive analysis needed to determine whether a nominating shareholder is an "affiliate."[748] They argued that it rarely would be clear whether a nominating shareholder's relationship with the company would consist "solely" of its nominating and soliciting activities, no matter how a safe harbor may be worded. They also expressed concern that the safe harbor would discourage nominating shareholders from participating in potentially fruitful discussions with the company, for fear that such participation would go beyond "solely" nominating and soliciting for a director candidate.

After considering the comments, we do not believe that the proposed safe harbor would provide a level of certainty to nominating shareholders concerning their potential "affiliate" status sufficient to warrant a departure from the current application of the term. We believe it is more appropriate to conduct a facts-and-circumstances analysis in this regard, as would currently be the case in other situations. We agree with commenters' views on the limited utility of the safe harbor's application in practice, acknowledging that a nominating shareholder would be obligated to conduct a facts-and-circumstance analysis to determine affiliate status even if we were to adopt the safe harbor as proposed. We also recognize that some nominating shareholders or members of nominating shareholder groups may be reluctant to engage in certain activities that would further the general purpose of Rule 14a–11 due to concerns that such activities would jeopardize their ability to use the safe harbor.

In this light, it does not appear that the proposed safe harbor would meaningfully facilitate use of Rule 14a–11, if at all, and may, in fact, deter it because some nominating shareholders or members of nominating shareholder groups may limit their activities out of concern that their activities would jeopardize reliance on the safe harbor. Accordingly, we have decided neither to adopt a safe harbor under the rule nor to adopt a similar safe harbor for shareholders submitting nominees pursuant to State law or a company's governing instruments. Instead, as is currently the case in other contests, those who use the rule will need to analyze affiliate status on a case-by-case basis, taking into consideration all relevant facts and circumstances, including the circumstances surrounding a nomination and election of a shareholder nominee.

E. Application of the Liability Provisions in the Federal Securities Laws to Statements Made by a Nominating Shareholder or Nominating Shareholder Group

It is our intent that a nominating shareholder or group relying on Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents to include a nominee in company proxy materials be liable for any statement included in the Schedule 14N or other related communications, or which it causes to be included in a company's proxy materials, which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact or omits to state any material fact necessary to make the statements therein not false or misleading. To this end, we proposed to add a new paragraph (c) to Rule 14a–9 to specifically address a nominating shareholder's or group's liability when providing information on a Schedule 14N to be included in a company's proxy materials pursuant to Rule 14a–11.

As proposed, new paragraph (c) stated that "no nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the Federal proxy rules, an applicable State law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in registrant proxy materials, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to a solicitation for the same meeting or subject matter which has become false or misleading."

Commenters generally supported the proposal to impose Rule 14a–9 liability on nominating shareholders or groups that caused false or misleading statements to be included in a company's proxy materials. One commenter supported the use of Rule 14a–9 as the standard for assigning liability, as the standards under that rule are well known and therefore would promote uniformity.[749] The commenter further stated that Rule 14a–9(c) makes sufficiently clear that a nominating shareholder or group would be liable for statements included in its Schedule 14N or notice to the company that is included in the company's proxy materials. As for the consequences of providing materially false information or representations in a Schedule 14N, the commenter stated that such a situation should be handled in the same way as materially false statements or omissions in a Schedule 14A or other soliciting material filed in connection with a proxy contest. Another commenter suggested that the disclosure provided to the company by the nominating shareholder or group and included in the company's proxy materials be treated as the shareholder's or group's soliciting materials.[750] The commenter did not believe that Rule 14a–9(c) makes clear that the nominating shareholder or group would be liable for any information included in its Schedule 14N or notice to the company that is included in the company's proxy materials. One commenter stated that members of a nominating group should be jointly and severally liable to the company for material misstatements or omissions provided to the company about the group or its members.[751] Another commenter, noting investors' concerns about exposure to joint liability from participating with other investors to nominate a candidate, requested that the Commission add additional commentary about the limits of joint liability for unapproved statements of other members of a nominating

[745] *See* letter from Schulte Roth & Zabel. The commenter explained that nominees often request agreements, such as indemnification agreements, that clearly relate only to their nomination. In other situations, however, nominees and nominating shareholders enter into other agreements, including compensation agreements, which may not relate exclusively to the nomination.

[746] *See* letters from ABA; Seven Law Firms.

[747] *See* letter from ABA.

[748] *See* letters from ABA; Seven Law Firms.

[749] *See* letter from CII.

[750] *See* letter from Protective.

[751] *See* letter from Verizon.

group.[752] One commenter suggested that a nominating shareholder or group should be required to indemnify the company for any costs incurred in connection with any misstatements or omissions in the information provided to the company for inclusion in the company's proxy materials.[753]

We are adopting Rule 14a–9(c) largely as proposed, but with specific references to statements made in the Schedule 14N and other related communications and a clarification that the rule would apply where a nominee is submitted pursuant to a foreign law provision in addition to a State law provision or the company's governing documents. New Rule 14a–9(c) provides that "no nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the Federal proxy rules, an applicable state or foreign law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in registrant proxy materials, include in a notice on Schedule 14N, or include in any other related communication, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to a solicitation for the same meeting or subject matter which has become false or misleading." The changes to the rule text are intended to clarify that a nominating shareholder or group would be liable for statements it makes regarding the nomination, regardless of whether those statements ultimately appear in the company's proxy statement, as we consider any statements that are made in the Schedule 14N or in other communications to be part of the solicitation by the nominating shareholder or group. Consistent with this view, the Schedule 14N filing (as well as any other related communications) would be considering soliciting materials for purposes of Section 14(a) liability.

Under the Proposal, the rule also included express language providing that the company would not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11 and then repeated by the company in its proxy statement, except where the company knows or has reason to know that the information is false or misleading.[754] A similar provision was proposed in Rule 14a–19 with regard to information provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable State law provision or a company's governing documents.[755]

A number of commenters opposed the "knows or has reason to know" standard.[756] Many commenters argued generally that because the Commission's Proposal would eliminate the board's involvement in selecting the shareholder nominees and prevent a company from excluding any information from its proxy materials, the company should not be liable for information provided by the nominating shareholder, group, or nominee.[757] Commenters further noted that companies would not have adequate time or sufficient means to investigate the statements made by the nominating shareholder, group, or nominee.[758] Therefore, these commenters argued that it would be inappropriate to shift onto companies any liability for statements made by a nominating shareholder, group, or nominee or impose a duty to investigate or otherwise confirm the accuracy of the information provided by a nominating shareholder, group, or nominee.[759] One commenter predicted that if a company is liable for information provided by a nominating shareholder or group and included in a company's proxy materials pursuant to Rule 14a–11, an applicable State law provision, or a provision in a company's governing documents, it would challenge in court any information provided by a nominating shareholder, group, or nominee that it suspects is materially false or misleading.[760] The commenter asserted that this type of expensive and time-consuming litigation likely would undermine the Commission's goals for the rule. Some commenters believed that the appropriate standard would be the standard in Rule 14a–8(*l*)(2) and Rule 14a–7(a)(2)(i): "the company is not responsible for the contents of [the shareholder proponent's] proposal or supporting statement."[761] Other commenters recommended generally that the Commission allow companies to provide certain disclaimers in their proxy materials regarding the statements provided by the nominating shareholder or group,[762] with one commenter suggesting that companies also should be able to set the nominating shareholder's or group's statements apart from their own statements by using different fonts, colors, graphics or other visual devices.[763]

Two commenters addressed the issue of a company's liability for disclosure provided by a nominating shareholder or group that is determined to be materially false or misleading after the proxy materials have been sent.[764] One commenter stated that companies should not have liability for failing to correct or recirculate proxy materials if, after the company mails its proxy materials, it is notified (or learns) that the information provided by a nominating shareholder or group is (or has become) materially false or misleading.[765] The commenter noted that the burden of updating and correcting information provided by a nominating shareholder or group should be solely the obligation of that shareholder or group. Another commenter provided similar views, noting that "[i]n situations where the registrant's changes have not been permitted, and certainly after the proxy materials have been published, we think the burden [of correcting or recirculating proxy materials] should be on the nominating shareholder and that the exception imposing liability on the registrant should not apply."[766] One commenter recommended that if Rule 14a–11 is adopted, the rule should state that liability is only attached when "the company knows or is grossly negligent in not knowing that the information is false or misleading."[767] Another commenter asked that the company be liable for false and misleading

[752] *See* letter from Universities Superannuation.

[753] *See* letter from Verizon.

[754] *See* proposed Rule 14a–11(e).

[755] *See* Note to proposed Rule 14a–19.

[756] *See* letters from ABA; Alaska Air; American Bankers Association; Ameriprise; BorgWarner; BRT; Caterpillar; Cleary; DTE Energy; ExxonMobil; Honeywell; ICI; Protective; S. Quinlivan; Seven Law Firms; Sidley Austin; Society of Corporate Secretaries; Southern Company; UnitedHealth; Verizon.

[757] *See* letters from American Bankers Association; Ameriprise; BorgWarner; BRT; Caterpillar; ExxonMobil; Honeywell; S. Quinlivan; UnitedHealth; Verizon.

[758] *See* letters from Alaska Air; BorgWarner; BRT; DTE Energy; Protective; Seven Law Firms; Society of Corporate Secretaries.

[759] *See* letters from Alaska Air; BorgWarner; BRT; DTE Energy; Protective; Seven Law Firms; Sidley Austin; Society of Corporate Secretaries; Southern Company; United Health; Verizon.

[760] *See* letter from ABA.

[761] *See* letters from ABA; BorgWarner; BRT; Caterpillar; Society of Corporate Secretaries; Southern Company.

[762] *See* letters from Alaska Air; BorgWarner; BRT; ICI; Protective.

[763] *See* letter from BRT.

[764] *See* letters from ABA; Sidley Austin.

[765] *See* letter from ABA.

[766] Letter from Sidley Austin.

[767] *See* letter from Ameriprise.

information provided by a nominating shareholder or group only if it knew the information was false or misleading.[768]

After considering the comments, we are adopting the proposed provision stating that companies will not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11 and then repeated by the company in its proxy statement. This is the same standard used in Rule 14a–8. We modified the proposed provision in response to commenters to remove the reference to information that the company knows or has reason to know is false or misleading. We believe that the standard that currently is used in Rule 14a–8 is well understood and that it would add unnecessary confusion and create significant uncertainty for companies to alter the standard in the context of Rule 14a–11. Using the Rule 14a–8 standard also is consistent with our revision to Rule 14a–11 to remove as a basis for exclusion of a nominee that information in the Schedule 14N is false or misleading. Accordingly, the final rule contains express language providing that the company will not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11 and then reproduced by the company in its proxy statement.[769] A similar provision is included in an instruction to new Rule 14a–18 with regard to information that is provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable state or foreign law provision, or the company's governing documents.[770]

As noted above, commenters raised concerns about correcting or recirculating proxy materials and potential liability for failing to correct or recirculate proxy materials after learning that material a nominating shareholder or group provided is false or misleading. As discussed above, under the rules as adopted, a company will not be responsible for any information that is provided by the nominating shareholder or group under Rule 14a–11 and then reproduced by the company in its proxy statement—the nominating shareholder or group will have liability for that information. Accordingly, a company will not be required to recirculate or correct proxy materials if it learns that the materials provided to shareholders included false or misleading information from the nominating shareholder or group.

Under the Proposal, any information provided to the company in the notice from the nominating shareholder or group under Rule 14a–11 (and, as required, filed with the Commission by the nominating shareholder or group) and then included in the company's proxy materials would not be incorporated by reference into any filing under the Securities Act, the Exchange Act, or the Investment Company Act unless the company determines to incorporate that information by reference specifically into that filing.[771] A similar provision was proposed regarding information provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable State law provision or a company's governing documents.[772]

Those commenting on this provision stated that information provided by a nominating shareholder, group, or nominee should not be deemed to be incorporated by reference into Securities Act, Exchange Act or Investment Company Act filings,[773] but if it is, it should be treated as the responsibility of the nominating shareholder, group, or nominee rather than the company.[774]

We are adopting this provision as proposed.[775] To the extent the company does specifically incorporate the information by reference or otherwise adopt the information as its own, however, we will consider the company's disclosure of that information as the company's own statements for purposes of the anti-fraud and civil liability provisions of the Securities Act, the Exchange Act, or the Investment Company Act, as applicable.

III. Paperwork Reduction Act

A. Background

Certain provisions of the final rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[776] We published a notice requesting comment on the collection of information requirements in the Proposing Release for the rules, and we submitted these requirements to the Office of Management and Budget for review in accordance with the PRA.[777] The titles for the collections of information are:

(1) "Proxy Statements—Regulation 14A and Schedule 14A" (OMB Control No. 3235–0059);

(2) "Information Statements—Regulation 14C and Schedule 14C" (OMB Control No. 3235–0057);

(3) "Form ID" (OMB Control No. 3235–0328);

(4) "Schedule 14N";

(5) "Securities Ownership—Regulation 13D and 13G (Commission Rules 13d–1 through 13d–7 and Schedules 13D and 13G)" (OMB Control No. 3235–0145);

(6) "Form 8–K" (OMB Control No. 3235–0060); and

(7) "Rule 20a–1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations" (OMB Control No. 3235–0158).

These regulations, rules and forms were adopted pursuant to the Exchange Act and the Investment Company Act, among other statutes, and set forth the disclosure requirements for securities ownership reports filed by investors, proxy and information statements,[778] and current reports filed by companies to provide investors with the information they need to make informed voting or investing decisions. The hours and costs associated with preparing, filing, and sending these schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the rules is mandatory. Responses to the

[768] *See* letter from ICI.

[769] *See* Rule 14a–11(f).

[770] *See* Instruction to new Rule 14a–18. *See also* Note to proposed Rule 14a–19.

[771] *See* the Instruction to proposed Item 7(e) of Schedule 14A; Instruction to proposed Item 22(b)(18) of Schedule 14A.

[772] *See* the Instruction to proposed Item 7(f) of Schedule 14A; Instruction to proposed Item 22(b)(19) of Schedule 14A.

[773] *See* letters from ABA; CII; Protective.

[774] *See* letters from ABA; Protective.

[775] *See* the Instruction to Item 7(e) of Schedule 14A and Instruction to Item 22(b)(18) of Schedule 14A with regard to information provided in connection with a Rule 14a–11 nomination. *See* the Instruction to Item 7(f) of Schedule 14A and Instruction to Item 22(b)(19) of Schedule 14A with regard to information provided in connection with a nomination made pursuant to applicable State law or a company's governing documents.

[776] 44 U.S.C. 3501 *et seq.*

[777] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[778] The proxy rules apply only to domestic companies with securities registered under Section 12 of the Exchange Act and to investment companies registered under the Investment Company Act. The number of annual reports by reporting companies may differ from the number of proxy and information statements filed with the Commission in any given year. This is because some companies are subject to reporting requirements by virtue of Section 15(d) of the Exchange Act, and therefore are not covered by the proxy rules. Also, some companies are subject to the proxy rules only because they have a class of debt registered under Section 12. These companies generally are not required to hold annual meetings for the election of directors. In addition, companies that are not listed on a national securities exchange or national securities association may not hold annual meetings and therefore would not be required to file a proxy or information statement.

information collection will not be kept confidential and there is no mandatory retention period for the information disclosed.

B. Summary of the Final Rules and Amendments

As discussed above in more detail, the final rules provide shareholders with two ways to more fully exercise their traditional State law rights to nominate and elect directors. First, new Exchange Act Rule 14a–11 will, under certain circumstances, require companies to include in their proxy materials shareholder nominees for director submitted by long-term shareholders or groups of shareholders with significant holdings. Rule 14a–11 will apply to all reporting companies subject to the Exchange Act proxy rules, with a few exceptions. Rule 14a–11 will apply only when applicable state or foreign law or a company's governing documents do not prohibit shareholders from nominating a candidate for election as a director. Further, Rule 14a–11 will not apply to companies subject to the proxy rules solely because they have a class of debt securities registered under Section 12 of the Exchange Act. Rule 14a–11 will apply to smaller reporting companies, but on a delayed basis. Consistent with the Proposal, companies are not able to "opt out" of the rule in favor of a different framework for including shareholder director nominees in company proxy materials. In addition, as was proposed, the rule will apply regardless of whether any specified event has occurred to trigger the rule and regardless of whether the company is subject to a concurrent proxy contest.

A nominating shareholder or group seeking to use Rule 14a–11 to require a company to include a nominee or nominees in the company's proxy materials will be required to meet certain conditions, including an ownership threshold and holding period and filing a Schedule 14N to provide required disclosures and certifications. Under the rule, a company will not be required to include a shareholder nominee or nominees for director in the company's proxy materials where the nominating shareholder or group holds the securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11. A company also will not be required to include a nominee submitted pursuant to Rule 14a–11 who does not meet the requirements of the rule. For example, a company would not be required to include a nominee if that nominee's candidacy, or if elected, board membership, would violate applicable Federal law, State law, foreign law, or the rules of a national securities exchange or a national securities association (other than the rules related to director independence) and such violation could not be cured during the time period provided in the rule.[779]

Second, the new amendment to Exchange Act Rule 14a–8(i)(8)[780] will preclude a company from relying on Rule 14a–8(i)(8) to exclude from its proxy materials shareholder proposals by qualifying shareholders seeking to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials including, for example, proposals to allow lower ownership thresholds or higher numbers of shareholder director nominees.[781]

In connection with Rule 14a–11 and the amendment to Rule 14a–8(i)(8), we also are adopting new rules that will require a notice to be filed with the Commission on new Schedule 14N, and transmitted to the company, when a shareholder seeks to submit a nomination to a company pursuant to Rule 14a–11 or pursuant to applicable state or foreign law provision or the company's governing documents.[782] The Schedule 14N will require a nominating shareholder or group to provide disclosure similar to the disclosure currently required in a contested election. The company will be required to include the disclosure provided by the nominating shareholder or group in its proxy materials. Thus, the new rules will require a company to provide additional disclosure on Schedules 14A and 14C,[783] as well as Form 8–K, and a nominating shareholder or group to provide disclosure on new Schedule 14N.

When filed in connection with Rule 14a–11, Schedule 14N requires disclosure about the amount and percentage of securities entitled to be voted on the election of directors by the nominating shareholder or group and the length of ownership of such securities. Schedule 14N also requires disclosure similar to the disclosure currently required for a contested election and disclosure of whether the nominee satisfies the company's director qualifications.[784] Schedule 14N also requires a certification that the nominating shareholder or group is not holding any of the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11. A nominating shareholder or group also will be required to certify that the nominating shareholder or group and the nominee satisfy the applicable requirements of Rule 14a–11.

When a Schedule 14N is filed in connection with a nomination pursuant to an applicable state or foreign law provision or a company's governing documents providing for the inclusion of one or more shareholder director nominees in company proxy materials, the Schedule 14N requires similar, but more limited, disclosures than a Schedule 14N filed in connection with a nomination pursuant to Rule 14a–11.[785] In addition, a nominating shareholder or group filing a Schedule 14N in connection with a nomination submitted for inclusion in a company's proxy materials pursuant to applicable state or foreign law or a company's governing documents will be required to provide a more limited certification

[779] For an additional discussion of the Rule 14a–11 eligibility requirements, *see* Section II.B.4 above.

[780] Exchange Act Rule 14a–8 requires a company to include a shareholder proposal in its Schedule 14A unless the shareholder has not complied with the procedural requirements in Rule 14a–8 or the proposal falls within one of the 13 substantive bases for exclusion in Rule 14a–8, including Rule 14a–8(i)(8).

[781] In this regard, we note that to the extent that a shareholder proposal seeks to establish a procedure for the inclusion of shareholder nominees for director in a company's proxy materials, generally any such proposal adopted by shareholders would not affect the availability of Rule 14a–11. To the extent that a proposal seeks to restrict shareholder reliance on Rule 14a–11, the proposal would be subject to exclusion pursuant to Rule 14a–8(i)(2) because it would cause the company to violate Federal law or pursuant to Rule 14a–8(i)(3) because the proposal would be contrary to the proxy rules.

[782] *See* Sections II.B.8 and II.C.5 above.

[783] Schedule 14A prescribes the information that a company with a class of securities registered under Exchange Act Section 12, or a person soliciting shareholders of such a company, must include in its proxy statement to provide shareholders with material information relating to voting decisions.

Schedule 14C prescribes the information that a company with a class of securities registered under Exchange Act Section 12 must include in its information statement in advance of a shareholders' meeting when it is not soliciting proxies from its shareholders, including when it takes corporate action by written authorization or consent of shareholders.

Investment Company Act Rule 20a1 requires registered investment companies to comply with Exchange Act Regulation 14A or 14C, as applicable. The annual responses to Investment Company Act Rule 20a–1 reflect the number of proxy and information statements that are filed by registered investment companies.

[784] *See* Item 5 of Schedule 14N.

[785] *See* Item 6 of Schedule 14N.

than is required for a nomination pursuant to Rule 14a–11.[786]

We also are adopting two new exemptions from the proxy rules for solicitations by a shareholder or group in connection with a nomination pursuant to Rule 14a–11.[787] The first exemption addresses written and oral solicitations by shareholders that are seeking to form a nominating shareholder group, provided that certain requirements are met.[788] The second new exemption will apply to written and oral solicitations by or on behalf of a nominating shareholder or group that has met the requirements of Rule 14a–11 in favor of shareholder nominees or for or against company nominees.[789] Each of these new exemptions requires the shareholder or group soliciting in connection with a nomination pursuant to Rule 14a–11 to file under cover of Schedule 14N any written materials published, sent or given to shareholders no later than the date such materials are first published, sent or given to shareholders. In addition, persons relying on Rule 14a–2(b)(7) to commence oral solicitations must file a notice of such solicitation under cover of Schedule 14N.

C. Summary of Comment Letters and Revisions to Proposal

We requested comment on the PRA analysis in the Proposing Release. Three commenters addressed our estimate of 30 burden hours for a company that is associated with including a nominee in its proxy materials.[790] According to a survey that BRT conducted, two commenters noted that if a company determines that it will include a shareholder nominee, the costs of preparing a written notice to the nominating shareholder or group, as well as including in the company's proxy materials the name of, and other disclosures concerning, the nominee, and preparing the company's own statement regarding the shareholder nominee would require a total of an average of 99 hours of company personnel time and outside costs of $1,159,073 per company for each shareholder nominee.[791] One commenter asserted that we underestimated the burden associated with these three actions because our estimate did not account for the fact that a company or its corporate governance committee is likely to undertake a lengthy process before determining whether to support the candidate.[792] This commenter asserted that our estimate began only once a company has already determined to include the nominee, and did not account for the amount of time necessary for a company to fully and completely evaluate shareholder nominees. This would include, for example, determinations about the nominee's eligibility, investigation and verification of information provided by the nominee, research into the nominee's background, analysis of the relative merits of the shareholder nominee as compared to management's own nominees, multiple meetings of the relevant board committees, and analysis of whether a nomination would conflict with any Federal law, State law or director qualification standards.

The commenter asserted that our burden estimate of 65 hours for a company that determines not to include a nominee in its proxy materials does not account for "significant" costs and the "enormous" amount of time that management and the board will likely spend on the proxy contest itself.[793] The commenter also indicated that our estimates did not account for the burdens on registered investment companies as a result of their unique circumstances. The commenter noted that subjecting registered investment companies to Rule 14a–11 will result in significant administrative burdens on open-end funds and fund complexes, and increased costs. This commenter, however, did not provide alternative cost estimates. Another commenter questioned our assumption that the cost of submitting a no-action request pursuant to Rule 14a–11 is comparable to that of a no-action request submitted pursuant to Rule 14a–8.[794] This commenter argued that due to the fundamental issues at stake, boards will likely expend significantly more resources to challenge shareholder nominees and elect their own nominees than they will to oppose a shareholder proposal submitted pursuant to Rule 14a–8.

One commenter submitted the results of a survey it conducted in which the participants predicted that, on average, 15% of companies listed on U.S. exchanges could expect to face a shareholder director nomination under Rule 14a–11 in 2011.[795] As explained in greater detail below, we believe the actual number of shareholders or groups of shareholders that will seek to use Rule 14a–11 may be much smaller. While we note that there are inherent uncertainties involved in providing this estimate, we estimate for purposes of the PRA requirements, based on available data on the number of contested elections, that 45 companies other than registered investment companies and six registered investment companies with shareholders eligible to submit nominees pursuant to Rule 14a–11 will receive such a nomination each year.

D. Revisions to PRA Reporting and Cost Burden Estimates

As discussed above, the rules we are adopting include several substantive modifications to the Proposal; however, the Schedule 14N disclosure requirements we are adopting are substantially similar to the proposed disclosure requirements. In addition to the disclosure we proposed to be included in Schedule 14N, the schedule also will require disclosure of whether the shareholder nominee satisfies the company's director qualifications.[796] As discussed more fully below, we are revising our estimates in response to commenters' suggestions and the modifications to the Proposal that we are adopting in the final rules. The burden estimates discussed below relate to the hours and costs associated with preparing, filing and sending the above schedules and forms, and constitute estimates of reporting and cost burdens imposed by each collection of information.

For purposes of the PRA, we estimate the total annual incremental paperwork burden resulting from new Rule 14a–11 and the related rule changes for reporting companies (other than registered investment companies) and registered investment companies to be approximately 4,113 hours of internal company or management time and a cost of approximately $548,200 for the services of outside professionals.[797] For purposes of the PRA, we estimate the

[786] *See* Item 8(b) of Schedule 14N.

[787] For further discussion of these exemptions, *see* Section II.B.10 above.

[788] *See* new Rule 14a–2(b)(7).

[789] *See* new Rule 14a–2(b)(8).

[790] *See* letters from BRT; S&C; Society of Corporate Secretaries. In response to these comments, we have increased some of our burden estimates. *See* footnotes 815 and 817 below.

[791] *See* letters from BRT; Society of Corporate Secretaries.

[792] *See* letter from S&C.

[793] *Id.*

[794] *See* letter from BRT.

[795] *See* letter from Altman. The survey had 47 participants that were primarily issuers. The median forecast of this survey was 10%. The survey was based on the eligibility criteria contained in the Proposing Release.

[796] *See* Item 5(e) of Schedule 14N.

[797] For convenience, the estimated PRA hour burdens have been rounded to the nearest whole number. We estimate an hourly cost of $400 for the service of outside professionals based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing proxy statements and related disclosures with the Commission.

total annual incremental paperwork burden to nominating shareholders and groups from Schedule 14N to be approximately 7,870 hours of shareholder personnel time, and $1,049,300 for services of outside professionals. As discussed further below, these total costs include all additional disclosure burdens associated with the final rules, including burdens related to the notice and disclosure requirements. The total costs described above also include the burden hours resulting from the new exemptions for solicitations by nominating shareholders or groups in connection with a nomination pursuant to Rule 14a–11.[798] As noted above, smaller reporting companies will not be subject to Rule 14a–11 until three years after the effective date of the rule. For purposes of the PRA, we have calculated the burden estimates as if the rule has been fully phased in for all companies.

As amended, Rule 14a–8(i)(8) will no longer permit companies to exclude, under that basis, shareholder proposals that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. For purposes of the PRA, we estimate the total annual incremental paperwork burden resulting from the amendment to Rule 14a–8(i)(8) and the related rule changes for reporting companies (other than registered investment companies), registered investment companies, and shareholders to be approximately 17,994 hours of internal company or shareholder time and a cost of approximately $2,399,200 for the services of outside professionals.[799]

1. Rule 14a–11

New Rule 14a–11 will require any company subject to the rule to include disclosure about a nominating shareholder's or group's nominee or nominees for election as director in the company's proxy statement, and the name of the nominee or nominees on the company's proxy card, when the conditions of the rule are met. The rule will not apply if the company is subject to the proxy rules solely as a result of having a class of debt registered under Section 12 of the Exchange Act or if State law, foreign law or a company's governing documents prohibit shareholders from nominating a candidate or candidates for election as director. A nominating shareholder or group will be required to file Schedule 14N to disclose information about the nominating shareholder or group and the nominee or nominees, and the company will be required to include certain information regarding the nominating shareholder or group and nominee or nominees in the company's proxy statement unless the company determines that it is not required to include the nominee or nominees in its proxy materials.[800] A nominating shareholder or group also will be afforded the opportunity to include in the company's proxy statement a statement of support for its nominee or nominees not to exceed 500 words per nominee. The nominee or nominees also will be included on the company's form of proxy in accordance with Exchange Act Rule 14a–4.

Under the final rule, shareholders or groups owning at least 3% of the voting power of a company's securities entitled to be voted on the election of directors for at least three years as of the date of filing their notice on Schedule 14N with the Commission, and transmitting the notice to the company, will be eligible to submit a nominee for election as director to be included in the company's proxy materials,[801] provided certain other eligibility requirements are met [802] and subject to certain limitations on the overall number of shareholder nominees for director.

In the Proposing Release, we estimated that 208 companies with eligible shareholders would receive nominations pursuant to Rule 14a–11. That number was based in part on data, which we used to estimate that approximately 4,163 reporting companies (other than registered investment companies) would have at least one shareholder who met the eligibility criteria set forth in the Proposing Release. We then estimated that 5% of those companies would receive a nomination from an eligible shareholder or group of shareholders, resulting in 208 companies receiving nominations pursuant to Rule 14a–11 annually.[803] In the Proposing Release, we also estimated that 61, or 5%, of 1,225 registered investment companies responding to Rule 20a–1 each year would receive shareholder nominations for inclusion in their proxy materials. After further consideration, we believe that a better indicator of how many shareholders might submit a nomination is the number of contested elections and board-related shareholder proposals that have been submitted to companies.[804] We believe starting with this number is better because it indicates shareholders or groups of shareholders who have shown an interest in using currently available means under our rules to influence governance matters. The number of contested elections and board-related shareholder proposals, however, does not reflect the additional eligibility requirements that are being adopted in new Rule 14a–11. For example, Rule 14a–11 requires that a shareholder or group of shareholders satisfy an ownership threshold of at least 3% of the company's voting power; that amount of securities must have been held continuously for at least three years as of the date the nominating shareholder or group submits notice of its intent to use Rule 14a–11; and the nominating shareholder or group must execute a certification that it is not holding the securities with the purpose, or with the effect, of changing control of the company or to gain a number of board seats that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11. As a result of the additional eligibility requirements and certifications required by Rule 14a–11, we believe it is reasonable to

[798] *See* new Rules 14a–2(b)(7) and 14a–2(b)(8).

[799] This corresponds to 6,510 hours of shareholder time and $868,000 for the shareholders' use of outside professionals and 11,484 hours of company time and $1,531,200 for the company's use of outside professionals.

[800] The burdens associated with Schedule 14N are discussed below.

[801] *See* Section II.B.4.b. above for a discussion of how voting power is determined.

[802] The eligibility requirements are provided in Rule 14a–11(b). As discussed in more detail in Section II.B.4., a nominating shareholder or group must not be holding the securities used to meet the ownership threshold with the purpose, or with the effect, of changing the control of the company or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11. A nominating shareholder or group also must provide certain statements and disclosure regarding its ownership and the nominee or nominees must meet the applicable eligibility requirements.

[803] If we used the same data for estimating the number of nominees that would be submitted pursuant to the final rules as adopted, there would be approximately 2,117 companies with at least one shareholder eligible to submit a nomination. If we were to assume that 5% of those companies with at least one shareholder eligible to submit a nomination would receive a nomination, then we would estimate that 106 companies would receive a nomination each year.

[804] In this regard, we note that it is estimated that there were 57 contested solicitations in 2009. *See* Georgeson, 2009 Annual Corporate Governance Review Executive Summary (*available at http://www.georgeson.com/usa/acgr09.php*) and footnote 828 below. In addition, approximately 118 Rule 14a–8 shareholder proposals related to board issues were submitted to shareholders for a vote in the 2008–2009 proxy season. Board related proposals include proposals to have an independent chairman of the board, proposals to allow for cumulative voting and proposals to require a majority vote to elect directors. *See* RiskMetrics 2009 Proxy Season Scorecard, May 15, 2009. We believe these actions related to contested solicitations or board issues, 175 in total, provide useful information about the degree of interest in using Rule 14a–11.

significantly reduce the number of contested elections and board-related shareholder proposals for purposes of estimating the number of shareholders or groups of shareholders who may submit a nomination pursuant to Rule 14a–11. For purposes of this analysis, we estimate that 45 companies other than registered investment companies will receive nominees from shareholders [805] for inclusion in their proxy materials.[806] We further estimate that six registered investment companies will receive nominees from shareholders pursuant to Rule 14a–11 annually.[807]

We estimate for PRA purposes that each company that receives nominees pursuant to Rule 14a–11 will receive two nominees from one shareholder or group. The median board size based on a 2007 sample of public companies was nine.[808] Approximately 60% of the boards sampled had between nine and 19 directors. In the case of registered investment companies, we estimate that the median board size is eight.[809] Thus, although some shareholders or groups could seek to include fewer than two nominees and others would be permitted to include more than two nominees, depending on the size of the board, we assume for purposes of the PRA that each shareholder or group would submit two nominees. As a result, for reporting companies, we estimate up to 211 total company burden hours per company (which is the sum of the bullets below doubled where appropriate to reflect two nominees) which corresponds to 158 hours (211 × 0.75) of company time, and a cost of approximately $21,100 (211 × 0.25 × $400) for the services of outside professionals. In each case, this estimate includes:

- If the company determines that it will include a shareholder nominee, the company's preparation of a written notice to the nominating shareholder or group (five burden hours per notice);
- The company's inclusion in its proxy statement and form of proxy of the name of, and other related disclosures concerning, a person or persons nominated by a shareholder or shareholder group (five burden hours per nominee); [810]
- The company's preparation of its own statement regarding the shareholder nominee or nominees (40 burden hours per nominee); and
- If a company determines that it may exclude a shareholder nominee submitted pursuant to the new rule, the company's preparation of a written notice to the nominating shareholder or group followed by written notice of the basis for its determination to exclude the nominee to the Commission staff (116 burden hours per notice).[811]

For purposes of this PRA analysis, we assume that approximately 41 (or 90% of 45) reporting companies (other than registered investment companies) and 5 (or 90% of 6) registered investment companies that receive a shareholder nominee for director will be required to include the nominee in their proxy materials. In the other 10% of cases, we assume that the company will be able to exclude the shareholder nominee (after providing notice of its reasons to the Commission). If a company determines to include a shareholder nominee, it must provide written notice to the nominating shareholder or group. We estimate the burden associated with preparing this notice to be five hours. For reporting companies (other than registered investment companies), this will result in 205 aggregate burden hours (41 companies × 5 hours/company), which corresponds to 154 burden hours of company time (41 companies × 5 hours/company × 0.75) and $20,500 in services of outside professionals (41 companies × 5 hours/company × 0.25 × $400). For registered investment companies, this will result in 25 aggregate burden hours (5 companies × 5 hours/company), which corresponds to 19 burden hours of company time (5 companies × 5 hours/company × 0.75), and $2,500 for services of outside professionals (5 companies × 5 hours/company × 0.25 × $400).

We estimate the annual disclosure burden for companies to include nominees and related disclosure in their proxy statements and on their form of proxy to be 5 burden hours per nominee, for a total of 410 aggregate burden hours (41 responses × 5 hours/response times; 2 nominees) for reporting companies (other than registered investment companies), and 50 aggregate burden hours (5 responses × 5 hours/response × 2 nominees) for registered investment companies. For reporting companies (other than registered investment companies), this corresponds to 308 burden hours of company time, and $41,000 for services of outside professionals.[812] For registered investment companies, this corresponds to 38 hours of company time, and $5,000 for services of outside professionals.[813]

We estimate that 41 reporting companies (other than registered investment companies) and 5 registered investment companies will include a statement with regard to the shareholder nominees.[814] We anticipate that the

[805] We further estimate that 75% of the 45 submissions, or 34, will be made by groups of shareholders, and the remaining 11 will be made by individuals. *See* the discussion below regarding the estimated increase in Schedule 13G filings.

[806] For the reasons noted above, we discounted the 175 contested elections and board-related shareholder proposals by approximately 75% to reflect the much more stringent eligibility requirements under new Rule 14a–11 as compared to Rule 14a–8. The 45 filings that we estimate for purposes of the PRA are equal to 2.1% of the 2,117 companies we estimate to have at least one eligible shareholder meeting the ownership requirements of the rule.

[807] In this regard, we estimate that there were 11 contested elections in 2009, based on the number of EDGAR filings on form-type PREC14A with respect to unique investment companies in 2009. In addition, the average number of no-action letters issued by the staff regarding proposals seeking to amend a registered investment company's bylaws to provide for shareholder director nominations received in calendar years 2007, 2008 and 2009, rounded to the nearest whole number greater than zero, is one. We estimate that investment companies currently receive as many proposals regarding nomination procedures or disclosures as there are contested elections and no-action letters issued by the staff, resulting in a total of 24 contested elections and board-related shareholder proposals per year. For reasons similar to those articulated above for non-investment companies, we believe these actions related to contested solicitation or board issues, 24 in total, provide useful information about the degree of interest in using Rule 14a–11. However, as discussed above, Rule 14a–11 contains different eligibility requirements than our current rules that will likely result in fewer companies receiving nominations submitted pursuant to the rule. Similar to non-investment companies, we believe it is reasonable to discount the 24 contested elections and board-related shareholder proposals by approximately 75%, resulting in six investment companies receiving nominations pursuant to Rule 14a–11. We further estimate that 75% of the submissions, or five, will be made by groups of shareholders and the remaining one will be made by an individual. *See* the discussion below regarding the estimated increase in Schedule 13G filings.

[808] According to information from RiskMetrics, based on a sample of 1,431 public companies the median board size in 2007 was 9, with boards ranging in size from 4 to 23 members. Approximately 40% of the boards in the sample had 8 or fewer directors, approximately 60% had between 9 and 19 directors, and less than 1% had 20 or more directors.

[809] *See* Investment Company Institute and Independent Directors Council, *Overview of Fund Governance Practices 1994–2006,* at 6–7 (November 2007), *available at http://www.ici.org/pdf/rpt_07_fund_gov_practices.pdf* (noting that the median number of independent directors per fund complex in 2006 was six and that independent directors held 75% or more of board seats in 88% of fund complexes).

[810] The requirement is in amended Rule 14a–4.

[811] As discussed below, for companies that exclude a nominee but do not request no-action relief, we estimate this burden to be 100 hours.

[812] The calculations for these numbers are: 410 burden hours × 0.75 = 308 burden hours of company time and 410 burden hours × 0.25 × $400 = $41,000 for services of outside professionals.

[813] The calculations for these numbers are: 50 burden hours × 0.75 = 38 hours of company time and 50 burden hours × 0.25 × $400 = $5,000 for services of outside professionals.

[814] We assume that each company that includes a shareholder nominee in its proxy materials would include such a statement.

burden to include a statement will include time spent to research the nominee's background, determinations about the nominee's eligibility, investigation and verification of information provided by the nominee, analysis of the relative merits of the shareholder nominee as compared to management's own nominees, multiple meetings of the relevant board committees, analysis of whether a nomination will conflict with any Federal law, State law or director qualification standards, preparation of the statement, and company time for review of the statement by, among others, the nominating committee and legal counsel. In the Proposing Release we estimated that this burden will be approximately 20 hours per nominee. Based on comments received, however, we believe it is appropriate to increase this estimate to 40 hours per nominee.[815] For reporting companies (other than registered investment companies), this will result in 3,280 aggregate burden hours (41 statements × 40 hours/statement × 2 nominees). This corresponds to 2,460 hours of company time (41 statements × 40 hours/statement × 2 nominees × 0.75) and $328,000 for services of outside professionals (41 statements × 40 hours/statement × 2 nominees × 0.25 × $400) for reporting companies (other than registered investment companies). For registered investment companies, this will result in 400 aggregate burden hours (5 statements × 40 hours/statement × 2 nominees). This corresponds to 300 hours of company time (5 statements × 40 hours/statement × 2 nominees × 0.75) and $40,000 for services of outside professionals (5 statements × 40 hours/statement × 2 nominees × 0.25 × $400).

Further, for purposes of this analysis, we assume that approximately 9 (or 20% of 45) reporting companies (other than registered investment companies) and 1 (or 20% of 6) registered investment companies that receive a shareholder nominee for director for inclusion in their proxy materials will make a determination that they are not required to include a nominee in their proxy materials because the requirements of Rule 14a–11 are not met and will file a notice of intent to exclude that nominee.[816] We further estimate that 3 (or 33% of 9) of those reporting companies (other than registered investment companies) will not seek no-action relief from the Commission and will only provide the required notice to the nominating shareholder or group and the Commission. We estimate that the remaining 6 reporting companies other than registered investment companies and the one registered investment company that makes a determination that it is not required to include a nominee in its proxy materials will seek no-action relief in order to exclude the nomination. We estimate that the burden hours associated with preparing and submitting the company's notice to the nominating shareholder or group and the Commission regarding its intent to exclude a shareholder nominee that includes a request for no-action relief would be 116 hours per notice.[817] We estimate that the burden hours associated with preparing and submitting the company's notice to the nominating shareholder or group and the Commission regarding its intent to exclude a shareholder nominee and its reasons for doing so would be 100 hours.[818] One commenter questioned our assumption that submitting a request to the staff to exclude a shareholder nominee will be comparable to preparing a no-action request to exclude a proposal under Rule 14a–8.[819] This commenter argued that due to the fundamental issues at stake, boards are likely to expend significant resources to challenge shareholder nominees and elect their own nominees. We recognize the possibility that companies might expend greater resources in opposing a shareholder nominee than a shareholder proposal. We believe, however, that some of the resources to oppose a shareholder nominee will be allocated to the use of other means outside of the required disclosure in the proxy statement (*e.g.,* "fight letters") so we have not factored that into our collection of information estimate. We believe that a portion of the burden associated with this will be reflected in the company's preparation of its own statement regarding the shareholder nominee, rather than in the preparation of a no-action request, and accordingly, as discussed above, we have increased our estimate of the associated burden from 20 to 40 hours. Although we have increased the burden to the company associated with preparing its own statement, we are not persuaded that also increasing the burden associated with preparing a request to exclude the nominee will be an accurate estimate. We are, however, as discussed above, increasing to 116 hours our estimate for preparing a notice of intent to exclude

[815] In its comment letter and based on its survey of its members, BRT estimated that the preparation of a notice to the nominating shareholder, inclusion of related disclosure in the company's proxy materials, and preparation of its own statement regarding the shareholder nominee will require an average of 99 hours of personnel time. In the Proposing Release, we estimated the burden for these three actions to be 30 hours. We note that the survey conducted by the BRT provides useful information regarding the amount of personnel time that a company will spend responding to a Rule 14a–11 nomination; however, the survey represents a limited number of companies. While we are persuaded that the burden to companies of preparing a statement with regard to the shareholder nominee may require more than the 20 hours we estimated in the Proposing Release, we believe that 99 hours may represent the high end of the range. In light of this information, we believe it is appropriate to increase our estimate and we believe it is adequate to double our estimate of this component from 20 to 40 hours to reflect the average burden across all companies. Thus, we estimate that the internal burden associated with these three actions would be 50 hours.

[816] With respect to companies other than registered investment companies, we assume that 6 of these submissions ultimately would be excludable under the rule.

[817] This estimate is based on data provided by the BRT in its comment letter dated August 17, 2009. In its letter, the BRT provided data from a survey of its own members indicating that the average burden associated with preparing and submitting a single no-action request to the Commission staff in connection with a shareholder proposal is approximately 47 hours and associated costs of $47,784. Although the letter did not specify as much, assuming these costs correspond to legal fees, which we estimate at an hourly cost of $400, we estimate that this cost is equivalent to approximately 120 hours ($47,784/$400). We note that this estimate is higher than the 65 hours we estimated in the Proposing Release, where we relied on 2003 data provided by the American Society of Corporate Secretaries indicating 30 hours and associated costs of $13,896, or 35 hours ($13,896/$400). The BRT survey also indicated that if a company opposes a shareholder nominee, it would incur an additional average of 302 hours of company time. This would be in addition to its estimate of 99 hours for the actions described above. As noted above, the survey conducted by the BRT provides useful estimates for us to consider, but the survey represents a limited number of companies. In addition, it is unclear whether the 302 hours is inclusive of the no-action process. We believe this estimate is high and believe the revised number discussed below is a better estimate because it attempts to reflect the burden across all companies. For purposes of the PRA, we assume that submitting the notice and reasons for excluding a shareholder nominee to the staff will be comparable to preparing a no-action request to exclude a proposal under Rule 14a–8. While it appears, based on commenters' estimates, that associated costs may have increased since 2003, based on estimates provided by other commenters on the costs of preparing and submitting a no-action request (*see, e.g.,* letter from S&C), we believe an average of the two estimates provides a more representative estimate of the spectrum of reporting companies, as opposed to those who participated in the BRT survey. Thus, we estimate that the burden to submit the notice and reasons for excluding a shareholder nominee and request no-action relief, would be approximately 116 hours ([167 hrs + 65 hrs]/2).

[818] We believe that even if a company is not seeking no-action relief the company will still spend significant time preparing its notice to exclude the nominee. Because the notice will be required to include the reasons that the nominee is being excluded, we believe that the burden will be similar to, though not quite as extensive as, preparing a request for no-action relief.

[819] *See* letter from BRT.

the nominee and request no-action relief based on 2009 data received from commenters.[820]

In the case of reporting companies (other than registered investment companies) that have determined they may exclude a nominee and seek no-action relief from the staff, we estimate that this will result in an aggregate burden of 696 hours (6 notices × 116 hours/notice), corresponding to 522 hours of company time (6 notices × 116 hours/notice × 0.75) and $69,600 for the services of outside professionals (6 notices × 116 hours/notice × 0.25 × $400). In the case of registered investment companies that have determined they may exclude a nominee and seeking no-action relief from the staff, we estimate that this will result in 116 aggregate burden hours (1 notice × 116 hours/notice), which will correspond to 87 hours of company time (1 notice × 116 hours/notice × 0.75) and $11,600 for the services of outside professionals (1 notice × 116 hours/notice × 0.25 × $400). For companies (other than registered investment companies) that have determined they may exclude a nomination but not to seek no-action relief from the staff, we estimate that this will result in an aggregate burden of 300 hours (3 notices × 100 hours/notice), corresponding to 225 hours of company time (3 notices × 100 hours/notice × 0.75) and $30,000 for the services of outside professionals (3 notices × 100 hours/notice × 0.25 × $400).[821] These burdens would be added to the PRA burdens of Schedules 14A and 14C or, in the case of registered investment companies, Rule 20a–1.

We also estimate that the annual burden for the nominating shareholder's or group's participation in the no-action process[822] available pursuant to Rule 14a–11 would average 60 hours per nomination.[823] For nominating shareholders or groups of reporting companies (other than registered investment companies), this will result in 360 total burden hours (6 responses × 60 hours/response). This will correspond to 270 hours of shareholder time (6 responses × 60 hours/response × 0.75) and $36,000 for services of outside professionals (6 responses x 60 hours/response × 0.25 × $400). For nominating shareholders or groups of registered investment companies, this will result in 60 total burden hours (1 response × 60 hours/response). This will correspond to 45 hours of shareholder time (1 response × 60 hours/response × 0.75) and $6,000 for services of outside professionals (1 response × 60 hours/response × 0.25 × $400). This burden would be added to the PRA burden of Schedule 14N.

We also are adopting two new exemptions from the proxy rules for solicitations by shareholders or groups in connection with a nomination pursuant to Rule 14a–11. The first exemption addresses written and oral solicitations by shareholders that are seeking to form a nominating shareholder group, provided that certain requirements are met.[824] Solicitations made in reliance on this exemption would be required to be filed under cover of Schedule 14N with the appropriate box marked on the cover page. As discussed above, we estimate that 34 of the submissions made to companies (other than registered investment companies) pursuant to Rule 14a–11 will be by groups of shareholders formed for purposes of satisfying the eligibility requirements of the rule. We estimate that 31 (90% of 34) of these groups will avail themselves of Rule 14a–2(b)(7). In the case of reporting companies (other than registered investment companies), this will result in an aggregate burden of 31 hours (31 solicitations × 1 hour/solicitation), which corresponds to 23 hours of shareholder time (31 solicitations × 1 hour/solicitation × 0.75) and $3,100 for the services of outside professionals (31 solicitations × 1 hour/solicitation × 0.25 × $400). In the case of registered investment companies, we estimate that five of the submissions made pursuant to Rule 14a–11 will be by groups of shareholders formed for purposes of satisfying the eligibility requirements of the rule. We estimate that all of these groups will avail themselves of Rule 14a–2(b)(7) (90% of 5 rounds up to 5). This will result in an aggregate burden of 5 hours (5 solicitations × 1 hour/solicitation), which corresponds to 4 hours of shareholder time (5 solicitations × 1 hour/solicitation × 0.75) and $500 for the services of outside professionals (5 solicitations × 1 hour/solicitation × 0.25 × $400). These burden hours would be added to the PRA burden of Schedule 14N.

The second new exemption will apply to written and oral solicitations by or on behalf of a nominating shareholder or group that has met the requirements of Rule 14a–11 in favor of shareholder nominees or for or against company nominees.[825] Although nominating shareholders or groups will not be required to engage in written solicitations, if the nominating shareholder or group does so, the exemption will require inclusion in any written soliciting materials filed under cover of Schedule 14N of a legend advising shareholders to look at the company's proxy statement when available and advising shareholders how to find the company's proxy statement. For purposes of this analysis, we assume that 50% of nominating shareholders or groups ultimately included in a company's proxy statement will solicit in favor of their nominee or nominees outside the company's proxy statement. In the case of reporting companies (other than registered investment companies), this will result in an aggregate burden of 20 hours (20 solicitations × 1 hour/solicitation), which corresponds to 15 hours of shareholder time (20 solicitations × 1 hour/solicitation × 0.75) and $2,000 for services of outside professionals (20 solicitations × 1 hour/solicitation × 0.25 × $400). These burden hours would be added to the PRA burden of Schedule 14N. In the case of registered investment companies, this will result in an aggregate burden of 3 hours (3 solicitations × 1 hour/solicitation), which corresponds to 2 hours of shareholder time (3 solicitations × 1 hour/solicitation × 0.75) and $300 for services of outside professionals (3 solicitations × 1 hour/solicitation × 0.25 × $400). These burden hours would be added to the PRA burden of Schedule 14N.

2. Amendment to Rule 14a–8(i)(8)

Under our amendment to Rule 14a–8(i)(8), the election exclusion, a company will no longer be able to rely on this basis to exclude a shareholder proposal that seeks to establish a procedure under a company's governing

[820] Our prior estimate of 65 hours in the Proposing Release was based on 2003 data.

[821] As discussed above, we estimate that only one registered investment company will make a determination that it is not required to include a nominee in its proxy material and that this company will seek no-action relief.

[822] There is no corresponding burden for shareholders or groups whose nomination is excluded by the company, and the company does not seek no-action relief. If the shareholder objects to the exclusion, there is no requirement that the shareholder seek redress from the staff or the Commission. As a result, we have not provided an estimated burden.

[823] As noted in footnote 817, we estimate that the average burden to a company associated with preparing and submitting a no-action request to the staff is approximately 116 burden hours. We believe that the average burden for a shareholder proponent to respond to a company's no-action request is likely to be less than a company's burden to prepare the request; therefore, we estimate it will take approximately half the time (or 60 burden hours) for a nominating shareholder or group to respond to a company's notice to the Commission of its intent to exclude.

[824] *See* new Rule 14a–2(b)(7).

[825] *See* new Rule 14a–2(b)(8).

documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. The shareholder proposal will 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).

Historically, shareholders have made relatively few proposals relating to shareholder access to a company's proxy materials. The staff received 368 no-action requests from companies seeking to exclude shareholder proposals during the 2006–2007 fiscal year. Of these requests, only three (or approximately one percent) related to proposals for bylaw amendments providing for shareholder nominees to appear in the company's proxy materials. During the 2007–2008 fiscal year, the staff received 423 no-action requests to exclude shareholder proposals pursuant to Rule 14a–8. Of these no-action requests, six (or approximately two percent) related to proposals for bylaw amendments providing for shareholder nominees to appear in the company's proxy materials. During the 2008–2009 fiscal year, the staff received 365 no-action requests to exclude shareholder proposals pursuant to Rule 14a–8. Of these requests, seven related to shareholders' ability to have their nominee included in a company's proxy materials. One such request sought to exclude a proposal to directly amend a company's governing documents to permit shareholder director nominations; the remaining six no-action requests related to proposals requesting that the company reincorporate in North Dakota where the relevant state corporate law gives qualified shareholders the right to submit director nominees for inclusion in the company's proxy materials.[826] Although these reincorporation proposals did not seek to amend the companies' bylaws, by seeking reincorporation into North Dakota it appears they sought the ability for shareholders to have nominees included in a company's proxy materials. As of July 23, 2010, during the 2009–2010 fiscal year, the staff has received 353 no-action requests to exclude shareholder proposals pursuant to Rule 14a–8, none of which related to shareholders' ability to have their nominee included in a company's proxy materials. While we believe that these proposals are helpful in gauging the level of shareholder interest in nominating directors, because our amendment to Rule 14a–8(i)(8) narrows the scope of the exclusion and no longer permits companies to exclude certain proposals that are excludable under current Rule 14a–8(i)(8), and Rule 14a–11 as adopted includes meaningful eligibility standards, we believe there may be an increase in the number of shareholder proposals seeking to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials to allow, for example, lower ownership thresholds or higher numbers of shareholder director nominees.

While the number of no-action requests the staff has received in the past is a useful starting point for the PRA analysis, other data also is helpful to gauge shareholder interest in nominating directors and to predict the anticipated impact on the number of proposals submitted pursuant to Rule 14a–8 that seek to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials that otherwise would be excludable under current Rule 14a–8(i)(8). For example, based on publicly available information, from 2001 to 2005, there were, on average, 14 contested elections per year.[827] It is estimated that in 2009 there were at least 57 contested elections,[828] and in 2008 it is estimated that there were at least 50 contested elections.[829] For purposes of the PRA, we believe that as a result of the amendment to Rule 14a–8(i)(8), shareholders may submit at least as many shareholder proposals to establish procedures under a company's governing documents for the inclusion of shareholder nominees for director in company proxy materials as there are contested elections. We believe that if shareholders are willing under the current proxy rules to put forth the expense and effort to wage a contest to put forth their own nominees in 57 instances, there may be a similar number of proposals submitted to companies pursuant to Rule 14a–8, as amended, because companies will no longer be permitted to exclude some proposals that currently are excludable under Rule 14a–8(i)(8). We also believe that some shareholders that have submitted proposals in the past with regard to other board issues will submit proposals seeking to establish procedures under a company's governing documents for the inclusion of shareholder nominees for director in company proxy materials. As noted in the Proposing Release, according to information from RiskMetrics, approximately 118 Rule 14a–8 shareholder proposals regarding board issues were submitted to shareholders for a vote in the 2008–2009 proxy season.[830] For purposes of the PRA, we estimate that approximately half of these shareholders may submit a proposal regarding procedures for the inclusion of shareholder nominees for director in company proxy materials, resulting in up to 59 proposals in lieu of proposals related to other board issues.[831]

In the case of reporting companies (other than registered investment companies), we believe that the amendment to Rule 14a–8(i)(8) may result in an increase of up to 64 (57 + 7 2009 shareholder proposals) proposals annually from 2009, and a total of 123 proposals (59 proposals + 57 + 7) to companies per year regarding procedures for the inclusion of shareholder nominees for director in company proxy materials.[832] We

[826] *See* North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35–08 (2009).

[827] *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise,* 93 *Va. L. Rev.* 675, 683 (2007) ("Bebchuk (2007)") (citing data from proxy solicitation firm Georgeson Shareholder). *See* footnote 314 in the Proposing Release.

[828] *See* Georgeson, 2009 Annual Corporate Governance Review (stating that as of the end of September 2009 it had tracked 57 formal proxy contests); *see also* RiskMetrics Group, 2009 Postseason Report Summary, A New Voice in Governance: Global Policymakers Shape the Road to Reform, October 2009, *available at http://www.riskmetrics.com/docs/2009-postseason-report* (noting that during the 2009 proxy season there were at least 39 proxy contests, and 36 negotiated settlements prior to a shareholder vote).

[829] *See* letter from BRT (citing data from Georgeson, "2008 Annual Corporate Governance Review"). *See also* RiskMetrics Group, 2008 Postseason Report Summary, Weathering the Storm: Investors Respond to the Global Credit Crisis, October 2008, *available at http://www.riskmetrics.com/docs/2008postseason_review_summary.*

[830] *See* footnote 804 above.

[831] We note that we used this estimate in the Proposing Release and did not receive comment on it. *See* Section IV.C.2. of the Proposing Release. We acknowledge the possibility that the number of Rule 14a–8 proposals relating to director nomination procedures may decrease with shareholders' ability to submit a nominee for inclusion in company proxy materials pursuant to Rule 14a–11, but we believe that any decrease may be countered by an increase in shareholder proposals to establish company-specific requirements that are different than Rule 14a–11.

[832] The increase is calculated by adding the number of proxy contests in 2009 (57) plus the number of no-action requests received in 2009 regarding proposals seeking to amend a company's bylaws to provide for shareholder director nominations (seven). We have not included an estimated 59 proposals in this increase because we believe they will be submitted in lieu of other types

Continued

estimate the annual incremental burden for the shareholder to prepare the proposal to be 10 burden hours per proposal, for a total of 640 burden hours (64 proposals × 10 hours/proposal). This will correspond to 480 hours of shareholder time (64 proposals × 10 hours/proposal × 0.75) and $64,000 for the services of outside professionals (64 proposals × 10 hours/proposal × 0.25 × $400).[833]

We recognize that a company that receives a shareholder proposal has no obligation to submit a no-action request to the staff under Rule 14a–8. We anticipate that because the proposals that would be submitted pursuant to amended Rule 14a–8 could affect the composition of the company's board of directors, nearly all companies receiving such proposals would submit a written statement of its reasons for excluding the proposal to the staff. We estimate that there will be a total of 123 proposals per year regarding procedures for the inclusion of shareholder nominees in the company's proxy statement. This number includes the 64 (57 + 7) new proposals plus the 59 proposals submitted in lieu of other proposals. Thus, we estimate that 90% of the estimated 123 companies receiving proposals seeking to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials will submit a written statement of their reasons for excluding the proposal to the staff and would seek no-action relief.

We estimate that companies would determine that they could exclude, and would seek staff concurrence through the no-action letter process for, 110 proposals (123 proposals × 90%) per proxy season. We estimate that the annual burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 116 hours per proposal, for a total of 12,760 burden hours (110 proposals × 116 hours/proposal) for reporting companies (other than registered investment companies). This will correspond to 9,570 hours of company time (110 proposals × 116 hours/proposal × 0.75) and $1,276,000 for the services of outside professionals (110 proposals × 116 hours/proposal × 0.25 × $400).

We also estimate that the annual burden for the proponent's participation in the Rule 14a–8 no-action process would average 60 hours per proposal, for a total of 6,600 burden hours (110 proposals × 60 hours/proposal).[834] This will correspond to 4,950 hours of shareholder time (110 proposals × 60 hours/proposal × 0.75) and $660,000 for services of outside professionals (110 proposals × 60 hours/proposal × 0.25 × $400). These burdens would be added to the PRA burden of Schedules 14A and 14C.

In the case of registered investment companies, we anticipate that the amendment to Rule 14a–8(i)(8) will result in an increase of 12 proposals annually, and a total of 24 proposals regarding procedures for the inclusion of shareholder nominees for director in company proxy materials to companies per year.[835] We estimate the annual incremental burden for the shareholder proponent to prepare the proposal to be 10 hours per proposal, for a total of 120 burden hours (12 proposals × 10 hours/proposal). This would correspond to 90 hours of shareholder time (12 proposals × 10 hours/proposal × 0.75) and $12,000 for the services of outside professionals (12 proposals × 10 hours/proposal × 0.25 × $400).

Similar to reporting companies other than investment companies, we assume that 90% of registered investment companies that receive a shareholder proposal seeking to establish procedures under a company's governing documents for the inclusion of one or more shareholder nominees in a company's proxy materials will determine that they may exclude the proposal from their proxy materials and request concurrence through the no-action letter process (so registered investment companies will seek to exclude 22 such proposals per proxy season). Also similar to reporting companies other than registered investment companies, we assume that the annual burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 116 hours per proposal, for a total of 2,552 burden hours for registered investment companies (22 proposals × 116 hours/proposal). This corresponds to 1,914 hours of company time (22 proposals × 116 hours/proposal × 0.75) and $255,200 for the services of outside professionals (22 proposals × 116 hours/proposal × 0.25 × $400). We also estimate that the annual burden for the proponent's participation in the Rule 14a–8 no-action process would average 60 hours per proposal, for a total of 1,320 burden hours (22 proposals × 60 hours/proposal). This corresponds to 990 hours of shareholder time (22 proposals × 60 hours/proposal × 0.75) and $132,000 for the services of outside professionals (22 proposals × 60 hours/proposal × 0.25 × $400). These burdens would be added to the PRA burden of Rule 20a–1.

3. Schedule 14N and Exchange Act Rule 14a–18

Rule 14n–1 establishes a new filing requirement for the nominating shareholder or group, under which the nominating shareholder or group will be required to file notice of its intent to include a shareholder nominee or nominees for director pursuant to Rule 14a–11, applicable State law provisions, or a company's governing documents, as well as disclosure about the nominating shareholder or group and nominee or nominees on new Schedule 14N. New Schedule 14N was modeled after Schedule 13G, but with more extensive disclosure requirements than Schedule 13G. Schedule 14N will require, among other items, disclosure about the amount and percentage of securities owned by the nominating shareholder or group, the length of ownership of such amount, and a written statement that the nominating shareholder or group will continue to hold the securities through the date of the meeting.

of proposals (a shareholder is limited to submitting one shareholder proposal to each company).

[833] We note that this calculation is for incremental, not total, costs. One commenter estimated that the average approximate total cost for shareholders to include a Rule 14a–8 proposal was $30,000. *See* letter from CalPERS. Assuming these costs correspond to legal fees, which we estimate at an hourly cost of $400, we estimate that this cost will be equivalent to approximately 75 hours.

[834] As noted in footnote 817 above, we estimate that the average burden to a company associated with preparing and submitting a no-action request to the staff was approximately 116 burden hours. As noted above in footnote 823, we estimate 60 burden hours for a shareholder proponent to respond to a company's notice of intent to exclude and request for no-action relief to the Commission. In this regard, we also estimate that the average incremental burden for a shareholder proponent to submit a shareholder proposal would be 10 hours. We note that one commenter estimated that the average approximate cost to shareholders of submitting a proposal is $30,000. *See* letter from CalPERS. We note that this commenter's estimate corresponds to the burden to shareholders of submitting a proposal, whereas our estimate of 60 burden hours corresponds to the burden to shareholders in responding to a company's no-action request.

[835] The increase is estimated based on the number of registered investment company proxy contests in calendar year 2009 (11) plus the average number of no-action letters issued by the staff regarding proposals seeking to amend a registered investment company's bylaws to provide for shareholder director nominations received in calendar years 2007, 2008, and 2009 rounded to the nearest whole number greater than zero (1). In addition, we estimate that investment companies currently receive as many proposals regarding nomination procedures or disclosures as there are contested elections and no-action letters issued by the staff, resulting in a total of an estimated 24 proposals regarding nomination procedures or disclosures related to director nominations to companies per year.

In addition, Schedule 14N will contain the disclosure required to be included in the nominating shareholder's or group's notice to the company of its intent to require that the company include the shareholder's or group's nominee in the company's proxy materials pursuant to Rule 14a–11 or pursuant to applicable state or foreign law provisions or a company's governing documents. With regard to the latter, we are seeking to assure that nominating shareholders or groups that submit a shareholder nomination for inclusion in a company's proxy materials pursuant to applicable state or foreign law provisions or the company's governing documents also provide disclosure similar to the disclosure required in a contested election to give shareholders the information needed to make an informed voting decision.

Schedule 14N will require disclosures regarding the nature and extent of the relationships between the nominating shareholder or group, the nominee and the company or any affiliate of the company. Pursuant to Items 7(e)–(f) of Schedule 14A and, in the case of an investment company, Items 22(b)(18)–(19) of Schedule 14A, the company will be required to include certain information set forth in the shareholder's notice on Schedule 14N in its proxy materials. A nominating shareholder or group filing a Schedule 14N to provide disclosure when submitting a nominee for inclusion in a company's proxy materials pursuant to applicable state or foreign law provisions or the company's governing documents will not be required to provide certain statements and certifications required for nominating shareholders or groups using Rule 14a–11.

We estimate that compliance with the Schedule 14N requirements will result in a burden greater than Schedule 13G[836] but less than a Schedule 14A.[837] Therefore, we estimate that compliance with Schedule 14N will result in 47 hours per response per nominee submitted pursuant to Rule 14a–11.[838] We also note that the burden associated with filing a Schedule 14N in connection with a nomination made pursuant to an applicable state or foreign law provision or the company's governing documents may be slightly less than a nomination made pursuant to Rule 14a–11 because certain disclosures, statements, and certifications will not be required (including a statement that the nominating shareholder will continue to own the amount of securities through the date of the meeting, disclosure about the nominating shareholder's or group's intent with respect to continued ownership of the securities after the election, the certifications that will be required to use Rule 14a–11 (such as the certification concerning lack of intent to change control or to gain a number of seats on the board that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11, or the certifications that the nominating shareholder or group and the nominee satisfy the requirements of Rule 14a–11), and a supporting statement from the nominating shareholder or group. Therefore, we estimate that compliance with Schedule 14N when a shareholder or group submits a nominee or nominees to a company pursuant to an applicable state or foreign law provision or the company's governing documents will result in 40 hours per response per nominee.

For purposes of the PRA, we estimate the total annual incremental burden for nominating shareholders or groups to prepare the disclosure that will be required under this portion of the final rules to be approximately 7,870 hours of shareholder time, and $1,049,300 for the services of outside professionals.[839] This estimate includes the nominating shareholder's or group's preparation and filing of the notice and required disclosure and, as applicable, certifications on Schedule 14N and filings related to new Rules 14a–2(b)(7) and 14a–2(b)(8).

We do not expect that every shareholder that meets the eligibility threshold to submit a nominee for inclusion in a company's proxy materials pursuant to Rule 14a–11, an applicable state or foreign law provision, or a company's governing documents will do so. As discussed above, we estimate that 45 reporting companies (other than registered investment companies) and 6 registered investment companies will receive notices of intent to submit nominees pursuant to Rule 14a–11. We anticipate that some companies will receive nominees from more than one shareholder or group, though, as discussed above, for purposes of PRA estimates, we assume companies with an eligible shareholder would receive two nominees from only one shareholder or group.

We estimate that compliance with the requirements of Schedule 14N submitted pursuant to Rule 14a–11 will require 4,230 burden hours (45 notices × 47 hours/notice × 2 nominees/shareholder) in aggregate each year for nominating shareholders or groups of reporting companies (other than registered investment companies), which corresponds to 3,173 hours of shareholder time (45 notices × 47 hours/notice × 2 nominees/shareholder × 0.75) and costs of $423,000 (45 notices × 47 hours/notice × 2 nominees/shareholder × 0.25 × $400) for the services of outside professionals. In the case of registered investment companies, we estimate that a nominating shareholder's or group's compliance with the requirements of Schedule 14N will require 564 burden hours (6 responses × 47 hours/response × 2 nominees) in aggregate each year, which corresponds to 423 hours of shareholder time (6 responses × 47 hours/response × 2 nominees × 0.75) and costs of $56,400 for the services of outside professionals (6 responses × 47 hours/response × 2 nominees × 0.25 × $400). Therefore, we estimate a total of 4,794 burden hours for all reporting companies, including investment companies, broken down into 3,596 hours of shareholder time and $479,400 for services of outside professionals.

We assume that all nominating shareholders or groups will prepare a statement of support for the nominee or nominees, and we estimate the disclosure burden for the nominating shareholder or group to prepare a statement of support for its nominee or nominees to be approximately 10 burden hours per nominee. In the case of companies other than registered investment companies, this results in an aggregate burden of 900 (45 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 675 hours of shareholder time (45 statements × 10 hours/statement × 2 nominees/shareholder × 0.75) and $90,000 for services of outside professionals (45 statements × 10 hours/

[836] We currently estimate the burden per response for preparing a Schedule 13G filing to be 12.4 hours.

[837] We currently estimate the burden per response for preparing a Schedule 14A filing to be 101.5 hours and a Schedule 14C to be 102.62 hours.

[838] We estimate that the burden of preparing the information in Schedule 14N for a nominating shareholder or group would be ⅓ of the disclosures typically required by a Schedule 14A filing, which results in approximately 34 burden hours. For purposes of this analysis, we estimate that the 34 burden hours will be added to the 12.4 hours associated with filing a Schedule 13G, resulting in a total of approximately 47 burden hours. We estimate that 75% of the burden of preparation of Schedule 14N will be borne internally by the nominating shareholder or group, and that 25% will be carried by outside professionals. We believe the nominating shareholder or group will work with their nominee to prepare the disclosure and then have it reviewed by outside professionals.

[839] This figure represents the aggregate burden hours attributed to Schedule 14N and is the sum of the burden associated with Schedules 14N submitted pursuant to Rule 14a–11, applicable state or foreign law provisions, and a company's governing documents.

statement × 2 nominees/shareholder × 0.25 × $400) for shareholders of reporting companies (other than registered investment companies). For registered investment companies, this will result in an aggregate burden of 120 (6 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 90 hours of shareholder time (6 statements × 10 hours/statement × 2 nominees/shareholder × 0.75) and $12,000 for services of outside professionals (6 statements × 10 hours/statement × 2 nominees/shareholder × 0.25 × $400). Therefore, we estimate a total of 1,020 burden hours for all reporting companies, including investment companies, broken down into 765 hours of shareholder time and $102,000 for services of outside professionals.

When a nominating shareholder or group submits a nominee or nominees to a company pursuant to an applicable state or foreign law provision or the company's governing documents, the nominating shareholder or group will be required to file a Schedule 14N to provide disclosure about the nominating shareholder or group and the nominee or nominees. As discussed, a company will be required to include certain disclosures about the nominating shareholder or group and the nominee or nominees in its proxy statement. As noted above, we estimate that the burden associated with filing a Schedule 14N in connection with a nomination made pursuant to an applicable state or foreign law provision or a company's governing documents is 40 hours per nominee. We also estimate that approximately 30 nominating shareholders or groups of reporting companies (other than registered investment companies) will submit a nomination pursuant to an applicable state or foreign law provision or a company's governing documents.[840] Thus, we estimate compliance with the requirements of Schedule 14N for nominating shareholders or groups submitting nominations pursuant to an applicable state or foreign law provision or the company's governing documents would result in 2,400 aggregate burden hours (30 notices × 40 hours/notice × 2 nominees/shareholder) each year for nominating shareholders or groups of reporting companies (other than registered investment companies), broken down into 1,800 hours of shareholder time (30 notices × 40 hours/notice × 2 nominees/shareholder × 0.75) and costs of $240,000 for the services of outside professionals (30 notices × 40 hours/notice × 2 nominees/shareholder × 0.25 × $400). In the case of registered investment companies, we estimate that approximately 12 nominating shareholders or groups will submit a nomination pursuant to an applicable state or foreign law provision or a company's governing documents.[841] We estimate that a nominating shareholder's or group's compliance with the requirements of Schedule 14N would result in 960 aggregate burden hours (12 notices × 40 hours/notice × 2 nominees/shareholder) each year, which corresponds to 720 hours of shareholder time (12 notices × 40 hours/notice × 2 nominees/shareholder × 0.75) and costs of $96,000 for the services of outside professionals (12 notices × 40 hours/notice × 2 nominees/shareholder × 0.25 × $400). Therefore, we estimate that the total burden hours would be 3,360 for all reporting companies, including investment companies, broken down into 2,520 hours of shareholder time and $336,000 for services of outside professionals.

We assume that all nominating shareholders or groups that submit a nominee or nominees pursuant to an applicable state or foreign law provision or a company's governing documents will prepare a statement of support for the nominee or nominees,[842] and we estimate the disclosure burden for the nominating shareholder or group to prepare a statement of support for its nominee or nominees to be approximately 10 burden hours per nominee. This results in an aggregate burden of 600 hours (30 statements × 10 hours/statement × 2 nominees/shareholder) for shareholders of reporting companies (other than registered investment companies), which corresponds to 450 hours of shareholder time (30 statements × 10 hours/statement × 2 nominees/shareholder × 0.75) and $60,000 for services of outside professionals (30 statements × 10 hours/statement × 2 nominees/shareholder × 0.25 × $400). For registered investment companies, this results in an aggregate burden of 240 hours (12 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 180 hours of shareholder time (12 statements × 10 hours/statement × 2 nominees/shareholder × 0.75) and $24,000 for services of outside professionals (12 statements × 10 hours/statement × 2 nominees/shareholder × 0.25 × $400). This results in a total of 840 burden hours, broken down into 630 hours of shareholder time and $84,000 for the services of outside professionals.

4. Amendments to Exchange Act Form 8–K

Under Rule 14a–11, a nominating shareholder or group will be required to file with the Commission, and transmit to the company, a notice on Schedule 14N of its intent to require the company to include the nominating shareholder's or group's nominee in the company's proxy materials. The nominating shareholder or group must file and transmit the notice on Schedule 14N no earlier than 150, and no later than 120, calendar days before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting. If the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed more than 30 days from the prior year, then the nominating shareholder or group will be required to provide notice a reasonable time before the company mails its proxy materials, as specified by the company in a Form 8–K filed pursuant to new Item 5.08 of Form 8–K. The final rules also require a registered investment company that is a series company to file a Form 8–K disclosing the total number of the company's shares that are entitled to vote for the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of

[840] As discussed above, according to information from RiskMetrics, approximately 118 Rule 14a–8 shareholder proposals regarding board issues were submitted to shareholders for a vote in the 2008–2009 proxy season. *See* footnote 804. We believe this data is a useful starting point for estimating the number of shareholders who may avail themselves of our new rules, including the use of Schedule 14N. Also as discussed above, we estimate that approximately half of these shareholders may submit a proposal pursuant to Rule 14a–8 regarding procedures for the inclusion of shareholder nominees for director in company proxy materials, resulting in 59 proposals. We believe the number of shareholders submitting nominees pursuant to a state or foreign law provision will be lower than the number of shareholders submitting proposals pursuant to Rule 14a–8. As a result, we estimate that approximately 30 shareholder proponents will submit nominations pursuant to applicable state or foreign law provisions or a company's governing documents.

[841] We estimate that approximately half of the 24 shareholders submitting proposals to registered investment companies regarding the inclusion of one or more shareholder nominees for director in company proxy materials will make submissions pursuant to applicable state or foreign law provisions or a company's governing documents. As a result, we estimate that approximately 12 shareholder proponents will submit to registered investment companies nominations pursuant to applicable state or foreign law provisions or a company's governing documents.

[842] We are assuming for PRA purposes that any applicable state or foreign law provision or company's governing documents will allow for inclusion of such a statement by the nominating shareholder or group.

the end of the most recent calendar quarter.[843]

For purposes of the PRA, we estimate that approximately 4% of reporting companies (other than registered investment companies) will be required to file a Form 8–K because the company did not hold an annual meeting during the prior year, or the date of the meeting has changed by more than 30 days from the prior year.[844] Based on our estimate that there are approximately 11,000 reporting companies (other than registered investment companies), this corresponds to 440 companies that will be required to file a Form 8–K. In accordance with our current estimate of the burden of preparing a Form 8–K, we estimate 5 burden hours to prepare, review and file the Form 8–K, for a total burden of 2,200 hours (440 filings × 5 hours/filing). This total burden corresponds to 1,650 hours of company time (440 filings × 5 hours/filing × 0.75) and $220,000 for services of outside professionals (440 filings × 5 hours/filing × 0.25 × $400).

In the case of registered investment companies, we estimate that, similar to reporting companies other than registered investment companies, 4% of registered closed-end management investment companies subject to Rule 14a–11 that are traded on an exchange would be required to file a Form 8–K because the company did not hold an annual meeting during the prior year or the date of the meeting has changed by more than 30 days from the prior year.[845] We estimate that approximately 625 of the 1,225 registered investment companies responding to Investment Company Act Rule 20a–1 are closed-end funds that are traded on an exchange, resulting in 25 closed-end funds that will be required to file Form 8–K for these purposes (625 registered closed-end management investment companies × 0.04).[846] However, we estimate that few, if any, registered open-end management investment companies regularly hold annual meetings. Therefore, we estimate that 600 registered investment companies are not closed-end investment companies and will be required to file Form 8–K. This results in a total of 625 registered investment companies required to file Form 8–K (25 closed-end management investment companies + 600 other registered investment companies) and 3,125 burden hours (625 filings × 5 hours/filing). This total burden corresponds to 2,344 hours of company time (625 filings × 5 hours/filing × 0.75) and $312,500 for services of outside professionals (625 filings × 5 hours/filing × 0.25 × $400).[847] Adding the totals for reporting companies (other than registered investment companies) and registered investment companies results in a total burden of 5,325, which corresponds to 3,994 hours of company time and $532,500 for services of outside professionals. This includes the requirement for a registered investment company that is a series company to file a Form 8–K disclosing the total number of the company's shares that are entitled to vote for the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.

5. Schedule 13G Filings

Shareholders will be permitted to aggregate holdings for purposes of meeting the eligibility threshold in Rule 14a–11 and therefore we anticipate that some groups of shareholders may beneficially own in the aggregate more than 5% of a voting class of an equity security registered pursuant to Section 12. In these circumstances, nominating shareholders will need to consider whether they have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b)(1) that is required to file beneficial ownership reports.[848] To the extent nominating shareholder groups exceed the 5% threshold and file a Schedule 13G, this will result in an increased number of Schedule 13G filings. With respect to reporting companies other than registered investment companies, we estimate that 25% (11) of the nominees submitted pursuant to Rule 14a–11 will be from shareholders who individually meet the eligibility thresholds (25% of 45), and 75% (34) will be from shareholder groups (75% of 45). We estimate that 75% of the 34 groups formed will exceed the 5% threshold and will file a Schedule 13G. As a result, we estimate that an additional 26 Schedule 13G filings will be made annually. The total burden associated with this increase in the number of filings is 322 burden hours (26 additional Schedule 13Gs × 12.4 hours/schedule). This burden corresponds to 81 hours of shareholder time (26 additional Schedule 13Gs × 12.4 hours/Schedule × 0.25) and $96,720 for services of outside professionals (26 additional Schedule 13Gs × 12.4 hours/Schedule × 0.75 × $400).

With respect to registered investment companies, we estimate that approximately 3 (50% of 6) of the shareholder nominees will be submitted by shareholders of closed-end funds whose shareholders are required to file beneficial ownership reports under the Exchange Act.[849] We estimate that 25% (1) of the nominees for director of closed-end funds submitted pursuant to Rule 14a–11 will be from shareholders who individually meet the eligibility thresholds (25% of 3), and 75% (2) will be from shareholder groups (75% of 3). We estimate that 75% of the two groups formed to nominate directors of closed-end funds will exceed the 5% threshold and file a Schedule 13G. As a result, we estimate that an additional 2 Schedule 13G filings will be made annually (75% of two groups rounds up to two). The total burden associated with this increase in the number of filings is approximately 25 burden hours (2 additional Schedule 13Gs × 12.4 hours/schedule). This burden corresponds to 6 hours of shareholder time (2 additional Schedule 13Gs × 12.4 hours/schedule × 0.25) and $7,440 for services of outside

[843] The amendment to Rule 14a–8(i)(8) is not expected to impact Form 8–K, so the burden estimates solely reflect the burden changes resulting from new Item 5.08, including when a nomination is submitted pursuant to a company's governing documents or pursuant to applicable State law.

[844] Based on information obtained in 2003 from the Investor Responsibility Research Center, 3.75% of companies (other than registered investment companies) did not hold an annual meeting during the prior year or the date of the meeting changed by more than 30 days from the prior year. *See also* footnote 195 in the 2003 Proposal.

[845] We believe that the percentage for registered closed-end investment companies will be similar to other reporting companies because such investment companies are traded on an exchange and are required to hold annual meetings of shareholders.

[846] We estimate that 1,225 registered investment companies hold annual meetings each year based on the number of responses to Rule 20a–1. Based on data provided by Lipper, the Commission estimates that approximately 625 registered closed-end management investment companies are traded on an exchange.

[847] Consistent with the current estimates for Form 8–K, we estimate that that 75% of the burden of preparation of Form 8–K is carried by the company and that 25% of the burden of preparation of Form 8–K is carried by outside professionals at an average cost of $400 per hour. The burden includes disclosure of the date by which a nominating shareholder or group must submit the notice required by Rule 14a–11(c) as well as disclosure of net assets, outstanding shares, and voting.

[848] We recognize that each shareholder group will need to analyze its own facts and circumstances in order to determine whether it is required to file a Schedule 13G; however, we expect that most groups will file a Schedule 13G.

[849] Under Section 13(d) of the Exchange Act, only holders of equity securities of closed-end funds are required to file beneficial ownership reports with the Commission. Holders of open-end funds are not subject to this requirement. Previously, we estimated that approximately 625 (or slightly over 50%) of the 1,225 registered investment companies responding to Investment Company Act Rule 20a–1 are closed-end funds that are traded on an exchange. We estimate that the percentage of the shareholder nominees that will be submitted by shareholders of closed-end funds will be approximately equal to the percentage of closed-end funds that are traded on an exchange.

professionals (2 additional Schedule 13Gs × 12.4 hours/schedule × 0.75 × $400).

Adding the totals for reporting companies (other than registered investment companies) and registered investment companies results in a total burden of 347 hours, which corresponds to 87 hours of shareholder time and $104,160 for services of outside professionals.

6. Form ID Filings

Under Rule 14n–1 and Rule 14a–11, a shareholder who submits a nominee or nominees for inclusion in the company's proxy statement must provide notice on Schedule 14N to the company of its intent to require that the company include the nominee or nominees in the company's proxy materials. The notice on Schedule 14N must be filed with the Commission on the date the notice is transmitted to the company. We anticipate that some shareholders who submit a nominee or nominees for inclusion in a company's proxy materials will not previously have filed an electronic submission with the Commission and will file a Form ID. Form ID is the application form for access codes to permit filing on EDGAR. The final rules are not changing the form itself, but we anticipate that the number of Form ID filings may increase due to shareholders filing Schedule 14N when submitting a nominee or nominees to a company for inclusion in its proxy materials pursuant to Rule 14a–11, applicable state or foreign law provisions, or a company's governing documents. We estimate that 90% of the shareholders who submit a nominee or nominees for inclusion in a company's proxy materials will not have filed previously an electronic submission with the Commission and will be required to file a Form ID. As noted above, we estimate that approximately 45 reporting companies (other than registered investment companies) and 6 registered investment companies will receive shareholder nominations submitted pursuant to Rule 14a–11. This corresponds to 46 additional Form ID filings (90% of 51). In addition, as noted above, we estimate that approximately 30 reporting companies (other than registered investment companies) and 12 registered investment companies will receive shareholder nominations submitted pursuant to an applicable state or foreign law provision or a company's governing documents. This corresponds to an additional 38 Form ID filings (90% of 42). As a result, the additional annual burden would be 13 hours (84 filings × 0.15 hours/filing).[850] For purposes of the PRA, we estimate that the additional burden cost resulting from the new rules will be zero because we estimate that 100% of the burden will be borne internally by the nominating shareholder or group.

E. Revisions to PRA Reporting and Cost Burden Estimates

Table 1 below illustrates the incremental annual compliance burden of the collection of information in hours and in cost for securities ownership reports filed by investors, proxy and information statements, and current reports under the Exchange Act. The burden was calculated by multiplying the estimated number of responses by the estimated average number of hours each entity spends completing the form. We estimate that 75% of the burden of preparation of the proxy and information statement and current reports is carried by the company internally, while 25% of the burden of preparation is carried by outside professionals at an average cost of $400 per hour. We estimate that 75% of the burden of preparation of Schedule 14N, any soliciting materials with regard to formation of a nominating shareholder group, and any soliciting materials regarding the nomination will be carried by the nominating shareholder or group internally and that 25% of the burden of preparation will be carried by outside professionals retained by the nominating shareholder or group. We estimate that 25% of the burden of preparation of Schedule 13G (for nominating shareholder groups that beneficially own more than 5% of a voting class of any equity security registered pursuant to Section 12) will be carried by the nominating shareholder or group internally and that 75% of the burden of preparation will be carried by outside professionals retained by the nominating shareholder or group. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried internally by the company and nominating shareholder or group is reflected in hours.

[850] We currently estimate the burden associated with Form ID is 0.15 hours per response.

TABLE 1—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES*

	Current annual responses (A)	Proposed annual responses (B)	Current burden hours (C)	Increase in burden hours (D)	Proposed burden hours (E) = C + D	Current professional costs (F)	Increase in professional costs (G)	Proposed professional costs = F + G
Sch 14A	7,300	7,300	671,970	16,370	688,340	79,214,887	2,182,590	81,397,477
Sch 14C	680	680	631,152	1,819	632,971	7,393,639	242,510	7,636,149
Sch 14N	0	162	0	7,870	7,870	0	1,049,300	1,049,300
Form 8–K	115,795	116,860	493,436	3,994	497,430	65,791,500	532,500	66,324,000
Form ID	65,700	65,784	9,855	13	9,868	0	0	0
Sch 13G	12,500	12,528	35,577	87	35,664	42,694,200	104,160	42,798,360
Rule 20a–1	1,225	1,225	142,958	3,438	146,396	20,090,000	458,300	20,548,300
Total	.....	.....	.....	33,591	.....	.....	4,569,360	.....

*The incremental burden estimate for Rule 20a–1 includes the disclosure that would be required on Schedule 14A and 14C, discussed above, with respect to funds.

IV. Cost-Benefit Analysis

A. Background

The Commission is adopting new rules that, under certain circumstances, will require companies to include in their proxy materials shareholder nominees for director, as well as other disclosure regarding those nominees and the nominating shareholder or group. In addition, the new rules will require companies, under certain circumstances, to include in their proxy materials a shareholder proposal that seeks to establish a procedure in the company's governing documents for the inclusion of shareholder director nominees in the company's proxy materials. As a result, a company's proxy materials may be required, under certain circumstances, to provide shareholders with information about, and the ability to vote for, a shareholder nominee for director. The new rules will therefore facilitate shareholders' ability to exercise their traditional State law rights to nominate and elect directors by improving the disclosure provided in connection with corporate proxy solicitations and communication between shareholders in the proxy process.

We requested comment on all aspects of the cost-benefit analysis contained in the Proposing Release, including identification of any additional costs and benefits. We have considered these comments carefully and made responsive changes to the rules in order to minimize the potential costs. Below we consider the benefits and costs of the economic effects of the new rules and discuss the comments we received, as applicable.

B. Summary of Rules

Rule 14a–11 will require companies to include shareholder nominations for director and disclosure about the nominating shareholder or group and the nominee in a company's proxy materials if, among other things, the nominating shareholder or group held, as of the date of the shareholder notice on Schedule 14N, either individually or in the aggregate, at least 3% of the voting power of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) or on a written consent in lieu of such meeting and has held the qualifying amount of securities used to satisfy the ownership threshold continuously for at least three years as of the date of the shareholder notice on Schedule 14N (in the case of a shareholder group, each member of the group must have held the amount of securities that are used to satisfy the ownership threshold for at least three years as of the date of the shareholder notice on Schedule 14N). The nominating shareholder or group also will be required to hold the shares through the date of the meeting. A nominating shareholder or group that includes a nominee or nominees in a company's proxy materials pursuant to Rule 14a–11 will be required to provide in its notice on Schedule 14N filed with the Commission and transmitted to the company disclosures similar to the disclosures required in a traditional contested election. Pursuant to Item 7(e) of Schedule 14A (and, in the case of registered investment companies and business development companies, Item 22(b)(18) of Schedule 14A), the company will be required to include in its proxy materials certain disclosure provided by the nominating shareholder or group in its notice on Schedule 14N. In addition, the new rules will enable shareholders to engage in limited solicitations to form nominating shareholder groups and engage in solicitations in support of their nominee or nominees without disseminating a proxy statement.[851]

The Commission also is adopting an amendment to Rule 14a–8 to narrow the exclusion in paragraph (i)(8) of the rule, which addresses director elections. Under the amendment, a company will not be permitted to rely on Rule 14a–8(i)(8) to omit from its proxy materials a shareholder proposal that seeks to establish a procedure in the company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials. The current procedural requirements for submitting a shareholder proposal pursuant to Rule 14a–8 will remain the same. No additional disclosures will be required from any shareholder that submits such a proposal; however, a nominating shareholder or group that includes a nominee or nominees in a company's proxy materials pursuant to an applicable state or foreign law provision or the company's governing documents will be required to file with the Commission and transmit to the company, in its notice on Schedule 14N, disclosures similar to the disclosures required in a traditional contested election. Pursuant to Item 7(f) of Schedule 14A (and, in the case of registered investment companies and business development companies, Item 22(b)(19) of Schedule 14A), the company will be required to include in its proxy materials certain disclosures provided by the nominating shareholder or group in its notice on Schedule 14N.

C. Factors Affecting Scope of the New Rules

Our discussion of the economic effects of the new rules takes into account various factors, such as the

[851] *See* Rules 14a–2(b)(7) and 14a–2(b)(8).

incentives and actions of certain parties, that will affect the rules' scope and influence.

Any future actions of the states and their legislatures could affect the applicability of the new rules. Rule 14a–11, for instance, will not apply to companies incorporated in states or other jurisdictions that prohibit nominations of directors by shareholders or permit companies to prohibit such nominations and where the company's governing documents do so.[852] Under Rule 14a–8, shareholder proposals must be proper subjects for action by shareholders under the laws of the jurisdiction of the company's organization. To the extent that states or other jurisdictions change their laws, for example, to prohibit the nomination of directors by shareholders, Rule 14a–11 and Rule 14a–8 would apply less broadly.

Future actions of boards may affect the applicability of the new rules. In the case of Rule 14a–11, we believe that the applicability of the rule is not likely to be affected by future actions of a board because companies generally may not prohibit shareholders from nominating directors under existing State law.[853] In addition, a company will not be permitted to exclude pursuant to amended Rule 14a–8(i)(8) a shareholder proposal that would establish a procedure under a company's governing documents for the inclusion of one or more shareholder nominees for director in the company's proxy materials. It is reasonable to expect that some shareholders will submit this type of proposal, particularly shareholders who perceive that the current board does not represent, or possibly may come to not represent, their interests and are not otherwise able to use Rule 14a–11 (such as if the shareholder does not qualify to submit a nominee or if larger shareholders have exhausted the nomination slots available pursuant to Rule 14a–11). Finally, boards seeking to limit the effect of shareholder-nominated candidates submitted pursuant to Rule 14a–11 and elected as directors may, in some instances, choose to expand the board size to dilute, to an extent, the influence of those directors.[854]

The actions and intentions of shareholders also may affect the applicability of the new rules. To rely on Rule 14a–11, the nominating shareholder (or where there is a nominating shareholder group, each member of the nominating shareholder group) must not be holding any of the company's securities with the purpose, or with the effect, of changing control of the company[855] or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11 and must provide a certification to this effect in its filed Schedule 14N.[856] The effect of the rule also is affected by the limitation on the number of shareholder director nominees that a company is required to include in its proxy materials. Under Rule 14a–11, a company will not be required to include shareholder nominations for more than a maximum of one director or 25% of the existing board, whichever is greater. If one shareholder or group that is eligible to use Rule 14a–11 nominates the maximum allowable number of candidates, a company will be permitted to exclude any other shareholder's or group's nominees from the company's proxy materials.[857] Further, if the maximum allowable number of existing shareholder director nominees is currently in place on the board, additional shareholder director nominees are not required to be disclosed in the proxy materials pursuant to the rule.[858]

Shareholders seeking to establish a procedure in a company's governing documents and submit nominees for director using such a provision will need to initiate a two-step process to have their nominees included in a company's proxy materials.[859] Unlike the use of Rule 14a–11, this two-step process depends on both the likelihood that a shareholder will initiate such a process and on its success at each step of the process (*e.g.,* the successful inclusion of the shareholder proposal in the company's proxy materials and adoption of the proposal by the appropriate shareholder vote). The likelihood that a shareholder will initiate the two-step process could be limited by the costs arising from the time needed to complete the process (*e.g.,* including opportunity costs of holding securities where the shareholder may consider the company's board composition to be sub-optimal) and the added risk of failure due to the need to complete two separate steps to include its director nominees in the proxy materials. The likelihood that a shareholder will initiate this process is also affected by the existence of Rule 14a–11, which some eligible shareholders may seek to use instead.

Lastly, the scope of the effects of Rule 14a–11, including the expected benefits and costs described below, is affected by the size of the eligible population of shareholder groups and companies. Consequently, the scope of the direct effects of Rule 14a–11 will narrow to the extent that the rule's eligibility criteria reduce the number of shareholders eligible to take advantage of the rule. According to the data from Form 13F filings, 33% of the 6,416 public issuers included in the sample would have one or more shareholders that, on its own, satisfies the 3% ownership threshold and three-year holding period

[852] As noted above, we are not aware of any states that currently prohibit shareholder nominations for director.

[853] Several commenters also stated that they were unaware of any law in any state or in the District of Columbia that prohibits shareholders from nominating directors. *See* letters from ABA; BRT; CII; Eaton.

[854] As an example, a board of eight directors, with two new shareholder-nominated directors, may expand to up to 11 directors. Such an expansion would dilute the influence of the shareholder-nominated directors without increasing the number of director slots for shareholder nominees for director in the proxy materials because Rule 14a–11 includes a provision allowing companies to round down the number of nominees that must be included when calculating the 25% maximum.

[855] Although Rule 14a–11 does not contain a requirement that the shareholder nominee or nominees do not have an intent to change the control of the company, a nominating shareholder's or group's ability to meet the requirement and certify that it does not have such an intent will be impacted by the intentions and actions of its nominee or nominees. For example, a nominating shareholder will not be able to certify that it does not hold the company's securities for the purpose, or with the effect, of changing the control of the company if its nominee launches its own proxy contest or tender offer. For further discussion, *see* Section II.B.4.d. above.

[856] *See* certifications in Item 8 of new Schedule 14N.

[857] Prior to the time a company has commenced printing its proxy statement and a form of proxy, if a nominating shareholder or group withdraws its shareholder director nominee or the nominee becomes disqualified, the company will be required to include in its proxy materials the director nominee or nominees of the nominating shareholder or group with the next highest voting power percentage that is otherwise eligible to use the rule and that filed a timely notice in accordance with the rule, if any. This process will continue until the company includes the maximum number of nominees that it is required to include in its proxy materials or the company exhausts the list of eligible nominees. For further discussion, *see* Section II.B.7.b above.

[858] This could be the case when shareholder-nominated candidates for director are elected at a company with a classified board or when a company decides to nominate previously-elected shareholder-nominated directors after their first term in office.

[859] The first step of this two-step process would be the submission of a shareholder proposal pursuant to Rule 14a–8 seeking to establish a procedure in a company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials and shareholder approval of the proposal. The second step would be the submission and inclusion of shareholder director nominees in the company's proxy materials pursuant to the nomination procedures adopted by shareholders.

requirement of Rule 14a–11.[860] Our extension of the holding period from a one-year period, as proposed, to the three-year period in the final rule, as well as the increase in the ownership threshold from that proposed for large accelerated filers, limit the number of shareholders eligible to use the rule and the number of companies directly affected by the rule. For non-accelerated filers, the uniform 3% ownership threshold is lower than the 5% ownership threshold that we proposed for that class of filers. This may result in an increase in the number of shareholders eligible to use Rule 14a–11 and the number of companies directly affected by the rule as compared to those shareholders and companies affected under the proposed one year and 5% minimum standards; however, we believe that the extension of the holding period from one to three years may limit any increase in the number of shareholders eligible to use the rule at smaller reporting companies. The comments we received on the Proposal did not substantiate the concern that the rule would have a disproportionate impact on small issuers, and comments from companies overwhelmingly supported uniform ownership thresholds for all public companies.

D. Benefits

We believe that Rule 14a–11 and the amendment to Rule 14a–8(i)(8), where applicable, will (1) facilitate shareholders' ability to exercise their traditional State law rights to nominate and elect directors; (2) establish a minimum uniform procedure pursuant to which shareholders will be able to include their director nominees in a company's proxy materials and enhance shareholders' ability to propose alternative procedures that further shareholders' rights to nominate and elect directors; (3) potentially improve overall board and company performance; and (4) result in more informed voting decisions in director elections due to improved disclosure of shareholder director nominations and enhanced communications between shareholders regarding director nominations.

1. Facilitating Shareholders' Ability to Exercise Their State Law Rights to Nominate and Elect Directors

Facilitating shareholders' ability to exercise their traditional State law rights to nominate and elect directors is a direct benefit of the new rules for shareholders. The new rules do so by requiring the company proxy materials to include shareholder nominees under certain conditions and, as a result, providing alternative means for shareholders to nominate and elect director candidates other than through a traditional proxy contest. Some eligible shareholders may view the new rules as more advantageous than traditional proxy contests and, hence, the new rules may influence their behavior. In addition, eligible shareholders who would have considered launching a proxy contest for purposes other than to change control of the company may prefer to use the new rules instead. The availability of the new rules also may encourage shareholders who would not have previously considered conducting a proxy contest to take a greater role in the governance of their company by using the new rules to have their nominees for director included in a company's proxy materials.

The precise level of the direct benefits to shareholders will depend on a number of other factors. The benefits may be enhanced to the extent that companies' governing documents are modified to require inclusion of shareholder nominees for director in the company's proxy materials from a broader spectrum of shareholders (for example, by lowering the ownership threshold required to have a nominee included in the company's proxy materials or shortening the holding period).[861] The instances of such changes to provisions in governing documents may increase as a result of the amendment to Rule 14a–8(i)(8).[862] We also recognize the possibility that certain quantifiable benefits for shareholders, such as a nominating shareholder's or group's savings in the direct costs of printing and mailing proxy materials, may be less than the quantifiable costs for a company subject to the new rules. We note, however, that the benefits of the new rules are not limited to those that are quantifiable (such as the direct savings in printing and mailing costs) and instead include benefits that are not as easily quantifiable (such as the possibility of greater shareholder participation and communication in the director nomination process), as discussed below. We believe that these benefits, collectively, justify the costs of the new rules.

We discuss below the ways in which the new rules will facilitate shareholders' exercise of their traditional State law rights and the benefits for shareholders (particularly as compared to a traditional proxy contest). We discuss specific monetary cost savings, both direct and indirect, as well as other changes and the resulting benefits for shareholders.

Shareholders generally have the right under State law to nominate and elect their own director candidates—a right that many shareholders believe they should be able to exercise.[863] Currently, however, a shareholder or group that wishes to present its director nominations for a shareholder vote must generally conduct a proxy contest, which is a costly endeavor. The nominating shareholder or group would have to incur costs involved with preparing proxy materials with the required disclosures regarding the director nominations and mailing the proxy materials to each shareholder solicited.[864] Several commenters stated that the costs of traditional proxy contests have made them prohibitively expensive for shareholders wishing to exercise their traditional State law rights to nominate and elect directors.[865]

Further, the concern about the costs of conducting a traditional proxy contest is not limited to the fact that the nominating shareholder or group must incur these costs directly. A collective action problem also exists. The time and effort spent by a shareholder in nominating and advocating for new directors are not shared by other shareholders. This unequal cost sharing may serve to discourage any one

[860] November 2009 Memorandum. *See* Section II.B.4.b. above for a discussion of the data, including its limitations.

[861] As adopted, Rule 14a–11 requires the nominating shareholder individually, or the nominating group in the aggregate, to hold at least 3% of the total voting power of the company's securities that are entitled to be voted on the election of directors at the annual (or a special meeting in lieu of the annual) meeting of shareholders, or on a written consent in lieu of such meeting, on the date the nominating shareholder or nominating group provides notice to the company on Schedule 14N.

[862] As amended, companies will no longer be able to rely on Rule 14a–8(i)(8) to exclude a shareholder proposal that seeks to establish a procedure in the company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials.

[863] *See* letters from AFSCME; Sodali; Universities Superannuation (citing a June 2009 survey conducted by ShareOwners.org showing that 82% of the respondents believed that shareholders should be able to "nominate and elect directors of their own choosing to the boards of the companies they own," while 16% of the respondents stated that "shareholders should not be able to propose directors to sit on the boards of the companies they own.").

[864] Proxy contests waged in connection with efforts to obtain control may involve costs related to not only preparing proxy materials and engaging in solicitation efforts, but to the purchase or lock-up of a significant amount of the voting securities of the target company. Such costs could be high.

[865] *See* letters from Americans for Financial Reform; CalPERS; CII; Florida State Board of Administration; M. Katz; J. McRitchie; S. Ranzini; Teamsters.

shareholder from assuming the costs of running a traditional proxy contest on its own, even though a successful contest could result in a greater aggregate benefit for all shareholders.[866] As a result, there is the added economic cost of foregone opportunities where a qualified director candidate fails to be nominated because no one shareholder or group wishes to bear alone the costs of an election contest for the benefit of all shareholders.

We believe Rule 14a–11 will further our stated goal of facilitating shareholders' ability to nominate and elect their own director candidates by allowing shareholders to avoid certain direct costs of conducting a traditional proxy contest and reducing the overall costs to shareholders for nominating and electing directors—a belief shared by several commenters.[867] The new rules also will mitigate collective action and free-rider concerns that may have otherwise deterred many shareholders from exercising their rights under State law to nominate directors.

Direct cost savings, particularly as compared to the cost of a traditional proxy contest, come from two sources. First, a nominating shareholder or group may see direct cost savings due to reduced printing and postage costs. Based on the information available,[868] we calculate that a shareholder using Rule 14a–11 to submit a director nominee or nominees to be included in a company's proxy materials will save at least $18,000 on average in printing and postage costs.

Second, and significantly, a nominating shareholder or group may see direct cost savings related to reduced expenditures for advertising and promotion of its candidates as a result of its ability to use the company's proxy materials to directly solicit other shareholders. To the extent that the nominating shareholder or group decides to reduce its public relations and advertising expenditures to promote its candidates, or to engage proxy solicitors, the cost savings will be greater. These reductions in costs may remove a disincentive for shareholders to submit their own director nominations, mitigate the collective action concern, and serve the goal of facilitating shareholders' ability to exercise their traditional State law rights to nominate and elect directors.

We received significant comment questioning the need for the new rules to reduce the costs described above or the degree to which the reduction in costs will actually facilitate shareholder director nominations.[869] One commenter characterized the direct printing and mailing cost savings as the sole benefit of the new rules for shareholders and one that is not justified by the costs and disruption that would result from the rules.[870] The commenter observed that the average of $18,000 in estimated savings identified in the Proposing Release represented less than 5% of the cost of a traditional proxy contest and did not include costs that would be incurred by a shareholder actively seeking the election of its nominee, such as costs related to legal counsel, proxy solicitors, public relations advisers and advertising.

We recognize that the adoption of the new rules may not relieve a nominating shareholder or group of all expenditures that could be incurred for an active campaign that may be more successful to support the election of its candidate to the company's board of directors. The new rules, however, are not intended to serve that purpose. Instead, the new rules' goal is to facilitate shareholders' ability to present their own director nominees for a vote at a shareholder meeting by eliminating or reducing barriers in the proxy solicitation process—one of which is the direct cost of printing and mailing proxy materials—that have contributed to frustrating shareholder director nominations.[871]

We also recognize that the direct printing and mailing cost savings of $18,000, on their own, may not be viewed by some to be significant enough to drive the behavior of large shareholders of public companies. The comments that we received regarding the likely increase in the number of election contests resulting from the new rules, however, seem to undercut this view and suggest instead that shareholders' behavior may indeed be influenced by the rules.[872] The extent to which election contests are predicted to increase as a result of shareholders nominating their own director candidates for inclusion in the company's proxy materials strongly indicates that the benefits of the new rules cannot be fairly characterized as a

[866] *See, e.g.,* letters from Bebchuk, *et al.* ("In evaluating eligibility and procedural requirements, the SEC should also keep in mind that many institutional investors lack incentives to invest actively in seeking governance benefits that would be shared by their fellow shareholders."); Lucian A. Bebchuk and Scott Hirst ("Bebchuk/Hirst") (submitting the article by Lucian A. Bebchuk and Scott Hirst, *Private Ordering and the Proxy Access Debate,* 65 Bus. Law. 329 (2010) ("Bebchuk and Hirst (2010)"), in which the authors state: "Thus, challengers who might be able to improve the management of the company may be discouraged from running because they will bear all of the costs but capture only a fraction of the benefits from any improvement in governance." *See also* Lynn A. Stout, *The Mythical Benefit of Shareholder Control,* 93 Va. L. Rev. 789, 789 (2007) ("Stout (2007)") ("In a public company with widely dispersed share ownership, it is difficult and expensive for shareholders to overcome obstacles to collective action and wage a proxy battle to oust an incumbent board.") (cited in the Proposing Release, Section V.B.1.).

[867] *See* letters from CII; Key Equity Investors; Pershing Square. The benefit of a reduction in the cost of a proxy solicitation exists only to the extent that the nominating shareholder or group views Rule 14a–11 as a substitute for a traditional proxy contest. Even with the adoption of Rule 14a–11, some shareholders may prefer to conduct a traditional proxy contest due to the various restrictions on the use of the rule. For example, the rule restricts the number of shareholder director nominees that a company will be required to include in its proxy materials. The rule also will be available only to shareholders that do not hold the securities in the company with the purpose, or with the effect, of changing control of the company. These elements of Rule 14a–11 impose restrictions that are not present in a traditional proxy contest. Some shareholders also may prefer a traditional proxy contest over Rule 14a–11 for reasons related to their strategy for the conduct of the election contest, such as having greater control over the mailing schedule and contents of their proxy materials. *See, e.g.,* letter from Carl T. Hagberg ("C. Hagberg") (stating that "most truly serious nominators of director candidates will surely produce their own proxy materials, and take control of their own 'electioneering' with materials and proxy cards of their own, if they want to stand a reasonable chance to win."). Therefore, while Rule 14a–11 may encourage some shareholders seeking to nominate and elect their candidates to use the rule instead of conducting a traditional proxy contest, other shareholders may continue to prefer a traditional contest. For such shareholders, the expected reduction in a shareholder's proxy solicitation costs will not materialize.

[868] According to a study of proxy contests conducted during 2003, 2004, and 2005, the average cost of a proxy contest to a soliciting shareholder was $368,000. *See* letter from Automatic Data Processing, Inc. (April 20, 2006) regarding *Internet Availability of Proxy Materials,* Exchange Act Release No. 34–52926 (December 8, 2005) (File No. S7–10–05). The costs included those associated with proxy advisors and solicitors, processing fees, legal fees, public relations, advertising, and printing and mailing of proxy materials. Approximately 95% of the costs were unrelated to printing and postage. The cost of printing and postage averaged approximately $18,000.

[869] *See* letters from 26 Corporate Secretaries; 3M; Ameriprise; Association of Corporate Counsel; BRT; Cummins; DuPont; ExxonMobil; FMC Corp.; Frontier; GE; General Mills; Honeywell; IBM; Keating Muething; Motorola; Schneider; Sidley Austin; Simpson Thacher; Time Warner Cable; Wachtell; Wells Fargo; Xerox.

[870] *See* letter from BRT.

[871] We recognize that other factors may have similarly frustrated the effective exercise of this State law right. We discuss below these factors and how the new rules will reduce or eliminate these factors.

[872] *See, e.g.,* letters from Altman (stating that participants in its survey predicted that, on average, 15% of companies listed on U.S. exchanges could expect to face a shareholder director nomination submitted under Rule 14a–11 in 2011, based on the eligibility criteria of the Proposal); BRT (stating that the new rules "will increase the frequency of contested elections * * *"); Chamber of Commerce/CCMC (noting that if the new rules are adopted, "it is likely that proxy contests (in which the company is required to solicit proxies on behalf of shareholders) will increase greatly and may become customary.").

"mere $18,000 in estimated savings" [873] —a characterization that we believe obfuscates the significance of this benefit of our new rules.

We received comment that while certain shareholders may be relieved of certain costs to run a traditional proxy contest as a result of the new rules, the rules may simply shift those costs onto the company and, indirectly, all shareholders.[874] Therefore, while the rules may reduce the direct costs of solicitation by a particular shareholder for its director nominees, it may result in an increase in the overall cost of a company's proxy solicitation for a director election (*e.g.,* additional printing and mailing costs arising from the disclosure of the shareholder director nominations) and indirectly the cost to all shareholders, particularly if the new rules lead to an increase in the number of shareholder director nominations. We have some reason to believe, however, that the increased costs for the company may not be as much as would otherwise result if that shareholder engaged in a traditional proxy contest.[875] We also note that, to the extent that the new rules help to address the collective action concern, it could remove disincentives that previously deterred shareholders from submitting director nominations that may have ultimately benefited all shareholders.

Other commenters observed that savings in printing and mailing costs could be obtained through our notice and access model for electronic delivery of proxy materials [876] or stated that the notice and access model has already reduced the costs for shareholders to effect changes in the membership of a board.[877] We note that this observation applies only to the direct printing and mailing costs, rather than all of the other monetary cost savings discussed throughout this section. We agree that the notice and access model may decrease significantly the printing and mailing costs associated with a proxy solicitation. To the extent that a shareholder chooses to nominate and elect its director candidates through a traditional proxy contest using the notice and access model, the expected benefit of a reduction in printing and mailing costs will be somewhat lower. The notice and access model, however, may not necessarily provide a soliciting shareholder with the same cost savings possible under Rule 14a–11. Under the model, a soliciting shareholder will still incur the costs of printing and mailing notices of availability of proxy materials to shareholders from whom the person is soliciting proxy authority.[878] Further, as we recognized at the time we created the notice and access model, additional printing and mailing costs will be incurred to the extent that a solicited shareholder requests paper copies of the proxy materials.[879] A soliciting shareholder also may prefer using the new rules over a traditional proxy contest conducted through the notice and access model for reasons related to its strategy for the conduct of the election contest, such as avoiding the need and cost to use Exchange Act Rule 14a–7 to obtain a shareholder list from the company (or have the company send proxy materials on its behalf) [880] as well as the requirement to file preliminary proxy materials at least ten calendar days before definitive materials are first sent to shareholders.[881]

The new rules will do more than reduce the direct monetary costs described above. We recognize that shareholders today are widely dispersed and the corporate proxy is the principal means through which State law voting rights are exercised. The dispersed nature of ownership creates certain intangible disincentives to the effective exercise of shareholders' ability to nominate and elect their own director candidates, as discussed below. As we stated in the Proposing Release, the proxy process provides the only practical means for shareholders to solicit votes from other shareholders in favor of the election of their nominees. The current inability of many shareholders to utilize the proxy process for this purpose means that shareholder director nominees do not have a realistic prospect of being elected because most, if not all, shareholders would have cast their votes well in advance of the shareholder meeting. Shareholders are deprived of not only the ability to exercise a traditional State law right, but the opportunity to assess

[873] *See* letter from BRT.

[874] *See* letter from ABA. We recognized this possibility in the Proposing Release as well, noting that the rule "may result in a decrease in costs to shareholders that would have to conduct proxy contests in the absence of [proposed] Rule 14a–11, but may increase the costs for companies." *See* Proposing Release, Section V.C.3.

[875] One commenter on the 2003 Proposal estimated that a Rule 14a–11 contest would cost a company approximately one-third what a full proxy contest costs. *See* letter from Stephen M. Bainbridge submitted in connection with the 2003 Proposal (File No. S7–19–03)("Bainbridge 2003 Letter"). Based on this assumption and relying on data from a late 1980s survey, this commenter estimated that the costs of such a contest to a public company would be $500,000. This commenter also cited data estimating companies' annual expenditures on Rule 14a–8 shareholder proposals to be $90 million. While this commenter noted the belief that it is unlikely that there will be as many Rule 14a–11 election contests as Rule 14a–8 shareholder proposals, the commenter asserted that incumbent boards are likely to spend considerably more on opposing each Rule 14a–11 contest than on opposing a Rule 14a–8 shareholder proposal. This commenter estimated that $100 million may be an appropriate estimate for the lower boundary of the range within which Rule 14a–11's direct costs will fall. Commenters did not provide any data during the comment period for the Proposal that compared these costs for a company.

[876] *See, e.g.,* letters from 26 Corporate Secretaries; Ameriprise; BRT.

[877] *See* letters from 26 Corporate Secretaries; 3M; Ameriprise; Association of Corporate Counsel; BRT; Cummins; DuPont; ExxonMobil; FMC Corp.; Frontier; GE; General Mills; Honeywell; IBM; Keating Muething; Motorola; Schneider; Sidley Austin; Simpson Thacher; Time Warner Cable; Wachtell; Wells Fargo; Xerox.

[878] Exchange Act Rule 14a–16(*l*)(2). A soliciting person other than the company could limit the cost of a solicitation by soliciting proxies only from a select group of shareholders, such as those with large holdings, without furnishing other shareholders with any information. This flexibility would allow a soliciting person other than the company to reduce even further its printing and mailing costs by soliciting only those persons who have not previously requested paper copies of the proxy materials. Certain practical reasons, however, may deter a soliciting person other than the company from taking full advantage of this flexibility, such as the fact that institutional investors may prefer receiving paper copies of proxy materials. *See* Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy,* 61 Vand. L. Rev. 476, 488 (2008) (noting that institutional investors "generally may request paper delivery to minimize their own printing costs.") (cited in the letters from BRT and Simpson Thacher).

[879] *See Internet Availability of Proxy Materials,* Release No. 34–55146 (January 22, 2007) ("Internet Proxy Availability Release") (noting that "to the extent that some shareholders request paper copies of the proxy materials, the benefits of the amendments in terms of savings in printing and mailing costs will be reduced.").

[880] Exchange Act Rule 14a–7 sets forth the obligation of companies either to provide a shareholder list to a requesting shareholder or to send the shareholder's proxy materials on the shareholder's behalf. The rule provides that the company has the option to provide the list or send the shareholder's materials, except when the company is soliciting proxies in connection with a going-private transaction or a roll-up transaction. Under Rule 14a–7(e), the shareholder must reimburse the company for "reasonable expenses" incurred by the company in providing the shareholder list or sending the shareholder's proxy materials.

[881] Exchange Act Rule 14a–6 requires that preliminary copies of the proxy statement and form of proxy be filed with the Commission at least ten calendar days prior to the date that definitive copies of such materials are first sent or given to security holders, except if the solicitation relates to certain matters to be acted upon at the meeting of security holders. Accordingly, the proxy statement and form of proxy for a traditional proxy contest must be filed in preliminary form. By contrast, under the amendments to Rule 14a–6 that we are adopting today, the inclusion of a shareholder director nominee in the company's proxy materials will not require the company to file preliminary proxy materials, provided that the company is otherwise qualified to file directly in definitive form. In this regard, the inclusion of a shareholder director nominee will not be deemed a solicitation in opposition for purposes of the exclusion from filing preliminary proxy materials.

and vote on qualified candidates who could have been presented for a vote if the proxy process functioned as intended. As with the direct monetary costs, reducing the costs arising from the dispersed nature of ownership discussed below will help address any related collective action concerns.

Some commenters observed that a shareholder seeking to nominate and elect its own director candidates through a traditional proxy contest is disadvantaged by the fact that its candidates are presented to shareholders through a separate set of proxy materials.[882] A nominating shareholder or group may encounter difficulties in having its nominees evaluated in the same manner as those of management by shareholders who are used to receiving only the company's proxy materials and who may react differently, and perhaps negatively, to the shareholder's nominees simply because the nominees are presented in a separate, unfamiliar set of proxy materials.

As we stated throughout this release, the Federal proxy rules should not frustrate the exercise of a shareholder's traditional State law right to present its own director candidates for a shareholder vote. To the extent that the exercise of this right is hindered simply because of a nominating shareholder's or group's need to deliver a separate set of proxy materials and potentially negative reaction by shareholders to the appearance of this set of materials, we believe that our new rules will help address that concern. With the new rules, a shareholder will have the ability to include its director nominees in the company's proxy materials, provided that the rules' requirements are met. The fact that a nominating shareholder or group could have its director nominees included in a company's proxy materials—as opposed to being included in its own proxy materials—pursuant to the new rules may be viewed by the shareholder or group as a significant improvement in its ability to have its nominees evaluated by shareholders in the same manner as they evaluate management's nominees. Shareholders who are interested in effecting a change in the company's leadership or direction may be less likely to be deterred by the prospect that their director nominees will not be assessed on their merit. Nominating shareholders also may see less need for additional soliciting efforts, such as the hiring of proxy solicitors, public relations advisors, or advertising, if their director nominees are presented alongside those of management in a set of company proxy materials with which the company's shareholders are familiar.[883]

Shareholders also may be hindered in making their voting decisions in a traditional proxy contest due to the fact that they have to evaluate more than one set of proxy materials—one sent by a company and another sent by an insurgent shareholder—when evaluating whether and how to grant authority to vote their shares by proxy.[884] Presenting the competing director nominees on one proxy card, with the related disclosure contained in one proxy statement, may simplify the shareholder's decision-making process and reduce the potential for any confusion on the part of shareholders.[885] The result may be a greater degree of participation by shareholders through the proxy process in the governance of their companies.

2. Minimum Uniform Procedure for Inclusion of Shareholder Director Nominations and Enhanced Ability for Shareholders To Adopt Director Nomination Procedures

Rule 14a–11, as adopted, will provide shareholders of companies subject to the Federal proxy rules the ability to include their director nominees in the company's proxy materials, provided that the rule's requirements are met.[886] Further, with our adoption of the amendment to Rule 14a–8(i)(8), shareholders will be able to present in the company's proxy materials a proposal that would seek to establish a procedure in the company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials.[887] Shareholders will have a greater ability to present for a shareholder vote a director nomination procedure with requirements, such as the requisite ownership threshold or holding period, that differ from those of Rule 14a–11.[888]

We received significant comment regarding the uniform applicability of Rule 14a–11 and the amendment to Rule 14a–8(i)(8).[889] While there was widespread support for the amendment to Rule 14a–8(i)(8), commenters were

[882] *See* letters from Bebchuk/Hirst (submitting the Bebchuk and Hirst (2010) study, which noted the ability of shareholders to include their nominees in the company's proxy materials would "avoid intangible disadvantages that may result from being on a separate card."); Pershing Square (stating that "the absence of universal ballots, on which shareholders can vote from among all nominees regardless of who proposed them, is glaring and clearly anti-choice" and that "[o]ur 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.").

At the October 7, 2009 "Proxy Access Roundtable" held by the Harvard Law School Program on Corporate Governance (the transcript of which was submitted as part of a comment letter from S. Hirst), Roy Katzovicz, the Chief Legal Officer of Pershing Square Capital Management, L.P. explained:

As a cultural matter, there are two sub-points. First and foremost, having the decision of choosing two people, one next to the other, invites, we think, a more intelligent analysis on the part of shareholders generally. In particular, we think that if the basis for election for a nominee is their merit as an individual, a fund or an investor of any type that can identify the deadweight on the board, and in place of that deadweight find ideal candidates from a skills perspective to round out the board, they're going to have an easier time getting shareholder support for their nominee. Their ability to vote among all the nominees and from all proponents, I think, facilitates that kind of person-by-person analysis, versus slate-by-slate analysis.

[883] As discussed in Section II.B.9.d.ii. above, we have adopted the proposed amendments to Exchange Act Rule 14a–4 out of a similar desire to avoid giving management's director nominees an advantage over those of a nominating shareholder or group and to create an impartial presentation of the nominees for whom a shareholder may vote.

[884] One commenter stated that if enabling shareholders to evaluate a board more efficiently and make more informed voting decisions is the goal of the Proposal, then enhancing proxy disclosure, rather than facilitating proxy contests, will better achieve that goal. *See* letter from Davis Polk. We recognize the importance of enhancing the disclosure provided in connection with proxy solicitations and recently adopted new rules to better enable shareholders to evaluate the leadership of public companies. *See* Proxy Disclosure Enhancements Adopting Release. These rules, however, do not dispense with the need for Rule 14a–11 and the amendment to Rule 14a–8(i)(8). The new rules we are adopting will complement the recently-adopted proxy disclosure enhancement rules by enabling shareholders to submit their own director nominees if, after evaluating a company's public disclosures and performance, they are displeased with that company's current leadership or direction.

[885] As discussed in Section IV.D.4. below, the new disclosure requirements that we are adopting for shareholder director nominations submitted pursuant to Rule 14a–11, a state or foreign law provision, or a provision in the company's governing documents also will facilitate more informed voting decisions by providing shareholders with important disclosures and enhancing their ability to communicate with each other regarding director nominations.

[886] For a discussion of the companies that are subject to Rule 14a–11, *see* Section II.B.3. above. As discussed in that section, foreign private issuers and companies that are subject to the Federal proxy rules solely because they have a class of debt securities registered under Exchange Act Section 12 will not be subject to Rule 14a–11. For smaller reporting companies, Rule 14a–11 will become effective three years after the date that the rule becomes effective for all other companies.

[887] As previously discussed, a shareholder proposal seeking to establish such a procedure will continue to be subject to exclusion under other provisions of Rule 14a–8.

[888] As discussed in Section II.C. above, a provision in a company's governing documents establishing a procedure for the inclusion of shareholder director nominees in a company's proxy materials will not affect the operation of Rule 14a–11, regardless of whether the company's shareholders have approved the provision.

[889] For further discussion of the comments regarding the uniform applicability of Rule 14a–11 and the amendment to Rule 14a–8(i)(8), *see* Sections II.B.2. and II.C. above.

divided on the extent to which companies and shareholders should be permitted to use Rule 14a–8 to propose alternative requirements for shareholder director nominations and on the related issue of whether shareholders and companies should be able to opt out of Rule 14a–11 entirely. Some commenters believed that the amendment to Rule 14a–8(i)(8) should facilitate private ordering under State law by enabling shareholders to include in the company's proxy materials a Rule 14a–8 proposal that would impose more restrictive eligibility criteria than those of Rule 14a–11.[890] A number of commenters also believed that shareholders should be able to elect to have their companies opt out of Rule 14a–11, including through the submission of a Rule 14a–8 proposal.[891] To facilitate private ordering, a significant number of commenters supported the adoption of the amendment to Rule 14a–8(i)(8) while opposing adoption of Rule 14a–11.[892]

By contrast, other commenters supported an amendment enabling shareholders to include in a company's proxy materials a Rule 14a–8 proposal that establishes a shareholder director nomination procedure but only if the procedure would provide shareholders with a greater ability to include their director nominees in the company's proxy materials.[893] A number of commenters also opposed any provision that would permit companies to opt out of Rule 14a–11 [894] and preferred the uniform applicability of Rule 14a–11 to all companies.[895]

We considered these comments carefully. As discussed above, and noted in the Proposal, the purpose of the rules is to facilitate shareholders' traditional State law rights to nominate and elect their own director candidates. As such, we believe that a uniform application of Rule 14a–11 to companies subject to the Federal proxy rules is the best way to enable shareholders of these companies to do so without having to incur the types of costs and other disadvantages that shareholders traditionally have encountered. A single, uniform rule will provide shareholders of any company subject to the rule with the ability to meaningfully exercise their traditional State law rights to present their own director candidates for a vote at a shareholder meeting may be invoked through the proxy process. With the adoption of the amendment to Rule 14a–8(i)(8), shareholders will be able to establish procedures that can further facilitate this ability, if they wish.

By contrast, we believe that exclusive reliance on private ordering under State law would not be as effective and efficient in facilitating the exercise of these rights. Commenters identified procedural and legal difficulties that they believe would hinder the establishment of a shareholder director nomination procedure under private ordering, including: A supermajority voting standard for approval of the proposal; [896] the constraints imposed by the 500-word limit for a Rule 14a–8 proposal; [897] the significant percentage of companies that restrict shareholders' ability to amend or propose bylaws; [898] and the potential ability of a board to repeal or amend a shareholder-adopted bylaw procedure.[899] Some commenters also expressed a general concern that under private ordering, the provisions in a company's governing documents regarding shareholder director nominations may be so restrictive that it would be impossible for shareholders to have candidates included in company proxy materials.[900] Other commenters, however, disagreed that these difficulties would actually interfere with the establishment of a procedure under a private ordering approach.[901]

As previously discussed, we believe that our rules should provide shareholders with the ability to include director nominees in a company's proxy materials without the need for shareholders to bear the burdens of overcoming substantial obstacles to creating that ability on a company-by-company basis.[902] Private ordering based on an opt-in approach would require shareholders to incur significant costs, regardless of the presence of the difficulties described above. Shareholders would need to expend both time and funds to draft and submit a proposal, such as a Rule 14a–8 proposal, establishing a shareholder director nomination procedure on a company-by-company basis.[903] These costs may be higher if the company opposes and solicits against adoption of the proposal—a possibility that is very likely at companies where disagreements between incumbent directors and a nominating shareholder or group already exist.[904] Further, shareholders may be disinclined to undergo a two-step process to submit their own nominees—first, to establish a nomination procedure through a Rule 14a–8 shareholder proposal and, second, to submit their director candidates for inclusion in the company's proxy materials—given the

[890] *See* letters from American Express; BorgWarner; Brink's; BRT; CIGNA; P. Clapman; Con Edison; CSX; Davis Polk; DTE Energy; DuPont; GE; General Mills; C. Holliday; JPMorgan Chase; Metlife; P&G; Pfizer; Safeway; Seven Law Firms; Society of Corporate Secretaries; Southern Company; Tenet; U.S. Bancorp; Verizon.

[891] *See* letters from DTE Energy; JPMorgan Chase; P&G; Seven Law Firms; Society of Corporate Secretaries; U.S. Bancorp.

[892] *See, e.g.,* letters from ABA; BRT; Society of Corporate Secretaries.

[893] *See* letters from CII; Governance for Owners; D. Nappier.

[894] *See* letters from AFL–CIO; Amalgamated Bank; W. Baker; Florida State Board of Administration; IAM; Marco Consulting; P. Neuhauser; Nine Law Firms; Norges Bank; Relational; Shamrock; TIAA–CREF; USPE; ValueAct Capital.

[895] *See* letters from AFSCME; CalPERS; CalSTRS; CII; COPERA; Florida State Board of Administration; John C. Liu ("J. Liu"); D. Nappier; Nathan Cummings Foundation; Phil Nicholas ("P. Nicholas"); OPERS; State Universities Retirement System of Illinois ("SURSI"); SWIB; WSIB.

[896] *See* B. Young, footnote 52, above ("Data on bylaw amendment limitations show that at between 38 and 43% of companies, depending on the index, shareholders are either unable to amend the bylaws or face significant challenges in the form of supermajority vote requirements."); *see also* letters from AFSCME; Bebchuk/Hirst; Florida State Board of Administration; J. Liu.

[897] *See* letters from Bebchuk/Hirst; CII; Florida State Board of Administration.

[898] *See* letters from AFSCME; Florida State Board of Administration; Nathan Cummings Foundation; SWIB.

[899] *See* letters from AFSCME; Corporate Library; Sodali. *See also* Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors: A Decision-Making Analysis,* 5 Berkeley Bus. L.J. 131, 144 (2008) (discussing how a company's management defeated a shareholder proposal regarding shareholder director nominations through the use of a bylaw requiring a super-majority shareholder vote in favor of such a shareholder proposal and noting that "[t]he super-majority requirement was one of several potential defenses that management might have employed; it might also have imposed inconvenient notice requirements, stringent shareholder qualification rules, or restrictions mirroring the conditions of SEC rule 14a–8. If these barriers proved insufficient, management might have considered counter-initiatives; it is an open question in Delaware and certain other states whether the board of directors has the power to repeal a shareholder-initiated bylaw by adopting a superseding bylaw amendment.")

[900] *See* letters from Florida State Board of Administration; P. Neuhauser; Shamrock.

[901] *See* letters from AT&T; ABA; BRT; J. Grundfest; Keller Group; Lemonjuice.biz ("Lemonjuice"); Seven Law Firms.

[902] *See* Section II.B.2. above, for additional discussion of our consideration of a private ordering approach.

[903] *See* letters from CalPERS; Florida State Board of Administration; D. Nappier; P. Neuhauser. One of these commenters estimated that the approximate cost for shareholders of "running a proposal" is $30,000. *See* letter from CalPERS. The commenter estimated that it would cost $351,000,000 to attempt to establish the right of shareholders of Russell 3000 companies to include their director nominees in a company's proxy materials.

[904] The reluctance of companies to support the establishment of a shareholder director nomination procedure was noted in an article submitted by a commenter. *See* letter from Bebchuk/Hirst (referring to Bebchuk and Hirst (2010)). In their article, the authors observed that while the establishment of such a procedure is permissible under the existing laws of some states, including Delaware, only three companies have in fact established a shareholder director nomination procedure.

length of time that they will have to hold the requisite amount of securities and, perhaps more importantly, the risk of failure at each step of the process.

Different but equally significant issues would arise under an opt-out approach. Shareholders who wish to retain their ability to include their director nominees in the company's proxy materials pursuant to Rule 14a–11 may find it difficult to successfully oppose an opt-out proposal due to management's ability to draw on the company's resources to promote the adoption of the proposal.[905] We also believe that if we were to allow an opt-out approach, even one in which only shareholders could approve an opt out, there is a high likelihood that the effort to procure such approval could be supported by management and funded by company assets, while opposing views could not be advanced effectively. Shareholders of these companies would find themselves, once again, left without an effective or efficient ability to nominate and elect their own director candidates. Further, as some commenters observed, both the opt-in and opt-out approaches may impose unnecessary complexity and administrative burdens for shareholders with diversified holdings in numerous companies and may hinder their exercise of a traditional State law right.[906]

[905] In this regard, we note that a survey that one commenter conducted showed that, if available, a large majority of its member companies—approximately two-thirds—would seek to implement an opt-out from Rule 14a–11. *See* letter from Society of Corporate Secretaries. This survey suggests that shareholders of many companies may, once again, be limited in their ability to have their director candidates included in the companies' proxy materials.

[906] *See* letters from CFA Institute; CII; COPERA; D. Nappier; OPERS. One commenter countered that most long-term institutional shareholders are unlikely to submit director candidates at a large number of companies simultaneously and predicted that private ordering will lead to "some degree of standardization" in the types of shareholder director nomination procedures. *See* letter from Society of Corporate Secretaries. While we appreciate these points, we believe that adoption of Rule 14a–11, in fact, provides such "standardization." The amendment to Rule 14a–8(i)(8) complements Rule 14a–11 by enabling shareholders to consider and vote on proposals that provide shareholders with an even greater ability to present their own director candidates for a shareholder vote. Lastly, we recognize that the amendment to Rule 14a–8(i)(8) could result in some complexity as well, in that shareholders could establish director nomination procedures that require, for example, a different ownership threshold or holding period than those contained in Rule 14a–11. We believe, however, that such complexity is justified because it furthers our goal of facilitating, as much as possible, the effective exercise of shareholders' traditional State law right of shareholders to nominate their own director candidates for a vote at a shareholder meeting.

3. Potential Improved Board Performance and Company Performance

As discussed throughout this release, we are adopting the new rules with the goal of facilitating shareholders' ability under State law to nominate and elect directors for election to the board. Because State law provides shareholders with the right to nominate and elect directors to ensure that boards remain accountable to shareholders and to mitigate the agency problems associated with the separation of ownership from control, facilitating shareholders' exercise of these rights may have the potential of improviing board accountability and efficiency and increasing shareholder value. In the Proposing Release, we requested comment on the assertion that the Proposal could improve board performance and, hence, company performance—both for boards that include shareholder-nominated directors elected pursuant to the new rules and for boards that may be more attentive and responsive to shareholder concerns to avoid the submission of shareholder director nominations pursuant to the new rules.[907]

We received significant comment regarding this assertion. Many commenters agreed that the new rules may result in the benefit of more accountable, more responsive, and generally better-performing boards.[908] Other commenters, however, questioned whether the new rules would in fact promote board accountability,[909] warned of the costs of distracting and expensive election contests,[910] and disputed the conclusions of a study regarding the benefits enjoyed by companies with "hybrid boards" that was cited in the Proposing Release.[911] Commenters also challenged the basis for any suggestions in the Proposing Release that the recent economic crisis was somehow linked to the inability of shareholders to include their director nominees in the company's proxy materials, pointing out that we have contemplated similar regulatory efforts several times before the recent crisis occurred.[912]

[907] *See* Proposing Release, Section V.B.3.

[908] *See* letters from AFSCME; Bebchuk, *et al.;* Brigham; CalPERS; CII; L. Dallas; T. DiNapoli; A. Dral; GovernanceMetrics; Governance for Owners; Hermes; M. Katz; LUCRF; J. McRitchie; R. Moulton-Ely; D. Nappier; P. Neuhauser; NJSIC; OPERS; Pax World; Pershing Square; Relational; RiskMetrics; D. Romine; Shareowners.org; Social Investment Forum; Teamsters; TIAA–CREF; Universities Superannuation; USPE; Walden. One commenter added that the benefits of the right to include shareholder director nominees in the company's proxy materials, including enhanced shareholder value from hybrid boards and directors becoming "more alert to their duties," are "less easy to quantify." *See* letter from P. Neuhauser.

[909] *See, e.g.,* letters from Alaska Air; Ameriprise; Brink's; Comcast; CSX; General Mills; Piedmont; Praxair; William H. Steinbrink ("W. Steinbrink"); Time Warner Cable; United Brotherhood of Carpenters.

[910] *See* letters from ABA; Atlas; AT&T; Book Celler; Carlson; Carolina Mills; Chamber of Commerce/CCMC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick; GE; General Mills; Glass Lewis; Glaspell; Intelect; R. Clark King; Koppers; MCO; MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; D. Merilatt; NAM; NIRI; NK; O3 Strategies; Roppe; Rosen; Safeway; Sara Lee; Schneider; Southland; Style Crest; Tenet; TI; tw telecom; R. VanEngelenhoven; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[911] *See, e.g.,* letters from IBM; Simpson Thacher. These commenters questioned the conclusions of the study by Chris Cernich, *et al.,* "Effectiveness of Hybrid Boards," IRRC Institute for Corporate Responsibility (May 2009) ("Cernich (2009)"), *available at http://www.irrcinstitute.org/pdf/IRRC_05_09_EffectiveHybridBoards.pdf* (cited in the Proposing Release, Section V.B.3.). For example, one of these commenters stated that the study "demonstrates that the objectives of successful dissidents were often short-term in nature" and "suggests that companies with dissidents on their board perform better than their peers over a one-year period, but that they perform worse over a three-year period." *See* letter from Simpson Thacher. The other commenter stated that "the only conclusion that could fairly be drawn from the data is that some companies perform better, and many perform worse, under such circumstances" and "of the companies with dissident directors studied for three years after the contest period, share performance averaged just 0.7%, which is 6.6% less than peer companies."

We recognize the limitations of the Cernich (2009) study as well. While it provides useful documentation of patterns of behavior of activist investors, its long-term findings on shareholder value creation are difficult to interpret. Return estimates are presented without standard errors. For long-term returns in particular, this shortcoming makes it difficult to infer whether results arise because returns are different than peers in expectation, or because of random chance. Other studies cited in this release do use standard statistical inference techniques to approach similar questions. *See, e.g.,* J. Harold Mulherin and Annette B. Poulsen, *Proxy Contests and Corporate Change: Implications For Shareholder Wealth,* J. Fin. Econ. (March 1998) ("Mulherin and Poulsen (1998)") (cited in the NERA Report submitted as part of the letter from BRT).

[912] *See* letters from 3M; ACE; Ameriprise; American Bankers Association; BRT; Devon; Dewey; GE; A. Goolsby; C. Holliday; Honeywell; IBM; Jones Day; Norfolk Southern; Pfizer; Sidley Austin; Simpson Thacher; TI; tw telecom; Unitrin; Wachtell. *See also* letters from BRT (submitting the study by Andrea Beltratti and René M. Stulz, *Why Did Some Banks Perform Better During the Credit Crisis? A Cross-Country Study of the Impact of Governance and Regulation* (July 2009) ("Beltratti and Stulz (2009)"), in which the authors found "no consistent evidence that better governance led to better performance during the crisis" but found "strong evidence that banks with more shareholder-friendly boards performed worse."); Chamber of Commerce/CCMC (submitting an article by Brian R. Cheffins, *Did Corporate Governance "Fail" During the 2008 Stock Market Meltdown? The Case of the S&P 500* ("Cheffins (2010)"), which stated that because "corporate governance functioned tolerably well in companies removed from the S&P 500 and that a combination of regulation and market forces will likely prompt financial firms to scale back the free-wheeling business activities that arguably helped to precipitate the stock market meltdown, the case is not yet made for fundamental reform of current corporate governance arrangements.").

The comments reflect the sharp divide on the question of whether facilitating shareholders' ability to exercise their rights to nominate and elect directors would lead to the benefit of improved board and company performance. We have considered these comments carefully and appreciate both the fact that the empirical evidence may appear mixed and the potential for negative effects due to management distraction and discord on the board that some commenters identified. After assessing the costs and benefits identified by commenters, and for reasons discussed below, we believe that the totality of the evidence and economic theory supports the view that facilitating shareholders' ability to include their director nominees in a company's proxy materials has the potential of creating the benefit of improved board performance and enhanced shareholder value—both in companies with the actual election of shareholder-nominated directors and in companies that react to shareholders' concerns because of the possibility of such directors being elected. Thus, as discussed below, it is our conclusion that the potential benefits of improved board and company performance and shareholder value justify the potential costs.

By facilitating shareholders' exercise of their traditional State law rights to nominate and elect directors, we believe that eligible shareholders may prefer to use the new rules over a costly traditional proxy contest, making election contests a more plausible avenue for shareholders to participate in the governance of their company. This may have two beneficial effects on the governance of a company. First, the board and management of a company may be increasingly responsive to shareholders' concerns, even when contested elections do not occur, because of shareholders' ability to present their director nominees more easily. Second, new shareholder-nominated directors may be more inclined to exercise judgment independent of the company's incumbent directors and management.

The new rules will remove or reduce some of the current disincentives to shareholders' exercise of their traditional State law rights to nominate director candidates. Once the rules become effective, boards' responsiveness to concerns expressed by shareholders may increase because shareholders could more easily nominate their own directors to run against incumbent directors.[913] In response to the Proposal, commenters submitted studies regarding the effects of reducing incumbent directors' insulation from removal, which showed measures that make incumbent directors more vulnerable to replacement by shareholder action have salutary deterrent effects against board complacency and improve corporate governance and shareholder value.[914] Further, by creating a new threat of removal, the new rules could lead to greater accountability on the part of incumbent directors to the extent they see a close link between their performance and the prospect of removal.[915] In response to the Proposal, one commenter also submitted studies that showed that anti-takeover provisions protecting incumbent management are associated with economically significant reductions in firm valuation, returns and performance, and share prices increase when activists prompt elimination of provisions such as staggered boards.[916] Conversely, the creation of a staggered board structure was found to be associated with a reduction in firm value.[917] Because our new rules may make director elections more competitive by facilitating shareholders' ability to nominate and elect their own director candidates and, hence, also make some incumbent directors less secure in their positions, we believe that the rules may have analogous salutary effects.

As we noted in the Proposing Release, the presence of directors nominated by shareholders may have an effect on company performance and shareholder value.[918] We also noted in the Proposing

[913] The Supreme Court's recent opinion in *Citizens United v. FEC,* 130 S.Ct. 876 (2010) underscores the importance of board responsiveness to shareholder concerns. In *Citizens United,* the government asserted an interest in limiting independent expenditures by corporations in political campaigns in order to prevent dissenting shareholders from being compelled to fund corporate political speech with which they disagreed. *Citizens United,* 130 S.Ct. at 911. The Court, however, stated that any such coercion could be addressed "through the procedures of corporate democracy." *Id., quotation omitted.*

[914] *See* letter from L. Bebchuk (noting the article by Lucian A. Bebchuk and Alma Cohen, *The Costs of Entrenched Boards,* J. Fin. Econ. (November 2005) ("Bebchuk and Cohen (2005)"), in which the authors stated: "Staggered boards are associated with an economically meaningful reduction in firm value * * * [w]e also provide suggestive evidence that staggered boards bring about, and not merely reflect, an economically significant reduction in firm value * * * [f]inally, the correlation with reduced firm value is stronger for staggered boards that are established in the corporate charter (which shareholders cannot amend) than for staggered boards established in the company's bylaws (which shareholders can amend).").

Commenters also submitted empirical studies indicating that facilitating shareholders' rights and voice may result in better company performance. *See* letters from L. Bebchuk; CalSTRS; Nathan Cummings Foundation (noting the study by Paul Gompers, Joy Ishii and Andrew Metrick, *Corporate Governance and Equity Prices,* 118 Q.J. Econ. 107 (2003), in which the authors found that "firms with stronger shareholder rights had higher firm value, higher profits, higher sales growth, lower capital expenditures, and made fewer corporate acquisitions."); letters from CalSTRS; Nathan Cummings Foundation (noting the study by B. Lawrence Brown and Marcus Caylor, *The Correlation Between Corporate Governance and Company Performance,* Research Commissioned Institutional Shareholder Services (2004), in which the authors found that "firms with weaker governance perform more poorly, are less profitable, more risky, and have lower dividends than firms with better governance."). *See also* letter from T. Yang (noting the study by Bonnie Buchanan, Jeffry M. Netter, and Tina Yang, *Proxy Rules and Proxy Practice: An Empirical Study of US and UK Shareholder Proposals* (September 2009) ("Buchanan, Netter, and Yang (2009)"), in which the authors found that "after receiving a shareholder proposal, [U.S.] firms exhibit higher stock returns and the improvement is greater [ ] when the proposal is likely to be wealth maximizing or sponsored by a shareholder owning a relatively large equity stake in the target firm.").

[915] As we noted in the Proposing Release, economists have put forth theory and evidence on the link between incentives that are associated with accountability and performance. *See, e.g.,* Benjamin E. Hermalin and Michael S. Weisbach, *Endogenously Chosen Board of Directors and Their Monitoring of the Board,* 88 Am. Econ. Rev. 96 (1998) (cited in the Proposing Release, Section V.B.3); Milton Harris and Artur Raviv, *Control of Corporate Decisions: Shareholders vs. Management* (May 29, 2008), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965559* (cited in the Proposing Release, Section V.B.3.).

[916] *See* Bebchuk and Hirst (2010) (noting the "substantial empirical evidence indicating that director insulation from removal is associated with lower firm value and worse performance."). *See also* letter from L. Bebchuk (noting the following articles: Lucian A. Bebchuk, Alma Cohen and Allen Ferrell, *What Matters in Corporate Governance?,* 22 Rev. Fin. Studs. 783 (2009) ("Bebchuk, Cohen, and Ferrell (2009)") ("We put forward an entrenchment index based on six provisions: staggered boards, limits to shareholder bylaw amendments, poison pills, golden parachutes, and supermajority requirements for mergers and charter amendments * * * [w]e find that increases in the index level are monotonically associated with economically significant reductions in firm valuation as well as large negative abnormal returns during the 1990–2003 period."); Re-Jin Guo, Timothy A. Kruse and Tom Nohel, *Undoing the Powerful Anti-Takeover Force of Staggered Boards,* J. Corp. Fin. (June 2008) ("Guo, Kruse and Nohel (2008)") ("We find that de-staggering the board creates wealth and that shareholder activism is an important catalyst for pushing through this change."); Olubunmi Faleye, *Classified Boards, Firm Value, and Managerial Entrenchment,* J. Fin. Econ. (February 2007) ("Faleye (2007)") (noting that "classified boards significantly insulate management from market discipline, thus suggesting that the observed reduction in value is due to managerial entrenchment and diminished board accountability.")).

[917] *See* Bebchuk and Hirst (2010); Bebchuk and Cohen (2005).

[918] *See* Proposing Release, Section V.B.3. (citing Cernich (2009)). Moreover, as we noted in the same section of the Proposing Release, empirical evidence has indicated that the ability of significant shareholders to hold corporate managers

Continued

Release that academic literature indicates the benefit to shareholders of having an independent, active and committed board of directors.[919] Directors are charged under State law to act as disinterested fiduciaries on behalf of all shareholders, but it has been recognized that the difficult agency problem created by the separation in public companies of ownership from control creates conflicts not completely addressed by State law. We received comment expressing concern regarding the close relationships between directors and a company's management and the degree to which the nomination process is dominated by management.[920] Directors nominated by shareholders pursuant to the new rules will owe their presence on the board to their nomination by one or more significant shareholders and therefore may be independent in a way that is fundamentally different from directors nominated by the incumbent directors. We found to be relevant the empirical evidence cited in our Proposing Release and by commenters regarding the effect on shareholder value of so-called "hybrid boards" (*i.e.,* boards composed of a majority of incumbent directors and a minority of dissident directors).[921] Such boards are a close, but not perfect, analog to the results from an election in which shareholder nominees submitted pursuant to the new rules are elected and typically result when the shareholder's nominees join the board through an actual or threatened proxy contest, but without a change of control. In the study cited in the Proposing Release, ongoing businesses with a minority of dissident directors posted increases in shareholder value of 9.1%, relative to peers, during the contest period, indicating that the market viewed the contest as having a positive effect on shareholder value.[922] Other commenters adduce evidence that boards with a minority of dissident directors produce positive changes in corporate governance structures and strategy and result in increased shareholder value measured in both absolute returns and relative to peers.[923] Amending our proxy rules to facilitate the operation of State laws permitting shareholder nominations of directors may allow shareholders to elect directors who, without obtaining control, can exercise similar influence over decisions critical to shareholder value.

We recognize the existence of studies that reached conclusions contrary to those discussed above.[924] Other commenters warn that the new rules will lead to election contests that will be distracting, time-consuming, and inefficient for companies, boards, and management.[925]

We have reviewed these studies and have reason to question some of their conclusions either because of questions raised by subsequent studies,[926]

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accountable for activity that does not benefit investors may reduce agency costs and increase shareholder value. *See, e.g.,* Brad M. Barber, "Monitoring the Monitor: Evaluating CalPERS' Activism" (November 2006), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890321* (cited in the Proposing Release, Section V.B.3.). See also Deutsche Bank, Global Equity Research, "Beyond the Numbers: Corporate Governance in Europe," (March 5, 2005) (cited in the Proposing Release, Section V.B.3).

[919] *See* Proposing Release, Section V.B.3. (citing Fitch Ratings, "Evaluating Corporate Governance" (December 12, 2007), *available at http://www.fitchratings.com/corporate/reports/report_frame.cfm?rpt_id=363502*).

[920] *See, e.g.,* letters from CII (noting that "some boards are dominated by the chief executive officer, who often plays the key role in selecting and nominating directors" and quoting a view expressed by a prominent investor that "[t]hese people [chief executive officers] aren't looking for Dobermans. * * * They're looking for cocker spaniels."); J. McRitchie ("It is well known that until recently the vast majority of board vacancies were filled via recommendations from CEOs who also are typically chairmen of the boards * * * Recent requirements for an 'independent' nominating committee provide little assurance against continued management domination. These 'independent' board members serve at the pleasure of the CEOs and the other board members; they have no independent base of power.").

[921] Cernich (2009). *See also* letters from D. Romine; GovernanceMetrics; P. Neuhauser; Social Investment Forum; TIAA–CREF; Universities Superannuation.

As we previously noted, the Cernich (2009) study cites long-term return results, relative to peers, which are positive over the subsequent year but negative over the subsequent three years. However, these results are not reported with standard errors, making it difficult to determine whether the expected returns following contests are different from peers, or whether the realized long-term returns during the sample period are merely the result of random chance. Other research, such as Mulherin and Poulsen (1998), is consistent with these findings, but investigates the impact of proxy contests generally, rather than hybrid boards.

[922] Cernich (2009).

[923] *See* letters from D. Romine; GovernanceMetrics; P. Neuhauser; Social Investment Forum; TIAA–CREF; Universities Superannuation. *See also* Mulherin and Poulsen (1998); James F. Cotter, Anil Shivdasani, and Marc Zenner, *Do Independent Directors Enhance Target Shareholder Wealth During Tender Offers?,* J. Fin. Econ. (February 1997) (finding, after examining a sample of 169 tender offers conducted from 1989 through 1992, that target shareholder gains from tender offers were approximately 20% greater when the board was independent).

[924] *See* letter from BRT (referring to the "Report on Effects of Proposed SEC Rule 14a–11 on Efficiency, Competitiveness and Capital Formation, in Support of Comments by Business Roundtable" by NERA Economic Consulting ("NERA Report")); David Ikenberry and Joself Lakonishok, *Corporate Governance Through the Proxy Contest: Evidence and Implications,* 66 J. Bus. 420 (1993) ("Ikenberry and Lakonishok (1993)) (claiming that "companies with dissident board members substantially underperform compared to their peers.") (cited in the NERA Report); Lisa Borstadt and Thomas Zwirlein, *The Efficient Monitoring Role of Proxy Contests: An Empirical Analysis of Post-Contest Control Changes and Firm Performance,* Fin. Mgm't (1992) ("Borstadt and Zwirlein (1992)") (asserting that, in the long run, proxy contests destroy shareholder value) (cited in NERA Report); Beltratti and Stulz (2009) (submitted as part of the letter from BRT and cited in letters from AT&T, BRT, and Seven Law Firms); Cheffins (2010) (examining thirty-seven companies removed from the S&P 500 index during 2008 and concluding that corporate governance functioned "tolerably well" in these companies to negate the need for fundamental reform of the current corporate governance arrangements) (submitted as part of the letter from Chamber of Commerce/CCMC); Ali C. Akyol, Wei Fen Lim and Patrick Verwijmeren, *Shareholders in the Boardroom: Wealth Effects of the SEC's Rule to Facilitate Director Nominations* (December 14, 2009) ("Akyol, Lim, and Verwijmeren (2009)") (documenting negative stock price reactions to the announcements of regulatory activities related to shareholders' right to include director nominees in the company's proxy materials, including the Proposal) (submitted as part of the letter from J. Grundfest); David F. Larcker, Gaizka Ormazabal and Daniel J. Taylor, *The Regulation of Corporate Governance* (January 16, 2010)) ("Larcker, Ormazabal, and Taylor (2010)") (submitted as part of the letter from David F. Larcker ("D. Larcker")).

[925] *See* letters from ABA; Atlas; AT&T; Book Celler; Carlson; Carolina Mills; Chamber of Commerce/CCMC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick; GE; General Mills; Glass Lewis; Glaspell; Intelect; R. Clark King; Koppers; MCO; MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; D. Merilatt; NAM; NIRI; NK; O3 Strategies; Roppe; Rosen; Safeway; Sara Lee; Schneider; Southland; Style Crest; Tenet; TI; tw telecom; R. VanEngelenhoven; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[926] For example, we note that a study highlighted a methodological flaw in the Ikenberry and Lakonishok (1993) study. Mulherin and Poulsen (1998) noted that this study had required that companies exist as the same entity in the COMPUSTAT database subsequent to the contest, eliminating some of the most favorable outcomes of proxy contests from consideration and biasing the estimate of long-term returns downward. After making corrections for this statistical bias and examining a sample of 270 proxy contests for board seats conducted from 1979 to 1994, the authors found that the market had a favorable response to the initiation of the proxy contest with an average abnormal return of 8.04% in the initiation period, followed by long-run returns statistically indistinguishable from those of comparable stocks. Their analysis showed that the wealth gains during proxy contests stemmed mainly from firms that were acquired. Overall, the authors concluded that proxy contests generally create value, and for companies that were not acquired, "the occurrence of management turnover [had] a significant, positive effect on shareholder wealth relative to the firms that do not replace senior management." In the Borstadt and Zwirlein (1992) study, the finding of a negative risk-adjusted return, conditional on dissidents winning, was based on a sample of 32 firms. Borstadt and Zwirlein note that, overall, "dissident activity leads to gains for shareholders and is often followed by corporate reforms * * * such that the realized gains over the contest period appear to be permanent." A survey article on corporate governance confirmed that this is the current academic consensus, stating that "[t]he latest evidence suggests that proxy fights provide a degree of managerial disciplining and enhance shareholder value." *See* Marco Becht, Patrick Bolton and Ailsa Roell, *Corporate Governance and Control,* Handbook of the Economics of Finance (2003) ("Becht, Bolton and Roell (2003)").

limitations acknowledged by the studies' authors,[927] or our own concerns about the studies' methodology or scope.[928] While we recognize that there are strongly-held views on every side of this debate, we believe that, as discussed throughout this release and supported by commenters' views and empirical data, we have a reasonable basis for expecting the benefits described above.

We are aware, of course, that the new rules are additive to many existing means of monitoring and "disciplining" a company's board and management,[929] which include: Hostile takeovers; stockholders "voting with their feet" by selling their shares; board members being replaced by other means when the company's stock performance is poor; and management turnover following poor performance or wrongdoing.[930]

We acknowledge these alternatives, but believe that, for the reasons noted above, directors nominated pursuant to the new rules will have a degree of independence that is not present in the existing means of "disciplining" a company's board and management. Moreover, the ability of shareholders to "vote with their feet" or submit to a takeover bid may be unattractive from a shareholder's perspective if those transactions occur after a period of weak management that has depressed the company's share price. Further, shareholders who invest in indices may not be readily able to sell securities of a particular company that is part of the index, making it difficult for them to "vote with their feet." The high costs involved with other existing mechanisms for "management discipline," such as a traditional proxy contest, often mean that the prospect of replacing incumbent directors is remote unless the company's performance falls below a very low threshold. By that time, a significant amount of shareholder value will have, by hypothesis, already been lost and will require additional time to recoup. We believe that the new rules will help shareholders exert "management discipline" by reducing the cost of, and otherwise making more plausible, shareholder nominations.

We also acknowledge concerns expressed by commenters that the Proposal would encourage boards to make decisions to improve results in the short-term at the expense of long-term shareholder value creation.[931] For the reasons described above, we believe the new rules have the potential to lead to improved company performance and enhanced shareholder value for both short-term and long-term shareholders. Evidence suggests that, historically, proxy contests have created value in both the short-run and long-run for shareholders.[932] The possible inclusion and potential election of shareholder director nominees in company proxy materials would not negate the board's fiduciary obligations, which are to all shareholders. Finally, shareholder director nominees are subject to election by both long-term and short-term shareholders, who will express their interest through their vote. In sum, we do not expect that the prospect that such holders would nominate directors should lead boards to take short-term actions that would detract from long-term value in order to avoid nominations.

A number of commenters expressed special concerns with respect to the Proposal's effect on investment companies, asserting that the election of a shareholder director nominee may, in some circumstances, increase costs and potentially decrease the effectiveness and efficiency of a unitary or cluster board utilized by a fund complex.[933] Some of these commenters noted their belief that investment company governance presents a special case, arguing that the rules should not be extended to them absent empirical evidence specifically related to boards in this industry.[934] Commenters also argued that investment companies are subject to a unique regulatory regime under the Investment Company Act that provides additional protection to investors, such as the requirement to obtain shareholder approval to engage in certain transactions or activities, and that investment companies and their boards have very different functions from non-investment companies and their boards.[935] We understand these concerns, but we also note that some commenters have raised governance concerns regarding the relationship between boards and investment advisers.[936] Moreover, although investment companies and their boards may have different functions from non-investment companies and their boards, investment company boards, like the boards of other companies, have significant responsibilities in protecting shareholder interests, such as the approval of advisory contracts and fees.[937] We also do not believe that the regulatory protections offered by the Investment Company Act (including requirements to obtain shareholder approval to engage in certain transactions and activities) serve to decrease the importance of the rights that are granted to shareholders under State law. In fact, the separate regulatory regime to which investment companies are subject emphasizes the importance of investment company directors in dealing with the conflicts of interest created by the external management

[927] For example, we believe that attempts to draw sharp inferences from the Beltratti and Stulz (2009) study may not be warranted because, as the authors themselves noted, the evidence leaves much to interpretation. The authors concluded that negative conclusions about board effectiveness may be unwarranted because it is unfair to evaluate ex-ante decisions using hind-sight. In particular, they explained that:

Such a result does not mean that good governance is bad. Rather it is consistent with the view that banks that were pushed by their boards to maximize shareholder wealth before the crisis took risks that were understood to create shareholder wealth, but were costly ex post because of outcomes that were not expected when the risks were taken.

Beltratti and Stulz (2009) at 3.

[928] For example, the relatively short timeframe and small number of companies examined in Cheffins (2010) study alone justify some caution in attempting to draw any sharp inferences from the study. As for the Akyol, Lim, and Verwijmeren (2009) and Larcker, Ormazabal, and Taylor (2010) studies, we note that, even if facilitating shareholders' ability to include their nominees in a company's proxy materials enhances shareholder value, it may be possible to observe negative stock price reactions for a particular set of public announcement dates. The problem lies in ascertaining the first time investors learned about the regulatory efforts to facilitate this shareholder right. On that initial date, investors may have adjusted share prices for both the capitalized value of the benefits (or costs) associated with the regulatory effort and the probability of the effort's success. Subsequent public announcements may simply cause investors to update these initial assessments of the valuation impact and the probability of success. Consequently, it is difficult to infer whether the price reactions are independent of past announcements or simply a revision of the investors' prior expectations. It is important, therefore, to disentangle investor expectations about the probability of the success of the regulatory effort from the associated valuation implications. It appears that the Akyol, Lim, and Verwijmeren (2009) and Larcker, Ormazabal, and Taylor (2010) studies did not focus on this distinction.

[929] *See* NERA Report.

[930] *Id.*

[931] *See, e.g.,* letters from BRT; GE; General Mills; IBM; Metlife; Office Depot; Safeway; Wachtell.

[932] *See* Mulherin and Poulsen (1998) and discussion in footnote 926 above.

[933] *See, e.g.,* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard.

[934] *See* letters from ICI; ICI/IDC; S&C; T. Rowe Price.

[935] *See* letters from ABA; Barclays; ICI; ICI/IDC; IDC; T. Rowe Price; S&C; Vanguard.

[936] *See* letters from J. Reid; J. Taub.

[937] *See Jones v. Harris Assocs.,* 130 S.Ct. 1418, 1423, 176 L. Ed. 2d 265, 273–274 (2010). *See also* S. Rep. No. 91–184; 91st Congress 1st Session; S. 2224 (1969) ("This section is not intended to authorize a court to substitute its business judgment for that of the mutual fund's board of directors in the area of management fees. * * * The directors of a mutual fund, like directors of any other corporation will continue to have * * * overall fiduciary duties as directors for the supervision of all of the affairs of the fund.").

structure of most investment companies.[938]

Lastly, improved board performance may result from the possible increase in the pool of qualified director candidates. When a company does not include shareholder nominees for director in its proxy materials, it loses the opportunity to increase the pool of qualified nominees. Further, it deprives shareholders of the opportunity to consider and assess all qualified candidates if asked to make an informed voting decision in director elections. As we stated in the Proposing Release, facilitating shareholders' ability to include director nominations in a company's proxy materials may result in a larger pool of qualified director nominees from which to choose.[939] By allowing shareholders to submit their own director nominees for inclusion in the company's proxy materials, the demand for qualified individuals who may be willing to serve as shareholder-nominated directors also may increase. This increased demand may, in turn, encourage more individuals to present themselves as potential shareholder director nominees, resulting in a large pool of potential candidates. We recognize, however, this benefit may be offset by the possibility that some qualified individuals may be less willing to be nominated to serve on a board if faced with a contested election.[940]

4. More Informed Voting Decisions in Director Elections Due to Improved Disclosure of Shareholder Director Nominations and Enhanced Shareholder Communications

There was widespread support among commenters for the principle that the Commission should require disclosures regarding nominating shareholders and their nominees.[941] The new requirements in Rule 14a–11, Rule 14n–1, and Schedule 14N will require certain disclosures and certifications to be provided on Schedule 14N by shareholders who submit a nominee under Rule 14a–11. A nominating shareholder or group will be required to provide disclosure of the information similar to that currently required in a proxy contest regarding the nominating shareholder and nominee[942] as well as certain certifications required for use of Rule 14a–11.[943] Rule 14a–18, Rule 14n–1 and Schedule 14N will require similar disclosures when a shareholder or group uses an applicable state or foreign law provision or company's governing documents to include shareholder nominees for director in the company's proxy materials. The information provided by the disclosures and certifications will help provide transparency to shareholders when voting on shareholder nominees for director and therefore may lead to better informed voting decisions.

With respect to Rule 14a–8(i)(8), companies previously have been permitted to exclude shareholder proposals to establish procedures for including shareholder director nominees in the company's proxy materials. This exclusion arose out of the concern that allowing such proposals would result in the occurrence of contested elections without the disclosure that otherwise would be required in a traditional proxy contest.[944] The new disclosure requirements applicable to nominations made pursuant to state or foreign law or a company's governing documents address that concern by mandating disclosure that is similar to that required in a traditional proxy contest.[945]

In addition to improved disclosure, our new rules will enhance shareholders' ability to communicate with each other regarding director nominations and elections through the proxy process. Shareholders eligible to use Rule 14a–11 will be able to utilize the company's proxy materials to present their own director nominees for a vote by other shareholders. They will be able to include in the company's proxy materials a statement supporting their director nominees.[946] Shareholders who are dissatisfied with the company's existing board or the company's director nominees will be able to communicate this view and their preference for alternative candidates through the votes they cast under the proxy process.

The new solicitation exemptions also will facilitate communications between shareholders.[947] Shareholders interested in forming a nominating group to use Rule 14a–11 can contact other shareholders—through both oral and written communications—for that purpose without fear that their communications would be viewed as solicitations under the proxy rules, as long as the exemption's conditions are satisfied.[948] If its director nominees are included in the company's proxy materials pursuant to Rule 14a–11, the nominating shareholder or group can solicit other shareholders to vote in favor of its nominees, or against the company's own nominees, as long as the exemption's conditions are satisfied.[949]

With the new amendment to Rule 14a–8(i)(8), shareholders will benefit from a greater ability to present a proposal to establish an alternative procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. Thus, shareholders will be able to present for consideration by other shareholders a director nomination procedure that they believe is appropriate for their company. Through their votes on the proposal, shareholders will then have an opportunity to communicate their views on this proposal to other shareholders and the company's management.

E. Costs

We anticipate that the new rules, where applicable, may result in costs related to (1) potential adverse effects on company and board performance; (2) additional complexity in the proxy process; and (3) preparing the required disclosures, printing and mailing, and costs of additional solicitations.

[938] *See* footnote 142 above.

[939] *See* Proposing Release, Section V.B.3.

[940] For a more detailed discussion, *see* Section IV.E.1. below.

[941] *See* letters from ABA; Alston & Bird; Americans for Financial Reform; CalSTRS; CFA Institute; CII; Corporate Library; Dominican Sisters of Hope; Florida State Board of Administration; GovernanceMetrics; ICI; Mercy Investment Program; Protective; RiskMetrics; Sisters of Mercy; Tri-State Coalition; Ursuline Sisters of Tildonk; USPE; Walden.

[942] Among the information included in Schedule 14N is the disclosure required by Items 4(b), 5(b), 7 and, for investment companies, Item 22(b) of Schedule 14A. This disclosure is the same disclosure required for a solicitation subject to Exchange Act Rule 14a–12(c).

[943] Item 8 of Schedule 14N. These certifications include: A certification that the nominating shareholder (or where there is a nominating shareholder group, each member of the nominating shareholder group) is not holding any of the company's securities with the purpose, or with the effect, of changing control of the company or to gain a number of seats on the board that exceeds the maximum number of nominees that the company could be required to include under Rule 14a–11; a certification that the nominating shareholder or group satisfies the applicable eligibility requirements of Rule 14a–11; a certification that the shareholder director nominee satisfies the applicable eligibility requirements of Rule 14a–11; and a certification that the information set forth in the notice on Schedule 14N is true, complete, and correct.

[944] *See* Shareholder Proposal Proposing Release (proposing amendments to Rule 14a–8 to "make clear that director nominations made pursuant to [bylaw amendments concerning shareholder nominations of directors] would be subject to the disclosure requirements currently applicable to proxy contests" and noting that such disclosure is of "great importance" to an informed voting decision by shareholders).

[945] *See* Rule 14a–18, Rule 14n–1, and Schedule 14N.

[946] *See* Item 7(e) of Schedule 14A and Item 5(i) of Schedule 14N.

[947] *See* Rules 14a–2(b)(7) and 14a–2(b)(8).

[948] *See* Rule 14a–2(b)(7).

[949] *See* Rule 14a–2(b)(8).

1. Costs Related to Potential Adverse Effects on Company and Board Performance

Rule 14a–11 and the amendment to Rule 14a–8(i)(8) may result in potential adverse effects on the performance of a company and its board of directors.

First, we received significant comment stating that election contests are distracting and time-consuming for companies, boards, and management.[950] Further, to the extent that a more competitive nomination and election process motivates incumbent directors to be more responsive to shareholders' concerns, the board may incur costs in attempting to institute policies and procedures it believes will address shareholder concerns. It is possible that the time a board spends on shareholder relations could reduce the time that it otherwise would spend on strategic and long-term thinking and overseeing management, which, in turn, may negatively affect shareholder value.[951]

We considered these comments and appreciate commenters' concerns regarding these costs. We believe it is important to note that these costs are associated with the traditional State law right to nominate and elect directors, and are not costs incurred for including shareholder nominees for director in the company's proxy materials. Further, the ownership threshold and holding period that we adopted in response to commenters' concerns should limit the use of Rule 14a–11 to only holders who demonstrate a long-term, significant commitment to the company. To encourage constructive dialogue between a company and a nominating shareholder or group regarding the director nominees to be presented to shareholders for a vote, we revised the rule so that if a company negotiates with the nominating shareholder or group that otherwise would be eligible to have its nominees included in the company's proxy materials after the nominating shareholder or group has submitted its nomination on Schedule 14N, and the company agrees to include the nominating shareholder's or group's nominees on the company's proxy card as company nominees, those nominees will count toward the 25% maximum set forth in the rule.[952] We believe that the cost described above may be offset by other factors as well. The additional communication between a board and the company's shareholders may lead to enhanced transparency into the board's decision-making process, more effective monitoring of this process by shareholders, and, ultimately, a better decision-making process by the board. The cost also may be offset to the extent that shareholders understand that the board's time and other resources are in scarce supply and will take these considerations into account in deciding to nominate directors, recognizing that the cost of a distracted board may not justify pursuing their own specific concerns.

Second, the new rules may lead some companies to re-examine their current procedures for shareholders to submit their own director nominees for consideration by either the company's board or nominating committee, especially if the company is subject to, or thinks it likely will be subject to, shareholder-nominated director candidates submitted pursuant to Rule 14a–11. These companies may incur costs associated with such a re-examination and any resulting adjustments to their procedures.[953] These costs may be limited, however, to the extent that the new rules improve the overall efficiency of the director nomination process and lead to improvements in the existing procedures for director nominations.

Third, the new rules could, in some cases, result in lower quality boards.[954] The quality of a company's board may decrease if, as some commenters predicted, unqualified individuals are elected to the board.[955] Commenters worried, in particular, that a shareholder director nominee will be elected without undergoing the same extensive vetting process or having to comply with the same independence or director qualification standards applicable to other director nominees.[956] The presence of directors who lack the proper qualifications may result in a lower quality board and represent a cost to companies and shareholders. It is important to recognize that Rule 14a–11 provides for only the inclusion of a shareholder director nominee in the company's proxy materials, not the election of that nominee. Further, the new disclosure requirements contained in the Proposal will provide shareholders with information for them to assess whether a shareholder nominee possesses the necessary qualifications and experience to serve as a director.[957] Accordingly, as other commenters have noted, an unqualified individual, even if nominated, will still need to receive the support of a significant number of shareholders in order to be elected to the board.[958] Therefore, the cost arising

[950] *See* letters from ABA; Atlas; AT&T; Book Celler; BRT; Carlson; Carolina Mills; Chamber of Commerce/CCMC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick; GE; General Mills; Glass Lewis; Glaspell; Intelect; R. Clark King; Koppers; MCO; MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; D. Merilatt; NAM; NIRI; NK; O3 Strategies; Roppe; Rosen; Safeway; Sara Lee; Schneider; Southland; Style Crest; Tenet; TI; tw telecom; R. VanEngelenhoven; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[951] *See, e.g.,* Akyol, Lim, and Verwijmeren (2009) (finding that, based on the market response of a sample of 1,315 firms, "the proposed rule is perceived as costly by shareholders," "that increasing shareholder rights, specifically by facilitating director nominations by shareholders, may actually be detrimental to shareholder wealth," and that "empowering shareholders is not necessarily perceived as a good thing by most shareholders."); Stout (2007) ("Perhaps the most obvious [economic function of board governance] is promoting more efficient and informed business decisionmaking. It is difficult and expensive to arrange for thousands of dispersed shareholders to express their often-differing views on the best way to run the firm."); *see generally* Stephen M. Bainbridge, *Response to Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment,* 119 Harv. L. Rev. 1735 (2006) (discussing how concern for accountability may undermine decision-making discretion and authority) (cited in the Proposing Release, Section V.C.1.). *But see* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power,* 118 Harv. L. Rev. 833, 883 (2005) ("[M]ere recognition that back-seat driving might sometimes be counter-productive is hardly sufficient to mandate general deference to management. Such mandated deference would follow only if one assumes that shareholders are so irrational or undisciplined that they cannot be trusted to decide for themselves whether deference would best serve their interests.") (cited in the Proposing Release, Section V.C.1.).

[952] *See* new Rule 14a–11(d) (5). For a discussion of this modification, *see* Section II.B.6.c. above.

[953] *See, e.g.,* letters from Biogen; GE.

[954] *See* letters from 3M; ABA; American Electric Power; Atlantic Bingo; AT&T; Avis Budget; Biogen; Boeing; BRT; Burlington Northern; Callaway; Carlson; Chamber of Commerce/CCMC; CIGNA; Columbine; Cummins; CSX; J. Dillon; Emerson Electric; Erickson; ExxonMobil; FedEx; Headwaters; C. Holliday; IBM; Intelect; R. Clark King; Lange; Louisiana Agencies; Metlife; NIRI; O3 Strategies; V. Pelson; PepsiCo; Pfizer; Roppe; Rosen; Ryder; Sara Lee; Sidley Austin; tw telecom; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo. *See also* Stephen M. Bainbridge, *A Comment on the SEC Shareholder Access Proposal* (November 14, 2003) at 17, *available at http://ssrn.com/abstract=470121* ("The likely effects of electing a shareholder representative therefore will not be better governance. It will be an increase in affectional conflict . * * * It will be a reduction in the trust-based relationships that causes horizontal monitoring within the board to provide effective constraints on agency costs.") (cited in the Proposing Release, Section V.C.1.).

[955] *See* letters from AGL; Air Tite, Inc. ("Air Tite"); All Cast; John C. Astle ("J. Astle"); Astrum Solar ("Astrum"); Atlantic Bingo; Burlington Northern; Glen Burton ("G. Burton"); R. Chicko; Columbine; Darden Restaurants; Erickson; Fluharty; Horizon; Lange; Mama's; Massey Services; NIRI; O3 Strategies; P&G; PepsiCo; W. Steinbrink; Stringer; Theragenics; VCG; Wachtell; and Wells Fargo.

[956] *See* letters from AGL; Astrum; Boeing; R. Burt; G. Burton; S. Campbell; Carolina Mills; Columbine; W. Cornwell; Erickson; Fenwick; FPL Group; Intelect; Little; McDonald's; MedFaxx; Norfolk Southern; P&G, Rosen; UnitedHealth; VCG; Wells Fargo; Xerox; Yahoo.

[957] *See* Rules 14a–11, 14a–18 and 14n–1, and Schedule 14N.

[958] *See* letters from BCI; Bebchuk, *et al.;* CII; T. DiNapoli; Florida State Board of Administration;

Continued

from unqualified directors may be limited to the extent that shareholders understand that experience and competence are important director qualifications and cast their votes for the most-qualified candidates. Moreover, as adopted, the rule will require a company to include in its proxy materials no more than one shareholder director nominee or a number of nominees that represent 25% of the company's board, whichever is greater.[959] We believe that this provision will limit the effect of any potential decrease in the overall quality of a board. Lastly, to the extent that there is a risk of unqualified individuals being elected as directors, it is a risk that arises because shareholders are given the right under state or foreign law to determine who sits on the board of directors.

The quality of a board also may decrease if, as some commenters warned, the increased likelihood of a contested election discourages experienced and capable individuals from serving on boards, making it more difficult for companies to recruit qualified directors or create a board with the proper mix of experience, skills, and characteristics.[960] Some commenters noted that it is already difficult to recruit qualified independent directors.[961] Other commenters, however, did not believe that Rule 14a–11 will discourage experienced, capable directors from serving,[962] with one commenter stating that it encountered no difficulty in finding executives willing to serve on a shareholder-nominated slate.[963] To the extent that the prospect of a contested election deters an otherwise qualified individual from considering a board seat, this will represent a cost to both the company and its shareholders. This cost may be mitigated, however, by the ability of other individuals—those who would not have been considered or nominated by the incumbent directors—to be nominated and presented for a shareholder vote pursuant to Rule 14a–11 or a procedure in the company's governing documents established through Rule 14a–8. The cost may be further mitigated to the extent that the new rules lead to the election of individuals who will present a greater diversity of views for the board's consideration, thereby leading to a better decision-making process, and, ultimately, greater shareholder value.[964] Lastly, as we stated in the Proposing Release,[965] the possibility of qualified candidates being discouraged from running for a board seat may be limited by shareholders' understanding that board dynamics can be important, and that changing them may not always be beneficial.

Fourth, potential disruptions in boardroom deliberations represent another possible cost to shareholders and companies. If a shareholder director nominee is elected and disruptions or polarization in boardroom dynamics occur as a result, the disruptions may delay or impair the board's decision-making process. Such boardroom disruption may occur when one or more directors seek to promote an agenda that conflicts with that of the rest of the board. We received significant comment that the presence of shareholder-nominated directors could disrupt the collegiality and efficiency of boards.[966] We recognize the view that for companies whose boards are already well-functioning, such disruption could be counterproductive and could delay the board's decision-making process and a delay or impairment in the decision-making process could constitute an indirect economic cost to shareholder value. For the reasons discussed above, however, we believe that boards with directors who were not nominated by the incumbent directors would, on balance, improve company performance and increase shareholder value.[967]

In addition, it may be possible for an investor to submit director nominees through the new rules with the intention of having the nominees, if elected, advocate for board decisions that maximize the investor's private gains but at the expense of other shareholders.[968] In the case of Rule 14a–11, the cost may be limited to the extent that the ownership threshold and holding requirement allow the use of the rule by only holders who demonstrated a significant, long-term commitment to the company. This cost may be limited to the extent that a director nominee with narrow interests must still gain the support of a significant number of shareholders to be elected.[969] The disclosure requirements that we are adopting also may alert shareholders to the narrow interests of the nominating shareholder or group in advance of the election so that they can cast their votes in favor of the candidate who will best serve the interests of all shareholders.[970] The cost may be further limited to the extent that a shareholder director nominee, once elected to the board, will be subject to the same fiduciary duties applicable to all other directors.[971] The possibility of a director seeking to promote private gain at the expense of shareholders generally—and the related costs to the board's overall performance and dynamics—should be limited to the extent that such a director recognizes these duties and strives to fulfill these legal obligations. The cost also may be limited to the extent that shareholders recognize the potential

Governance for Owners; A. Krakovsky; P. Neuhauser; NJSIC; Relational; Shamrock; Social Investment Forum.

[959] *See* Rule 14a–11(d)(1).

[960] *See* letters from 3M; ABA; American Electric Power; Atlantic Bingo; AT&T; Avis Budget; Biogen; Boeing; BRT; Burlington Northern; Callaway; Carlson; Chamber of Commerce/CCMC; CIGNA; Columbine; Cummins; CSX; J. Dillon; Emerson Electric; Erickson; ExxonMobil; FedEx; Headwaters; C. Holliday; IBM; Intelect; R. Clark King; Lange; Louisiana Agencies; Metlife; NIRI; O3 Strategies; V. Pelson; PepsiCo; Pfizer; Roppe; Rosen; Ryder; Sara Lee; Sidley Austin; tw telecom; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[961] *See, e.g.,* letters from Ameriprise; BRT; Chamber of Commerce/CCMC.

[962] *See* letters from Florida State Board of Administration; Pershing Square.

[963] *See* letter from Pershing Square.

[964] *See* letters from L. Dallas (citing Jerry Goodstein *et al., The Effects of Board Size and Diversity on Strategic Change,* 15 Strategic Mgmt. J. 241 (1994) and Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors,* 76 Tulane L. Rev. 1363 (2002)); LIUNA; RiskMetrics (noting that it tracked over a four-year period the returns of a portfolio of companies where activists gained board seats in 2005, found that the portfolio outperformed the S&P 500 index even during the recent market turmoil, and saw no indication that the presence of dissident directors on boards had a detrimental impact on shareholder value); Teamsters.

[965] *See* Proposing Release, Section V.C.1.

[966] *See, e.g.,* letters from Association of Corporate Counsel; BRT; Chamber of Commerce/CCMC; GE; IBM; McDonald's; O'Melveny & Myers; P&G; PepsiCo; Seven Law Firms; Society of Corporate Secretaries (also presenting data that the average hedge fund ownership is 7.15%, the number of S&P 500 companies with hedge fund ownership at or above 5% is 273, and the number of S&P 500 companies with hedge fund ownership at or above 10% is 104); Vinson & Elkins; Wachtell; Xerox; Yahoo. *See also* Larcker, Ormazabal, and Taylor (2010)(stating that "the evidence suggests shareholders react negatively to regulation of proxy access, and that the reaction is decreasing in the number of large blockholders and increasing in the number of small institutional investors," and that "the market perceives that shareholders of firms with many large blockholders are harmed by proxy access and is consistent with critics' claims that large blockholders will use the privileges afforded them by proxy access regulation to manipulate the governance process to make themselves better off at the expense of other shareholders.").

[967] *See* Section IV.D.3. above.

[968] *See, e.g.,* letters from BRT; Eaton; IBM; McDonald's; Seven Law Firms; Society of Corporate Secretaries; UnitedHealth. *See also* Stout (2007) at 794 ("[B]y making it easier for large shareholders in public firms to threaten directors, a more effective shareholder franchise might increase the risk of intershareholder 'rent-seeking' in public companies.").

[969] *See* letters from BCIA; Bebchuk, *et al.;* CII; T. DiNapoli; Florida State Board of Administration; Governance for Owners; A. Krakovsky; P. Neuhauser; NJSIC; Relational; Shamrock; Social Investment Forum.

[970] *See* Rule 14a–11, Rule 14a–18, Rule 14n–1, and Schedule 14N.

[971] *See* letter from CII. *See also* Veasey & DiGuglielmo, above.

harm from misuse of the board's decision-making process and therefore do not vote for the nominee if they view the cost as sufficiently high.

Fifth, to the extent that the need to comply with the new rules makes the U.S. public equity markets less attractive,[972] discourages private companies from conducting public offerings in the U.S.,[973] or encourages U.S. reporting companies to become non-reporting companies, this would be a cost of the new rules because investors' investment opportunities could be limited. This cost may be mitigated to the extent that the new rules help improve board accountability and corporate governance, generate stronger company performance, and increase shareholder value. Investors may be more willing to invest or continue to invest in companies in which they have the ability to present their own shareholder director nominees in the company's proxy materials if they are displeased with the company's performance. We also note that shareholders in many foreign countries already have the ability to include their director nominees in the company's proxy materials.[974] We therefore believe that the new rules may bring the U.S. capital markets closer in line with international practice by giving shareholders of U.S. companies an ability that may already be enjoyed by shareholders of many non-U.S. companies.

Lastly, with respect to investment companies, a number of commenters expressed concern that the election of a shareholder director nominee may, in some circumstances, increase costs and burdens (*e.g.,* the shareholder-nominated director would have to leave during discussions that pertain to the other investment companies in the complex, board materials would have to be customized for the director, and the fund complex would face challenges in preserving the status of privileged information) and potentially decrease the efficiency of a unitary or cluster board utilized by a fund complex.[975] We recognize that for fund complexes that utilize unitary or cluster boards, the election of a shareholder director nominee may, in some circumstances, increase costs and potentially decrease the efficiency of the boards.[976] We note, however, that these costs are associated with the traditional State law right to nominate and elect directors, and are not costs incurred for including shareholder nominees in the company's proxy materials. We also note that any increased costs and decreased efficiency of an investment company's board as a result of the fund complex no longer having a unitary or cluster board would occur, if at all, only in the event that the investment company shareholders elect the shareholder nominee. Investment companies may include information in the proxy materials making investors aware of the company's views on the perceived benefits of a unitary or cluster board and the potential for increased costs and decreased efficiency if the shareholder nominees are elected. Moreover, we note that a fund complex can take steps to minimize the cost and burden of a shareholder-nominated director who is elected by, for example, entering into a confidentiality agreement in order to preserve the status of confidential information regarding the fund complex.

Two commenters in a joint comment letter argued that there are a number of practical and legal issues that prevent confidentiality agreements from being sufficient to protect the interests of fund shareholders, and included a memorandum from a law firm discussing concerns about Regulation FD, enforceability of confidentiality agreements, whether shareholder-nominated directors would sign confidentiality agreements, compliance, and loss of attorney-client privilege.[977] We considered the issues raised by the joint comment letter. To the extent that material non-public information is discussed by boards in a fund complex, we emphasize that entering into a confidentiality agreement is only one method of preserving the confidentiality of information revealed in board meetings attended by the shareholder-nominated director. The fund complex can have separate meetings and board materials for the board with the shareholder-nominated director, especially if particularly sensitive legal or other matters will be discussed or to protect attorney-client privilege. Finally, we believe the concerns expressed in the memorandum about confidentiality agreements were either not compelling or speculative in nature.

Although commenters argued that the election of a shareholder-nominated director to a unitary or cluster board will necessarily result in decreased effectiveness of the board, we disagree. In this regard, one commenter argued that competition in the board nomination process may improve efficiency by providing additional leverage for boards in negotiations with the investment adviser.[978] In any event, we believe that investment company shareholders should have the opportunity to exercise their traditional State law rights to elect a non-unitary or non-cluster board if they so choose.

2. Costs Related to Additional Complexity of Proxy Process

The new rules that we are adopting will, for the first time, require that company proxy materials include information about, and the ability to vote for, director nominees submitted by shareholders. The rules will facilitate shareholders' ability to exercise their traditional State law rights to nominate and elect their own director candidates. One of the costs of this newly-enhanced ability, however, is the additional complexity in the proxy process as both companies and shareholders may have to consider and address the issue of shareholder director nominations more frequently than in the past.

Several commenters expressed concern that the inability of companies and shareholders to opt out of Rule 14a–11, or establish a shareholder director nomination procedure with criteria different than those of Rule 14a–11, may create workability and implementation issues for companies, as they struggle to comply with a rule that does not fit their specific capital and governance structures.[979] One commenter, for example, identified several of these issues, such as: the operation of the rule in a company with multiple classes of stock, a cumulative voting standard, or a majority voting standard; the treatment of derivatives and other synthetic ownership under the rule; the need for adequate protection against use of the rule for change of control attempts; and the consequences of false

[972] *See* letter from BRT.

[973] *See* letters from Altman (stating that its survey of 36 public companies showed that 80.85% of respondents believe the new rules "will deter some U.S. private companies from going public and some foreign companies from listing on U.S. exchanges."); BRT; Richard Tullo ("R. Tullo").

[974] *See* letters from ACSI; CalPERS; ICGN; LUCRF; Pax World; RiskMetrics; Social Investment Forum; SWIB.

[975] *See, e.g.,* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard.

[976] *See, e.g.,* letters from ICI; ICI/IDC; IDC; MFDF; Vanguard.

[977] *See* letter from ICI/IDC (including attached legal memorandum).

[978] *See* letter from J. Taub.

[979] *See, e.g.,* letters from ABA ("Workability requires that the rule or bylaw be easily understandable, be able to be readily administered, address all relevant issues, operate in a time frame that permits proper conduct of shareholder meetings and action by a fully informed shareholder body, recognize the role and fiduciary responsibility of the board of directors, comply with the requirements of the Commission's rules and other applicable law and allow the company and its shareholders sufficient flexibility to respond to changed circumstances in a timely manner."); Keller Group; Wachtell.

certifications by a nominating shareholder or group.[980] We recognize the possibility that attempting to comply with a highly-complex rule without the necessary flexibility to adapt the rule to a company's specific situation may create certain costs for companies, such as the cost of legal advice and possible litigation if uncertainties must be resolved in courts. We also recognize the possibility that shareholders may have to incur similar costs if they attempt to use a highly-complex and unclear rule.

The requirements of Rule 14a–11, such as the eligibility criteria, may add a certain degree of complexity in the proxy process. For example, the process of determining which shareholder director nominee will be in the company's proxy materials and the limitations on the number of shareholder nominees for director that a company is required to include in its proxy materials may add complexity. If several shareholders or groups desire (and qualify) to nominate the maximum number of directors they are allowed to place in the company's proxy materials, only the shareholder or group holding the largest qualifying ownership interest will succeed. Another potential source of complexity under Rule 14a–11 is the number of shareholder director nominees that a nominating shareholder or group may submit to a company during a particular proxy season. For example, if the maximum allowable number of shareholder director nominees currently serves on the board, a company will not be required to include additional shareholder director nominees in the company's proxy materials. These sources of complexity and any uncertainty that may arise in implementing the new rules could result in costs to companies, shareholders seeking to have their nominees included in the companies' proxy materials, and shareholder director nominees. For example, both companies and shareholders could incur costs to seek legal advice in connection with shareholder nominations submitted pursuant to Rule 14a–11, the inclusion of shareholder director nominees in a company's proxy materials, submission of a notice of intent to exclude a nominee or nominees, and the process set forth in the rule for seeking an informal statement of the staff's views with respect to the company's determination to exclude a shareholder director nominee. Companies and shareholders also could incur costs to seek legal advice in connection with shareholder proposals submitted pursuant to Rule 14a–8 and the process for submission of a no-action request to exclude the proposal. To the extent disputes on whether to include particular nominees or proposals are not resolved between the company and shareholders, companies and/or shareholders may seek recourse in courts, which will increase costs.

As discussed throughout the release, the rules we are adopting include modifications to the proposed rules. We believe that the modifications will help minimize the complexity of the new rules and clarify uncertainties as much as possible. For example, our decision to adopt a uniform ownership threshold instead of the proposed tiered approach simplifies this particular eligibility requirement and should reduce some of the uncertainties identified by a commenter.[981] We also clarified the availability of Rule 14a–11 when there is a concurrent proxy contest,[982] provided standards for the order of priority of shareholder director nominees upon the withdrawal or disqualification of another shareholder director nominee,[983] addressed issues regarding the application of Rule 14a–11 to certain corporate structures (such as staggered boards and different classes of voting securities),[984] and adopted a uniform deadline for the submission of shareholder director nominations pursuant to Rule 14a–11 that is generally applicable to companies subject to the rule.[985] The costs arising from any complexity or uncertainty arising from the new rules may be mitigated to the extent that companies and shareholders gain greater familiarity with the new rules over time,[986] additional guidance is provided by the Commission or its staff,[987] and, if necessary, uncertain legal issues are resolved by courts.

Lastly, as discussed above, we believe the overall proxy solicitation process for contested director elections may be less confusing for shareholders as a result of our new rules.[988] Presenting the competing director nominees on one proxy card, with the related disclosure contained in one proxy statement, may simplify the shareholder's decision-making process, reduce the potential for any confusion on the part of shareholders, and address any reluctance on the part of shareholders to consider an insurgent shareholder's nominee solely because the nominee was not presented in the company's proxy materials.

3. Costs Related To Preparing Disclosure, Printing and Mailing and Costs of Additional Solicitations and Shareholder Proposals

The new rules will impose additional direct costs on companies and shareholders related to the preparation of required disclosure, printing and mailing costs, and costs of additional solicitations that may be undertaken as a result of including one or more shareholder nominees for director in the company's proxy materials pursuant to Rule 14a–11, a company's governing documents, or an applicable state or foreign law provision.[989]

First, the new rules will impose direct costs onto companies and shareholders due to the rules' disclosure and procedural requirements. For example, companies that determine that they may exclude a shareholder director nominee pursuant to Rule 14a–11 will be required to provide a notice to the nominating shareholder or group regarding any eligibility or procedural deficiencies in the nomination and provide to the Commission notice of the basis for its determination.[990] Companies also may incur costs in preparing any statements regarding the shareholder director nominees that they wish to include in their proxy materials. Nominating shareholders or groups and the nominees also will be required to disclose information about themselves, which may be costly.[991] Most of this disclosure will be provided by the nominating shareholder or group in the notice to the company, which would be filed on new Schedule 14N. The Schedule 14N also will include

[980] *See* letter from Wachtell.

[981] *See* letter from Shearman & Sterling (opposing the tiered ownership thresholds because a number of companies regularly move from one category of filer to another as the aggregate worldwide market value of their voting and non-voting common equity changes from fiscal year to fiscal year, which it believed would lead to uncertainty).

[982] *See* Section II.B.2.e. above.

[983] *See* Section II.B.7.b. above.

[984] *See* Sections II.B.4.b. and II.B.6.a. above.

[985] *See* Section II.B.8.c.ii. above.

[986] *See* letter from CII.

[987] For example, we are adopting, as proposed, a procedure by which companies could send a notice to the Commission where the company intends not to include a shareholder director nominee in its proxy materials and could seek informal staff views—through a no-action request—with respect to that determination.

[988] *See* Section IV.D.1. above.

[989] We note that these increased costs may be less for companies using the notice and access model. *See* Internet Proxy Availability Release.

[990] For purposes of the PRA analysis, we estimate these disclosure requirements would result in 225 burden hours of company time, and $30,000 for the services of outside professionals.

[991] For purposes of the PRA analysis, we estimate the total burden for Schedule 14N for shareholders submitting nominees pursuant to Rule 14a–11 would result in a total of 7,870 hours of shareholder time and $1,049,300 for the services of outside professionals.

information regarding the length of ownership, certifications, and other information. Companies could incur additional costs to investigate or verify the information regarding shareholder director nominees provided by nominating shareholders or groups, determine whether nominations will conflict with any laws, and analyze the relative merits of the shareholder director nominees and the companies' own director nominees.[992] For purposes of the PRA analysis, we estimate that the disclosure burden of Rule 14a–11 on reporting companies (other than registered investment companies) and registered investment companies is 4,113 hours of personnel time and $548,200 for the services of outside professionals. We also estimate for purposes of the PRA analysis that the disclosure burden to shareholders of Schedule 14N will be 7,870 hours of shareholder time and $1,049,300 for the services of outside professionals. We also received estimates from commenters regarding the costs described above.[993] These estimates are described in the PRA analysis above.[994]

Companies also could incur costs due to the potential increase in the number of shareholder proposals submitted to companies as a result of the expansion in the types of proposals permitted under Rule 14a–8. Under the amendment to Rule 14a–8(i)(8), companies will no longer be able to rely on this basis to exclude from their proxy materials shareholder proposals that seek to establish a procedure in the company's governing documents for the inclusion of shareholder nominees for director in the company's proxy materials. This will likely result in increased costs to companies related to reviewing and processing such proposals to determine matters such as shareholder eligibility and whether there is another basis for excluding these proposals under Rule 14a–8. If a company decides to exclude the shareholder proposal, it will have to incur the costs, such as legal fees, needed to prepare and submit a notice to the Commission regarding its basis for excluding the proposal. In this regard, we received several estimates from commenters regarding the costs related to a Rule 14a–8 shareholder proposal. Based on its July 2009 survey of its member companies, one commenter stated that companies spend an estimated 47 hours and associated costs of $47,784 to prepare and submit a notice of intent to exclude a shareholder proposal.[995] An investment company estimated that its costs for including a shareholder proposal in its complex-wide proxy materials exceeded $3 million in "tabulation expenses."[996] One commenter, however, described the costs to companies resulting from the amendment to Rule 14a–8(i)(8) as "negligible" (with such costs confined to any additional costs of printing and distributing the proposal in the company's proxy materials).[997] For purposes of the PRA analysis, we estimate that shareholders will submit a total of 147 proposals regarding procedures for the inclusion of shareholder nominees in company proxy materials per year to reporting companies, including registered investment companies. Assuming that 90% of reporting companies (including registered investment companies), or 132 companies, prepare and submit a notice of intent to exclude these proposals, the resulting costs to companies will result in approximately 11,484 hours and $1,531,200 for the services of outside professionals.[998] These costs could decrease to the extent that the Rule 14a–8 no-action process provides guidance from the staff on which types of proposals are excludable. Further, because a company that receives a shareholder proposal has no obligation to make a submission under Rule 14a–8 unless it intends to exclude the proposal from its proxy materials, these costs also may decrease to the extent that the company does not seek to exclude the proposal. Lastly, the costs may be limited to the extent that shareholders do not submit proposals related to director nomination procedures due to the uniform applicability of Rule 14a–11 to all companies subject to the rule and availability of the rule for eligible shareholders.[999]

Second, the new rules may increase the incremental costs of printing and mailing a company's proxy materials due to the need to include additional names and background information of shareholder director nominees in the proxy materials and the increased weight of these materials. These costs may increase as the number of shareholder director nominees to be included in the company's proxy materials increases. Thus, this may result in a decrease in the costs to shareholders that would have had to conduct traditional proxy contests in the absence of Rule 14a–11, but may increase the costs for companies.[1000]

Companies also will incur additional printing and mailing costs with respect to the inclusion of a shareholder proposal related to changes to a company's governing documents regarding inclusion of shareholder director nominees in the company's proxy materials. We have two sources of information estimating such costs. Based on its July 2009 survey of its member companies, one commenter stated that companies spend an estimated 20 hours and associated costs of $18,982 to print and mail one shareholder proposal.[1001] The responses to a questionnaire that the Commission made available in 1997 relating to 1998 amendments to Rule 14a–8 suggest such costs to the responding companies averaged $50,000.[1002] As noted above,

[992] *See, e.g.,* letter from S&C.

[993] *See* letters from BRT; Society of Corporate Secretaries.

[994] *See* Section III.C. above, for discussion of the estimates included in the letters from BRT and Society of Corporate Secretaries.

[995] *See* letter from BRT.

[996] *See* letter from Vanguard. The commenter did not elaborate on the nature of these "tabulation expenses." It also noted that this figure does not include "incremental printing and mailing costs because the proposal was included in the proxy statement and did not require a separate mailing."

[997] *See* letter from CII.

[998] This estimate is based on the assumption that shareholders of reporting companies (other than registered investment companies) will submit approximately 123 proposals per year regarding procedures for inclusion of shareholder nominees for director in company's proxy materials, and that 90% of companies that receive such a shareholder proposal will seek to exclude the proposal from their proxy materials. Thus, we estimate that companies will seek to exclude 110 such proposals (123 proposals × 90%) per proxy season. We estimate that the annual burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 116 hours per proposal, for a total of 12,760 burden hours (110 proposals × 116 hours/proposal) for reporting companies (other than registered investment companies). This will correspond to 9,570 hours of company time (110 proposals × 116 hours/proposal × 0.75) and $1,276,000 for the services of outside professionals (110 proposals × 116 hours/proposal × 0.25 × $400). For registered investment companies, we estimate for purposes of the PRA that the total burden hours will be 2,552 hours, which corresponds to 1,914 hours of company time and $255,200 for the services of outside professionals. *See* Section III.D.2. above.

[999] As discussed in Section II.B.3. above, Rule 14a–11 will not apply to certain types of companies.

[1000] However, as explained in footnote 875 above, the increased costs for the company may not be as much as would otherwise result if the shareholders engaged in a traditional proxy contest.

[1001] *See* letter from BRT. This cost is in addition to the estimated 47 hours and associated costs of $47,784 that companies spend to prepare and submit a notice of intent to exclude a shareholder proposal.

[1002] In the adopting release for the amendments to Rule 14a–8 in 1998, we noted that responses to a questionnaire we made available in February 1997 suggested the average cost spent on printing costs (plus any directly related costs, such as additional postage and tabulation expenses) to include shareholder proposals in company proxy materials was approximately $50,000. The responses received may have accounted for the printing of more than one proposal.

for purposes of the PRA, we estimate that the amendment to Rule 14a–8(i)(8) could result in the annual submission of 147 shareholder proposals regarding procedures for the inclusion of shareholder director nominees in company proxy materials. Based on this information, for purposes of our analysis, we assume printing and mailing costs of one shareholder proposal in a company's proxy materials could be in the range of approximately $18,000 to $50,000. Assuming each of these proposals were included in company proxy materials, it could result in a total cost of approximately $2,646,000 to $7,350,000 for the affected companies.

Finally, the new rules may lead to an increase in soliciting activities by both companies and shareholders. Companies may increase solicitations to vote for their slate of directors, to vote against shareholder director nominees, or to vote against shareholder proposals. Shareholders may increase solicitations to vote for shareholder proposals, to withhold votes for a company's nominees for director, or to vote for the shareholder director nominees. This increase in soliciting activities by both companies and shareholders will result in an increase in costs as well. These solicitation costs are not, however, required under our rules.

We received a significant amount of comment regarding the extent to which companies will solicit against the election of a shareholder director nominee. One commenter predicted that boards will take "extraordinary efforts" to campaign against the shareholder director nominees, including significant media and public relations efforts, advertising in a number of forums, mass mailings, and other communication efforts, as well as the hiring of outside advisors and the expenditure of significant time and effort by the company's employees.[1003] As examples of these costs, the commenter pointed to the costs of recent proxy contests, which ranged from $14 million to $4 million, as well as the costs of contests at smaller companies, which ranged from $3 million to $800,000. Another commenter conducted a survey of its member companies and indicated that an average total of 302 hours of company personnel and director time will be needed if a company opposes a shareholder director nominee.[1004] One commenter estimated its own annual costs for defending against a shareholder director nominee to be approximately $330,000 and 275 hours of management's time.[1005] Another commenter noted that it had direct costs of approximately $11 million in 2008 and more than $9 million in 2009—in addition to the substantial indirect costs in management time and attention—as a result of the proxy contests that it faced.[1006]

We understand that company boards may be motivated by the issues at stake to expend significant resources to challenge shareholder director nominees, elect their own nominees, or solicit votes against a shareholder proposal. We therefore recognize that, as a practical matter, it can reasonably be expected that the boards of some companies likely would oppose the election of shareholder director nominees. If the incumbent board members incur large expenditures to defeat shareholder director nominees, those expenditures will represent a cost to the company and, indirectly, all shareholders. It is also possible that some shareholders may perceive the use of corporate funds to oppose the election of nominees submitted by shareholders as having a negative effect on the value of their investments.

These costs, however, may be limited by two factors. They may be limited to the extent that the directors' fiduciary duties prevent them from using corporate funds to resist shareholder director nominations for no good-faith corporate purpose.[1007] Some commenters, in fact, characterized the costs incurred by incumbent directors to defeat shareholder director nominees as discretionary because Rule 14a–11 itself does not require such efforts.[1008] Other commenters disagreed with this characterization, asserting that the directors' fiduciary duties may compel them to expend company resources to oppose a shareholder director nominee.[1009] We recognize that, under certain circumstances, company directors likely would oppose a particular shareholder director nominee and expend company resources in that effort, which would increase the costs to the company resulting from Rule 14a–11.[1010] However, the costs for companies may be less to the extent that directors determine not to expend such resources to oppose the election of the shareholder director nominees and simply include the shareholder director nominees and the related disclosure in the company's proxy materials.[1011] The requisite ownership threshold and holding period of Rule 14a–11 may also limit the number of shareholder director nominations that a board may receive, consider, and possibly contest.

4. Other Costs

The new rules may result in additional costs, as described below.

With respect to investment companies, one commenter stated that if a shareholder nomination causes an election to be "contested" under rules of the New York Stock Exchange, brokers would not be able to vote client shares on a discretionary basis, making it difficult and more expensive for investment companies to achieve a quorum for a meeting.[1012] We recognize that it may be more costly for investment companies to achieve a quorum at shareholder meetings if a shareholder director nomination causes an election to be "contested" under the rules of the New York Stock Exchange and brokers cannot vote shares on a discretionary basis. We believe, however, that the costs imposed on investment companies will be limited for three reasons. First, to the extent investment companies do not hold annual meetings as permitted by State law, investment company shareholders will have less opportunity to take advantage of the new rules.[1013] Second, even when investment company shareholders do have the opportunity to take advantage of the new rules, the disproportionately large and generally passive retail shareholder base of investment companies suggests that the new rules will be used less frequently than will be the case with non-

[1003] *See* letter from Chamber of Commerce/CCMC.

[1004] *See* letter from BRT.

[1005] *See* letter from Ryder.

[1006] *See* letter from Biogen.

[1007] *See Hall* v. *Trans-Lux Daylight Picture Screen Corp.,* 171 A. 226, 228 (Del. Ch. 1934) ("where reasonable expenditures are in the interest of an intelligent exercise of judgment on the part of the stockholders upon policies to be pursued, the expenditures are proper; but where the expenditures are solely in the personal interest of the directors to maintain themselves in office, expenditures made in their campaign for proxies are not proper.").

[1008] *See* letters from CalSTRS; CII; Florida State Board of Administration.

[1009] *See* letters from ABA; BRT.

[1010] The Commission is not expressing a view as to the scope of directors' State law fiduciary duties in responding to shareholder director nominations or expressing a view as to what conduct would be consistent with these duties.

[1011] For example, the costs that are incurred only if the incumbent directors choose to challenge or solicit against a shareholder director nominee (*e.g.,* the legal fees arising from the company's efforts to exclude the nominee from its proxy materials) are distinguishable from the costs that must be incurred irrespective of whether the directors oppose the shareholder director nomination (*e.g.,* the increased printing costs caused by the inclusion of the shareholder director nominees and related disclosures in the company's proxy materials).

[1012] *See* letter from S&C. NYSE Rule 452 provides that, with respect to registered investment companies, brokers may not vote uninstructed shares in contested elections.

[1013] *See* letters from ABA; MFDF.

investment companies.[1014] Third, because we have sought to limit the cost and burden on all companies, including investment companies, by limiting Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company for at least three years, and because, as suggested by one commenter, many funds, such as money market funds, are held by shareholders on a short-term basis,[1015] we believe that the situations where shareholders will meet the eligibility requirements will be limited.

Our decision to adopt, as proposed, the revisions to Rule 14a–6(a)(4) and Note 3 to the rule[1016] means that the inclusion of a shareholder director nominee in the company's proxy materials will not require the company to file preliminary proxy materials, provided that the company was otherwise qualified to file directly in definitive form. Because the proxy materials will not be filed in preliminary form, the Commission staff may not have the opportunity to review these proxy materials before companies make definitive copies available to shareholders. Staff review of preliminary materials can benefit shareholders by helping to assure that companies comply with the Federal proxy rules and provide appropriate disclosure to shareholders. We believe, however, that any cost related to the staff's inability to review preliminary proxy materials is mitigated by the staff's ability to review the disclosure contained in the Schedule 14N as well as in any additional soliciting materials filed by either the company or the nominating shareholder or group. Further, as we recently stated, the staff retains the right to comment on proxy materials filed in definitive form if the staff deems that to be appropriate under the circumstances.[1017]

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[1018] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[1019] and Section 2(c) of the Investment Company Act[1020] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

We are adopting new rules that will, under certain circumstances, require that company proxy materials include information about, and the ability to vote for, director nominees submitted by shareholders. The rules will facilitate the exercise of shareholders' rights to nominate and elect directors and provide shareholders with information about a nominating shareholder or group and its nominees for director. Rule 14a–11 will provide for the inclusion of shareholder nominees for director in the company's proxy materials under certain circumstances and disclosure regarding the nominating shareholder or group and nominees submitted pursuant to the rule. The amendment to Rule 14a–8(i)(8) will provide an avenue for shareholders to submit proposals that would seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. No longer permitting companies to exclude these types of proposals pursuant to Rule 14a–8(i)(8) should enable shareholders to better reflect their preferences for director nomination procedures that would further facilitate their ability to nominate and elect their own director candidates. In addition, the new rules require disclosure of information regarding nominating shareholders or groups and any nominees submitted pursuant to an applicable state or foreign law provision or a company's governing documents, which provides shareholders a more informed basis for deciding how to vote for nominees for election to the board of directors.

We requested comment on whether the new rules will promote efficiency, competition and capital formation or have an impact or burden on competition. We received a number of comments that addressed this section. The comments we received, and our consideration of those comments, are discussed below.

The analysis below is based on our understanding that while no state currently prohibits shareholders from nominating candidates for the board of directors,[1021] shareholders generally do not have a right under existing State law to require a company to include their director nominees in the company's proxy materials.[1022]

We expect that the new rules will promote efficiency in the capital markets in a number of ways. First, we have already considered extensively the expected costs and benefits of the new rules in the Cost-Benefit Analysis and throughout the release. As we believe the benefits (including the possible benefit of improved board accountability and company performance) justify the costs, we expect the new rules to promote efficiency of the economy on the whole.

We believe the new rules will promote efficiency by reducing several different types of costs that previously discouraged potentially beneficial actions. The new rules will reduce the cost of shareholders' exercise of their rights to nominate and elect directors.[1023] To the extent that facilitating shareholders' ability to nominate and elect directors of their own choosing is expected to produce the economic benefits for investors described elsewhere in this release, the

[1014] *See* letter from J. Taub.

[1015] *See* letter from ABA.

[1016] The revisions make clear that inclusion of a shareholder director nominee would not be deemed a solicitation in opposition for purposes of the exclusion from filing preliminary proxy materials.

[1017] *See Shareholder Approval of Executive Compensation of TARP Recipients,* Exchange Act Release No. 34–61335 (Jan. 12, 2010) (adopting an amendment to Exchange Act Rule 14a–6(a) to add the shareholder advisory vote on executive compensation required for participants in the Troubled Asset Relief Program ("TARP") to the list of items that do not trigger a preliminary filing requirement).

[1018] 15 U.S.C. 78w(a)(2).

[1019] 15 U.S.C. 78c(f).

[1020] 15 U.S.C. 80a–2(c).

[1021] We are not aware of any law in any state or in the District of Columbia that prohibits shareholders from nominating directors. For further discussion, *see* Section II.B.2.a. above.

[1022] One notable exception exists under the North Dakota Publicly Traded Corporations Act, which permits holders of at least five percent of the outstanding shares of a company subject to the statute to submit a notice of intent to nominate directors and requires the company to include each such shareholder nominee in its proxy statement and form of proxy. *See* North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35–08 (2009).

[1023] Many commenters noted the general ineffectiveness or prohibitive cost of the existing means to effect a change in the membership of a board, such as a traditional proxy contest, Rule 14a–8 shareholder proposals, and communications with a company's nominating committee or board. *See* letters from Americans for Financial Reform; Brigham; CalPERS; CII; Florida State Board of Administration; Ironfire; M. Katz; J. McRitchie; Nathan Cummings Foundation; P. Neuhauser; Pax World; S. Ranzini; Teamsters; TIAA–CREF; USPE. Moreover, only a traditional proxy contest was viewed by some commenters to be a realistic method of effecting change in the board's membership. *See* letters from Americans for Financial Reform; CalPERS; CII; Florida State Board of Administration; M. Katz; J. McRitchie; S. Ranzini; Teamsters. Yet, according to these commenters, the high costs of such a proxy contest hinder shareholders' ability to nominate and elect directors. For further discussion of these costs, *see* Section IV.C.1. above.

new rules will bring about these benefits at a reduced cost and thereby promote efficiency. Some commenters asserted that although the new rules may relieve certain shareholders of costs that they are unwilling to incur to run a traditional short-slate election contest, those costs will simply be shifted onto the company and indirectly borne by all shareholders.[1024] This burden may be justified, however, because these costs may not be as much as would otherwise result if that shareholder engaged in a traditional proxy contest,[1025] resulting in a reduction in the overall cost of changing a limited percentage of a board's membership. The burden may be further justified because the new rules may mitigate any collective action concerns.[1026]

The new rules also will promote efficiency by reducing the cost of administering informed shareholder voting—to the extent that a shareholder director nominee is submitted for inclusion in a company's proxy materials pursuant to Rule 14a–11, a company's governing documents, or a state or foreign law provision—by providing for director nominees to be included on one proxy card with clear disclosure [1027] for shareholders to evaluate when deciding whether and how to grant authority to vote their shares by proxy, as opposed to having to evaluate more than one set of proxy materials sent by a company and an insurgent shareholder.[1028] Presenting the competing director nominees on one proxy card, with the related disclosure contained in one proxy statement, may simplify the shareholder's decision-making process, reduce the potential for any confusion on the part of shareholders, and address any reluctance on the part of shareholders to consider an insurgent shareholder's nominee solely because the nominee was not presented in the company's proxy materials.[1029]

The new rules could promote efficiency by reducing the cost of effective communication between shareholders and directors, potentially resulting in enhanced board responsiveness and accountability as described elsewhere in the release.[1030] Such communications may, in some cases, address the concerns that prompted the shareholders to submit their own director nominations and help avert any distracting election contests.[1031] Enhanced communication with shareholders also may result in better decision-making by the board as shareholders may provide the board with new ideas or information that the board has not considered.

We considered potential negative effects of the new rules on the efficiency of U.S. public companies, as discussed below.

As discussed elsewhere in the release, if the number of election contests increases as a result of the new rules, boards may end up devoting less time to overseeing their companies' business operations. Election contests have been described by many commenters as distracting, time-consuming, and inefficient for companies, boards, and management.[1032] To the extent that a board's attention is drawn away by the demands of election contests or shareholders, the new rules may impair companies' ability to compete efficiently. To limit the use of Rule 14a–11 to only holders who demonstrate a significant, long-term commitment to the company, we adopted a uniform 3% ownership threshold and 3-year holding period. We also continue to believe that this concern may be mitigated to the extent that shareholders, while voicing their concerns and seeking the board's attention, understand the board's time may be in scarce supply and take this factor into consideration when deciding to nominate director candidates.[1033]

The efficiency of U.S. public companies could be negatively affected if shareholders use the new rules to promote their narrow interests at the expense of other shareholders.[1034] If the new rules facilitate the ability of shareholders with narrow interests to place directors on the board, the new rules may impair efficiency by increasing the cost of board deliberations and resulting in companies taking actions that benefit only a few shareholders. This negative effect, however, could be limited to the extent that the disclosure requirements related to Rule 14a–11 alert shareholders to the narrow interests of the nominating shareholder or group in advance of the election so that they can cast their votes in favor of the candidate who will best serve the interests of all shareholders.[1035] Directors with potentially narrow interests also will be subject to the same fiduciary duties as directors nominated by the company.[1036]

[1024] *See* letter from ABA.

[1025] *See* Bainbridge 2003 Letter.

[1026] *See* Section IV.D.1. above.

[1027] It is assumed here that the private cost of making the required disclosure and the cost to the company for including the disclosure in the company's proxy materials is lower than the total information cost for voting shareholders.

[1028] As discussed in footnote 884 above, we do not believe that our recent adoption of rules enhancing proxy solicitation disclosure dispenses with the need for Rule 14a–11 and the amendment to Rule 14a–8(i)(8).

[1029] *See* Section IV.D.1. above.

[1030] *See* letters from AFSCME; Bebchuk, *et al.;* Brigham; CalPERS; CII; L. Dallas; T. DiNapoli; A. Dral; GovernanceMetrics; Governance for Owners; Hermes; M. Katz; LUCRF; J. McRitchie; R. Moulton-Ely; D. Nappier; P. Neuhauser; NJSIC; OPERS; Pax World; Pershing Square; Relational; RiskMetrics; D. Romine; Shareowners.org; Social Investment Forum; Teamsters; TIAA–CREF; Universities Superannuation; USPE; Walden. According to these commenters, the prospect of an election contest may create greater incentives for incumbent directors to communicate with shareholders, address their concerns, and consider shareholders' preferences regarding nominations for director.

[1031] We have changed certain provisions of Rule 14a–11 from their proposed form to further encourage communication between boards and shareholders. *See, e.g.,* Rule 14a–11(d)(5).

[1032] *See, e.g.,* letters from ABA; Atlas; AT&T; Book Celler; Carlson; Carolina Mills; Chamber of Commerce/CCMC; Chevron; Crespin; M. Eng; Erickson; ExxonMobil; Fenwick; GE; General Mills; Glass Lewis; Glaspell; Intelect; R. Clark King; Koppers; MCO; MeadWestvaco; MedFaxx; Medical Insurance; Merchants Terminal; D. Merilatt; NAM; NIRI; NK; O3 Strategies; Roppe; Rosen; Safeway; Sara Lee; Schneider; Southland; Style Crest; Tenet; TI; tw telecom; R. VanEngelenhoven; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[1033] *See* Proposing Release, Section V.C.1.

[1034] *See, e.g.,* letters from 3M; ACE; AGL; Alaska Air; Alcoa; Allstate; American Bankers Association; American Business Conference; American Express; Ameriprise; Artistic Land Designs; Association of Corporate Counsel; J. Astle; Astrum; Atlantic Bingo; Avis Budget; J. Blanchard, Board Institute; Boeing; Boston Scientific; Brink's; BRT; Burlington Northern; Callaway; S. Campbell; Cargill; Carpet and Tile ("Carpet and Tile"); Caterpillar; Chamber of Commerce/CCMC; Kevin F. Clune ("K. Clune"); P. Clapman; Chevron; J. Chico; CIGNA; CNH Global; Columbine; Competitive Enterprise Institute; A. Conte; W. Cornwell; Crown Battery; Cummins; Darden Restaurants; Data Forms, Inc. ("Data Forms"); Deere; T. Dermody; Dewey; A. Dickerson; W. B. Dickerson; J. Dillon; Eaton; Emerson Electric; A. England; Engledow; Mike Emis ("M. Emis"); FedEx; FMC Corp.; FPL Group; Frontier; GE; General Mills; Healthcare Practice; Home Depot; Honeywell; Horizon; Karen L. Hubbard ("K. Hubbard"); IBM; ICI; Instrument Piping Tech; Theodore S. Jablonski ("T. Jablonski"); Keating Muething; Koppers; C. Leadbetter; Leggett; Little; Louisiana Agencies; ITT; Leggett; Brittany D. Lunceford ("B. Lunceford"); Melvin Maltz ("M. Maltz"); Massey Services; J. McCoy; McDonald's; D. McDonald; MCO; McTague; MeadWestvaco; MedFaxx; D. Merilatt; Metlife; M. Metz; J. Miller; E. Mitchell; Moore Brothers; Motorola; MT Glass; NAM; NIRI; Norfolk Southern; O'Melveny & Myers; Office Depot; Omaha Door; P&G; V. Pelson; PepsiCo; Pinch a Penny ("Pinch a Penny"); Protective; Realogy; J. Rosen; RTW; Ryder; S&C; Safeway; Sara Lee; R. Saul; Schneider; Seven Law Firms; Sidley Austin; Southern Company; Southern Services; M. Sposato; Ralph Strangis ("R. Strangis"); Tenet; Tesoro; E. Tremaine; tw telecom; L. Tyson; UnitedHealth; U.S. Bancorp; VCG; Vinson & Elkins; Wachtell; Wagner Industries; Wells Fargo; Weyerhaeuser; Xerox; Yahoo. One commenter added that many recent election contests were directed towards achieving short-term financial objectives, including proposals to sell the company or effect a buyback or special dividend. *See* letter from Simpson Thacher.

[1035] *See* Rule 14a–11, Rule 14a–18, Rule 14n–1, and Schedule 14N.

[1036] Veasey & DiGuglielmo, at 774 ("Directors will generally be responsible for protecting the best interests of the corporation and all its stockholders, despite the directors' designation by some particular constituency, because fiduciary duties

The increased likelihood of a contested election may discourage some qualified candidates from running for a board seat, making it more difficult for companies to recruit qualified directors and negatively affecting the efficiency of U.S. public companies.[1037] Nevertheless, as discussed elsewhere in the release, a countervailing effect that the new rules may have is the impact on the labor market for director candidates and potential increase in the demand for individuals who can serve as shareholder director nominees.[1038]

Finally, compliance with the new rules may impose additional financial costs on companies, such as for legal services, printing and mailing of proxy materials, and additional proxy solicitation efforts.[1039] The workability and implementation issues identified by commenters, in particular, may force companies to incur significant time and funds to resolve.[1040] Increased litigation costs also represent a possible negative effect of the new rules, as companies and nominating shareholders or groups expend resources to resolve legal disputes in Federal and state courts. Incurring such costs could negatively affect the efficiency of the capital markets. As discussed throughout the release, we have modified several aspects of the rules we proposed to clarify any uncertainties identified by commenters and to address workability issues. We also have taken steps to address commenters' concerns regarding a company's liability for misrepresentations or omissions in the nominating shareholder's or group's information that is repeated in the company's proxy materials.[1041] As described above, we have made modifications to clarify that a company will not be liable for materially false or misleading information provided by the nominating shareholder or group.[1042] Finally, additional guidance from the Commission, its staff, or courts should further resolve any uncertainties regarding the new rules' implementation and may reduce the need for parties to resort to litigation.

With respect to investment companies, a number of commenters expressed concern that the election of a shareholder director nominee may, in some circumstances, decrease the effectiveness and efficiency of a unitary or cluster board utilized by a fund complex.[1043] In addition, one commenter noted that small investment companies are likely to be particularly affected by the Proposal and its attendant costs, including the loss of the benefits of a cluster or unitary board.[1044] According to the commenter, "the expected smaller rate of return on capital may dissuade some entrepreneurs from entering the investment company industry, and force the exit of some fund advisers with thin profit margins," negatively affecting both efficiency and competition.

We recognize that for fund complexes that utilize unitary or cluster boards, the election of a shareholder director nominee may, in some circumstances, increase costs and potentially decrease the efficiency of the boards.[1045] We note, however, that any decrease in efficiency and competition is associated with the State law right to nominate and elect directors, and not from including shareholder nominees in the company's proxy materials. We also note that any decreased efficiency of an investment company's board, or any decrease in competition, as a result of the fund complex no longer having a unitary or cluster board would occur, if at all, only in the event that investment company shareholders elect the shareholder nominee. Investment companies may include information in the proxy materials making investors aware of the company's views on the perceived benefits of a unitary or cluster board and the potential for increased costs and decreased efficiency if the shareholder nominees are elected. Furthermore, we believe that exempting small investment companies from the new rules would not be appropriate because doing so would interfere with achieving the goal of facilitating shareholders' ability to participate more meaningfully in the nomination and election of directors and to promote the exercise of shareholders' traditional State law rights to nominate and elect directors.[1046] Although commenters argued that the election of a shareholder-nominated director to a unitary or cluster board will necessarily result in decreased effectiveness of the board, we disagree. In this regard, one commenter argued that competition in the board nomination process may improve efficiency by providing additional leverage for boards in negotiations with the investment adviser.[1047] In any event, we believe that investment company shareholders should have the opportunity to exercise their traditional State law rights to elect a non-unitary or non-cluster board if they so choose.

We considered the possible effects that the new rules may have on competition, as discussed below.

With the possible effect of improved board accountability and corporate governance, the new rules may ultimately increase shareholder value, generate stronger company performance, and increase competition. Investors also may be more willing to invest in companies in which they have the ability to present their own shareholder director nominees in the company's proxy materials if they become displeased with the company's performance. Nevertheless, it is possible that some companies may be more reluctant to conduct public offerings in the U.S. or may wish to avoid being a reporting company due to the need to comply with new rules, making the U.S. public equity markets less attractive.[1048] Companies may instead attempt to raise capital through private placements or in foreign equity markets instead of through public offerings in the U.S. equity markets. We note that shareholders in many foreign countries

generally will trump contractual expectations in the corporate context."). *See also* letters from ACSI; LUCRF (indicating that they are unaware of any breaches of fiduciary or statutory duties, including Regulation FD, by shareholder-nominated directors in jurisdictions that allow shareholder director nominations in the company's proxy materials).

[1037] *See* letters from 3M; ABA; American Electric Power; Atlantic Bingo; AT&T; Avis Budget; Biogen; Boeing; BRT; Burlington Northern; Callaway; Carlson; Chamber of Commerce/CCMC; CIGNA; Columbine; Cummins; CSX; J. Dillon; Emerson Electric; Erickson; ExxonMobil; FedEx; Headwaters; C. Holliday; IBM; Intelect; R. Clark King; Lange; Louisiana Agencies; Metlife; NIRI; O3 Strategies; V. Pelson; PepsiCo; Pfizer; Roppe; Rosen; Ryder; Sara Lee; Sidley Austin; tw telecom; Wachtell; Wells Fargo; Weyerhaeuser; Yahoo.

[1038] *See* Section IV.D.3. above.

[1039] For a discussion of these costs, *see* Section IV.E.3. above.

[1040] *See, e.g.,* letters from ABA; Wachtell.

[1041] *See* letters from ABA; Alaska Air; American Bankers Association; Ameriprise; BorgWarner; BRT; Caterpillar; Cleary; DTE Energy; ExxonMobil; Honeywell; ICI; Protective; S. Quinlivan; Seven Law Firms; Sidley Austin; Society of Corporate Secretaries; Southern Company; UnitedHealth; Verizon.

As originally proposed, under Rule 14a–11(e) and Note to Rule 14a–19, a company would not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11, an applicable State law provision, or the company's governing documents and then repeated by the company in its proxy statement, except where the company "knows or has reason to know that the information is false or misleading."

[1042] For further discussion, *see* Section II.E. above.

[1043] *See, e.g.,* letters from ABA; ICI; ICI/IDC; IDC; MFDF; S&C; T. Rowe Price; Vanguard.

[1044] *See* letter from ICI.

[1045] *See, e.g.,* letters from ICI; ICI/IDC; IDC; MFDF; Vanguard.

[1046] For a specific discussion of the impact of the rule on small companies and the alternatives we considered in lieu of applying the rule to such entities, *see* Section VI. below.

[1047] *See* letter from J. Taub.

[1048] *See* letters from Altman (stating that its survey of 36 public companies showed that 80.85% of respondents believe the new rules "will deter some U.S. private companies from going public and some foreign companies from listing on U.S. exchanges."); BRT; R. Tullo.

already have the ability to include their director nominees in the company's proxy materials.[1049] We therefore believe that the new rules may bring the U.S. capital markets closer in line with international practice by giving shareholders of U.S. companies an ability that may already be enjoyed by shareholders of many non-U.S. companies. Lastly, we note that the new rules will not apply to foreign private issuers because they are exempt from the Commission's proxy rules.[1050] Therefore, we do not believe that the new rules will affect the willingness of such issuers to raise capital in the U.S. capital markets.

We also believe that directors nominated by shareholders pursuant to the new rules and elected to the board may be more inclined to exercise independent judgment in the boardroom due to the fact that they were nominated by shareholders, not the incumbent directors. The impact of these shareholder-nominated directors may lead to greater competition when the board considers strategic alternatives, including in the market for corporate control. Board members play a key role in evaluating corporate control transactions and, while the new rules are not intended to facilitate a change in control, shareholder-nominated directors may not share the same bias as incumbent directors regarding a transaction that may be contrary to their interests but beneficial for shareholders. The presence of these directors, therefore, may lead to increased competition in the market for corporate control. We recognize that since the number of shareholder director nominees that a company is required to include in its proxy materials pursuant to Rule 14a–11 is limited, the potential effect on competition for corporate control may also be limited.

Lastly, the requirement that a nominating shareholder or member of the nominating shareholder group using Rule 14a–11 provide proof of ownership in the form of written statements with respect to securities held on deposit with a clearing agency acting as a securities depository may affect the competitive position of brokers or banks that are not securities depository participants.[1051] Due to the need for a nominating shareholder or member of a nominating shareholder group to obtain a separate written statement from a broker or bank that is not a clearing agency participant (*e.g.,* when a broker or bank of the nominating shareholder or member of the nominating shareholder group holds shares of the shareholder or member in an omnibus account at another broker or bank), it is possible that some shareholders may prefer to hold their securities directly through a clearing agency participant to avoid having to obtain more than one written statement to prove their ownership of the requisite amount of securities. If so, the competitive positions of clearing agency participants and clearing agencies themselves in the marketplace may be enhanced. Their competitive position also may be enhanced if a nominating shareholder is reluctant to change its broker or bank because it would need to obtain a written statement from each broker or bank with respect to the shares that it is using to meet the ownership threshold and specify the time period during which the shares were held.

We considered the possible effects that the new rules may have on capital formation, as discussed below.

We expect that potential investors may be more willing to invest in a company if they have greater confidence in the abilities of the company's board members. The new rules allow for a more competitive election process—one in which shareholders will have the opportunity to evaluate qualified alternatives to the board's own nominees and select the person that they feel is most qualified. To the extent that the overall quality of a company's board increases as a result of a more competitive election, the company's ability to attract the necessary capital in the marketplace may be enhanced as well.

Further, potential investors may be more willing to invest in a company if they know that they have a meaningful way to nominate directors for election. The new rules will facilitate investors' ability to nominate and elect director candidates, and may thereby have the effect of holding boards more accountable. Investors may also be attracted to the potential increase in shareholder value that may result from an increased ability to replace directors and enhancement of shareholders' rights.[1052] Lastly, potential investors could prefer to invest in companies with boards that they feel are more open and responsive to their views.

By enabling greater board accountability to shareholders, the new rules also may contribute to restoring investor confidence in the U.S. markets and address any reluctance to invest in U.S. companies.[1053] Companies attempting to raise capital in the U.S. markets may therefore encounter greater willingness on the part of potential investors to participate in their securities offerings.[1054]

As part of our rulemaking process, we considered possible alternatives to the new rules that may serve the same function—and to the same degree—of promoting efficiency, competition, and capital formation. In this regard, we received significant comment that the rules are unnecessary in light of recent corporate governance reforms that already increased the accountability of boards to shareholders.[1055] While each of these reforms may enhance to some degree the boards' accountability and responsiveness to shareholders or shareholders' ability to effect change in the board's membership, we believe they may not be as efficient, effective, or optimal as the new rules. Our consideration of recent corporate governance reforms and suggested alternatives are discussed throughout the release.

We recognize the passage of recent amendments to state corporation laws to enable companies to provide in their governing documents an ability for shareholders to include their director

[1049] *See* letters from ACSI; CalPERS; ICGN; LUCRF; Pax World; RiskMetrics; Social Investment Forum; SWIB.

[1050] Exchange Act Rule 3a12–3 exempts securities of certain foreign issuers from Section 14(a) of the Exchange Act.

[1051] *See* Instruction 4 to new Schedule 14N.

[1052] *See* Section IV.D.3. above.

[1053] *See, e.g.,* letters from AFSCME and Sodali (noting a June 2009 survey of investors conducted by ShareOwners.org that indicated 57% of the respondents feel strong Federal action would "restore their lost confidence in the fairness of the markets" and 81% of the respondents identified "overpaid CEOs and/or unresponsive management and boards" as the top reason for the loss of investor confidence in the markets); letter from Universities Superannuation (noting that "Governance Metrics International now ranks the United States behind Britain, Australia, Canada, and Ireland in corporate governance quality" and that "the CFA Institute 2009 Financial Market Integrity Index survey of investment professionals found a marked decline over the past year in global sentiment of investment professionals toward the United States, with only 43 percent of non-U.S. respondents reporting they would recommend investing in the United States (based solely on ethical behavior and regulation of capital market systems), down from 67 percent a year earlier.").

[1054] *See* letter from Universities Superannuation.

[1055] *See* letters from 26 Corporate Secretaries; 3M; Advance Auto Parts; Allstate; Avis Budget; American Express; Anadarko; Association of Corporate Counsel; AT&T; L. Behr; Best Buy; Boeing; BRT; R. Burt; California Bar; S. Campbell; Carlson; Caterpillar; Chamber of Commerce/CCMC; Chevron; CIGNA; W. Cornwell; CSX; Cummins; Davis Polk; Dewey; DuPont; Eaton; M. Eng; FedEx; FMC Corp.; FPL Group; Frontier; GE; General Mills; C. Holliday; Honeywell; C. Horner; IBM; Jones Day; Keating Muething; J. Kilts; R. Clark King; N. Lautenbach; MeadWestvaco; Metlife; Motorola; O'Melveny & Myers; Office Depot; Pfizer; Protective; S&C; Safeway; Sara Lee; Shearman & Sterling; Sherwin-Williams; Sidley Austin; Simpson Thacher; Tesoro; Textron; TI; G. Tooker; UnitedHealth; Unitrin; U.S. Bancorp; Wachtell; Wells Fargo; West Chicago Chamber; Weyerhaeuser; Xerox; Yahoo.

nominees in the company's proxy materials, and that private ordering is an alternative to our new rules.[1056] However, as discussed throughout the release, we have reason to believe that reliance on private ordering under State law would be insufficient to meet our goal of facilitating the exercise of shareholders' traditional State law rights to nominate and elect directors.[1057] For example, companies, particularly those that have performed poorly or have activist shareholders, may be reluctant to amend their governing documents to provide for an ability of shareholders to include director nominees in the company's proxy materials, even if permitted by state corporation law.[1058] In that regard, one commenter observed that most of the companies currently able to provide such an ability in their governing documents under State law have, in fact, not done so.[1059] Further, as previously discussed, establishing such an ability on a company-by-company basis may be more costly and inefficient than under our new rules.[1060] For shareholders with a diverse portfolio of securities, the administrative burden of tracking each company's requirements for including a director nominee in the company's proxy materials may add another degree of inefficiency.[1061] Some commenters also expressed concerns about the ability of shareholders to adopt a provision in a company's governing documents for the inclusion of shareholder director nominees through the Rule 14a–8 process due to the rule's requirements (such as the 500-word limit on shareholder proposals)[1062] or procedural requirements for shareholder-proposed bylaw amendments, such as a super-majority voting requirement for adoption of amendments.[1063]

We considered the recent amendments to state corporation laws to enable a company to include in its governing documents a provision for reimbursement of a shareholder's proxy solicitation costs.[1064] We note, however, that poorly performing companies may be reluctant to include such a provision, forcing shareholders to undergo the potentially costly and time-consuming process of establishing such a provision themselves (for example, through a Rule 14a–8 shareholder proposal). Even if reimbursement arrangements were to exist at all public companies, we believe that the ability of shareholders to be reimbursed for their proxy solicitation costs may be less efficient in facilitating changes in the board or increasing board accountability or responsiveness because shareholders would still need funds to maintain an election contest.[1065] This may create a disparity among shareholders as shareholders with greater resources are able to take advantage of the right and conduct a proxy contest (with the knowledge they will be reimbursed) while those who lack such resources are unable to do so.

We also considered the trend towards adopting a majority voting standard in director elections, which gives shareholders a greater voice in director elections and the company's corporate governance. It is important to note, however, that a majority voting standard in director elections, while increasingly common, is not yet used by all companies.[1066] Further, commenters pointed out that even with a majority voting standard, some boards have disregarded the outcome of the elections by, for example, refusing to accept the resignations of directors who failed to receive a majority vote.[1067] Further, while a majority voting standard facilitates shareholders' ability to elect candidates put forth by a company's management, it does not facilitate shareholders' ability to exercise their right to nominate candidates for director.

We considered the growing effectiveness of "withhold" or "vote no" campaigns in director elections, particularly at companies with a majority voting standard for director elections. "Withhold" or "vote no" campaigns have long been available but appear only occasionally to have resulted in a change in composition of the board or senior management.[1068] By definition, however, such campaigns lack what Rule 14a–11 facilitates, namely a direct means to include shareholder-nominated candidates for election as directors, rather than merely express disapproval of incumbent directors.[1069]

We considered the effect of adoption of our notice and access model for electronic delivery of proxy materials, which reduces the printing and mailing costs for shareholders' proxy solicitations. As discussed above, the notice and access model, while reducing the printing and mailing costs, does not necessarily provide the same cost savings as Rule 14a–11.[1070] Further, a shareholder may find the use of the model to be unattractive for the reasons related to its strategy for the conduct of the election contest.[1071]

Lastly, one commenter pointed out that the market already provides multiple means of "management discipline."[1072] Shareholders could express their displeasure with current management by selling their securities

[1056] For example, Delaware recently amended the Delaware General Corporation Law to add new Section 112 clarifying that the bylaws of a Delaware corporation may provide that, if the corporation solicits proxies with respect to an election of directors, the corporation may be required to include in its solicitation materials one or more individuals nominated by a shareholder in addition to the individuals nominated by the board of directors. The obligation of the corporation to include such shareholder nominees will be subject to the procedures and conditions set forth in the bylaw adopted under Section 112. In addition, the American Bar Association's Committee on Corporate Laws has adopted similar changes to the Model Business Corporation Act. *See* American Bar Association, Section of Business Law, Committee on Corporate Laws Amendments to The Model Business Corporation Act Approved on Third Reading at the Committee's Meeting on December 12, 2009 (*available at http://www.abanet.org/media/docs/Amendments_to_MCBA_121709.pdf*).

[1057] *See* Sections II.B.2. and IV.D.2. above.

[1058] *See* letters from CalPERS; D. Nappier; P. Neuhauser; Pershing Square; Schulte Roth & Zabel.

[1059] *See* letter from TIAA–CREF. Further, based on its survey of its member companies, one commenter stated that a large majority—approximately two-thirds—would seek to opt out of Rule 14a–11, if possible. *See* letter from Society of Corporate Secretaries.

[1060] *See* letters from CalPERS; D. Nappier; P. Neuhauser.

[1061] *See* letter from CII.

[1062] *Id.*

[1063] *See* letter from CII (stating that, based on a November 2009 white paper commissioned by the CII and ShareOwners.org, many companies have supermajority voting requirements to amend the bylaws, thereby "making shareholder-proposed bylaw amendments nearly impossible to implement").

[1064] Delaware also added new Section 113 of the Delaware General Corporation Law, which allows a Delaware corporation's bylaws to include a provision that the corporation, under certain circumstances, will reimburse a shareholder for the expenses incurred in soliciting proxies in connection with an election of directors.

[1065] *See* letter from Florida State Board of Administration.

[1066] *See* letters from CalPERS (noting that the standard has "only been adopted by 294 companies in the S&P 500 and just 734 companies out of the 3,369 companies according to the Corporate Library Board Analyst database."); TIAA–CREF (noting that "[o]nly about half of S&P 500 companies and a small minority of Russell 3000 companies have adopted this reform.").

[1067] *See* letters from CalPERS; RiskMetrics; TIAA–CREF (noting that "[t]here are currently over 40 directors at U.S. companies who continue to serve without having received majority support."). *See also City of Westland Police & Fire Ret. Sys. v. Axcelis Technologies, Inc.*, 2009 Del. Ch. LEXIS 173 (September 28, 2009), aff'd, 2010 Del. LEXIS 382 (Del., August 11, 2010) (finding "no credible basis" to infer wrongdoing by directors who refused to accept resignations by other directors who failed to achieve the majority vote required by board policy).

[1068] *See* J.W. Verret, *Pandora's Ballot Box, Or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Re-Examined,* 62 Bus. Law. 1007, 1014 (2007) (reporting on one replacement of a board chairman following a withhold campaign resulting in a 43% withhold vote).

[1069] *See* letter from AFSCME.

[1070] *See* Section IV.D.1. above.

[1071] *Id.*

[1072] *See* letter from BRT (referring to the NERA Report).

in the company, board members could be replaced, and managers could be removed for wrongdoing. In addition, the commenter stated that the threat of takeover attempts that management faces and higher levels of board independence suggest the success of existing means of "management discipline."

While we are aware of these means of "management discipline," we believe the relevant issue is whether investors will benefit from our new rules. Shareholders' ability to express their displeasure with current management through the sale of securities may be limited if the market for the securities is illiquid or the shareholder is constrained by its policies to invest in all companies within a given index. Replacing board members or removing managers under the current regulatory scheme is expensive and often requires considerable time during which significant shareholder value may be lost. By providing a more efficient means for shareholders with a significant, long-term stake to nominate directors, the new rules will promote competition and enable shareholders to nominate and elect directors.

Commenters also argued that it was not necessary to make investment companies subject to the new rules because they are subject to a unique regulatory regime under the Investment Company Act that provides additional protection to investors, such as the requirement to obtain shareholder approval to engage in certain transactions or activities.[1073] However, we do not believe that the regulatory protections offered by the Investment Company Act (including requirements to obtain shareholder approval to engage in certain transactions and activities) serve to decrease the importance of the rights that are granted to shareholders under State law. In fact, the separate regulatory regime to which investment companies are subject emphasizes the importance of investment company directors in dealing with the conflicts of interest created by the external management structure of most investment companies.[1074]

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act.[1075] It relates to amendments to the rules and forms under the Exchange Act and the Investment Company Act that would, under certain limited circumstances, require companies to include in their proxy materials shareholder nominees for election as director. It also relates to the amendments to the rules that will prohibit companies from excluding shareholder proposals pursuant to Rule 14a–8(i)(8) that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. The amendments will require, under certain circumstances, a company's proxy materials to provide shareholders with information about, and the ability to vote for, a shareholder's, or group of shareholders', nominees for director. The amendments will facilitate the exercise of shareholders' traditional State law rights to nominate and elect directors to boards of directors and thereby enable shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest.

A. Need for the Amendments

As described in this release and the Proposing Release, the final rules include features from the proposals on this topic in 2003 and 2007, and reflect much of what we learned through the public comment that the Commission has received concerning this topic over the past seven years. The final rules are intended to facilitate shareholders' ability to participate more meaningfully in the nomination and election of directors, to promote the exercise of shareholders' traditional State law rights to nominate and elect directors, to open up communication between a company and its shareholders, and to provide shareholders with more information to make an informed voting decision by requiring disclosure about a nominating shareholder or group and its nominee or nominees. In particular, the final rules will enable long-term shareholders, or groups of long-term shareholders, with significant holdings to have their nominees for director included in company proxy materials. In addition, the amendment to Rule 14a–8(i)(8) will narrow the exclusion and will not permit companies to exclude, under Rule 14a–8(i)(8), shareholder proposals that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials.

The final rules are intended to achieve the stated objectives without unduly burdening companies. We sought to limit the cost and burden on companies by limiting Rule 14a–11 to nominations by shareholders who have maintained a significant continuous ownership interest in the company for at least three years at the time the notice of nomination is submitted, and by limiting the number of nominees a company is required to include in its proxy materials under Rule 14a–11. These aspects of the final rules will limit the number of nominees a company will be required to consider for inclusion in its proxy materials and thus will lower the cost to companies while facilitating the exercise of shareholders' traditional State law rights to nominate and elect directors to boards of directors, thereby enabling shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest. We believe the new rules will benefit shareholders by improving corporate suffrage, the disclosure provided in connection with proxy solicitations, and communication between shareholders through the proxy process.

The final rules include a phase-in period that delays the compliance date for Rule 14a–11 for smaller reporting companies, which include most small entities, for three years from the effective date of the rule for other companies.[1076] We believe the delayed compliance date will allow those companies to observe how the rule operates for other companies and may allow them to better prepare for the implementation of the rules. We also believe that delayed implementation for these companies will provide us with the opportunity to evaluate the implementation of Rule 14a–11 by larger companies and to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them.[1077] In addition, in

[1073] ABA; Barclays; ICI; IDC; T. Rowe Price; S&C; Vanguard.

[1074] *See* footnote 142 above.

[1075] 5 U.S.C. 601.

[1076] For purposes of this FRFA, we are required to consider the impact of our rules on small entities, including "small business." *See* footnote 1088 and the related discussion. The new rules will have a delayed effective date for smaller reporting companies as defined in Exchange Act Rule 12b–2. Whether a company is a small business is determined based on a company's assets while the determination of whether a company is a smaller reporting company is generally based on a company's public float. We expect that most small businesses that would be subject to the new rules also would qualify as smaller reporting companies.

[1077] As discussed in Section II.B.3. above, the recent Dodd-Frank Wall Street Reform and Consumer Protection Act provided the Commission with exemptive authority with respect to rules permitting the inclusion of shareholder director nominations in company proxy materials. In doing so, Congress noted that the Commission shall take into account whether any such requirement to permit inclusion of shareholder nominees for

an effort to limit the cost and burden on all companies subject to the rule, including smaller reporting companies, we have limited use of Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company, and we have extended the required holding period to at least three years at the time the notice of nomination is filed with the Commission and transmitted to the company. We expect that these eligibility requirements will help achieve the stated objective without unduly burdening any particular group of companies.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the Initial Regulatory Flexibility Act Analysis ("IRFA"), including the number of small entities that would be affected by the proposed rules, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed rules. We also considered, and sought comment on, excluding from operation of the rule smaller reporting companies either permanently or on a temporary basis through staggered compliance dates based on company size. We did not receive comments specifically addressing the IRFA. Several commenters, however, addressed aspects of the proposed rules that could potentially affect small entities.

In particular, many commenters stated generally that Rule 14a–11 should not apply to small businesses.[1078] Some commenters argued that the Proposal, if adopted, would hurt their larger corporate suppliers which would, in turn, increase their own costs of doing business.[1079] Two commenters recommended that Rule 14a–11 exclude companies that are not at least accelerated filers and be limited, at least initially, to large accelerated filers.[1080] These commenters expressed concern about the burden Rule 14a–11 would place on smaller companies, including difficulty in recruiting qualified directors and costs of conducting due diligence on shareholder nominees.[1081] One commenter noted that small investment companies, which may operate with thin profit margins, would be particularly affected by the Proposal and its attendant costs, including the loss of the benefits of a cluster or unitary board.[1082] By contrast, some commenters stated that Rule 14a–11 should apply to small businesses.[1083] At least one commenter argued that Rule 14a–11 would not impose a material burden on any company subject to the proxy rules because companies already have to distribute proxy cards and it would not be an imposition if they were required to add additional nominees to those cards.[1084] Another commenter argued that exempting small entities would be inconsistent with the stated goals of the Proposal and the costs and burden to such entities would be minimal.[1085]

We believe that exempting small companies, including small investment companies, from the new rules would not be appropriate because doing so would interfere with achieving the goal of facilitating shareholders' ability to participate more meaningfully in the nomination and election of directors, to promote the exercise of shareholders' rights to nominate and elect directors, to open up communication between a company and its shareholders and to provide shareholders with better information from which to make an informed voting decision. Some commenters noted that small companies are "just as likely" to have dysfunctional boards as their larger counterparts.[1086] Also, one commenter agreed that exempting small entities would be inconsistent with the stated goals of the Proposal and the costs and burdens to these entities would be minimal.[1087] However, we are cognizant of the fact that the new rules will increase the burden on all companies and therefore the potential burden on smaller reporting companies as defined in Rule 12b–2 under the Exchange Act. To address concerns about the potential impact on smaller reporting companies, the final rule delays the compliance date for Rule 14a–11 for smaller reporting companies for a period of three years from the effective date of the rule for other companies so that smaller reporting companies can observe how the rule operates and allow them to better prepare for the implementation of the rules. We also believe that delayed implementation for these companies will allow us to evaluate the implementation of Rule 14a–11 by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them. In addition, in an effort to limit the cost and burden on all companies subject to the rule, including smaller reporting companies, we have limited use of Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company, and we have extended the required holding period to at least three years at the time the notice of nomination is filed with the Commission and transmitted to the company. We expect that these eligibility requirements will help achieve the stated objective without unduly burdening any particular group of companies.

C. Small Entities Subject to the Rules

The final rules will affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction." [1088] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule

director in company proxy materials would disproportionately burden small issuers.

[1078] *See* letters from ABA; American Mailing; All Cast; Always N Bloom; American Carpets; J. Arquilla; B. Armburst; Artistic Land Designs; C. Atkins; Book Celler; K. Bostwick; Brighter Day Painting; Colletti; Commercial Concepts; Complete Home Inspection; D. Courtney; S. Crawford; Crespin; Don's; T. Ebreo; M. Eng; eWareness; Evans; Fluharty; Flutterby; Fortuna Italian Restaurant; Future Form; Glaspell; C. Gregory; Healthcare Practice; B. Henderson; S. Henning; J. Herren; A. Iriarte; J. Jones; Juz Kidz; Kernan; LMS Wine; T. Luna; Mansfield Children's Center; D. McDonald; Meister; Merchants Terminal; Middendorf; Mingo; Moore Brothers; Mouton; D. Mozack; Ms. Dee; G. Napolitano; NK; H. Olson; PESC; Pioneer Heating & Air Conditioning; RC; RTW; D. Sapp; SBB; SGIA; P. Sicilia; Slycers Sandwich Shop; Southern Services; Steele Group; Sylvron; Theragenics; E. Tremaine; Wagner; Wagner Industries; Wellness; West End; Y.M.; J. Young.

[1079] *See* letters from Always N Bloom; Brighter Day Painting; Caswells; Complete Home Inspection; Darrell's Automotive; Data Forms; Fluharty; E. Garcia; S. Henning; T. Luna; Magnolia; American Mailing; H. Olson; T. Roper; Solar Systems; E. Sprenkle; Steele Group; R. Trummel; T. Trummel; V. Trummel; Wagner; T. White.

[1080] *See* letters from ABA; Theragenics.

[1081] In this regard, one commenter suggested that our estimate of the burden to companies of evaluating a shareholder nominee's background to determine eligibility, investigation and verification of information provided by the nominee, research into the nominee's background, analysis of the relative merits of the shareholder nominee as compared to management's own nominee, meetings of the relevant board committees, and analysis of whether a nomination would conflict with any Federal or State law, or director qualification standards was too low. This commenter estimated that the burden hours associated with the above actions would be 99 hours of company personnel time. *See* letter from S&C (citing results of a survey conducted by BRT). For a discussion of burden estimates, *see* Section III. above.

[1082] *See* letter from ICI.

[1083] *See* letters from AFSCME; CII; D. Nappier.

[1084] *See* letter from USPE.

[1085] *See* letter from CII.

[1086] *See* letters from AFSCME; D. Nappier.

[1087] *See* letter from CII.

[1088] 5 U.S.C. 601(6).

157 [1089] and Exchange Act Rule 0–10(a) [1090] define a company, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,209 issuers that may be considered small entities.[1091]

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[1092] We estimate that approximately 168 registered investment companies and 33 business development companies meet this definition. The new rules may affect each of the approximately 201 issuers that may be considered small entities, to the extent companies and shareholders take advantage of the rules.

D. Reporting, Recordkeeping and Other Compliance Requirements

The final rules are designed to require, under certain circumstances, Exchange Act reporting companies (other than debt-only companies and companies whose applicable state or foreign law provisions or governing documents prohibit shareholder nominations) subject to the Federal proxy rules, including small entities, to include shareholder nominees for director in the company's proxy materials. Nominating shareholders or groups, including nominating shareholders that are small entities, will be required to meet certain eligibility requirements and to provide disclosure in Schedule 14N about the nominating shareholders and the nominee, and companies will be required to include the disclosure provided by the nominating shareholder or group in the company's proxy materials.

The final rules also will enable shareholders to include proposals in the company's proxy materials that seek to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. A nominating shareholder or group, including a nominating shareholder or group that is a small entity, using an applicable state or foreign law provision or a provision in the company's governing documents to submit a nomination for director to be included in a company's proxy materials will be required to provide disclosure in new Schedule 14N about the nominating shareholder or group and the nominee. Companies also will be required to include disclosure about the nominating shareholder or group and the nominee in the company's proxy materials when a shareholder submits a nomination for director for inclusion in the company's proxy materials pursuant to an applicable state or foreign law provision or a company's governing documents.

We have no reason to expect that the amendment to Rule 14a–8(i)(8) will substantially increase the number of shareholder proposals to smaller companies and likely will have little impact on small entities. With respect to Rule 14a–11, there is some data indicating that smaller companies are subject to more proxy contests as a group than larger companies,[1093] but the data do not demonstrate that the frequency is disproportionately larger at smaller companies relative to other companies. In addition, we did not receive data substantiating a disproportionate impact on smaller companies.

With respect to investment companies, we assume that small investment companies, which may operate with thin profit margins, would be particularly affected by the rules and the attendant costs, including the loss of the benefits of a cluster or unitary board.[1094] However, the costs resulting from the loss of the benefits of a cluster or unitary board are costs associated with the traditional State law rights to nominate and elect directors, and are not costs incurred for including shareholder nominees in the company's proxy materials. We also note that any increased costs and decreased efficiency of an investment company's board as a result of the fund complex no longer having a unitary or cluster board would occur, if at all, only in the event that investment company shareholders elect the shareholder nominee. Investment companies may include information in the proxy materials making investors aware of the company's views on the perceived benefits of a unitary or cluster board and the potential for increased costs and decreased efficiency if the shareholder nominees are elected.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the new rules, we considered the following alternatives:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- The clarification, consolidation or simplification of the rule's compliance and reporting requirements for small entities;
- The use of performance rather than design standards; and
- An exemption for small entities from coverage under the proposals.

As noted in the Proposing Release, the Commission has considered a variety of reforms to achieve its regulatory objectives while minimizing the impact on small entities. As one possible approach, we considered in 2003 requiring companies to include shareholder nominees for director in a company's proxy materials only upon the occurrence of certain events so that the rule would apply only in situations where there was a demonstrated failure in the proxy process related to director nominations and elections. We sought comment in the Proposing Release on this approach, with commenters arguing both for [1095] and against [1096] the approach. We have not taken this approach in the final rules because we do not believe it is appropriate to limit the rule to companies where specified events have occurred. Moreover, we are not aware of data suggesting that such specified events are less likely to occur at smaller companies than at larger companies.

We considered changes to Rule 14a–8(i)(8) in 2007 that would enable shareholders to have their proposals for bylaw amendments regarding the

[1089] 17 CFR 230.157.

[1090] 17 CFR 240.0–10(a).

[1091] The estimated number of reporting small entities is based on 2009 data, including the Commission's EDGAR database and Standard & Poor's.

[1092] 17 CFR 270.0–10(a).

[1093] *See, e.g.,* Bebchuk (2007).

[1094] *See* letter from ICI.

[1095] *See* letters from ADP; Alaska Air; Allstate; American Electric Power; Anadarko; AT&T; Avis Budget; Barclays; Biogen; Boeing; BRT; Burlington Northern; R. Burt; Callaway; Chevron; CIGNA; CNH Global; Comcast; Cummins; Deere; Eaton; ExxonMobil; FedEx; FMC Corp.; FPL Group; Frontier; General Mills; C. Holliday; IBM; ITT; J. Kilts; E.J. Kullman; N. Lautenbach; McDonald's; J. Miller; Motorola; Office Depot; O'Melveny & Myers; P&G; PepsiCo; Pfizer; Protective; Ryder; Sara Lee; Sherwin Williams; Theragenics; TI; TW Telecom; G. Tooker; UnitedHealth; Xerox.

[1096] *See* letters from ABA; AFSCME; CalSTRS; CFA Institute; CII; COPERA; T. DiNapoli; Florida State Board of Administration; ICGN; N. Lautenbach; LIUNA; D. Nappier; Nathan Cummings Foundation; OPERS; Pax World; Relational; Sodali; SWIB; TIAA–CREF; G. Tooker; USPE; ValueAct Capital.

procedures for nominating directors included in the company's proxy materials provided the shareholder submitting the proposal made certain disclosures and beneficially owned more than 5% of the company's shares. Although this approach could potentially reduce the number of shareholder proposals submitted to smaller entities by establishing a minimum threshold for having such proposals included in the company's proxy statement, we have not taken this approach because, as noted above, we do not expect the final rule to substantially increase the number of shareholder proposals to smaller companies. In addition, we have not relied exclusively on an amendment to Rule 14a–8(i)(8) to achieve our regulatory goals because we seek to provide shareholders with a more immediate and direct means of effecting change in the boards of directors of the companies in which they invest. For these reasons, as well as the reasons discussed throughout the release, we believe that these final rules may better achieve the Commission's objectives.

We also sought comment on whether the proposed tiered approach—under which shareholders or shareholder groups at larger companies would have to satisfy a lower ownership threshold than shareholders or shareholder groups at smaller companies in order to rely on Rule 14a–11—is appropriate and workable. We considered whether the effect of the tiered approach may make it less likely that shareholders at smaller companies will nominate directors under Rule 14a–11, but determined not to adopt this approach because the data available to us did not indicate a meaningful difference between small entities and entities generally in regard to concentration of long-term share ownership.[1097]

We considered whether a delayed compliance date for Rule 14a–11 for smaller reporting companies, which would include most small entities, would reduce the burden on these entities. After considering the comments discussed above, we have determined to delay the compliance date of Rule 14a–11 for smaller reporting companies for a period of three years from the effective date for other companies. We believe that a delayed compliance date for smaller reporting companies will allow those companies to observe how Rule 14a–11 operates for other companies and may allow them to better prepare for the implementation of the rules and, as noted, will give us a further opportunity to consider adjustments for smaller reporting companies. In addition, in an effort to limit the cost and burden on all companies subject to the rule, including smaller reporting companies, we have limited use of Rule 14a–11 to nominations by shareholders who have maintained significant continuous holdings in the company, and we have extended the required holding period to at least three years at the time the notice of nomination is filed with the Commission and transmitted to the company. We expect that these eligibility requirements will help achieve the stated objective without unduly burdening any particular group of companies.

We are not adopting different disclosure standards based on the size of the issuer. We believe uniform disclosure will be helpful to voting decisions on shareholder-nominated directors at companies of all sizes. Because we are delaying the compliance date of Rule 14a–11 for smaller reporting companies, we believe this will allow them additional time to prepare to comply with the new rule and observe the rule's impact on larger companies, which should allow smaller reporting companies to be able to comply with the same disclosure standards when the rule becomes applicable to them.

We considered the use of performance standards rather than design standards in the final rules. The final rule contains both performance standards and design standards. We proposed design standards to the extent that we believe compliance with particular requirements are necessary. However, to the extent possible, our rules impose performance standards. For example, under Rule 14a–11, a nominating shareholder or group can provide a 500-word statement of support concerning each of its nominee or nominees for director, but we do not specify the content. Similarly, shareholders can submit a proposal that seeks to establish a procedure under a company's governing documents for the inclusion of one or more shareholder director nominees in the company's proxy materials. By allowing shareholders to submit such proposals, we seek to provide shareholders and companies with a measure of flexibility to tailor the means through which they can comply with the standards. Even though Rule 14a–11 provides a procedure from which companies may not opt out, companies and shareholders are not prohibited from adopting nominating procedures that could further facilitate shareholders' ability to include their own director nominees in company proxy materials. Amended Rule 14a–8(i)(8) facilitates this process. In that respect, the rules provide both design and performance standards, as appropriate.

Lastly, as discussed above, we believe that the final rules should apply regardless of company size, as was proposed.[1098] The purpose of the rules is to facilitate the exercise of shareholders' traditional State law rights to nominate and elect directors to company boards of directors and thereby enable shareholders to participate more meaningfully in the nomination and election of directors at the companies in which they invest. We believe that shareholders of smaller reporting companies should be able to exercise these rights to the same extent as shareholders of larger reporting companies. Therefore, we are not persuaded that exempting smaller reporting companies from the final rules would be consistent with this goal.

Nonetheless, as discussed above, we recognize that smaller reporting companies may have had less experience with existing forms of shareholder involvement in the proxy process and may have less-developed infrastructures for managing these matters. The final rules therefore include a phase-in period that delays the compliance date of Rule 14a–11 for smaller reporting companies for three years from the effective date of the rule.

VII. Statutory Authority and Text of the Amendments

The amendments are made pursuant to Sections 3(b), 13, 14, 15, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, Sections 10, 20(a) and 38 of the Investment Company Act of 1940, as amended, and Sections 971(a) and (b) of the Dodd-Frank Act.

List of Subjects

17 CFR Parts 200

Freedom of information, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 232, 240, and 249

Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, the Securities and Exchange Commission is amending Title 17, chapter II of the Code of Federal Regulations as follows:

[1097] For further discussion, *see* Section II.B.4. above.

[1098] *See* Section II.B.3.f. above.

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart D—Information and Requests

■ 1. The authority citation for Part 200, Subpart D, continues to read, in part, as follows:

Authority: 5 U.S.C. 552, as amended, 15 U.S.C. 77f(d), 77s, 77ggg(a), 77sss, 78m(F)(3), 78w, 80a–37, 80a–44(a), 80a–44(b), 80b–10(a), and 80b–11.

* * * * *

■ 2. Add § 200.82a to read as follows:

§ 200.82a Public availability of materials filed pursuant to § 240.14a–11(g) and related materials.

Materials filed with the Commission pursuant to Rule 14a–11(g) under the Securities Exchange Act of 1934 (17 CFR 240.14a–11(g)), written communications related thereto received from interested persons, and each related no-action letter or other written communication issued by the staff of the Commission, shall be made available to any person upon request for inspection or copying.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 3. The authority citation for Part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.;* and 18 U.S.C. 1350.

* * * * *

■ 4. Amend § 232.13 by revising paragraph (a)(4) (the note remains unchanged) to read as follows:

§ 232.13 Date of filing; adjustment of filing date.

(a) * * *

(4) Notwithstanding paragraph (a)(2) of this section, a Form 3, 4 or 5 (§§ 249.103, 249.104, and 249.105 of this chapter) or a Schedule 14N (§ 240.14n–101 of this chapter) submitted by direct transmission on or before 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, shall be deemed filed on the same business day.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 5. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, *80b*–3, 80b–4, 80b–11, and 7201, *et seq.;* and 18 U.S.C. 1350 and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

■ 6. Amend § 240.13a–11 by revising paragraph (b) to read as follows:

§ 240.13a–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.13a–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter;

(2) Disclosure pursuant to Instruction 2 to § 240.14a–11(b)(1) of information concerning outstanding shares and voting; or

(3) Disclosure pursuant to Instruction 2 to § 240.14a–11(b)(10) of the date by which a nominating shareholder or nominating shareholder group must submit the notice required pursuant to § 240.14a–11(b)(10).

* * * * *

■ 7. Amend § 240.13d–1 by revising paragraphs (b)(1)(i) and (c)(1) and adding Instruction 1 to paragraph (b)(1) to read as follows:

§ 240.13d–1 Filing of Schedules 13D and 13G.

* * * * *

(b)(1) * * *

(i) Such person has acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d–3(b), other than activities solely in connection with a nomination under § 240.14a–11; and

* * * * *

Instruction 1 to paragraph (b)(1). For purposes of paragraph (b)(1)(i) of this section, the exception for activities solely in connection with a nomination under § 240.14a–11 will not be available after the election of directors.

* * * * *

(c) * * *

(1) Has not acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to § 240.13d–3(b), other than activities solely in connection with a nomination under § 240.14a–11;

* * * * *

Instruction 1 to paragraph (c)(1). For purposes of paragraph (c)(1) of this section, the exception for activities solely in connection with a nomination under § 240.14a–11 will not be available after the election of directors.

* * * * *

■ 8. Amend § 240.13d–102 by revising the sentences following the introductory text in Items 10(a) and (c) as follows:

§ 240.13d–102 Schedule 13G—Information to be included in statements filed pursuant to § 240.13d–1(b), (c), and (d) and amendments thereto filed pursuant to § 240.13d–2.

* * * * *

Item 10. Certifications

(a) * * *

By signing below I certify that, to the best of my knowledge and belief, the securities referred to above were acquired and are held in the ordinary course of business and were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect, other than activities solely in connection with a nomination under § 240.14a–11.

* * * * *

(c) * * *

By signing below I certify that, to the best of my knowledge and belief, the securities referred to above were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect, other than activities solely in connection with a nomination under § 240.14a–11.

* * * * *

■ 9. Amend § 240.14a–2 by:

■ a. Revising paragraph (b) introductory text; and

■ b. Adding paragraphs (b)(7) and (b)(8).

The revision and additions read as follows:

§ 240.14a–2 Solicitations to which § 240.14a–3 to § 240.14a–15 apply.

* * * * *

(b) Sections 240.14a–3 to 240.14a–6 (other than paragraphs 14a–6(g) and

14a–6(p)), § 240.14a–8, § 240.14a–10, and §§ 240.14a–12 to 240.14a–15 do not apply to the following:

* * * * *

(7) Any solicitation by or on behalf of any shareholder in connection with the formation of a nominating shareholder group pursuant to § 240.14a–11, provided that:

(i) The soliciting shareholder is not holding the registrant's securities with the purpose, or with the effect, of changing control of the registrant or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under § 240.14a–11(d);

(ii) Each written communication includes no more than:

(A) A statement of each soliciting shareholder's intent to form a nominating shareholder group in order to nominate one or more directors under § 240.14a–11;

(B) Identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;

(C) The percentage of voting power of the registrant's securities that are entitled to be voted on the election of directors that each soliciting shareholder holds or the aggregate percentage held by any group to which the shareholder belongs; and

(D) The means by which shareholders may contact the soliciting party.

(iii) Any written soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the shareholder with the Commission, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), under the registrant's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14N (§ 240.14n–101) and the appropriate box on the cover page must be marked.

(iv) In the case of an oral solicitation made in accordance with the terms of this section, the nominating shareholder must file a cover page in the form set forth in Schedule 14N (§ 240.14n–101), with the appropriate box on the cover page marked, under the registrant's Exchange Act file number (or in the case of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), under the registrant's Investment Company Act file number), no later than the date of the first such communication.

Instruction to paragraph (b)(7). The exemption provided in paragraph (b)(7) of this section shall not apply to a shareholder that subsequently engages in soliciting or other nominating activities outside the scope of § 240.14a–2(b)(8) and § 240.14a–11 in connection with the subject election of directors or is or becomes a member of any other group, as determined under section 13(d)(3) of the Act (15 U.S.C. 78m(d)(3) and § 240.13d–5(b)), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors.

(8) Any solicitation by or on behalf of a nominating shareholder or nominating shareholder group in support of its nominee that is included or that will be included on the registrant's form of proxy in accordance with § 240.14a–11 or for or against the registrant's nominee or nominees, provided that:

(i) The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization;

(ii) Any written communication includes:

(A) The identity of each nominating shareholder and a description of his or her direct or indirect interests, by security holdings or otherwise;

(B) A prominent legend in clear, plain language advising shareholders that a shareholder nominee is or will be included in the registrant's proxy statement and that they should read the registrant's proxy statement when available because it includes important information (or, if the registrant's proxy statement is publicly available, advising shareholders of that fact and encouraging shareholders to read the registrant's proxy statement because it includes important information). The legend also must explain to shareholders that they can find the registrant's proxy statement, other soliciting material, and any other relevant documents at no charge on the Commission's Web site; and

(iii) Any written soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the nominating shareholder or nominating shareholder group with the Commission, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), under the registrant's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14N (§ 240.14n–101) and the appropriate box on the cover page must be marked.

Instruction 1 to paragraph (b)(8). A nominating shareholder or nominating shareholder group may rely on the exemption provided in paragraph (b)(8) of this section only after receiving notice from the registrant in accordance with § 240.14a–11(g)(1) or § 240.14a–11(g)(3)(iv) that the registrant will include the nominating shareholder's or nominating shareholder group's nominee or nominees in its form of proxy.

Instruction 2 to paragraph (b)(8). Any solicitation by or on behalf of a nominating shareholder or nominating shareholder group in support of its nominee included or to be included on the registrant's form of proxy in accordance with § 240.14a–11 or for or against the registrant's nominee or nominees must be made in reliance on the exemption provided in paragraph (b)(8) of this section and not on any other exemption.

Instruction 3 to paragraph (b)(8). The exemption provided in paragraph (b)(8) of this section shall not apply to a person that subsequently engages in soliciting or other nominating activities outside the scope of § 240.14a–11 in connection with the subject election of directors or is or becomes a member of any other group, as determined under section 13(d)(3) of the Act (15 U.S.C. 78m(d)(3) and § 240.13d–5(b)), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors.

* * * * *

■ 10. Amend § 240.14a–4 by:

■ a. Revising the first sentence of paragraph (b)(2) introductory text; and

■ b. Adding a sentence to the end paragraph (b)(2) concluding text.

The revision and addition read as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(b) * * *

(2) A form of proxy that provides for the election of directors shall set forth the names of persons nominated for election as directors, including any person whose nomination by a shareholder or shareholder group satisfies the requirements of § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials. * * *

* * * Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

* * * * *

■ 11. Amend § 240.14a–5 by:

■ a. Revising paragraph (e)(1) to remove "and" at the end of the paragraph;

■ b. Revising paragraph (e)(2) to remove the period at the end of the paragraph and add in its place "; and"; and

■ c. Adding paragraph (e)(3) to read as follows:

§ 240.14a–5 Presentation of information in proxy statement.

* * * * *

(e) * * *

(3) The deadline for submitting nominees for inclusion in the registrant's proxy statement and form of proxy pursuant to § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials for the registrant's next annual meeting of shareholders.

* * * * *

■ 12. Amend § 240.14a–6 by:

a. Redesignating paragraphs (a)(4), (a)(5), (a)(6), and (a)(7) as paragraphs (a)(5), (a)(6), (a)(7), and (a)(8) respectively;

■ b. Adding new paragraph (a)(4);

■ c. Adding a sentence at the end of Note 3 to paragraph (a); and

■ d. Adding paragraph (p).

The revisions and additions read as follows:

§ 240.14a–6 Filing requirements.

(a) * * *

(4) A shareholder nominee for director included pursuant to § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

* * * * *

Note 3. * * * The inclusion of a shareholder nominee in the registrant's proxy materials pursuant to § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials does not constitute a "solicitation in opposition" for purposes of Rule 14a–6(a) (§ 240.14a–6(a)), even if the registrant opposes the shareholder nominee and solicits against the shareholder nominee and in favor of a registrant nominee.

* * * * *

(p) *Solicitations subject to § 240.14a–11.* Any soliciting material that is published, sent or given to shareholders in connection with § 240.14a–2(b)(7) or (b)(8) must be filed with the Commission as specified in that section.

■ 13. Amend § 240.14a–8 by revising paragraph (i)(8) as follows:

§ 240.14a–8 Shareholder proposals.

* * * * *

(i) * * *

(8) *Director elections:* If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or

(v) Otherwise could affect the outcome of the upcoming election of directors.

* * * * *

■ 14. Amend § 240.14a–9 by adding a paragraph (c), removing the authority citation following the section, and redesignating notes (a), (b), (c), and (d) as a., b., c., and d.

The addition reads as follows:

§ 240.14a–9 False or misleading statements.

* * * * *

(c) No nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the Federal proxy rules, an applicable state or foreign law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in a registrant's proxy materials, include in a notice on Schedule 14N (§ 240.14n–101), or include in any other related communication, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to a solicitation for the same meeting or subject matter which has become false or misleading.

* * * * *

■ 15. Add § 240.14a–11 to read as follows:

§ 240.14a–11 Shareholder nominations.

(a) *Applicability.* In connection with an annual (or a special meeting in lieu of an annual) meeting of shareholders, or a written consent in lieu of such meeting, at which directors are elected, a registrant will be required to include in its proxy statement and form of proxy the name of a person or persons nominated by a shareholder or group of shareholders for election to the board of directors and include in its proxy statement the disclosure about such nominee or nominees and the nominating shareholder or members of the nominating shareholder group as specified in Item 5 of Schedule 14N (§ 240.14n–101), provided that the conditions set forth in paragraph (b) of this section are satisfied. This rule will not apply to a registrant if:

(1) The registrant is subject to the proxy rules solely because it has a class of debt securities registered under section 12 of the Exchange Act (15 U.S.C. 78*l*); or

(2) Applicable state or foreign law or a registrant's governing documents prohibit the registrant's shareholders from nominating a candidate or candidates for election as director.

(b) *Eligibility.* A shareholder nominee or nominees shall be included in a registrant's proxy statement and form of proxy if the following requirements are satisfied:

(1) The nominating shareholder individually, or the nominating shareholder group in the aggregate, holds at least 3% of the total voting power of the registrant's securities that are entitled to be voted on the election of directors at the annual (or a special

meeting in lieu of the annual) meeting of shareholders or on a written consent in lieu of such meeting, on the date the nominating shareholder or nominating shareholder group files the notice on Schedule 14N (§ 240.14n–101) with the Commission and transmits the notice to the registrant;

Instruction 1 to paragraph (b)(1). In the case of a registrant other than an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), for purposes of (b)(1) of this section, in determining the total voting power of the registrant's securities that are entitled to be voted on the election of directors, the nominating shareholder or nominating shareholder group may rely on information set forth in the registrant's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to this Act, unless the nominating shareholder or nominating shareholder group knows or has reason to know that the information contained therein is inaccurate. In the case of a registrant that is an investment company registered under the Investment Company Act of 1940, for purposes of (b)(1) of this section, in determining the total voting power of the registrant's securities that are entitled to be voted on the election of directors, the nominating shareholder or nominating shareholder group may rely on information set forth in the following documents, unless the nominating shareholder or nominating shareholder group knows or has reason to know that the information contained therein is inaccurate:

a. In the case of a registrant that is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (§ 270.18f–2(a) of this chapter), the Form 8–K (§ 249.308 of this chapter) described in Instruction 2 to paragraph (b)(1) of this section; or

b. In the case of other investment companies, the registrant's most recent annual or semi-annual report filed with the Commission on Form N–CSR (§ 249.331 and § 274.128 of this chapter).

Instruction 2 to paragraph (b)(1). If the registrant is an investment company that is a series company (as defined in § 270.18f–2(a) of this chapter), the registrant must disclose pursuant to Item 5.08 of Form 8–K (§ 249.308 of this chapter) the total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) on the election of directors as of the end of the most recent calendar quarter.

Instruction 3 to paragraph (b)(1).

a. When determining the total voting power of the registrant's securities, which is the denominator in the calculation of the percentage of voting power held by the nominating shareholder individually or the nominating shareholder group in the aggregate, calculate the aggregate number of votes derived from all classes of securities of the registrant that are entitled to vote on the election of directors regardless of whether solicitation of a proxy with respect to those securities would require compliance with Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*).

b. When determining the total voting power of the registrant's securities held by the nominating shareholder or any member of the nominating shareholder group, which is the numerator in the calculation of the percentage:

1. Calculate the number of votes derived only from securities with respect to which solicitation of a proxy would require compliance with Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*) and over which the nominating shareholder or any member of the nominating shareholder group, as the case may be, has voting power and investment power, either directly or through any person acting on their behalf;

2. Notwithstanding the voting power calculation specified in paragraph b.1. of this instruction, add to the result of the calculation specified in paragraph b.1. of this instruction any votes attributable to securities with respect to which solicitation of a proxy would require compliance with Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*) that have been loaned by or on behalf of the nominating shareholder or any member of the nominating shareholder group to another person, if the nominating shareholder or member of the nominating shareholder group, as the case may be, or any person acting on their behalf, has the right to recall the loaned securities, and will recall the loaned securities upon being notified that any of the nominating shareholder's or group's nominees will be included in the registrant's proxy statement and proxy card; and

3. Subtract from the result of the calculation specified in paragraphs b.1. and b.2. of this instruction the number of votes attributable to securities of the registrant entitled to vote on the election of directors, regardless of whether solicitation of a proxy with respect to those securities would require compliance Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*), that the nominating shareholder or any member of the nominating shareholder group, as the case may be, or any person acting on their behalf, has sold in a short sale, as defined in 17 CFR 242.200(a), that is not closed out, or has borrowed for purposes other than a short sale.

c. For purposes of the voting power calculation in paragraph b.1. of this instruction:

1. A shareholder has voting power directly only when the shareholder has the power to vote or direct the voting, and investment power directly only when the shareholder has the power to dispose or direct the disposition, of the securities; and

2. A securities intermediary (as defined in § 240.17Ad–20(b)) shall not have voting power or investment power over securities for purposes of paragraph b.1. of this instruction solely because such intermediary holds such securities by or on behalf of another person, notwithstanding that pursuant to the rules of a national securities exchange such intermediary may vote or direct the voting of such securities without instruction.

Instruction 4 to paragraph (b)(1). If a registrant has more than one class of outstanding securities entitled to vote on the election of directors and those classes do not vote together in the election of all directors, then the voting power of the registrant's securities for purposes of the calculation of both the numerator and denominator specified in Instruction 3 to paragraph (b)(1) should be determined only on the basis of the voting power of the class or classes of securities that would be voting together on the election of the person or persons sought to be nominated by the nominating shareholder or the nominating shareholder group.

(2) The nominating shareholder or each member of the nominating shareholder group has held the amount of securities that are used for purposes of satisfying the minimum ownership requirement of paragraph (b)(1) of this section continuously for at least three years as of the date the notice on Schedule 14N (§ 240.14n–101) is filed with the Commission and transmitted to the registrant and must continue to hold that amount of securities through the date of the subject election of directors;

Instruction to paragraph (b)(2). To determine whether the amount of securities that are used for purposes of satisfying the minimum ownership requirement of paragraph (b)(1) has been held continuously during the three year period prior to the date the Schedule 14N (§ 240.14n–101) is filed and during the period after the Schedule 14N is filed through the date of the subject election of directors, and with respect to all points in time during those periods:

a. Include only the amount of securities with respect to which a solicitation of a proxy would require compliance with Exchange Act Regulation 14A (§ 240.14a–1 *et seq.*) and over which the nominating shareholder or the member of the nominating shareholder group, as the case may be, has voting power and investment power, either directly or through any person acting on their behalf;

b. Notwithstanding the voting power determination specified in paragraph a. of this instruction, include the amount of securities that have been loaned by or on behalf of the nominating shareholder or any member of the nominating shareholder group to another person, if the nominating shareholder or member of the nominating shareholder group, as the case may be, or any person acting on their behalf:

1. Has the right to recall the loaned securities; and

2. With respect to the period from the date the Schedule 14N (§ 240.14n–01) is filed through the date of the subject election of directors, will recall the loaned securities upon being notified that any of the person's nominees will be included in the registrant's proxy statement and proxy card;

c. Reduce the amount of securities held by the amount of securities, on a class basis, that the nominating shareholder or any member of the nominating shareholder group, as the case may be, or any person acting on their

behalf, sold in a short sale, as defined in 17 CFR 242.200(a), during the periods, or borrowed for purposes other than a short sale; and

d. Adjust the amount of securities held to give effect to any changes in the amount of securities during the periods resulting from stock splits, reclassifications or other similar adjustments by the registrant.

(3) The nominating shareholder or each member of the nominating shareholder group provides proof of ownership of the amount of securities that are used for purposes of satisfying the ownership and holding period requirements of paragraphs (b)(1) and (b)(2) of this section. If the nominating shareholder or each member of the nominating shareholder group is not the registered holder of the securities, the nominating shareholder or each member of the nominating shareholder group must provide proof of ownership in the form of one or more written statements from the registered holder of the nominating shareholder's securities (or the brokers or banks through which those securities are held) verifying that, as of a date within seven calendar days prior to filing the notice on Schedule 14N (§ 240.14n–101) with the Commission and transmitting the notice to the registrant, the nominating shareholder or each member of the nominating shareholder group, continuously held the amount of securities being used to satisfy the ownership threshold for a period of at least three years. The written statement or statements proving ownership must be attached as an appendix to Schedule 14N on the date the notice is filed with the Commission and transmitted to the registrant, and provide the information specified in Item 4 of Schedule 14N. In the alternative, if the nominating shareholder or member of the nominating shareholder group has filed a Schedule 13D (§ 240.13d–101), Schedule 13G (§ 240.13d–102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter), and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents, reflecting ownership of the securities as of or before the date on which the three-year eligibility period begins, the nominating shareholder or member of the nominating shareholder group may attach the filing as an appendix to the Schedule 14N or incorporate the filing by reference into the Schedule 14N;

Instruction to paragraph (b)(3). If the nominating shareholder or member of the nominating shareholder group must provide proof of ownership in the form of a written statement with respect to securities held through a broker or bank that is a participant in the Depository Trust Company or other clearing agency acting as a securities depository, then a statement from such broker or bank will satisfy the requirements of paragraph (b)(3) of this section. If the securities are held through a broker or bank (*e.g.,* in an omnibus account) that is not a participant in a clearing agency acting as a securities depository, the nominating shareholder or member of the nominating shareholder group must also obtain and submit a separate written statement specified in the Instruction to Item 4 of Schedule 14N (§ 240.14n–101).

(4) The nominating shareholder or each member of the nominating shareholder group provides a statement, as specified in Item 4(b) of Schedule 14N (§ 240.14n–101), on the date the notice on Schedule 14N is filed with the Commission and transmitted to the registrant, that the nominating shareholder or each member of the nominating shareholder group intends to continue to hold the amount of securities that are used for purposes of satisfying the minimum ownership requirement of paragraph (b)(1) of this section through the date of the meeting;

(5) The nominating shareholder or each member of the nominating shareholder group provides a statement, as specified in Item 4(b) of Schedule 14N (§ 240.14n–101), on the date the notice on Schedule 14N is filed with the Commission and transmitted to the registrant, regarding the nominating shareholder's or group's intent with respect to continued ownership of the registrant's securities after the election;

(6) The nominating shareholder (or where there is a nominating shareholder group, each member of the nominating shareholder group) is not holding any of the registrant's securities with the purpose, or with the effect, of changing control of the registrant or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under paragraph (d) of this section;

(7) Neither the nominee nor the nominating shareholder (or where there is a nominating shareholder group, any member of the nominating shareholder group) has an agreement with the registrant regarding the nomination of the nominee;

Instruction to paragraph (b)(7). Negotiations between the nominee, the nominating shareholder or nominating shareholder group and the nominating committee or board of the registrant to have the nominee included in the registrant's proxy statement and form of proxy as a registrant nominee, where those negotiations are unsuccessful, or negotiations that are limited to whether the registrant is required to include the shareholder nominee in the registrant's proxy statement and form of proxy in accordance with this section, will not represent a direct or indirect agreement with the registrant.

(8) The nominee's candidacy or, if elected, board membership would not violate controlling Federal law, State law, foreign law, or rules of a national securities exchange or national securities association (other than rules regarding director independence) or, in the case that the nominee's candidacy or, if elected, board membership would violate such laws or rules, such violation could not be cured by the time provided in paragraph (g)(2) of this section;

(9) In the case of a registrant other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the registrant, if any, or, in the case of a registrant that is an investment company, the nominee is not an "interested person" of the registrant as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19));

Instruction to paragraph (b)(9). For purposes of this provision, the nominee would be required to meet the definition of "independence" that is generally applicable to directors of the registrant and not any particular definition of independence applicable to members of the audit committee of the registrant's board of directors. To the extent a national securities exchange or national securities association rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), the nominee would not be required to meet the subjective determination of independence as part of the shareholder nomination process.

(10) The nominating shareholder or nominating shareholder group provides notice to the registrant on Schedule 14N (§ 240.14n–101), as specified by § 240.14n–1, of its intent to require that the registrant include that shareholder's or group's nominee in the registrant's proxy statement and form of proxy. This notice must be transmitted to the registrant on the date it is filed with the Commission. The notice must be filed with the Commission and transmitted to the registrant no earlier than 150 calendar days, and no later than 120 calendar days, before the anniversary of the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual

meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, or if the registrant is holding a special meeting or conducting an election of directors by written consent, then the nominating shareholder or nominating shareholder group must transmit the notice to the registrant and file its notice with the Commission a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8–K (§ 249.308 of this chapter) filed pursuant to Item 5.08 of Form 8–K; and

Instruction 1 to paragraph (b)(10). If the registrant held a meeting the previous year and the date of the current year's annual meeting has not changed by more than 30 calendar days from the date of the previous year's annual meeting, the window period for filing a notice on Schedule 14N (§ 240.14n–101) with the Commission and transmitting that notice to the registrant should be calculated by determining the release date disclosed in the registrant's previous year's proxy statement, increasing the year by one, and counting back 150 calendar days and 120 calendar days for the beginning and end of the window period, respectively. Where the 120 calendar day deadline falls on a Saturday, Sunday or holiday, the deadline will be treated as the first business day following the Saturday, Sunday or holiday.

Instruction 2 to paragraph (b)(10). If the registrant did not hold an annual meeting the previous year, or if the date of the current year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's annual meeting, or if the registrant is holding a special meeting or conducting the election of directors by written consent, the registrant must disclose pursuant to Item 5.08 of Form 8–K (§ 249.308 of this chapter) the date by which a shareholder or group must submit the notice required pursuant to paragraph (b)(10) of this section, which date shall be a reasonable time prior to the date the registrant mails its proxy materials for the meeting.

(11) The nominating shareholder or nominating shareholder group provides the certifications required by Schedule 14N (§ 240.14n–101) on the date the notice on Schedule 14N is filed with the Commission and transmitted to the registrant.

Instruction to paragraph (b). A registrant will not be required to include a nominee or nominees submitted by a nominating shareholder or nominating shareholder group pursuant to this section if the nominating shareholder or any member of the nominating shareholder group also submits any other nomination to that registrant and/or is participating in more than one nominating shareholder group for that registrant. In addition, a registrant will not be required to include a nominee or nominees if a nominating shareholder or member of a nominating shareholder group:

a. Is or becomes a member of any other group, as determined under section 13(d)(3) of the Act (15 U.S.C. 78m(d)(3) and § 240.13d–5(b)), or otherwise, with persons engaged in soliciting or other nominating activities in connection with the subject election of directors;

b. Is separately conducting a solicitation in connection with the subject election of directors other than a solicitation subject to § 240.14a–2(b)(8) in relation to those nominees it has nominated pursuant to this section or for or against the registrant's nominees; or

c. Is acting as a participant in another person's solicitation in connection with the subject election of directors.

(c) *Statement of support.* A registrant will be required to include a statement of support submitted by a nominating shareholder or nominating shareholder group in Item 5(i) of the notice on Schedule 14N (§ 240.14n-101), provided that the statement of support does not exceed 500 words per nominee. If a statement of support submitted by a nominating shareholder or nominating shareholder group exceeds 500 words per nominee, the registrant will be required to include the nominee or nominees, provided that the eligibility requirements and other conditions of the rule are satisfied, but the registrant may exclude the supporting statement(s).

(d) *Maximum number of shareholder nominees.* (1) A registrant will be required to include in its proxy statement and form of proxy one shareholder nominee or the number of nominees that represents 25% of the total number of the registrant's board of directors, whichever is greater, submitted by a nominating shareholder or nominating shareholder group pursuant to this section, subject to the limitations in paragraphs (d)(2), (d)(3), (d)(4), and (d)(5) of this section. A registrant may exclude a nominee or nominees if including the nominee or nominees would result in the registrant exceeding the maximum number of nominees it is required to include in its proxy statement and form of proxy pursuant to this provision.

Instruction to paragraph (d)(1). Depending on board size, 25% of the board may not result in a whole number. In those instances, the registrant will round down to the closest whole number below 25% to determine the maximum number of shareholder nominees for director that the registrant is required to include in its proxy statement and form of proxy.

(2) Where the registrant has one or more directors currently serving on its board of directors who were elected as a shareholder nominee pursuant to this section, and the term of that director or directors extends past the election of directors for which it is soliciting proxies, the registrant will not be required to include in the proxy statement and form of proxy more shareholder nominees than could result in the total number of directors who were elected as shareholder nominees pursuant to this section and serving on the board being more than one shareholder nominee or 25% of the total number of the registrant's board of directors, whichever is greater.

(3) Where the registrant has multiple classes of securities and each class is entitled to elect a specified number of directors, the registrant will be required to include the lesser of the number of nominees that the nominating shareholder's or group's class is entitled to elect or 25% of the registrant's board of directors, but in no case less than one nominee.

(4) Where the registrant agrees to include in its proxy statement and form of proxy, as an unopposed registrant nominee, the nominee or nominees of the nominating shareholder or nominating shareholder group that otherwise would be eligible under this section to have its nominees included in the registrant's proxy materials, the nominee will be considered a shareholder nominee for purposes of calculating the maximum number of shareholder nominees that must be included in the registrant's proxy statement and form of proxy, provided that the nominating shareholder or nominating shareholder group filed its notice on Schedule 14N (§ 240.14n–101) before beginning communications with the registrant about the nomination.

(5) A nominee included in a registrant's proxy statement and form of proxy as a result of an agreement between the nominee or nominating shareholder (or where there is a nominating shareholder group, any member of the nominating shareholder group) and the registrant, other than as specified in paragraph (d)(4) of this section, will not be counted as a shareholder nominee for purposes of calculating the maximum number of shareholder nominees that the registrant is required to include in its proxy statement and form of proxy.

Instruction to paragraph (d)(5). Negotiations between the nominee, the nominating shareholder or nominating shareholder group and the nominating committee or board of the registrant to have the nominee included in the registrant's proxy statement and form of proxy as a registrant nominee, where those negotiations are unsuccessful, or negotiations that are limited to whether the registrant is required to include the shareholder nominee in the registrant's proxy statement and form of proxy in accordance with this section, will not represent a direct or indirect agreement with the registrant.

(e) *Order of priority for shareholder nominees.* (1) In the event that more than one eligible shareholder or group of shareholders submits a nominee or nominees for inclusion in the registrant's proxy materials pursuant to this section, the registrant shall include in the proxy statement and form of proxy the nominee or nominees of the nominating shareholder or nominating shareholder group with the highest qualifying voting power percentage disclosed as of the date of filing the Schedule 14N (§ 240.14n–101) (as determined in calculating ownership to satisfy the requirement as specified in paragraph (b)(1) of this section) from which the registrant received a notice filed and transmitted as specified in paragraph (b)(10) of this section, up to and including the total number of nominees required to be included by the registrant pursuant to this section. Where the nominating shareholder or nominating shareholder group with the highest qualifying voting power percentage that is otherwise eligible to rely on this section and that filed and transmitted the notice as specified in paragraph (b)(10) of this section does not nominate the maximum number of individuals required to be included by the registrant, the nominee or nominees of the nominating shareholder or nominating shareholder group with the next highest qualifying voting power percentage from which the registrant received the notice filed and transmitted as specified in paragraph (b)(10) of this section would be included in the registrant's proxy statement and form of proxy, if any, up to and including the total number required to be included by the registrant. This process would continue until the registrant has included the maximum number of nominees it is required to include in its proxy statement and form of proxy pursuant to paragraph (d) of this section or the registrant exhausts the list of eligible nominees.

(2) Prior to the time a registrant has commenced printing its proxy statement and form of proxy, if a nominating shareholder or nominating shareholder group withdraws or is disqualified, a registrant will be required to include in its proxy statement and form of proxy the nominee or nominees of the nominating shareholder or nominating shareholder group with the next highest qualifying voting power percentage, disclosed as of the date of filing the Schedule 14N (§ 240.14n–101) (as determined in calculating ownership to satisfy the requirement as specified in paragraph (b)(1) of this section), from which the registrant received a notice filed and transmitted as specified in paragraph (b)(10) of this section, if any, up to and including the total number required to be included by the registrant. This process would continue until the registrant included the maximum number of nominees it is required to include in its proxy statement and form of proxy pursuant to paragraph (d) of this section or the registrant exhausts the list of eligible nominees. If the registrant has commenced printing its proxy statement and form of proxy, the registrant will not be required to include a nominee or nominees in its proxy statement and form of proxy in place of a nominee or nominees that has withdrawn or has been disqualified.

(3) If a nominee or nominees withdraws or is disqualified after the registrant provides notice to the nominating shareholder or nominating shareholder group of the registrant's intent to include the nominee or nominees in its proxy statement and form of proxy, the registrant will be required to include in its proxy statement and form of proxy any other eligible nominee submitted by that nominating shareholder or nominating shareholder group. If that nominating shareholder or nominating shareholder group did not include any other eligible nominees in its notice filed on Schedule 14N (§ 240.14n–101), then the registrant will be required to include the nominee or nominees of the nominating shareholder or nominating shareholder group with the next highest voting power percentage, disclosed as of the date of filing the Schedule 14N (§ 240.14n–101) (as determined in calculating ownership to satisfy the requirement as specified in paragraph (b)(1) of this section), from which the registrant received a notice filed and transmitted as specified in paragraph (b)(10) of this section, if any, up to and including the total number required to be included by the registrant. This process would continue until the registrant included the maximum number of nominees it is required to include in its proxy statement and form of proxy pursuant to paragraph (d) of this section or the registrant exhausts the list of eligible nominees. If the registrant has commenced printing its proxy statement and form of proxy, the registrant will not be required to include a nominee or nominees in its proxy statement and form of proxy in place of a nominee or nominees that has withdrawn or has been disqualified.

(4) Notwithstanding the other provisions of this paragraph, if a registrant has multiple classes of securities and each class is entitled to elect a specified number of directors, and nominating shareholders or groups of nominating shareholders of more than one of those classes submit a number of eligible nominees for inclusion in the registrant's proxy materials pursuant to this section that is greater than 25% of the total number of the registrant's board of directors, the registrant shall include in the proxy statement and form of proxy the nominee or nominees of the nominating shareholders or groups on the basis of the proportion of total voting power in the election of directors attributable to each class, rounding to the closest whole number, if necessary, and otherwise in accordance with paragraph (e) of this section.

Instruction 1 to paragraph (e). In determining the priority of the nominee or nominees to be included in the registrant's proxy materials, the registrant will be required to consider only the nominee or nominees that would otherwise be required to be included under the provisions of this section.

Instruction 2 to paragraph (e). If the registrant is including shareholder director nominees from more than one nominating shareholder or nominating shareholder group, as described in this paragraph, and including all of the shareholder director nominees of the nominating shareholder or nominating shareholder group that is last in priority would result in exceeding the maximum number required under paragraph (d) of this section, the nominating shareholder or nominating shareholder group that is last in priority may specify which of its nominees are to be included in the registrant's proxy materials.

(f) *False or misleading statements.* The registrant is not responsible for any information in the notice from the nominating shareholder or nominating shareholder group submitted as required by paragraph (b)(10) of this section or otherwise provided by the nominating shareholder or nominating shareholder group that is included in the registrant's proxy materials.

(g) *Determinations regarding eligibility.* (1) If the registrant determines that it will include a shareholder nominee, it must notify the nominating shareholder or nominating shareholder group (or their authorized representative) upon making this determination. In no event should the notification be postmarked or transmitted electronically later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission.

(2) If the registrant determines that it may exclude a shareholder nominee pursuant to a provision in paragraph (a), (b), (d), or (e) of this section, or exclude a statement of support pursuant to

paragraph (c) of this section, the registrant must notify in writing the nominating shareholder or nominating shareholder group (or their authorized representative) of this determination. This notice must be postmarked or transmitted electronically to the nominating shareholder or nominating shareholder group (or their authorized representative) no later than 14 calendar days after the close of the period for submission specified in paragraph (b)(10) of this section.

(i) The registrant's notice to the nominating shareholder or nominating shareholder group (or their authorized representative) that it has determined that it may exclude a shareholder nominee or statement of support must include an explanation of the registrant's basis for determining that it may exclude the nominee or statement of support.

(ii) The nominating shareholder or nominating shareholder group shall have 14 calendar days after receipt of the registrant's notice pursuant to paragraph (g)(2)(i) of this section to respond to the registrant's notice and correct any eligibility or procedural deficiencies identified in that notice. The nominating shareholder's or nominating shareholder group's response must be postmarked or transmitted electronically to the registrant no later than 14 calendar days after receipt of the registrant's notice.

(3) If the registrant intends to exclude a shareholder nominee or statement of support, after providing the requisite notice of and time for the nominating shareholder or nominating shareholder group to remedy any eligibility or procedural deficiencies in the nomination or statement, the registrant must provide notice of the basis for its determination to the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The Commission staff may permit the registrant to make its submission later than 80 calendar days before the registrant files its definitive proxy statement and form of proxy if the registrant demonstrates good cause for missing the deadline.

(i) The registrant's notice to the Commission shall include:

(A) Identification of the nominating shareholder or each member of the nominating shareholder group, as applicable;

(B) The name of the nominee or nominees;

(C) An explanation of the registrant's basis for determining that the registrant may exclude the nominee or nominees or a statement of support; and

(D) A supporting opinion of counsel when the registrant's basis for excluding a nominee or nominees relies on a matter of state or foreign law.

(ii) The registrant must file its notice to the Commission and simultaneously provide a copy to the nominating shareholder or each member of the nominating shareholder group (or their authorized representative). At the time the registrant files its notice, the registrant also may seek an informal statement of the Commission staff's views with regard to its determination to exclude from its proxy materials a nominee or nominees or a statement of support. The Commission staff may provide an informal statement of its views to the registrant along with a copy to the nominating shareholder or nominating shareholder group (or their authorized representative);

(iii) The nominating shareholder or nominating shareholder group may submit a response to the registrant's notice to the Commission. This response must be postmarked or transmitted electronically to the Commission no later than 14 calendar days after the nominating shareholder's or nominating shareholder group's receipt of the registrant's notice to the Commission. The nominating shareholder or nominating shareholder group must simultaneously provide to the registrant a copy of its response to the Commission.

(iv) If the registrant seeks an informal statement of the Commission staff's views with regard to its determination to exclude a shareholder nominee or nominees, the registrant shall provide the nominating shareholder or nominating shareholder group (or their authorized representative) with notice, either postmarked or transmitted electronically, promptly following receipt of the staff's response, of whether it will include or exclude the shareholder nominee; and

(v) The exclusion of a shareholder nominee or a statement of support by a registrant where that exclusion is not permissible under paragraph (a), (b), (c), (d), or (e) of this section shall be a violation of this section.

Instruction 1 to paragraph (g). When a registrant must provide a notice to a nominating shareholder, member of a nominating shareholder group, or authorized representative of a nominating shareholder group, the registrant is responsible for providing the notice in a manner that evidences timely transmission. Where a nominating shareholder, member of a nominating shareholder group, or authorized representative of a nominating shareholder group responds to a notice, the nominating shareholder, member of a nominating shareholder group, or authorized representative of a nominating shareholder group is responsible for providing the response in a manner that evidences timely transmission.

Instruction 2 to paragraph (g). Neither the composition of the nominating shareholder group nor the shareholder nominee may be changed as a means to correct a deficiency identified in the registrant's notice to the nominating shareholder or nominating shareholder group under paragraph (g)(2) of this section; however, where a nominating shareholder or nominating shareholder group submits a number of nominees that exceeds the maximum number required to be included by the registrant under the circumstances set forth in paragraph (d) of this section, the nominating shareholder or nominating shareholder group may specify which nominee or nominees are not to be included in the registrant's proxy materials.

Instruction 3 to paragraph (g). Unless otherwise indicated in this section, the burden is on the registrant to demonstrate that it may exclude a nominee or statement of support.

■ 16. Amend § 240.14a–12 by removing the heading following paragraph (c)(2)(iii) "Instructions to § 240.14a–12"; by removing the numbers 1. and 2. of instructions 1 and 2 to § 240.14a–12 and adding in their places the phrases "*Instruction 1 to § 240.14a–12.*" and "*Instruction 2 to § 240.14a–12.*", respectively; and adding Instruction 3 to § 240.14a–12 to read as follows:

§ 240.14a–12 Solicitation before furnishing a proxy statement.

* * * * *

Instruction 3 to § 240.14a–12. Inclusion of a nominee pursuant to § 240.14a–11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials, or solicitations by a nominating shareholder or nominating shareholder group that are made in connection with that nomination constitute solicitations in opposition subject to § 240.14a–12(c), except for purposes of § 240.14a–6(a).

■ 17. Add § 240.14a–18 to read as follows:

§ 240.14a–18 Disclosure regarding nominating shareholders and nominees submitted for inclusion in a registrant's proxy materials pursuant to applicable state or foreign law, or a registrant's governing documents.

To have a nominee included in a registrant's proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the registrant's governing documents addressing the inclusion of shareholder director nominees in the registrant's proxy materials, the nominating shareholder or nominating shareholder group must

provide notice to the registrant of its intent to do so on a Schedule 14N (§ 240.14n–101) and file that notice, including the required disclosure, with the Commission on the date first transmitted to the registrant. This notice shall be postmarked or transmitted electronically to the registrant by the date specified by the registrant's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the anniversary of the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder or nominating shareholder group must provide notice a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8–K (§ 249.308 of this chapter) filed pursuant to Item 5.08 of Form 8–K.

Instruction to § 240.14a–18. The registrant is not responsible for any information provided in the Schedule 14N (§ 240.14n–101) by the nominating shareholder or nominating shareholder group, which is submitted as required by this section or otherwise provided by the nominating shareholder or nominating shareholder group that is included in the registrant's proxy materials.

■ 18. Amend § 240.14a–101 by:

■ a. Revising Item 7 as follows:

■ i. Redesignating paragraph (e) as paragraph (g); and

■ ii. Adding new paragraph (e) and paragraph (f); and

■ b. Adding paragraphs (18) and (19) to Item 22(b).

The additions read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

SCHEDULE 14A INFORMATION

* * * * *

Item 7. * * *

* * * * *

(e) If a shareholder nominee or nominees are submitted to the registrant for inclusion in the registrant's proxy materials pursuant to § 240.14a–11 and the registrant is not permitted to exclude the nominee or nominees pursuant to the provisions of § 240.14a–11, the registrant must include in its proxy statement the disclosure required from the nominating shareholder or nominating shareholder group under Item 5 of § 240.14n–101 with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to Item 7(e). The information disclosed pursuant to paragraph (e) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), except to the extent that the registrant specifically incorporates that information by reference.

(f) If a registrant is required to include a shareholder nominee or nominees submitted to the registrant for inclusion in the registrant's proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the registrant's governing documents providing for the inclusion of shareholder director nominees in the registrant's proxy materials, the registrant must include in its proxy statement the disclosure required from the nominating shareholder or nominating shareholder group under Item 6 of § 240.14n–101 with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to Item 7(f). The information disclosed pursuant to paragraph (f) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), except to the extent that the registrant specifically incorporates that information by reference.

* * * * *

Item 22. Information required in investment company proxy statement.

* * * * *

(b) * * *

(18) If a shareholder nominee or nominees are submitted to the Fund for inclusion in the Fund's proxy materials pursuant to § 240.14a–11 and the Fund is not permitted to exclude the nominee or nominees pursuant to the provisions of § 240.14a–11, the Fund must include in its proxy statement the disclosure required from the nominating shareholder or nominating shareholder group under Item 5 of § 240.14n–101 with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to paragraph (b)(18). The information disclosed pursuant to paragraph (b)(18) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), except to the extent that the Fund specifically incorporates that information by reference.

(19) If a Fund is required to include a shareholder nominee or nominees submitted to the Fund for inclusion in the Fund's proxy materials pursuant to a procedure set forth under applicable state or foreign law or the Fund's governing documents providing for the inclusion of shareholder director nominees in the Fund's proxy materials, the Fund must include in its proxy statement the disclosure required from the nominating shareholder or nominating shareholder group under Item 6 of § 240.14n–101 with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to paragraph (b)(19). The information disclosed pursuant to paragraph (b)(19) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), or the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), except to the extent that the Fund specifically incorporates that information by reference.

* * * * *

■ 19. Amend part 240 by adding an undesignated center heading and §§ 240.14n–1 through 240.14n–3 and § 240.14n–101 to read as follows:

Regulation 14N: Filings Required by Certain Nominating Shareholders

§ 240.14n–1 Filing of Schedule 14N.

(a) A shareholder or group of shareholders that submits a nominee or nominees in accordance with § 240.14a–11 or a procedure set forth under applicable state or foreign law, or a registrant's governing documents providing for the inclusion of shareholder director nominees in the registrant's proxy materials shall file with the Commission a statement containing the information required by Schedule 14N (§ 240.14n–101) and simultaneously provide the notice on Schedule 14N to the registrant.

(b)(1) Whenever two or more persons are required to file a statement containing the information required by Schedule 14N (§ 240.14n–101), only one statement need be filed. The statement must identify all such persons, contain the required information with regard to each such person, indicate that the statement is filed on behalf of all such

persons, and include, as an appendix, their agreement in writing that the statement is filed on behalf of each of them. Each person on whose behalf the statement is filed is responsible for the timely filing of that statement and any amendments thereto, and for the completeness and accuracy of the information concerning such person contained therein; such person is not responsible for the completeness or accuracy of the information concerning the other persons making the filing.

(2) If the group's members elect to make their own filings, each filing should identify all members of the group but the information provided concerning the other persons making the filing need only reflect information which the filing person knows or has reason to know.

§ 240.14n–2 Filing of amendments to Schedule 14N.

(a) If any material change occurs with respect to the nomination, or in the disclosure or certifications set forth in the Schedule 14N (§ 240.14n–101) required by § 240.14n–1(a), the person or persons who were required to file the statement shall promptly file or cause to be filed with the Commission an amendment disclosing that change.

(b) An amendment shall be filed within 10 calendar days of the final results of the election being announced by the registrant stating the nominating shareholder's or the nominating shareholder group's intention with regard to continued ownership of their shares.

§ 240.14n–3 Dissemination.

One copy of Schedule 14N (§ 240.14n–101) filed pursuant to §§ 240.14n–1 and 240.14n–2 shall be mailed by registered or certified mail or electronically transmitted to the registrant at its principal executive office. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered.

§ 240.14n–101 Schedule 14N—Information to be included in statements filed pursuant to § 240.14n–1 and amendments thereto filed pursuant to § 240.14n–2.

Securities and Exchange Commission,
Washington, DC 20549
Schedule 14N
Under the Securities Exchange Act of 1934
(Amendment No. _)*

(Name of Issuer)

_____

(Title of Class of Securities)

_____

(CUSIP Number)

_____

[ ] Solicitation pursuant to § 240.14a–2(b)(7)
[ ] Solicitation pursuant to § 240.14a–2(b)(8)
[ ] Notice of Submission of a Nominee or Nominees in Accordance with § 240.14a–11
[ ] Notice of Submission of a Nominee or Nominees in Accordance with Procedures Set Forth Under Applicable State or Foreign Law, or the Registrant's Governing Documents

* The remainder of this cover page shall be filled out for a reporting person's initial filing on this form, and for any subsequent amendment containing information which would alter the disclosures provided in a prior cover page.

The information required in the remainder of this cover page shall not be deemed to be "filed" for the purpose of Section 18 of the Securities Exchange Act of 1934 ("Act") or otherwise subject to the liabilities of that section of the Act but shall be subject to all other provisions of the Act.

(1) Names of reporting persons:

_____

(2) Mailing address and phone number of each reporting person (or, where applicable, the authorized representative):

_____

(3) Amount of securities held that are entitled to be voted on the election of directors held by each reporting person (and, where applicable, amount of securities held in the aggregate by the nominating shareholder group), but including loaned securities and net of securities sold short or borrowed for purposes other than a short sale:

_____

(4) Number of votes attributable to the securities entitled to be voted on the election of directors represented by amount in Row (3) (and, where applicable, aggregate number of votes attributable to the securities entitled to be voted on the election of directors held by group):

_____

Instructions for Cover Page:

(1) *Names of Reporting Persons*—Furnish the full legal name of each person for whom the report is filed—*i.e.,* each person required to sign the schedule itself—including each member of a group. Do not include the name of a person required to be identified in the report but who is not a reporting person.

(3) and (4) *Amount Held by Each Reporting Person*—Rows (3) and (4) are to be completed in accordance with the provisions of Item 3 of Schedule 14N.

Notes: Attach as many copies of parts one through three of the cover page as are needed, one reporting person per copy.

Filing persons may, in order to avoid unnecessary duplication, answer items on Schedule 14N by appropriate cross references to an item or items on the cover page(s). This approach may only be used where the cover page item or items provide all the disclosure required by the schedule item. Moreover, such a use of a cover page item will result in the item becoming a part of the schedule and accordingly being considered as "filed" for purposes of Section 18 of the Act or otherwise subject to the liabilities of that section of the Act.

Special Instructions for Complying With Schedule 14N

Under Sections 14 and 23 of the Securities Exchange Act of 1934 and the rules and regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Schedule. The information will be used for the primary purpose of determining and disclosing the holdings and interests of a nominating shareholder or nominating shareholder group. This statement will be made a matter of public record. Therefore, any information given will be available for inspection by any member of the public.

Because of the public nature of the information, the Commission can use it for a variety of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statutes or provisions. Failure to disclose the information requested by this schedule may result in civil or criminal action against the persons involved for violation of the Federal securities laws and rules promulgated thereunder, or in some cases, exclusion of the nominee from the registrant's proxy materials.

General Instructions to Item Requirements

The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be prepared so as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

Item 1(a). Name of Registrant

Item 1(b). Address of Registrant's Principal Executive Offices

Item 2(a). Name of Person Filing

Item 2(b). Address or Principal Business Office or, if None, Residence

Item 2(c). Title of Class of Securities

Item 2(d). CUSIP No.

Item 3. Ownership

Provide the following information, in accordance with Instruction 3 to § 240.14a–11(b)(1):

(a) Amount of securities held and entitled to be voted on the election of directors (and, where applicable, amount of securities held in the aggregate by the nominating shareholder group): _____.

(b) The number of votes attributable to the securities referred to in paragraph (a) of this Item: _____.

(c) The number of votes attributable to securities that have been loaned but which the reporting person:

(i) has the right to recall; and

(ii) will recall upon being notified that any of the nominees will be included in the registrant's proxy statement and proxy card: _____.

(d) The number of votes attributable to securities that have been sold in a short sale that is not closed out, or that have been borrowed for purposes other than a short sale: _____.

(e) The sum of paragraphs (b) and (c), minus paragraph (d) of this Item, divided by the aggregate number of votes derived from all classes of securities of the registrant that are entitled to vote on the election of directors, and expressed as a percentage: _____.

Item 4. Statement of Ownership From a Nominating Shareholder or Each Member of a Nominating Shareholder Group Submitting this Notice Pursuant to § 240.14a–11

(a) If the nominating shareholder, or each member of the nominating shareholder group, is the registered holder of the shares, please so state. Otherwise, attach to the Schedule 14N one or more written statements from the persons (usually brokers or banks) through which the nominating shareholder's securities are held, verifying that, within seven calendar days prior to filing the shareholder notice on Schedule 14N with the Commission and transmitting the notice to the registrant, the nominating shareholder continuously held the amount of securities being used to satisfy the ownership threshold for a period of at least three years. In the alternative, if the nominating shareholder has filed a Schedule 13D (§ 240.13d–101), Schedule 13G (§ 240.13d–102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter), and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents, reflecting ownership of the securities as of or before the date on which the three-year eligibility period begins, so state and incorporate that filing or amendment by reference.

(b) Provide a written statement that the nominating shareholder, or each member of the nominating shareholder group, intends to continue to hold the amount of securities that are used for purposes of satisfying the minimum ownership requirement of § 240.14a–11(b)(1) through the date of the meeting of shareholders, as required by § 240.14a–11(b)(4). Additionally, provide a written statement from the nominating shareholder or each member of the nominating shareholder group regarding the nominating shareholder's or nominating shareholder group member's intent with respect to continued ownership after the election of directors, as required by § 240.14a–11(b)(5).

Instruction to Item 4. If the nominating shareholder or any member of the nominating shareholder group is not the registered holder of the securities and is not proving ownership for purposes of § 240.14a–11(b)(3) by providing previously filed Schedules 13D or 13G or Forms 3, 4, or 5, and the securities are held in an account with a broker or bank that is a participant in the Depository Trust Company ("DTC") or other clearing agency acting as a securities depository, a written statement or statements from that participant or participants in the following form will satisfy § 240.14a–11(b)(3):

As of [date of this statement], [name of nominating shareholder or member of the nominating shareholder group] held at least [number of securities owned continuously for at least three years] of the [registrant's] [class of securities], and has held at least this amount of such securities continuously for [at least three years]. [Name of clearing agency participant] is a participant in [name of clearing agency] whose nominee name is [nominee name].

[name of clearing agency participant]

By: [name and title of representative]

Date:

If the securities are held through a broker or bank (*e.g.* in an omnibus account) that is not a participant in a clearing agency acting as a securities depository, the nominating shareholder or member of the nominating shareholder group must (a) obtain and submit a written statement or statements (the "initial broker statement") from the broker or bank with which the nominating shareholder or member of the nominating shareholder group maintains an account that provides the information about securities ownership set forth above and (b) obtain and submit a separate written statement from the clearing agency participant through which the securities of the nominating shareholder or member of the nominating shareholder group are held, that (i) identifies the broker or bank for whom the clearing agency participant holds the securities, and (ii) states that the account of such broker or bank has held, as of the date of the separate written statement, at least the number of securities specified in the initial broker statement, and (iii) states that this account has held at least that amount of securities continuously for at least three years.

If the securities have been held for less than three years at the relevant entity, provide written statements covering a continuous period of three years and modify the language set forth above as appropriate.

For purposes of complying with § 240.14a–11(b)(3), loaned securities may be included in the amount of securities set forth in the written statements.

Item 5. Disclosure Required for Shareholder Nominations Submitted Pursuant to § 240.14a–11

If a nominating shareholder or nominating shareholder group is submitting this notice in connection with the inclusion of a shareholder nominee or nominees for director in the registrant's proxy materials pursuant to § 240.14a–11, provide the following information:

(a) A statement that the nominee consents to be named in the registrant's proxy statement and form of proxy and, if elected, to serve on the registrant's board of directors;

(b) Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A (§ 240.14a–101), as applicable;

(c) Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required of a participant in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A (§ 240.14a–101), as applicable;

(d) Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past ten years, as specified in Item 401(f) of Regulation S–K (§ 229.10 of this chapter). Disclosure pursuant to this paragraph need not be provided if provided in response to Item 5(c) of this section;

Instruction 1 to Item 5(c) and (d). Where the nominating shareholder is a general or limited partnership, syndicate or other group, the information called for in paragraphs (c) and (d) of this Item must be given with respect to:

a. Each partner of the general partnership;

b. Each partner who is, or functions as, a general partner of the limited partnership;

c. Each member of the syndicate or group; and

d. Each person controlling the partner or member.

Instruction 2 to Item 5(c) and (d). If the nominating shareholder is a corporation or if a person referred to in a., b., c. or d. of Instruction 1 to paragraphs (c) and (d) of this Item is a corporation, the information called for in paragraphs (c) and (d) of this Item must be given with respect to:

a. Each executive officer and director of the corporation;

b. Each person controlling the corporation; and

c. Each executive officer and director of any corporation or other person ultimately in control of the corporation.

(e) Disclosure about whether, to the best of the nominating shareholder's or group's knowledge, the nominee meets the director qualifications, if any, set forth in the registrant's governing documents;

(f) A statement that, to the best of the nominating shareholder's or group's knowledge, in the case of a registrant other than an investment company, the nominee meets the objective criteria for "independence" of the national securities exchange or national securities association rules applicable to the registrant, if any, or, in the case of a registrant that is an investment company, the nominee is not an "interested person" of the registrant as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)).

Instruction to Item 5(f). For this purpose, the nominee would be required to meet the definition of "independence" that is generally applicable to directors of the registrant and not any particular definition of independence applicable to members of the audit committee of the registrant's board of directors. To the extent a national securities exchange or national securities association rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), the nominee would not be required to meet the subjective determination of independence as part of the shareholder nomination process.

(g) The following information regarding the nature and extent of the relationships between the nominating shareholder or nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant:

(1) Any direct or indirect material interest in any contract or agreement between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any material pending or threatened legal proceeding in which the nominating shareholder or any member of the nominating shareholder group and/or the nominee is a party or a material participant, and that involves the registrant, any of its executive officers or directors, or any affiliate of the registrant; and

(3) Any other material relationship between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant not otherwise disclosed;

Note to Item 5(g)(3). Any other material relationship of the nominating shareholder or any member of the nominating shareholder group or nominee with the registrant or any affiliate of the registrant may include, but is not limited to, whether the nominating shareholder or any member of the nominating shareholder group currently has, or has had in the past, an employment relationship with the registrant or any affiliate of the registrant (including consulting arrangements).

(h) The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any; and

(i) Any statement in support of the shareholder nominee or nominees, which may not exceed 500 words for each nominee, if the nominating shareholder or nominating shareholder group elects to have such statement included in the registrant's proxy materials.

Item 6. Disclosure Required by § 240.14a–18

If a nominating shareholder or nominating shareholder group is submitting this notice in connection with the inclusion of a shareholder nominee or nominees for director in the registrant's proxy materials pursuant to a procedure set forth under applicable state or foreign law, or the registrant's governing documents provide the following disclosure:

(a) A statement that the nominee consents to be named in the registrant's proxy statement and form of proxy and, if elected, to serve on the registrant's board of directors;

(b) Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A (§ 240.14a–101), as applicable;

(c) Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A (§ 240.14a–101), as applicable;

(d) Disclosure about whether the nominating shareholder or any member of a nominating shareholder group has been involved in any legal proceeding during the past ten years, as specified in Item 401(f) of Regulation S–K (§ 229.10 of this chapter). Disclosure pursuant to this paragraph need not be provided if provided in response to Item 6(c) of this section;

Instruction 1 to Item 6(c) and (d). Where the nominating shareholder is a general or limited partnership, syndicate or other group, the information called for in paragraphs (c) and (d) of this Item must be given with respect to:

a. Each partner of the general partnership;

b. Each partner who is, or functions as, a general partner of the limited partnership;

c. Each member of the syndicate or group; and

d. Each person controlling the partner or member.

Instruction 2 to Item 6(c) and (d). If the nominating shareholder is a corporation or if a person referred to in a., b., c. or d. of Instruction 1 to paragraphs (c) and (d) of this Item is a corporation, the information called for

in paragraphs (c) and (d) of this Item must be given with respect to:

a. Each executive officer and director of the corporation;

b. Each person controlling the corporation; and

c. Each executive officer and director of any corporation or other person ultimately in control of the corporation.

(e) The following information regarding the nature and extent of the relationships between the nominating shareholder or nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant:

(1) Any direct or indirect material interest in any contract or agreement between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any material pending or threatened legal proceeding in which the nominating shareholder or any member of the nominating shareholder group and/or nominee is a party or a material participant, involving the registrant, any of its executive officers or directors, or any affiliate of the registrant; and

(3) Any other material relationship between the nominating shareholder or any member of the nominating shareholder group, the nominee, and/or the registrant or any affiliate of the registrant not otherwise disclosed; and

Instruction to Item 6(e)(3). Any other material relationship of the nominating shareholder or any member of the nominating shareholder group with the registrant or any affiliate of the registrant may include, but is not limited to, whether the nominating shareholder or any member of the nominating shareholder group currently has, or has had in the past, an employment relationship with the registrant or any affiliate of the registrant (including consulting arrangements).

(f) The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any.

Item 7. Notice of Dissolution of Group or Termination of Shareholder Nomination

Notice of dissolution of a nominating shareholder group or the termination of a shareholder nomination shall state the date of the dissolution or termination.

Item 8. Signatures

(a) The following certifications shall be provided by the filing person submitting this notice pursuant to § 240.14a–11, or in the case of a group, each filing person whose securities are being aggregated for purposes of meeting the ownership threshold set out in § 240.14a–11(b)(1) exactly as set forth below:

I, [identify the certifying individual], after reasonable inquiry and to the best of my knowledge and belief, certify that:

(1) I [or if signed by an authorized representative, the name of the nominating shareholder or each member of the nominating shareholder group, as appropriate] am [is] not holding any of the registrant's securities with the purpose, or with the effect, of changing control of the registrant or to gain a number of seats on the board of directors that exceeds the maximum number of nominees that the registrant could be required to include under § 240.14a–11(d);

(2) I [or if signed by an authorized representative, the name of the nominating shareholder or each member of the nominating shareholder group, as appropriate] otherwise satisfy [satisfies] the requirements of § 240.14a–11(b), as applicable;

(3) The nominee or nominees satisfies the requirements of § 240.14a–11(b), as applicable; and

(4) The information set forth in this notice on Schedule 14N is true, complete and correct.

(b) The following certification shall be provided by the filing person or persons submitting this notice in connection with the submission of a nominee or nominees in accordance with procedures set forth under applicable state or foreign law or the registrant's governing documents:

I, [identify the certifying individual], after reasonable inquiry and to the best of my knowledge and belief, certify that the information set forth in this notice on Schedule 14N is true, complete and correct.

Dated: _____

Signature: _____

Name/Title: _____

The original statement shall be signed by each person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative other than an executive officer or general partner of the filing person, evidence of the representative's authority to sign on behalf of such person shall be filed with the statement, *provided, however,* that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath his signature.

Attention: Intentional misstatements or omissions of fact constitute Federal criminal violations (see 18 U.S.C. 1001).

■ 20. Amend § 240.15d–11 by revising paragraph (b) to read as follows:

§ 240.15d–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.15d–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter;

(2) Disclosure pursuant to Instruction 2 to § 240.14a–11(b)(1) of information concerning outstanding shares and voting; or

(3) Disclosure pursuant to Instruction 2 to § 240.14a–11(b)(10) of the date by which a nominating shareholder or nominating shareholder group must submit the notice required pursuant to § 240.14a–11(b)(10).

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 21. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 22. Amend Form 8–K (referenced in § 249.308) by:

■ a. Adding a sentence at the end of General Instruction B.1;

■ b. Removing the phrase "Section 5.06" in the heading and adding in its place "Item 5.06"; and

■ c. Adding Item 5.08.

The additions read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

GENERAL INSTRUCTIONS

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B. Events To Be Reported and Time for Filing Reports

1. * * * A report pursuant to Item 5.08 is to be filed within four business days after the registrant determines the anticipated meeting date.

* * * * *

Item 5.08 Shareholder Director Nominations

(a) If the registrant did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N (§ 240.14n–101) required pursuant to § 240.14a–11(b)(10), which date shall be a reasonable time before the registrant mails its proxy materials for the meeting. Where a registrant is required to include shareholder director nominees in the registrant's proxy materials pursuant to either an applicable state or foreign law provision, or a provision in the registrant's governing documents, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N required pursuant to § 240.14a–18.

(b) If the registrant is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (§ 270.18f–2 of this chapter), then the registrant is required to disclose in connection with the election of directors at an annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) the total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) on the election of directors at such meeting of shareholders as of the end of the most recent calendar quarter.

* * * * *

By the Commission.

Dated: August 25, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–22218 Filed 9–15–10; 8:45 am]

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