United States Proxy Exchange

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VIA UPLOAD: http://www.sec.gov/rules/proposed.shtml

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: File No. S7-10-09
Facilitating Shareowner Nominations

Dear Ms. Murphy:

The United States Proxy Exchange (USPX) is delighted to submit comments on Facilitating Shareowner Nominations: SR 07-10-09. We are a non-government organization, incorporated in the Commonwealth of Massachusetts, that is dedicated to facilitating shareowner rights, primarily through the proxy process. We feel proposed Rule 14a-11 is a potentially important step towards restoring shareowner property rights.

Our responses to the specific questions posed by the Commission follow.

A.1. Does the Commission need to facilitate shareowner director nominations or remove impediments to help make the proxy process better reflect the rights a shareowner would have at a shareowner meeting?

In its overview accompanying the proposed rule, the Commission reviewed Congress's mandate that "the solicitation and issuance of proxies be left to regulation by the Commission." The Commission's interpretation of this mandate—that it ensure the "proxy process ... functions, as nearly as possible, as a replacement for an actual in-person meeting of shareowners."—is entirely appropriate.

Shareowners must have a means of exercising their rights, and performing on their responsibilities, as property owners. In the nineteenth century, this was accomplished through deliberative shareowner meetings, in which shareowners could participate, either in person or through a proxy of their choosing.

This no longer happens, but it is important to understand exactly what has been lost.

Shareowners have NOT lost the ability to appoint a proxy of their choosing. While corporate managers distribute proxy assignment cards that only allow shareowners to appoint those same managers as their proxy, shareowners don't have to use those cards. A shareowner can still appoint a proxy of her choosing. All it takes is a notarized letter accompanied by documentation of her share ownership. The USPX has facilitated a number of such proxy assignments on behalf of retail and institutional investors.

Furthermore, shareowners have NOT lost their shareowner meetings. These continue to be held each year, largely as a formality.

What shareowners HAVE lost is deliberation. Mere voting is not deliberation. It is one thing to vote. It is another thing entirely to set the agenda as to *what will be voted on*. That is where real authority lies. Deliberation is about setting the agenda and debate (both speaking and listening). These are the essential precursors to voting.

Shareowner meetings used to be deliberative. They were conducted according to *Roberts Rules of Order*. It has been decades since that happened. Today's shareowner meetings are, at best, informational—repeating information already contained in financial statements or corporate press releases. Routinely, shareowner participation is limited to a question-and-answer session at the end of the meeting—after all other business has concluded.

It is in this light that the Commission's mandate to ensure the proxy process "functions, as nearly as possible, as a replacement for an actual in-person meeting of shareowners" must be understood. Deliberative shareowner meetings have been lost, so the Commission is attempting to restore deliberation through the proxy process. Anything less would be a failure to fulfill the Commission's mandate from Congress.

There are two primary means whereby shareowners exercise their right to set the agenda and perform on their responsibilities as corporate property owners. One is submitting shareowner proposals; the other is submitting board nominations.

Accordingly, under its mandate, the Commission should facilitate shareowner deliberation on both proposals and board nominations. Because deliberation includes setting the agenda, the Commission facilitates the submission of shareowner proposals for inclusion on management's proxy cards under Rule 14a-8. The proposed Rule 14a-11 will (or should) do the same thing for shareowner board nominations.

A.2. Should the Commission adopt revisions to the proxy rules to facilitate the inclusion of shareowner nominees in company proxy materials, or are the existing means that are available to shareowners to exercise their rights to nominate directors adequate? How have changes in corporate governance over the past six years, including the move by many companies away from plurality voting to majority voting, affected a shareowner's ability to place nominees in company proxy materials? How have other developments, as well as ongoing developments such as some states adopting statutes allowing companies to reimburse shareowners who conduct director election contests and enabling companies to include in their bylaws provisions for inclusion of shareowner director nominees in company proxy materials, affected a shareowner's ability to nominate directors? Have other changes in law or practice created a greater or lesser need for such a rule?

Corporations are supposed to be democracies—one share, one vote. We assess a democracy based on the quality of its elections. Here is some empirical criteria applicable to any democracy:

1. Are elections routinely contested, or do incumbents usually run unopposed?

2. Are voters offered a variety of candidates to choose from, representing multiple viewpoints?

3. Are nominations accepted from a large cross section of the voting population, or do they always come from the same "elite" parties?

4. Are elections accompanied by lively debate through which voters get to know the candidates?

On all four counts, today's board elections are inadequate. They resemble more the Politburo elections of the former Soviet Union than they do the ideals of a liberal democracy.[1]

[1] In final editing of this letter, the above line about Politburo elections drew particularly strong responses. Attorney Matthew Rafat felt it was "inflammatory." Alexander Krakovsky had a different perspective, noting "I like the Soviet Politburo example. Have used it myself..... at a shareholders meeting in Russia."

Based on the preceding four criteria, it is evident that recent developments in corporate governance practices or state law have failed to fixed the problem. A solution such as the proposed Rule 14a-11 is called for.

A.3. Would the proposed amendments enable shareowners to effect change in a company's board of directors? Please explain and provide any empirical data in support of any arguments or analyses.

We are hopeful that, with revisions, proposed Rule 14a-11 will be an effective means for shareowners to effect change in companies' boards of directors. We have serious reservations about the rule as currently drafted. We address specific issues, and the merits of proposed Rule 14a-8(i)(8), in our responses to questions below.

A.4. What would be the costs and benefits to companies and shareowners if the Commission adopted new proxy rules that would facilitate the inclusion of shareowner director nominees in company proxy materials? What would be the costs and benefits to companies if the Commission adopted the proposed amendment to Rule 14a-8(i)(8)?

We concur with the response to this question submitted by the Council of Institutional Investors.

A.5. What direct or indirect effect, if any, would the proposed changes to the proxy rules have on companies' corporate governance policies relating to the election of directors?

Enhancing the ability of shareowners to nominate directors will encourage nominating committees and boards to more seriously consider the will of shareowners. Facing contested elections, boards—and perhaps individual board members—will strive to better communicate to shareowners about their actions and intentions for the company.

A.6. Could the proposed amendments to the proxy rules be modified to better meet the Commission's stated intent? If so, how? Please explain and provide empirical data or other specific information in support of any arguments or analyses. Please identify and discuss any other rules that would need to be amended.

Yes. See our detailed responses to questions below.

A.7. We note concerns regarding investor confidence. Would amending the proxy rules as proposed help restore investor confidence? Why or why not? Please explain and provide empirical data or other specific information in support of any arguments or analyses.

We believe that “investor confidence” is an ambiguous term that is open to differing interpretations. Investors might be “confident” that they are getting fair execution on stock trades, “confident” that the market won’t crash, “confident” that the Business Roundtable doesn’t have undue influence in Washington, “confident” that corporate executives aren’t enriching themselves at shareowners’ expense, etc. Another question is how to distinguish confidence from over-confidence. Doesn’t over-confidence produce market bubbles?

When one considers the staggering volume of trading, with investors large and small frenetically “putting on” and “taking off” positions, and computerized trading systems legally front running other traders by milliseconds, a more realistic concern is whether we have turned our secondary market for equity securities into a vast casino, which is hugely lucrative for too-big-to-fail brokerages, but is placing our economy at risk. Instead of “investor confidence,” perhaps we need a healthy dose of skepticism and long-term, buy-and-hold investing.

Unfortunately, existing proxy rules impede long-term investing by making it all but impossible for average investors (or even most institutional investors) to force meaningful change on entrenched boards. The only viable option available to most shareowners who are dissatisfied with how their corporation is being run is to sell their shares. This is called the “Wall Street walk.” Apologists for entrenched boards argue that, because dissatisfied shareowners always have the option of taking the Wall Street walk, there is no need for improved proxy rules. This argument suffers from two fatal flaws:

1. While the Wall Street walk may be reasonable for a shareowner acting in isolation, if adopted universally, it could erode an entire economy. With everyone taking the Wall Street walk whenever they perceive a problem, no one sticks around to fix a problem. This collective inaction was evident at numerous companies in the years leading up to the latest market crisis. If it remains unaddressed, that crisis will be a harbinger of worse to come.

2. The Wall Street walk argument makes a tacit assumption that shareowners should only intervene at a company when things are going badly. If things are going well at a company, but shareowners perceive that a different board could make things even better, the shareowners have every right to change the composition of the board. Of course, they have no economically viable means of exercising this right, which raises constitutional due process issues. The

> Wall Street walk isn't a solution, and existing proxy rules make it hard enough to implement change at a firm in severe trouble, let along at one where things are going relatively well.

If proxy rules are liberalized to make it feasible for average shareowners to remove board members, shareowners will rarely need to use the authority. The very fact that they have it will open the door to other, less drastic forms of engagement. We might find board members not only willing, but eager to talk with shareowners. Wouldn't that be a refreshing change!

It is this vision, and not concerns about investor "confidence" that makes us hopeful about amending proxy rules.

A.8. We also note concerns about board accountability and shareowner participation in the proxy process. Would the proposed amendments to the proxy rules address concerns about board accountability and shareowner participation on the one hand, and board dynamics, on the other? If so, how? If not, why not? Please explain and provide empirical data in support of any arguments or analyses.

While we have reservations about the proposed Rule 14a-11in its current form, we believe that, with modifications, it will dramatically enhance board accountability. It will do so in three ways:

- Shareowners will be able to nominate and elect directors committed to accountability.

- Shareowners will be able to include supporting statements for their nominees in management's proxy material. These statements can raise issues of the existing board's accountability, creating an incentive for change.

- Faced with possible removal, existing board members will be more open about their activities, and more receptive to communication with shareowners.

Apologists for entrenched boards argue that the presence of shareowner-nominated director on company boards will be disruptive. This claim is nothing more than an argument in support of single-party rule. We note with dismay the consequences of (actual or effective) single-party rule in the former Soviet Union, Japan, Mexico and Communist China. Single-party rule has been observed to encourage arrogance, cronyism, mediocrity, incompetence and diversion of assets. Our economy has experienced two devastating market panics in the past decade, and both revealed these afflictions to be commonplace on corporate boards. Allowing shareowners to nominate and elect directors of their own choosing will break the “single-party rule” of entrenched boards and go a long way to addressing such afflictions.

A.9. Would adoption of only proposed Rule 14a-11 meet the Commission’s stated objectives? If so, why? If not, why not? What modifications to the proposed rule and related disclosure requirements would be necessary, if any?

Proposed Rule 14a-11 and Proposed Rule 14a-8(i)(8) reflect the tension between federal law and state law that has existed in our nation since the drafting of the constitution. For the problem of entrenched boards, Rule 14a-11 is the “federal” solution. Drafted by a federal agency, it promulgates a uniform standard for proxy access. Rule 14a-8(i)(8) is the “states” solution. Drafted by the same federal agency, it promulgates a rule to allow shareowners to pass resolutions at individual corporations to ensure proxy access under states’ laws.

While we support both rules in concept, we believe neither is a solution. In informal discussions with institutional investors and shareowner activists there is a sense that, although both rules are flawed, perhaps shareowners can somehow cobble together a solution by drawing on both. We fear a more likely outcome is that we will end up with two flawed rules that change nothing. Hoping that one flawed rule will compensate for another rule’s flaws is not a solution so much as an excuse for implementing flawed rules.

The flaws in the two rules are of a different character. Those of Rule 14a-11 lie in its details—unfortunate provisions such as the 1%, 3%, 5% ownership requirement or the first-come-first-served provision. We discuss these shortcomings in our responses to upcoming questions. We believe they can be resolved in a final rule, so we are hopeful for Rule 14a-11.

The flaw in Rule 14a-8(i)(8) is fundamental. It envisions a sort of trench warfare, in which shareowners confront one entrenched board at a time, forcing change through Rule 14a-8 shareowner resolutions—under opaque state laws and in the face of sometimes unsympathetic state courts. It won’t be easy. We don’t believe it will work.

This past April, one of our volunteers attended the Waddell & Reed Financial shareowner meeting on behalf of Boston Common Asset Management. He moved a non-binding say-on-pay resolution BCAM had submitted under Rule 14a-8. Waddell & Reed’s management had fiercely opposed the resolution. At the shareowner meeting, it passed with 50.6% of the vote.

As the resolution was non-binding, the Waddell & Reed board could have simply ignored it, but this would have come at a slight cost to their reputation. Instead, they chose to conduct a review of the vote to look for irregularities. Their proxy solicitor found a block of votes that was inadvertently not voted but that would otherwise have been largely voted against the proposal. The block was big enough that, if it were counted, the say-on-pay resolution would go from a 50.6% win to a 48.5% loss.

Management sought permission from the Delaware State Court of the Chancery to reopen the polls and add the block to the vote tallies. Dawn Wolfe of BCAM was invited to participate in a single phone call with management and the Delaware judge prior to his ruling. As Ms. Wolfe recalls it, the phone call had been described to her as preliminary. During the call, she was surprised when the judge said he intended to make a decision right then. He let Waddell & Reed reopen the polls and count that single additional block of votes. The decision was unfortunate because it allowed management to address a single irregularity when an independent audit might have identified others. Ironically, the judge's decision came on the exact day an election was being stolen in Iran.

As demonstrators bled and died on the streets of Tehran, Waddell & Reed's management prepared a 10-Q to file with the Commission stating the say-on-pay proposal had been defeated with just a 48.5% vote. That 10-Q made no mention of the Delaware court decision that had facilitated it.

This troubling incident illustrates the lengths to which a corporation's management might go to frustrate shareowner resolutions under Rule 14a-8—and the lack of sympathy Delaware and other state courts can show for shareowner rights. Yet shareowners will face an even greater hurdle if they attempt to dislodge entrenched management through Rule 14a-8(i)(8) trench warfare.

That hurdle is state law. Drafting a proxy access proposal under 14a-8(i)(8) and defending it against legal challenges under state law will entail more than reading statutes and rules. Shareowners will have to look up regulations, court decisions, no action letters, etc. Few can do this themselves, so they will have to hire lawyers, which few can afford. How many foundations can afford to spend $25,000 in legal fees drafting and defending a proxy access proposal that complies with both a corporation's bylaws and governing state law? How could a foundation possibly justify such an expenditure when the money could be spent on disaster relief or feeding the homeless? Pension plan trustees, with a fiduciary duty to plan participants, would similarly have a hard time justifying such an expenditure.

It is our experience that shareowner activists and reputable institutional investors consciously limit their activities so as to avoid having to get entangled with state corporate laws. There are fifty different flavors of state law, and no good resources for laymen on much of it. Race-to-the-bottom state law is like a private sandbox for entrenched boards. Able to draw on shareowner assets to pay legal fees, they can afford lawyers. Indeed, with shareowners generally unable to afford legal fees, there are few lawyers who specialize in state corporate law that take shareowners as clients. One notable shareowner activist we spoke to has hired lawyers to represent him, but he commented that they “pull their punches.” Perhaps they don’t want to antagonize prospective corporate clients.

Experience with Rule 14a-8 proposals indicates that most are submitted as non-binding, and a primary reason for this is to avoid challenges based on state law. If shareowners have been unable to afford getting entangled with state law in order to pursue proposals under Rule 14a-8, there is no reason to believe they will be able to do so with proposals under Rule 14a-8(i)(8). The trench warfare some envision for Rule 14a-8(i)(8) is, we believe, never going to happen.

Even if it did happen—and even if it were successful, with many corporations implementing bylaws to allow proxy access—that still wouldn’t solve the problem. Each corporation’s bylaws would be different, subject to interpretation under a different state’s laws, and interact with that state’s laws in a unique or unpredictable way. There would be myriad ways each corporation’s entrenched board might challenge shareowner nominations under their specific bylaws provision. These would necessarily involve state law. The same issue of shareowners being unable to afford legal advice would arise.

Someone must be distributing talking points. Time and again, reading comment letters submitted so far, critics of Rule 14a-11 complain that it is a “one size fits all” solution. They never explain what exactly is wrong with “one size fits all.” In the forgoing discussion, we have explained what is wrong with any solution that is *not* “one size fits all.” The strength of Rule 14a-11 is its predictable, uniform application. The essential flaw in Rule 14a-8(i)(8) is its complete lack of uniformity. We believe it cannot work for shareowners.

We do not oppose Rule 14a-8(i)(8). At a handful of corporations, posing unique situations perhaps, it may be useful. It is simply not an effective tool for broad change. We do not believe it can complement Rule 14a-11 or make up for any shortcomings in that rule. Rule 14a-11 must stand alone. It will succeed or fail irrespective of Rule 14a-8(i)(8).

A.10. Would adoption of only the proposed amendment to Rule 14a-8(i)(8) and the related disclosure requirements meet the Commission’s stated objectives? If so, why? If not, why not? What modifications to the proposed rule amendment and related disclosure requirements would be necessary, if any?

As we indicate in our response to Question A.9, we do not believe implementation of just proposed Rule 14a-8(i)(8) and related disclosure requirements will meet the Commission’s stated objectives. We believe shortcomings of that proposed rule are fundamental and cannot be resolved through amendments.

B.2. Should Rule 14a-11 apply as proposed? Is it appropriate for proposed Rule 14a-11 to be unavailable where state law or a company's governing documents prohibit shareowners from nominating candidates for director? Would the proposed rule effectively facilitate shareowners' basic rights, particularly the right to nominate directors?

We believe that any state law that would—explicitly or effectively—require that shareowners not be allowed to nominate directors is unconstitutional. In particular, it violates the Fourteenth Amendment, which states in part "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property ..."

Denying shareowners the right to nominate, and hence elect, directors of their choosing would be to deny them control over the corporations they own—i.e. deny them control over their property in violation of the Fourteenth Amendment.

With regard to possible provisions within some corporation's governing documents, a similar argument applies. If shareowners are prevented from nominating, and hence electing, board members of their choosing, then they have lost control over the corporations they own. By definition, those corporations are out-of-control. Because out-of-control corporations are inconsistent with good public policy, no corporation should be allowed to have a provision in a governing document that—explicitly or effectively—prevents shareowners from nominating candidates for the board. Any company with such a provision in a governing document should be required to remove it from the governing document without any need for a shareowner vote on the matter.

For these reasons, and others detailed in responses to questions below, we believe Rule 14a-11 should preempt state law and company bylaws.

B.3. As proposed, 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. What effect, if any, will this application have on any particular group of companies (e.g., on smaller reporting companies)? Are there modifications that would accommodate the needs of a particular group of companies (e.g., smaller reporting companies) while accomplishing the goals of the proposal? Would it instead be more appropriate to exclude from operation of the procedure smaller reporting companies, either on a temporary basis through staggered compliance dates based on company size, or on a permanent basis? Should

any other groups of companies be excluded from operation of the rule (e.g., companies subject to the proxy rules for less than a specified period of time (e.g., one year, two years, or three years))? If so, for what period of time should the companies be excluded from operation of the rule (e.g., one year, two years, three years, permanently)?

Rule 14a-11 will impose no material burden on any company subject to the proxy rules. Companies already have to distribute proxy assignment cards. It will be no imposition to require them to add a few additional nominees' names to those cards. In addition, electronic distribution of proxy materials and recording of proxy votes is reducing the cost of this process. Rule 14a-11 should apply uniformly to all companies subject to the proxy rules.

B.4. Should proposed Rule 14a-11 apply to registered investment companies? Are there any aspects of the proposed nomination procedure that should be modified in the case of registered investment companies?

Rule 14a-11 should apply to all registered investment companies in the same manner it applies to other companies subject to the proxy rules.

B.6. As proposed, Rule 14a-11 would apply to companies that have voluntarily registered a class of equity securities pursuant to Exchange Act Section 12(g). Should companies that have registered on a voluntary basis be subject to Rule 14a-11? If so, should nominating shareowners of these companies be subject to the same ownership eligibility thresholds as those shareowners of companies that were required to register a class of equity securities pursuant to Section 12? Should we adjust any other aspects of Rule 14a-11 for companies that have voluntarily registered a class of equity securities pursuant to Section 12(g)?

Rule 14a-11 should apply to companies that have voluntarily registered a class of equity securities pursuant to Exchange Act Section 12(g).

If a company's equity securities are registered under the Exchange Act, this gives investors some assurance that the company is subject to various rules safeguarding their interests. It might confuse—or even mislead—shareowners if certain companies with registered equity securities have been granted an exception to one or more such rules—Rule 14a-11 in particular.

Furthermore, doing so would needlessly complicate the nominations process. Shareowners would need to know of this exemption, and how would they ascertain if a particular company was allowed the exemption?

B.7. Should proposed Rule 14a-11 be inapplicable to a company that has or adopts a provision in its governing documents that provides for or prohibits the inclusion of shareowner director nominees in the company proxy materials? Should the Commission's rules respond to variations in shareowner director nomination disclosures and procedures adopted, for example, under state corporate laws that specify that a company's governing documents may address the use of a company's proxy materials for shareowner nominees to the board of directors? Would it be more appropriate to only permit companies to comply with governing document provisions or state laws where those provisions or laws provide shareowners with greater nomination or proxy disclosure rights than those provided under proposed Rule 14a-11? Should Rule 14a-11 provide that a company's governing documents may render the rule inapplicable to a company only if the shareowners have approved, as contrasted to the board implementing without shareowner approval, a provision in the company's governing documents addressing the inclusion of shareowner nominees in company proxy materials? Should Rule 14a-11 be inapplicable if such shareowner-approved provisions are more restrictive than Rule 14a-11? Should Rule 14a-11 be inapplicable if such shareowner-approved provisions are less restrictive than Rule 14a-11? Or both?

Rule 14a-11 should apply uniformly to all companies subject to the proxy rules. While it is reasonable that individual companies may adopt rules that *extend* shareowner rights beyond those provided under Rule 14a-11, none should be allowed to adopt rules that in any way *limit* shareowner rights under Rule 14a-11.

Allowing companies to adopt their own, more limited rules as an alternative to Rule 14a-11 would create an enormous burden for shareowners. It would vastly complicate shareowner nominations, forcing shareowners to research companies' individual rules. With each company potentially adopting its own rule, there would be little or no legal precedent for interpreting each company's rule. Shareowner nominations would likely be challenged by corporations under their customized rules, leading to either to expensive litigation (in the case of the few shareowners with money to hire lawyers) or shareowners having their nominees arbitrarily excluded from management's proxy assignment cards.

We believe that shareowner rights should be facilitated through standardized, transparent rules. Shareowners should not be forced to hire lawyers to exercise simple property rights, such as nominating board candidates.

B.8. The New York Stock Exchange has filed with the Commission a proposed rule change to amend NYSE Rule 452 and corresponding Section 402.08 of the Listed Company Manual to eliminate broker discretionary voting for the election of directors. The Commission published the proposed rule change, as

amended on February 26, 2009, for comment in the Federal Register on March 6, 2009.110 If the amendment to Rule 452 is approved, what would be its effect on operation of proposed Rule 14a-11? Would any changes to Rule 14a-11 be required? Please be specific in your response.

Rule 14a-11 and the amendment to Rule 452 are entirely separate matters. We view the amendment to Rule 452 as a positive development. However, as we indicated in our response to Question A.1, it is one thing to vote. It is another thing entirely to set the agenda. Rule 14a-11 is about restoring the right of shareowners to set the agenda by nominating board candidates of their choosing. The amendment to Rule 452 relates to the mechanics of voting. It does not address the issue of restoring shareowners' right to set the agenda for their shareowner meetings.

B.9. Should proposed Rule 14a-11 exempt companies where state law or the company's governing documents require that directors be elected by a majority of shares present in person or represented by proxy at the meeting and entitled to vote? What specific issues would arise in an election where state law or the company's governing documents provided for other than plurality voting (e.g., majority voting)? What specific issues would arise in an election that is conducted by cumulative voting? Would these issues need to be addressed in revisions to the proposed rule text? If so, how?

This question is similar to the previous one, so our response invokes similar arguments.

Rule 14a-11 is an entirely separate mater from majority voting or cumulative voting. As explained in our response to Question E.1, we believe that "instant run-off" majority voting or a similar ranked voting system should be mandated for all board elections. However, as we indicated in our response to Question A.1, it is one thing to vote. It is another thing entirely to set the agenda. Rule 14a-11 is about restoring the right of shareowners to set the agenda by nominating board candidates of their choosing. Majority voting and cumulative voting relate to the mechanics of voting. They do nothing to restore shareowners' right to set the agenda for their shareowner meetings.

B.10. Should companies be able to take specified steps or actions, such as adopting a majority vote standard or bylaw specifying procedures for the inclusion of shareowner nominees in company proxy materials, to prevent application of proposed Rule 14a-11 where it otherwise would apply? If so, what such steps or actions would be appropriate and why would they be appropriate? For example, should companies that agree with a shareowner proponent not to exclude a shareowner proposal submitted by an eligible shareowner pursuant to Rule 14a-8 be exempted from application of the proposed rule

for a specified period of time? Should a company that implements any shareowner proposals that receive a majority of votes cast in a given year be exempted?

As we indicated in our response to Question B.9, majority voting is no substitute for Rule 14a-11. Rule 14a-11 is about restoring the right of shareowners to set the agenda for their shareowner meetings by nominating board candidates of their choosing. Majority voting relates to the mechanics of voting. It does not restore—and is no substitute for restoring—shareowners' right to set the agenda for their shareowner meetings.

Similarly, Rules 14a-8 and 14a-11 are entirely different matters. A corporation's behavior with regard to one should not have nay bearing on the applicability of the other.

We note with dismay how shareowners are so frequently treated as monolithic, with identical beliefs and goals. They are not. For this reason, it would be unreasonable to curtail one shareowner's rights under Rule 14a-11 just because another shareowner has exercised her rights under Rule 14a-8.

Indeed, allowing such exemptions for Rule 14a-11 would open the door to corporate mischief. Suppose companies were allowed an exemption for Rule 14a-11 whenever they "agree with a shareowner proponent not to exclude a shareowner proposal submitted by an eligible shareowner pursuant to Rule 14a-8." What would prevent entrenched corporate managers from recruiting a "straw man" to submit some benign Rule 14a-8 shareowner proposal just so they could agree not to exclude it and thereby obtain an exemption for Rule 14a-11?

We believe there should be no exemptions for Rule 14a-11. Exemptions would needlessly complicate the process of shareowner nominations. That would be burdensome, especially for the vast majority of (individual and institutional) shareowners who cannot afford or justify the cost of legal assistance. Also, depending on the specific exemptions, they would likely open the door to corporate mischief.

B.11. Should companies subject to Rule 14a-11 be permitted to exclude certain shareowner proposals that they otherwise would be required to include? If so, what categories of proposals? For example, should the company be able to exclude proposals that are non-binding, proposals that relate to corporate governance matters generally, proposals that relate to the structure or composition of boards of directors, or other proposals?

No. Companies subject to Rule 14a-11 should not be permitted to exclude any shareowner proposals that they otherwise would be required to include. As we indicated in our response to Question A.1, there are two primary means through which shareowners exercise their right to set the agenda, and perform on their responsibilities as corporate property owners. One is through proposals; the other is through board nominations. These serve different purposes, and both are essential if shareowners are to reclaim control over the corporations they own.

We believe Rule 14a-11 is an important step towards restoring shareowner rights. We see no justification for weakening Rule 14a-8.

B.12. One concern that has been raised about the effectiveness of the present proxy rules is the high cost to a shareowner to conduct a solicitation to nominate a director. Should the proposed rule provide that it does not apply to a company whose governing documents include a provision for reimbursement of expenses incurred by a participant or participants in the course of a solicitation in opposition as defined in Rule 14a-12(c)? If so, should the rule specify what manner of reimbursement would be sufficient for proposed Rule 14a-11 not to apply?

The proposed rule should *not* have an exception for corporations willing to reimburse expenses shareowners incur in conducting a proxy contest.

Orchestrating a proxy contest requires time, knowledge and expertise that most shareowners lack. Allowing corporations to force shareowners to go through that process in lieu of simply placing their nominees on management's proxy card would defeat the purpose of the proposed rule.

Proxy contests can cost hundreds of thousands of dollars—millions if there are legal challenges A 2003 proxy contest at El Paso cost insurgent shareowners $5.9 million. Such expenses raise two issues:

First, even with reimbursement, such staggering expenses will preclude the vast majority of shareowners from conducting proxy contests. How many shareowners could obtain unsecured financing for a potential $5.9 million proxy contest? Then there is the risk that a corporation will refuse to make full compensation. The corporation might challenge the expenditure and offer reimbursement for only a fraction of what was spent. Average shareowners, with limited financial resources, cannot afford to take such a risk.

Second, all shareowners would suffer financially from allowing such an exception to the proposed rule. Why should they incur the cost of reimbursement for an expensive proxy solicitation—which would be paid out of their company's assets—when shareowner nominations could simply be placed on management's proxy assignment card under Rule 14a-11 at no material cost to the company? An entrenched board might think nothing of spending corporate assets to obstruct shareowner board nominations, but doing so would hurt shareowners.

B.13. Should Rule 14a-11 be widely available, as proposed, or should application of the rule be limited to companies where specific events have occurred to trigger operation of the rule? If so, what events should trigger operation of the rule?

As the Commission has indicated in the narrative accompanying the proposed rule, the sorts of triggers that were considered in 2003 would needlessly complicate the nominations process and impose delays on shareowners seeking to implement change at corporations they own.

Requiring any sort of trigger event will undermine property rights. As owners of a corporation, shareowners have a fundamental right to dispose of that property in any manner they choose, subject to safeguards to protect minority shareowners and other stakeholders. This means shareowners can—or should be allowed to under Commission rules—nominate and elect whomever they choose to the board, whenever they want. Limiting that right to apply in only certain circumstances is to deny shareowners' property rights. It would be like telling citizens they can own cars, but they must obtain approval a day in advance to drive them.

Limiting rights in property limits the value of that property. It represents a destruction of wealth. The Commission's rules should facilitate wealth creation, not destruction.

B.14. If the Commission were to include triggering events in Rule 14a-11, would either of the triggering events proposed in 2003 and described above be appropriate? In responding, please discuss how any changes in corporate governance practices over the past six years have affected the usefulness of the triggering events proposed in 2003. For example, over the past six years many companies have adopted majority voting. If the triggering events proposed in 2003 are not appropriate, are there alternative events that the Commission should consider in place of, or in addition to, the above events? For example, should application of Rule 14a-11 be triggered by other factors such as economic performance (e.g., lagging a peer index for a specified number of consecutive years), being delisted by an exchange, being sanctioned by the Commission or other regulators, being indicted on criminal charges, having to restate earnings, having to restate earnings more than once in a specified period, or failing to take action on a shareowner proposal that received a majority shareowner vote?

Neither of the trigger events proposed in 2003 would be appropriate. Because shareowners collectively control whether those two specific trigger events occur, requiring those trigger events could have a perverse effect on shareowner behavior. Shareowners would reasonably strive to ensue that a trigger event has always occurred just to preserve their option to nominate directors. Imagine shareowners submitting proposals every year for them to be allowed to make nominations under proposed Rule 14a-11 the subsequent year. Furthermore, suppose shareowners are concerned that such a proposal might not garner the required 50% support. This would introduce a perverse incentive for them to withhold support from directors for the mere purpose of achieving the other trigger—a 35% withhold vote for at least one director.

Other proposed triggers relate to possible adverse events at a corporation, such as being delisted or having to restate earnings. The premise that shareowners should only be allowed to intervene when conditions at a corporation are adverse is inconsistent with shareowners' property rights. If a corporation has not been delisted; has not had to restate earnings; and has a 40% return on equity, shareowners should still be allowed to intervene. Perhaps shareowners believe that, if certain board members are replaced, the corporation will achieve a 60% return on equity. It is their corporation.

B.15. In the 2003 Proposal, the rule proposed would have been triggered by withhold votes for one or more directors of more than 35% of the votes cast. Is it appropriate to apply such a trigger to current proposed Rule 14a-11? If so, what would be an appropriate percentage and why? Would it be appropriate to base this trigger on votes cast rather than votes outstanding? Please provide a basis for any alternate recommendations, including numeric data, where available. Is the percentage of withhold votes the appropriate standard in all cases? For example, what standard is appropriate for companies that do not use plurality voting? If your comments are based upon data with regard to withhold votes for individual directors, please provide such data in your response.

As explained in our response to question B.14, requiring such a trigger event could lead to perverse shareowner behavior. Shareowners would have an incentive to withhold support for directors merely to preserve their right to nominate board candidates the following year.

B.16. If the Commission were to include a triggering event requirement, for what period of time after a triggering event should Rule 14a-11 apply (e.g., one year, two years, three years, or permanently)? Should there be a means other than the adoption of a provision in the company's governing documents for the company or shareowners to terminate application of the requirement at a company? If so, what other means would be appropriate?

We believe the proposed rule should require no trigger events.

B.17. What would be the possible consequences of the use of triggering events? Would the withhold vote trigger result in more campaigns seeking withhold votes? How would any such consequences affect the operation and governance of companies?

Trigger events will represent artificial constraints on the exercise of shareowner property rights. They will distort shareowner behavior. In particular, if there is a withhold vote trigger, we anticipate shareowners routinely conducting withhold vote campaigns merely to preserve their right to nominate board candidates. The additional withhold votes could cause directors who otherwise would have been elected to not be elected, at least at corporations that employ majority voting.

B.18. If the proposed requirement applied only after a specified triggering event, how would the company make shareowners aware when a triggering event has occurred? If the rule became operative based on the occurrence of triggering events, should the rule require additional disclosures in a company's Exchange Act Form 10-Q,111 10-K,112 or 8-K113 or, in the case of a registered investment company, Form N-CSR?114 For example, the rule could require the following:

- **A company would be required to disclose the shareowner vote with regard to the directors receiving a withhold vote or a shareowner proposal, either of which may result in a triggering event, in its quarterly report on Form 10-Q for the period in which the matter was submitted to a vote of shareowners or, where the triggering event occurred during the fourth quarter of the fiscal year, on Form 10-K;115 and**
- **A company would be required to include in that Form 10-Q or 10-K information disclosing that it would be subject to Rule 14a-11 as a result of such vote, if applicable.**

While we oppose any sort of trigger event, we believe that more transparent disclosure than that described above would be necessary, as in an 8K. Rather than force shareowners to rummage around in past 10-Ks and 10-Qs trying to determine if any trigger event has occurred, corporations should be required to make an explicit disclosure as to whether they are currently subject to proposed Rule 14a-11, and how much longer that state will persist, assuming there aren't future trigger events to extend the period.

B.19. Should the company's disclosure regarding the applicability of Rule 14a-11 be filed or made public in some other manner? If so, what manner would be appropriate?

Disclosure of whether or not a corporation is currently subject to Rule 14a-11 should be standardized and contained in filings available on EDGAR, so third party websites and data vendors can easily download the information and make it available to shareowners in a user-friendly form. These events should be considered material to the company and should therefore be filed in an 8K to notify shareowners of a significant event.

B.20. Should companies be exempted from complying with Rule 14a-11 for any election of directors in which another party commences or evidences its intent to commence a solicitation in opposition subject to Rule 14a-12(c) prior to the company mailing its proxy materials? What should be the effect if another party commences a solicitation in opposition after the company has mailed its proxy materials?

Shareowners' right to nominate directors under Rule 14a-11 should not be curtailed because some trashy hedge fund runs a proxy contest under Rule 14a-12(c).

However, such a scenario does pose a logistical concern. If there is a proxy contest at the same time that a few board candidates are nominated under Rule 14a-11, some shareowners may want to pick-and-choose among candidates, perhaps voting for some of the Rule 14a-11 nominees and some of the Rule 14a-12(c) nominees. Faced with two competing proxy assignment cards, perhaps received in the mail weeks apart, and with neither card listing all the candidates they wish to vote for, shareowners won't know how to communicate their intentions.

An obvious solution for this problem is for the Commission to abandon the archaic practice of proxy contests being waged with competing proxy assignment cards. Competing proxy assignment cards should be replaced with a combined proxy assignment card or a single absentee ballot, either one listing all nominees (board nominees, Rule 14a-11 nominees, and Rule 14a-12(c) nominees). A combined proxy assignment card would have a section for shareowners to select a proxy. All parties formally soliciting proxies would be listed, and there would also be an option to pencil in a name. An absentee ballot would be a ballot without any assignment of proxy.

Absentee ballots pose issues of their own. We will not discuss these here, as doing so would take us far afield of the topic of this letter. However, we believe a system of combined proxy assignment cards or absentee ballots could be implemented in a manner that would make them superior to the current unfortunate practice of competing proxy assignment cards. We would be happy to discuss this option with Commissioners or staff.

B.21. If a triggering event is required and companies are exempted from complying with Rule 14a-11 because another party has commenced or evidenced its intent to commence a solicitation in opposition subject to Rule 14a-12(c), should the period in which Rule 14a-11 applies be extended to the next year? What should be the effect if another party commences a solicitation in opposition after the company has mailed its proxy materials?

We believe trigger events should not be used and that companies should not be exempt from complying with Rule 14a-11 merely because another party conducts a solicitation in opposition subject to Rule 14a-12(c). This question B.21 illustrates how adoption of trigger events and such an exemption would needlessly complicate the nomination process while providing no benefit to average shareowners.

B.22. What provisions, if any, would the Commission need to make for the transition period after adoption of a rule based on this proposal? Would it be necessary to adjust the timing requirements of the rule depending on the effective date of the rule (e.g., if the rules are adopted shortly before a proxy season)?

This round of comments has identified a number of issues with the rule, as currently written. Addressing these is likely to require at least one more draft and round of comments, if not more. To provide adequate time, we recommend that Rule 14a-11 become effective for 2011 shareowner meetings at the earliest in order to incorporate suggested changes.

C.1. Are the proposed shareowner eligibility criteria for Rule 14a-11 necessary or appropriate? If not, why not? Should there be any restrictions regarding which shareowners can use proposed Rule 14a-11 to nominate directors for inclusion in company proxy materials? Should those restrictions be consistent with the requirements of Rule 14a-8 or should they be more extensive than the minimum requirements in Rule 14a-8?

The proposed shareowner eligibility requirements are unnecessary and inappropriate.

In the narrative accompanying the proposed rule, the Commission states that the proposed eligibility requirements are intended to “balance shareowners’ ability to participate more fully in the nomination and election process against the potential cost and disruption to companies subject to the proposed new rule."

It is important to put these competing goals in perspective. Both are about mitigating costs that are ultimately born by the shareowners. However, the magnitudes of those costs are in no way comparable.

The fact that shareowners have lost control over the companies they own has cost them, arguably, trillions of dollars over the last decade. Numerous companies—with names like Enron, Worldcom, AIG, IndyMac, and General Motors—have been crippled for having blatantly incompetent or irresponsible management. They are the tip of the iceberg. For every company that fails spectacularly, there are many others with management—unanswerable to shareowners—quietly diverting or destroying wealth through greed, incompetence or simple laziness.

Most signatories to this letter have extensive professional experience in corporate finance. Combined, we have several hundred years such experience. Over those many years, we have born witness to the ongoing destruction of wealth by unaccountable corporate executives at numerous companies in numerous ways that almost never make it into newspapers. This problem is profound, and the cost to shareowners and society is staggering.

When we contrast this problem with that of minimizing costs to companies for complying with Rule 14a-11, there is no comparison. Complying with Rule 14a-11 will not cost corporations—i.e. shareowners—trillions of dollars. It won't cost them billions of dollars. We would be surprised if it even cost them millions of dollars. That cost, whatever it may be, is a drop in the bucket.

As we explained in response to Question A.8, the claim that shareholder-nominated directors will disrupt companies is an argument for single-party rule. It is discredited by history. It is fatuous.

Accordingly, there should be no question of the Commission balancing "shareowners' ability to participate more fully in the nomination and election process against the potential cost and disruption to companies subject to the proposed new rule." If Rule 14a-11 contributes to restoring shareowner control over the corporations they own, it will be worth whatever minor costs of compliance those corporations may bear. We believe the Commission's entire focus should be on implementing Rule 14a-11 to be as effective as possible in restoring average shareowner's control over corporations. Corporate compliance costs, whatever they may be, will be so trivial as to not warrant consideration.

The proposed eligibility requirements are onerous and incompatible with this legitimate goal. The 1%, 3% and 5% shareholdings requirements, in particular, will all but preclude the participation of average shareowners. These thresholds have, in this regard, been criticized as elitist. They will also severely limit the ability of reputable institutional investors to participate. This is clearly a situation of “throwing the baby out with the bathwater.”

We feel the Commission has not adequately justified the propose 1%, 3%, and 5% eligibility thresholds. The thresholds will effectively shut out individual investors and most small or modest-sized institutional investors. The Commission confirms this is their intention: “We are proposing that only holders of a significant, long-term interest in a company be able to rely on Rule 14a-11.” We respectfully ask, “Why?” If the vast majority of shareholders are to be excluded, there better be a *compelling reason*. There isn’t.

Based on a careful reading of the Commission’s proposed rule and the comment letters received to date, we perceive little justification for the thresholds, and none that rises to our “compelling reason” standard. Much of what passes for justification merely begs the question:

> “Those who advocated a larger share ownership threshold argued that a nominating shareholder should have a substantial, long-term stake in the company in order to require the use of company funds to nominate a candidate.” [proposed rule, p. 45]

Why?

> “In addition, advocates of a larger share ownership threshold pointed out that the composition of the board of directors is critical to a corporation’s functions and, accordingly, shareholders should have to evidence a significant financial interest by satisfying a substantial ownership threshold in order to require a company to include in its proxy materials a shareholder director nominee or nominees.” [proposed rule, p. 45]

Again, why?

Based on our reading, we have identified three would-be justifications that do not beg the question and have been advanced in support of elitist thresholds.

The first is the Commission’s explicit justification: “seeking to balance shareholders’ ability to participate more fully in the nomination and election process against the potential cost and disruption to companies subject to the proposed new rule.” We have already explained why this is inappropriate.

The second would-be justification is “motivation.” It is based on a perception that shareholders with the largest holdings in a particular company will be most motivated to nominate high-caliber board candidates. From a public policy standpoint, it seems reasonable to encourage high-caliber board nominations and discourage others.

We disagree. While it is certainly good public policy to encourage high-caliber board nominations, we believe that individual shareowners will be more motivated than large institutional investors to nominate high-caliber candidates. Motivation is not proportional to absolute holdings. It is proportional to relative holding. An individual investor who is 20% invested in a particular stock will likely be more motivated than an employee of an institutional investor that is 0.5% invested in that stock. This is true irrespective of the absolute size of their portfolios. Also, the fact that individual shareowners have their own money on the line, while institutions are investing "other people's money," argues strongly for the relative motivation of individual shareowners.

This leads advocates of elitist thresholds to a fallback position, which is actually the third would-be justification we have identified. This relates to individual shareowners' *ability* to nominate high-caliber board candidates. There is a perception that individual shareowners are less sophisticated than institutional shareowners. While it may be true that the average individual shareowner may have less financial sophistication than the average employee of an institutional investor, it is also true that *average* individual shareowners wouldn't be making board nominations under Rule 14a-11.

Experience with rule 14a-8 shareowner proposals indicates that our nation is blessed with a cadre of motivated individual shareowners with knowledge, wisdom, vision, commitment and financial sophistication that vastly exceeds that of average employees at institutional investors. A few of them are signatories to this letter. Some focus on submitting Rule 14a-8 proposals to one or a handful of companies. Others cast their net more widely. Indisputably, these courageous individuals have contributed significantly to corporate governance through their many proposals. They have also exhibited a willingness to experiment or take risks with their proposals—something that is less common among institutional shareholders.

We are sure the Commission did not intend to insult these Americans heroes with the 1%, 3%, 5% thresholds. Now that we have presented their case, however, to proceed with the thresholds would be to do just that. There is no justification for doing so. Our American heroes demand that they be allowed to nominate on an equal footing with institutions.

We believe it should not be easy for *any* shareowners to place people on a board of directors. However, the challenge should reside in winning the election, not in making the nomination.

We acknowledged in our response to Question A.1 the Commission's legitimate goal, through the proxy process, of restoring to shareowners the benefits they would otherwise realize by participating in a deliberative shareowner meeting. It is a fundamental rule of deliberative bodies that the majority has the right to make decisions, but the minority has the right to first be heard. For this reason, reputable rules of procedure—such as *Roberts Rules of Order*—make it easy for participants in a deliberative meeting to bring a proposal or nomination before the group. Usually, all that is required is for one person to move the proposal or make the nomination, and for another person to second it. People with little experience with deliberative meetings may think this would make it too easy for "fringe groups" to move proposals or make nominations, but it works. It ensures that the minority has an opportunity to be heard, which is their right.

In our response to Question A.1, we pointed out that it is not enough for investors to be allowed to vote on issues. They must have the opportunity to deliberate. A large part of deliberation is setting the agenda. Shareowners can—or should be allowed to—set the agenda for their shareowner meetings in two ways. One is making shareowner proposals, and the other is making shareowner board nominations. Rule 14a-8 facilitates shareowner proposals, and Rule 14a-11 will facilitate shareowner board nominations. Because the two rules are so closely related, we believe they should be harmonized. It makes sense that they share a single uniform eligibility requirement. The eligibility requirement for Rule 14a-8—that shareowners have held at least $2,000 or a corporation's stock for at least a year—has worked perfectly well for many years. There is every reason to believe it will work just as well for Rule 14a-11.

Such a modest eligibility requirement does raise the issue of frivolous board nominations. Some may fear that companies will be inundated with numerous board nominations. It is worth noting that Rule 14a-8 hasn't caused companies to be inundated with frivolous shareowner proposals. This is strong empirical evidence that Rule 14a-11 won't cause companies to be inundated with frivolous shareowner board nominations.

Given how onerous—and elitist—the proposed 1%, 3% or 5% shareholdings requirements would be, and the fact that there doesn't appear to be any legitimate justification for them, we recommend that the Commission not impose them. We recommend adopting the same eligibility requirement for Rule 14a-11 as have worked so well for Rule 14a-8.

If problems arise, or if the Commission wants to implement safeguards to otherwise limit nominations to a manageable number, there are alternatives to onerous 1%, 3% and 5% thresholds. We describe some intriguing possibilities in our response to Question E.1.

In this response to Question C.1, we have not mentioned the proposal that the number of shareowner nominations under Rule 14a-11 be limited each year to no more than 25% of board seats up for election. We oppose that limitation and will address it in response to upcoming questions that explicitly raise it.

C.2. The proposed eligibility threshold is based on the percentage of securities owned and entitled to vote on the election of directors. This threshold is based on current Rule 14a-8 and reflects our intent to focus on those shareowners eligible to vote for directors. Is the proposed threshold appropriate or could it be better focused to accomplish our objective? For example, should eligibility instead be based on record ownership? Should eligibility be based on the value of shares owned? If so, on what date should the value be measured? What would be an appropriate value amount? Is there another standard or criteria? Is submission of the nomination the correct date on which to make these eligibility determinations? If not, what date should be used?

As we indicated in our response to Question C.1, we believe that the proposed eligibility requirements are onerous and are subject to criticism as elitist. We recommended that Rule 14a-11 have the exact same eligibility requirements as Rule 14a-8—that shareowners be eligible if they have held at least $2,000 of a company's stock for at least a year. All the issues raised in the current question can be addressed for Rule 14a-11 in exactly the same manner as for Rule 14a-8. This is what we meant in our response to Question C.1 when we suggested that Rules 14a-8 and 14a-11 be harmonized.

C.3. For companies that have more than one class of securities entitled to vote on the election of directors, does the rule provide adequate guidance on how to determine whether a shareowner meets the requisite ownership thresholds? Should the rule specifically address how to make this determination if one class of securities has greater voting rights than another class?

In our response to Question C.1, we recommend that Rule 14a-11 have the identical eligibility requirement as Rule 14a-8. The matter raised in this question can be addressed for Rule 14a-11 in the same manner it is addressed for Rule 14a-8.

C.4. What other criteria or alternatives should the Commission consider to determine the eligibility standards for shareowners to nominate directors?

We believe the Commission should adopt for Rule 14a-11 the exact same eligibility requirement as for Rule 14a-8—that shareowners be eligible if they have held at least $2,000 or a corporation's stock for at least a year. We believe there should be no additional eligibility requirements.

C.5. Is it appropriate to use a tiered approach to the ownership threshold for reporting companies (other than registered investment companies)? If so, is it appropriate and workable to use large accelerated filer, accelerated filer, and non-accelerated filer to define the three tiers? Are there aspects of the definitions of these groups that do not work with the proposed rule? Should we instead define the tiers strictly by public float or strictly by market capitalization? If so, what should the public float or market capitalization thresholds be (e.g., 5% for companies with less than $75,000,000 in public float; 3% for companies with more than $75,000,000 but less than $700,000,000 in public float; 1% for companies with greater than $700,000,000 in public float)?

We do not see how a tiered eligibility requirement could benefit shareowners. We can think of no public policy goal that would benefit from such a tiered eligibility requirement.

C.6. Is the 1% standard that we have proposed for large accelerated filers appropriate? Should the standard be lower (e.g., $2,000 or 0.5%) or higher (e.g., 2%, 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 3% standard that we have proposed for accelerated filers appropriate? Should the standard be lower (e.g., 1% or 2%) or higher (e.g., 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 5% standard that we have proposed for non-accelerated filers appropriate? Should the standard be lower (e.g., 1%, 2%, 3%, or 4%) or higher (e.g., 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)?

As we have indicated in responses to earlier questions, we believe the eligibility requirement should be that shareowners be eligible if they have held at least $2,000 or a corporation's stock for at least a year.

C.7. Should groups of shareowners composed of a large number of beneficial holders, but who collectively own a percentage of shares below the proposed thresholds, be permitted to have a nominee included in the company proxy materials? If so, what would be a sufficiently large group? Would a group composed of over 1%, 3%, 5% or 10% of the number of beneficial holders be sufficient? Should there be different disclosure requirements for a large shareowner group?

Based on the suggestion in our response to Question C.1 that the eligibility requirement for Rule 14a-11 be identical to that for rule 14a-8, this question becomes mute.

C.8. Is it appropriate to use a tiered approach to the ownership threshold for registered investment companies? Should the tiers and ownership percentages for registered investment companies be similar to those for reporting companies other than registered investment companies, as proposed, or should they be different? Is it appropriate and workable to base the tiers on a registered investment company's net assets? Should another measure be used instead? Should the determination of which tier a series investment company belongs to be made on a series by series basis, rather than for the company as a whole? Should the levels of net assets for each category be higher or lower? If so, why?

No.

C.9. Should the determination of which tier a series investment company is in be based on the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting, as disclosed in a Form 8-K filed in connection with the meeting at which directors are to be elected? Should the determination of which tier other registered investment companies are in be based on the net assets of the company as of the end of the company's second fiscal quarter in the fiscal year immediately preceding the fiscal year of the meeting, as disclosed in the company's Form N-CSR? If not, as of what date should net assets be determined for these purposes? Should all registered investment companies use a single date for purposes of making this determination?

Based on the suggestion in our response to Question C.1 that the eligibility requirement for Rule 14a-11 be identical to that for rule 14a-8, this question becomes mute.

C.10. Should a registered investment company that is a series company be required 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 shares of the company that are 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 annual meeting of shareowners (or, in lieu of such an annual meeting, a special meeting of shareowners) as of the end of the most recent calendar quarter? If not, how should shareowners of a series company determine whether they meet the applicable ownership threshold?

Based on the suggestion in our response to Question C.1 that the eligibility requirement for Rule 14a-11 be identical to that for rule 14a-8, this question becomes mute.

C.11. Is the 1% standard that we have proposed for registered investment companies with net assets of $700 million or more appropriate? Should the standard be lower (e.g., $2,000 or 0.5%) or higher (e.g., 2%, 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 3% standard that we have proposed for registered investment companies with net assets of $75 million or more, but less than $700 million, appropriate? Should the standard be lower (e.g., 1% or 2%) or higher (e.g., 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 5% standard that we have proposed for registered investment companies with net assets of less than $75 million appropriate? Should the standard be lower (e.g., 1%, 2%, 3%, or 4%) or higher (e.g., 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Should the determination of whether a shareowner or shareowner group beneficially owns a sufficient percentage of a series company's securities to nominate a director be made on a series by series basis, rather than for the company as a whole (i.e., should a shareowner be permitted to take advantage of the nomination process contained in proposed Rule 14a-11 if he or she owns the applicable percentage of shares of a series of the company, but does not own the applicable percentage of the company as a whole)? Should closed-end investment companies be subject to the same standards as open-end investment companies? As proposed, business development companies would be treated in the same manner as reporting companies (other than registered investment companies).150 Should business development companies be subject to the same tiered approach as reporting companies (other than registered investment companies)? Why or why not?

As we have indicated in responses to earlier questions, we believe the eligibility requirement should be that shareowners be eligible if they have held at least $2,000 or a company's stock for at least a year. We believe this should apply to all companies, including all investment companies.

C.12. In determining the securities that are entitled to be voted on the election of directors of a registered investment company for purposes of establishing whether the applicable threshold has been met, should the nominating shareowner or group be permitted to rely on information set forth in a Form 8-K filed in connection with the meeting where directors are to be elected (in the case of a series company) or the company's most recent annual or semi-annual report filed with the Commission on Form N-CSR (in the case of other investment companies), unless the nominating shareowner or group

knows or has reason to know that the information contained therein is inaccurate?

Based on the suggestion in our response to Question C.1 that eligibility requirements be based on specific *dollar amounts* of stock, this question becomes mute.

C.13. Voting rights for some registered investment companies are based on the net asset value of the shareowner's securities rather than the number of securities. Does the rule provide adequate guidance on how to determine whether a shareowner meets the requisite ownership threshold in such a case? Should the rule specifically address how to make the ownership threshold determination in cases where different securities of the same investment company have different voting rights on a per share basis?

Based on the suggestion in our response to Question C.1 that the eligibility requirement for Rule 14a-11 be identical to that for rule 14a-8, this question becomes mute.

C.14. Should there be a restriction on shareowner eligibility that is based on the length of time securities have been held? If so, is one year the proper standard? Should the standard be longer (e.g., two years, three years, four years, or five years)? Should the standard be shorter (e.g., six months)? Should the standard be measured by a different date (e.g., one year as of the date of the meeting, rather than the date of the notice)?

As we indicated in our response to question C.1, we think a one-year holding period is appropriate. This is based on the fact that the same holding period has worked so well for rule 14a-8.

C.15. Should eligibility be conditioned on meeting the required ownership threshold by holding a net long position for the required time period? If the Commission were to adopt such a requirement, would this require other modifications to the proposal?

If we understand this question correctly, the Commission is concerned that a shareowner might technically satisfy an eligibility requirement by holding a block of a company's stock, but at the same time have negative net exposure to the stock due to a short position or derivatives position in the same stock.

We believe this is a meritorious question, since short positions and equity derivatives positions are inherently speculative. The mere fact that a shareowner enters into such transactions suggests an agenda that would be incompatible with nominating directors or exercising other shareowner prerogatives. However, policing any rule based on short or derivatives positions a shareowner may hold would be extremely difficult.

We believe that shareowners' interests are best served by having only a minor eligibility requirement, which would be easily satisfied by most long-term investors. Worrying about short or derivatives positions—no matter how theoretically meritorious—would needlessly complicate shareowner nominations. Nominees should be evaluated on their own merits and owe a fiduciary duty to the corporation, if elected.

C.16. As proposed, a nominating shareowner would be required to represent its intent to hold the securities until the date of the election of directors. Is it appropriate to include such a requirement? What should be the remedy if the nominating shareowner or group represents its intent to hold the securities through the date of the meeting for the election of directors and fails to do so? Should the company be permitted to exclude any nominations from that nominating shareowner or member of a group for some period of time afterward (e.g., one year, two years, three years)? If the nominating shareowner or group fails to hold the securities through the date of the meeting, what, if anything, should the effect be on the election? Should the nominee submitted by the shareowner or group be disqualified?

A similar requirement holds for Rule 14a-8, and we feel it should apply in the same manner under Rule 14a-11.

If someone were elected to a company's board as a result of a Rule 14a-11 nomination, and it came to light that a nominating party failed to hold her shares through the election date, it would be perverse to invalidate the election. By the very act of electing the individual to the board, the shareowners would have affirmed the nomination. It is their rights we are trying to protect after all. While some sanction might be appropriate for the nominating party, it would be inappropriate to reverse the clear will of the shareowners in electing the nominee to their board.

An appropriate sanction for a nominating shareowner who failed to hold sufficient shares through the shareowners meeting would be to allow the company to preclude the shareowner from making any nominations (alone or as part of a group) for three years. Should a nominating group of shareowners fail to hold sufficient shares through the shareowners meeting, the sanction should only apply to those members of the group who reduced their holdings in the stock below the level of their holdings at the time the nomination was made.

C.17. We are proposing that a nominating shareowner represent an intent to hold through the date of the meeting because we believe it is important that the nominating shareowner or group have a significant economic interest in the company. Is it appropriate to require the shareowner to provide a statement regarding its intent with regard to continued ownership of the securities beyond the election of directors? Should a nominating shareowner be required to represent that it will hold the securities beyond the election if the nominating shareowner's nominee is elected (e.g., for six months after the election, one year after the election, or two years after the election)? Would the answer be different if the nominating shareowner's nominee is not elected?

In our response to Question C.1, we suggested that, because Rules 14a-8 and 14a-11 are so closely related, that they be harmonized. We believe that the requirement that shareowners intend to hold shares through the shareowners meeting should work in the same manner under Rule 14a-11 as it does under Rule 14a-8. We do not believe Rule 14a-11 should have extra requirements, such as requiring shareowners whose nominees are elected hold their shares for a longer period. Such additional requirements would de-harmonize the two rules, which would needlessly complicate shareowner nominations.

C.18. In the 2003 Proposal the Commission solicited comment on whether the rule should include a provision that would deny eligibility for any nominating shareowner or group that has had a nominee included in the company materials where that nominee did not receive a sufficient percentage of the votes. Commenters were mixed in their responses so we have not proposed a requirement in this regard, but are again requesting comment as to whether the rule should include a provision denying eligibility for any nominating shareowner or group who has had a nominee included in the company materials where that nominee did not receive a sufficient percentage of the votes (e.g., 5%, 10%, 15%, 25%, or 35%) within a specified period of time in the past (e.g., one year, two years, three years, four years, five years). If there should be such an eligibility standard, how long should the prohibition last (e.g., one year, two years, three years)? Similarly, we are again requesting comment (see also Request for Comment D.16.) as to whether the rule should include a provision that would deny eligibility for any nominee that has been included in the company proxy materials within a specified period of time in the past (e.g., one year, two years, three year, four years, five years) where that nominee did not receive at least a specified percentage of the votes (e.g., 5%, 10%, 15%, 25%, or 35%). How long should any such prohibition last (e.g., one year, two years, three years)?

We believe these proposals would needlessly complicate shareowner nominations and be of no benefit to shareowners. The fact that a nominating party's candidate does poorly in one election does not mean that the same nominating party's candidate won't do well in another. The nominating party may learn from its mistake and select a better nominee the next time. Even if it doesn't, the mood of an electorate (the shareowners) can change, so a candidate who is unpopular at one point may be popular at another.

A rule such as this might prove especially problematic when a group of shareowners nominate a candidate. Would every member of the group be sanctioned, so none could nominate for a period of time? The threat of such a sanction might cause shareowners undue hesitancy in joining a group to nominate.

C.19. As proposed, shareowners may aggregate their holdings in order to meet the ownership eligibility requirement. The shares held by each member of a group that are used to satisfy the ownership threshold must meet the minimum holding period. Should shareowners be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors?

Under the current proposal, this would be necessary if average individual shareowners are to have any hope of making nominations. However, we have indicated in our response to Question C.1 that we oppose the currently proposed eligibility requirements. In that response we proposed the same modest eligibility requirement that has proven effective with Rule 14a-8—that a shareowner have held $2,000 of a stock for a year.

We recommend that the Commission adopt—uniformly for both Rules 14a-8 and 14a-11—this modest eligibility requirement. Doing so will eliminate any need for aggregation.

C.20. If shareowners should be able to aggregate their holdings, is it appropriate to require that all members of a nominating shareowner group whose shares are used to satisfy the ownership threshold to meet the minimum holding period individually? If aggregation is not appropriate, what ownership threshold would be appropriate for an individual shareowner?

If shareowners must aggregate shareholdings for the purpose of satisfying an eligibility requirement, all shareowners in an aggregating group should be required to have individually held their shares for at least one year. As for requiring that an aggregating group continue to hold the required number of shares through the shareowners meeting, this requirement should apply to the group overall. However, it would be unfair to penalize the entire group because one member of the group decided to sell his shares prior to the shareowner meeting. In our response to Question C.16, we said "Should a nominating group of shareowners fail to hold sufficient shares through the shareowners meeting, the sanction should only apply to those members of the group who reduced their holdings in the stock below the level of their holdings at the time the nomination was made."

As we have indicated in responses to other questions, we believe that eligibility requirements for shareowners to nominate should be sufficiently modest that there be no need for shareowners to aggregate their holdings.

C.21. If a nominating shareowner sells any shares of the company that are in excess of the amount needed to satisfy the ownership threshold, should that shareowner not be eligible under the rule? Would it matter when the nominating shareowner sold the shares in relation to the nomination process?

We believe the answer should be no to both these questions.

C.22. Would shareowner groups effectively be able to form to satisfy the ownership thresholds? If not, what impediments exist? What, if anything, would be appropriate to lessen or eliminate such impediments?

We believe that, whatever form Rule 14a-11 ultimately takes, electronic shareholder forums should be facilitated to allow shareowners to take full advantage of the rule.

C.23. What would be an appropriate method of establishing the beneficial ownership level of a nominating shareowner or group? What would be sufficient evidence of ownership? For example, if the nominating shareowner is not the registered holder of the securities, should the nominating shareowner be required to provide a written statement from the "record" holder of the securities (usually a broker or bank), verifying that at the time the nominating shareowner submitted its notice to the company, the nominating shareowner continuously held the securities for at least one year?

Procedures should be identical to those for establishing eligibility under Rule 14a-8.

C.24. Should the Commission limit use of the rule, as proposed, to shareowners that are not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors? Why or why not? Would it be appropriate to require the shareowner to represent that it will not seek to change the control of a company or to gain more than a limited number of seats on the board for a period of time beyond the election of

directors? How should the rules address the possibility that a nominating shareowner's or group's intent may change over time?

There is no need for the Commission to limit use of the proposed rule to shareowners who are not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors. We agree that it would be undesirable for factions of shareowners to employ Rule 14a-11 for the purpose of gaining "control," but we also believe the severe restrictions the Commission has incorporated into the rule to achieve this purpose are onerous.

We believe that the community of entrenched board members have a "control" fixation. Through advocacy organs they fund out of shareowner assets, they promote this fixation among shareowners and regulators. The fixation is enshrined in existing proxy rules, which force any seriously contested board election to be a battle for "control." Draconian proxy solicitation rules stifle debate prior to shareowner meetings for fear that someone might plot "control." Individual investors and reputable institutional investors, who would prefer that *no single faction* "control" their boards, are marginalized.

Board elections should be an opportunity for shareowners to collectively select a diverse group of individuals whom they believe will do an outstanding job of overseeing their corporation. Instead, all that matters—pretty much all shareowners are told—is what faction each board nominee represents. With every contested board election structured as—or even just perceived as— a battle for "control," entrenched boards gain an advantage. Shareowners naturally tend to prefer the "devil they know" to the one they don't.

Able to draw on essentially unlimited corporate resources to promote their views, the community of entrenched board members has dominated debate over the drafting of proxy rules. Their fixation has nothing to do with the important issues confronting shareowners today. The US economy is not at risk due to hypothetical factions plotting to seize "control" over corporations. It is at risk because entrenched boards have squandered our nation's wealth. The whole issue of not allowing factions to seize "control" is a diversion. It is a fantasy—a fixation.

That fixation so dominates existing proxy rules as to make them unworkable for average shareowners—and unworkable for most reputable institutional investors as well. Existing proxy rules, more than anything else, are the reason boards are so entrenched.

One would hope that the proposed Rule 14a-11 would finally fix this problem. Instead, it embraces the same fixation, mandating that, in any board election under the rule, the existing board *must* retain "control." The simple act of nominating a board candidate is treated with such suspicion under the proposed rule that only investors satisfying the most onerous eligibility requirements are afforded the opportunity. On top of that, to make absolutely sure no one seizes "control," unworkable provisions (see our responses to Questions C.1) limit the total number of shareowner nominations so that, even if every shareowner nominee were elected, they would be too few in number to gain "control." By requiring that the existing board retain control, the proposed rule takes shareowners' natural disposition to prefer the "devil they know" and makes it a government mandate.

If Rule 14a-11 is implemented in its current form, the Commission will have two convoluted rules for shareowner board nominations:

- the existing proxy rules that require a proxy contest over "control," and
- the new Rule 14a-11, which requires that the existing board retain "control."

Both are beholden to the "control" fixation. Neither does anything significant to address the problem of entrenched boards.

What shareowners need—and the future of the US economy may depend on—is for the Commission to find some means for shareowners to take "control" away from entrenched boards *and not have to give it to some other single faction*. We need to break free of the fixation that insists that every board election *must result in some single faction taking "control."*

Our vision is that a well-conceived Rule 14a-11 will render the very notion of "control" anachronistic. Imagine the Commission implements a liberal Rule 14a-11. It has no onerous eligibility requirements, so pretty much any shareowner can nominate. It has no limitations on the number of shareowner nominations. There can be ten; there can be 100. To help shareowners sort through the nominees—and to allow nominees to present themselves to shareowners—the Commission exempts the new electronic shareowner forums from irrelevant proxy solicitation rules.

Now imagine a corporation with a twelve member board receiving a total of thirty-six nominations under that liberalized rule. Twelve are made by the current, entrenched board. Twelve come from some creepy faction seeking to gain "control." Twelve come from reputable individual investors or institutional investors, who deliberated over whom to nominate on a new electronic shareowner forum.

What will happen? With all thirty-six nominees listed on management's proxy assignment card, shareowners will be able to split their vote, selecting individual board members instead of selecting entire factions. Shareowners aren't likely to give all twelve board seats to the existing board. Neither are they likely to give all twelve to the creepy faction. Almost inevitably, they will elect a few board members from the existing board's slate because they see value in continuity. They will elect a few board members from the creepy slate because they perceive that the creepy faction has some good ideas that should have a voice on the board. They will elect a few board members nominated by reputable individual investors or institutional investors because they believe such truly independent board members will bring different perspectives to the board.

Under the liberalized Rule 14a-11 we envision, it will be *theoretically possible* for some faction to gain "control" over a company, but it will be *improbable*. Prudent shareowners won't let it happen. Given the alternative, they won't "place all their eggs in one basket." The whole issue of "control" will become largely irrelevant, as shareowners focus on choosing between individual board candidates instead of choosing between factions.

This desirable form of corporate democracy will allow shareowners to take "control" away from an entrenched board *and not give it to any one faction*. Yet this vision is *impossible* under the existing proxy rules, which require a contest for "control"; it is also *impossible* under the proposed Rule 14a-11, which requires that the existing board retain control.

For these reasons, we respectfully request that the Commission redraft the proposed Rule 14a-11 to make it a vehicle whereby average shareowners have a reasonable ability to reduce an existing board to a minority position. It is time for our securities regulations to address the issue of entrenched boards. In drafting an improved Rule 14a-11, the Commission has a tremendous opportunity to do just that. Failure to act would be to surrender our economic future to a fixation.

D.1. Is it appropriate to use compliance with state law, federal law, and listing standards as a condition for eligibility?

We do not believe that a company should be allowed to exclude a shareowner nominee from its proxy materials because it believes that the nominee's election would constitute a violation of state law, rules of a national securities exchange, or rules of a national securities association. We believe that Rule 14a-11 election of shareowner nominees should comply with federal law only.

Requiring compliance with state law, rules of a national securities exchange, or rules of a national securities association would create another enormous barrier to use of Rule 14a-11 for average shareowners and reputable institutional investors. It would require them to research state laws, exchange rules and securities association rules. Few can do this themselves, so they will face the choice of 1) hiring lawyers, or 2) proceeding with a nomination of uncertain viability.

As we indicated in our response to Question A.9, average investors and most reputable institutional investors cannot afford lawyers, at least not for this purpose. Corporate lawyers—more precisely, entrenched board members' lawyers paid for out of corporate assets—will have a field day. They will have all of a state's laws, one or more national exchanges' rules, and the rules of national securities associations to rummage around in to find technicalities on which to challenge nominations. Entrenched boards will spare no expense on these lawyers, paid for out of corporate assets. The lawyers will gladly run up the legal fees devising novel legal theories to allow further challenges, etc.

For empirical evidence that this is what will happen, we need look no further than the experience with Rule 14a-8. Shareowner proposals under that rule run a gauntlet of legal challenges by high-priced lawyers. Average investors and reputable institutional investors—with limited time, limited expertise and limited financial resources—are overwhelmed. Their resolutions are routinely thrown out based on technicalities or novel legal theories. The vast majority of shareowner resolutions are advisory only, primarily *because the proponents cannot afford the legal review that is generally necessary for a resolution to be binding*.

Consequently, even when shareowner resolutions pass by large margins, entrenched boards can ignore them. For five years in a row, shareowner activist John Chevedden has organized FirstEnergy shareowners in submitting a non-binding shareowner resolution related to supermajority voting. Every year, the resolution has passed overwhelmingly. Affirmative votes were 71% in 2005, 73% in 2006, 76% in 2007, 78% in 2008 and 81% in 2009. Every year, the entrenched board ignores the resolution. They get away with this because the proponents cannot afford the legal review that would generally be necessary for a binding proposal. There is a word for this. It is disenfranchisement ... If you can't afford the lawyers, don't bother voting.

If entrenched boards are allowed to challenge shareowner nominations on the basis of state law, exchange rules or securities association rules, shareowners will likely face staggering legal expenses few can afford. The situation is far more grave than that which shareowners face submitting proposals under Rule 14a-8. As we have mentioned, shareowners routinely avoid legal expenses under Rule 14a-8 by making their proposals non-binding. Furthermore, the Commission's "no action" rulings allow issues to be settled without resorting to the courts. The Commission intends to provide "no action" rulings under Rule 14a-11 for shareowner nominations, but we don't believe this will be effective. Under both Rules a 14a-8 and 14a-11, parties are not bound by the Commission's "no action" decisions. Given an unfavorable "no action" decision, an entrenched board always has recourse to the courts. While experience has shown most boards will not go to court over a no-action letter regarding non-binding proposals they can ignore, they will feel differently about a shareowner nominee who threatens to unseat them. Some directors might see defending their own entrenchment as worth just about any price, especially when the price is paid by shareowners through the corporate coffers.

If entrenched boards are allowed to challenge shareowner nominations on the basis of state law, exchange rules or securities association rules, we anticipate shareowner nominations will be routinely challenged, first through the Commission's "no action" process and, failing that, in the courts. Few shareholders will be able to afford legal representation, so shareowner nominations will be thrown out on even the most flimsy grounds. This alone will cripple Rule 14a-11, as currently drafted.

For the above reasons, we believe the Commission should not attempt to integrate Rule 14a-11 with state law or otherwise require that shareowner nominations under Rule 14a-11 comply with state law. If necessary, the Commission should seek legislation from Congress exempting shareowner nominations under Rule 14a-11 from state laws that might impact a nominee's eligibility to serve on a board. We similarly recommend that the Commission not require that shareowner nominations comply with exchange or association rules. These entities' rules raise additional, troubling issues.

Stock exchanges had a long history as non-profit, quasi-regulatory organizations. The New York stock Exchange (NYSE), for example, took on a quasi-regulatory role through enforcement of listing standards for corporations and capital requirements for broker-dealers long before even the Securities and Exchange Commission was formed. However, stock exchanges today tend to be for-profit entities. The NYSE in particular has transformed itself into a for-profit entity and is now part of a larger publicly traded firm. This required it to spin off its self-regulatory function to the National Association of Securities Dealers (NASD), which is now the Financial Industry Regulatory Authority (FINRA).

Exchanges compete fiercely with one another for stock listings. As entrenched boards have considerable influence over which exchange their corporation lists with, giving exchanges authority over shareowner nominations would pose a troubling and unnecessary conflict of interest.

For this reason, we believe the Commission should eliminate any role these profit-seeking entities play in financial regulation. The Commission does not implement rules making shareowners subject to edicts from Goldman Sachs. Neither should it implement rules making shareowners subject to edicts from a profit-seeking NYSE.

With regard to national securities associations, these are self-regulatory organizations. They are run by *certain entities* for the purpose of regulating *those same entities*. It would be inappropriate—and open the door to abuse—to allow a self-regulatory organization controlled by one group of entities to regulate another group of entities. Yet, this is exactly what would happen if the Commission permitted companies to exclude shareowner nominations from their proxy material for perceived violations of some self-regulatory organization's rules. The self-regulatory organization would be gaining regulatory authority over investors, including individual investors. It would dictate to investors whom they could or could not place on the boards of companies they own.

Rules that limit the prerogatives of management or entrenched boards are corporate regulation. Those that limit the prerogatives of shareowners take us in a different direction—towards the regulation of individuals' property rights.

Take FINRA for example. It is supposed to be controlled by securities firms for the purpose of regulating those same securities firms. It would be inappropriate to grant FINRA regulatory authority over investors, including individual investors. Yet, the Commission has done just that by deferring to FINRA regarding investor arbitration. See, for example, the letter of Les Greenberg commenting on rulemaking petition: *Request rulemaking to eliminate the requirement that an arbitrator affiliated with the securities industry sit on all public investor cases arbitrated before FINRA in which the amount in controversy exceeds $100,000.* [File No. 4-586] (http://www.sec.gov/comments/4-586/4586-1.pdf) Now the Commission is proposing to do it again.

King George claimed he was magnanimously looking out for the colonists' interests. They retorted that this was "taxation without representation." If FINRA were allowed to infringe on shareowners' property rights in order to "look out for their interests," we would call that "regulation without representation."

If the Commission believes some self-regulatory organization should regulate investors, it should be a self-regulatory organization controlled by those same investors. No such organization exists. We would be happy to discuss with the Commission having the United States Proxy Exchange take on such a role.

To summarize, we do not believe that a company should be allowed to exclude a shareowner nominee from its proxy materials because it believes that the nominee's election would constitute a violation of controlling state law, rules of a national securities exchange, or rules of a national securities association. Doing so 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. By creating another significant obstacle for shareowner use of Rule 14a-11, it would help perpetuate entrenched boards. The cost to shareowners in terms of destroyed wealth—if the past ten years is any indication—could be staggering.

In addition, allowing shareowner nominations under Rule 14a-11 to be subject to exchange or existing securities association rules would be inappropriate and pose significant conflicts of interest.

These costs vastly outweigh any minor benefits of requiring compliance with state law, exchange rules or securities association rules. Rather than attempting to hybridize Rule 14a-11 with these, we recommend that it be implemented as an independent, parallel rule.

We recommend that the Commission, under its authority to regulate the proxy process, exempt shareowner nominations under Rule 14a-11 from applicable state laws as well as any exchange or securities association rules.

We encourage the Commission to develop its own set of standard rules to which shareowner nominations must comply. These can draw from the best of state law, exchange rules, and association rules. In this way, Rule 14a-11 could generally conform with these, but in a streamlined manner that is accessible to average shareowners. The standards should be self-contained, written in laymen's terms, objective and unambiguous. They can be written to ensure shareowner nominations conform to federal laws.

D.2. Should there be any other or additional limitations regarding nominee eligibility? Would any such limitations undercut the stated purposes of the proposed rule? Are any such limitations necessary? If so, why?

There should be no immediate additional limitations regarding nominee eligibility. After some experience has been gained with Rule 14a-11 in practice, the Commission may want to revisit the issue.

D.3. Should there be requirements regarding independence of the nominee and nominating shareowner or group and the company and its management? If so, are the proposed limitations appropriate? What other or additional limitations would be appropriate? If these limitations generally are appropriate, are there instances where they should not apply? Should the fact that the nominee is being nominated by a shareowner or group, combined with the absence of any agreement with the company or its management, be a sufficient independence requirement?

The sorts of abuses that independent director rules attempt to address are, one would hope, unlikely to arise with shareowner-nominated directors. Indeed, certain relationships that are prohibited for independent directors under exchange or securities association independence rules might be desirable for shareowner-nominated directors. For example, shareowners might want to nominate a non-executive employee of the company to the board, believing the individual would lend valuable "from the trenches" insights to an otherwise cloistered board. Exchange or securities association independence rules would likely treat such an individual as not independent.

Steve Nieman is a pilot for Alaska Air. In his free time, he has worked tirelessly as a shareowner activist, challenging—respectfully but firmly—his company's entrenched board on a variety of issues. Based on his extensive knowledge of the company—as both an employee and an activist—as well as his demonstrated commitment to advancing the interests of shareowners, Steve would make an outstanding director for Alaska Air. Under proposed Rule 14a-11, exchange or securities association independence rules would likely treat him as not independent, based on his status as a company employee.

Exchange or securities association independence rules address issues that arise when an entrenched board nominates a slate of candidates that is likely to run unopposed—essentially, the entrenched board appoints the candidates to the board. Those rules are clearly inapplicable to the very different situation of shareowners nominating candidates who will certainly have to run against opposing candidates.

These two facts—that shareowners will make the nominations, and the candidates will have to win a contested election—represent significant safeguards that may render independence criteria unnecessary. For this reason, we recommend that Rule 14a-11 directors automatically be considered independent.

That being said, Rule 14a-11 may open the door to new forms of abuses. Anticipating what these might be, especially with the rule not yet finalized, is difficult. Given their influence and the resources at their disposal—and their demonstrated willingness to deploy these for their own self interests—we expect many within the community of entrenched board members will attempt to exploit or frustrate shareowner nominations in ways we would consider abusive. When corporate pension funds that are effectively controlled by entrenched boards and have never engaged in shareowner activism start making shareowner nominations under Rule 14a-11, that will be a warning sign.

In its narrative accompanying the proposed rule, the Commission acknowledged the potential for such abuse by the community of entrenched board members. However, the Commission describes the problem as one of individual and explicit agreements between groups submitting obstructionist nominations and a company's management (or the board) on whose behalf they do so. We believe this understates the problem.

First of all, if such agreements are entered into, they won't be documented. They will be all but impossible to prove. Entrenched board members who enter into them but deny doing so will never get caught.

Secondly, and far more importantly, it is likely that many within the community of entrenched board members will act in unison to obstruct shareowner nominations without any need for discussing or entering into agreements regarding nominations for specific companies. These are sophisticated people who don't need to be told how to look out for their collective self interest. Entrenched boards that control pension assets can take it upon themselves to have the plans submit obstructionist "shareowner" nominations at numerous companies. There will be no agreements to report. A collective understanding will develop. In all likelihood, *it will just happen.*

No disclosures about "independence" will address this problem. We believe such obstruction is inevitable and will be overwhelming. The best way to prevent it is to not limit the number of shareowner nominees.

We recommend the Commission impose no requirements for independence between nominating shareowners and a company at this point, other than the obvious (but likely superfluous) one of there being no agreements between the nominating shareowners and the company. After a few years, the Commission can assess if there have been abuses under the new rule and take appropriate action at that time. Appropriate action may or may not, depending on the specific abuses that come to light, include specifying independence requirements customized specifically for shareowner nominations under Rule 14a-11.

For reasons described in our response to Question D.1, we believe shareowner nominations should, under no circumstances, be subject to independence rules of exchanges or securities associations.

If the Commission does ultimately specify its own independence rules specifically for shareowner nominations under Rule 14a-11, these should be self-contained, written in laymen's terms, objective and unambiguous. To avoid confusion, and to distinguish them from existing independence rules—which serve very different purposes—they probably shouldn't even be called "independence" rules. They might be called "no-conflict" or "no-influence" rules.

D.4. How should any independence standards be applied? Should the nominee and the nominating shareowner or group have the full burden of determining the effect of the nominee's election on the company's compliance with any independence requirements, even though those consequences may depend on the outcome of any election and may relate to the outcome of the

election with regard to nominees other than shareowner nominees? Should the rules specify that the nominating shareowner or group may rely on information disclosed in the company's Commission filings in making this determination? How should the independence standards be applied when the entity is not a corporation – for example, a limited partnership?

Please see our response to the previous question.

It serves no public need to require nominating parties to satisfy independence requirements subject to uncertain future events. Since any independence requirements for shareowner nominations will serve very different purposes from existing independence requirements, we see no need to integrate the two or otherwise treat an "independent director" under one as an "independent director" under the other. This is why, in our response to the previous question, we suggested applying different names to the two concepts.

D.5. Where a company is subject to an independence standard of a national securities exchange or national securities association that includes a subjective component (e.g., subjective determinations by a board of directors or a group or committee of the board of directors), should the shareowner nominee be subject to those same requirements as a condition to nomination?

No. Such ambiguity would be burdensome for shareowners and facilitate obstruction on the part of entrenched boards. If an entrenched board abuses such subjective authority, to whom could the nominating parties appeal? Some entrenched boards have proven arrogant and obstructionist in their handling of Rule 14a-8 proposals, and there is every reason to expect that some will do the same, to the extent they are able, with Rule 14a-11.

As we indicated in our response to Question D.1, it is inappropriate for exchange or securities association rules to apply to shareowner nominations under Rule 14a-11. Any independence requirement for shareowner nominees should be a different concept from independence requirements for an entrenched board's nominees. To avoid confusion, they should be given different names.

D.6. As proposed, a nominating shareowner or group would be required to represent that the shareowner nominee satisfies generally applicable objective standards of a national securities exchange or national securities association that are 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. Should the proposal clarify that the nominee must meet the applicable objective standards of the company's primary listing exchange?

As indicated in our response to Question D.1, it would be inappropriate for shareowner nominations under Rule 14a-11 to be subject to exchange or securities association rules.

As indicated in our response to Question D.3, existing independence requirements are designed to address issues posed by entrenched boards nominating a slate of board candidates who will likely run unopposed. They are inappropriate for—and could prove detrimental to—shareowner nominations under Rule 14a-11.

D.7. Should the company or its nominating committee have any role in determining whether a shareowner nominee satisfies the generally applicable objective standards for director independence of any exchange on which the company's securities are listed?

No.

D.8. If a company has more stringent independence requirements than the listing standards applicable to the company, should the company's requirements apply? Or should the listing standards apply?

Company-specific standards should not apply. Allowing them to apply would further complicate the nominations process for average investors and reputable institutional investors. It would facilitate additional and unnecessary obstruction by corporate lawyers seeking to block shareowner nominations. This would be especially true if company-specific standards were ambiguous or open to differing interpretations.

As experience with Rule 14a-8 amply illustrates (see our response to Question D.1), it is critical that Rule 14a-11 be straightforward and apply uniformly to all companies, so that shareowners—with limited time, limited money and limited expertise—can make use of it.

Finally, as we indicated in our response to Question D.3, issues posed by shareowner nominations will likely be entirely different from those posed by entrenched board nominations. Independence requirements for one are inappropriate for—and could prove detrimental to—the other. To avoid confusion, we recommend they not be called by the same name.

D.9. If a company is not subject to an independence standard, should shareowner nominees to the board of directors under Rule 14a-11 be required to provide disclosure concerning whether they would be independent? If so, what standard should apply? Should the nominating shareowner or group be able to select the standard?

See our response to Question D.3.

D.11. As proposed, the rule includes a safe harbor providing that nominating shareowners will not be deemed "affiliates" solely as a result of using Rule 14a-11. This safe harbor would apply not only to the nomination of a candidate, but also where that candidate is elected, provided that the nominating shareowner or group does not have an agreement or relationship with that director otherwise than relating to the nomination. Is it appropriate to provide such a safe harbor for shareowner nominations? Should the safe harbor continue to apply where the nominee is elected? If so, should the nomination and election of the shareowner's nominee be a consideration in determining whether the shareowner is an affiliate, or should the safe harbor be "absolute"?

If independence requirements for shareowner nominations under Rule 14a-11 are immediately established—which we do not recommend—such a safe harbor would be appropriate.

D.13. Should the eligibility criteria include a prohibition on any affiliation between nominees and nominating shareowners or groups? If so, what limitations would be appropriate? For example, should there be a prohibition on the nominee being the nominating shareowner or a member of the nominating shareowner group, a member of the immediate family of the nominating shareowner or any member of the nominating shareowner group, or an employee of the nominating shareowner or any member of the nominating shareowner group? Would such a limitation unnecessarily restrict access by shareowners to the proxy process?

Such eligibility requirements would be inappropriate. It is natural that nominating parties will tend to nominate individuals with whom they have had some dealings. This is good, as it is through such dealings that the nominating parties will be able to make an assessment of the qualifications and character of the proposed nominee. However, any such relationships should be fully disclosed.

It is important to remember that shareowner nominations are of a fundamentally different character than nominations made by entrenched board. When an entrenched board nominates a slate of candidates, those candidates will most likely run unopposed. Essentially, the entrenched board is not *nominating* those candidates to the board so much as *appointing* them to the board. This calls for significant safeguards.

Shareowner nominees, on the other hand, will certainly have to run in a contested election. This will afford shareowners ample opportunity to vet them and decide for themselves if any of a nominee's affiliations are inappropriate.

D.14. Should eligibility criteria include a prohibition on agreements between companies and its management and nominating shareowners, as proposed? Would such a prohibition inhibit desirable negotiations between shareowners and boards or nominating committees regarding nominees for directors? Should the prohibition provide an exception to permit such negotiations, as proposed? If so, what should the relevant limitations be?

Eligibility criteria should include a prohibition on agreements between companies and its management and nominating shareowners. There should be no negotiations with management about possible Rule 14a-11 shareowner nominations, as this would open the door to abuse or manipulation.

This does not preclude negotiations between shareowners and management about nominations, but any nominations that result from such negotiations should be treated as management nominations and not be treated as shareowner nominations under Rule 14a-11. To do otherwise could be misleading, as shareowners are going to have a natural expectation that Rule 14a-11 nominations are "arms length" nominations.

D.15. Should the nominee be required to make any of the representations (e.g., the independence representation), either in addition to or instead of, the nominating shareowner or group? If so, should these representations be included in the shareowner notice on Schedule 14N or in some other document?

We believe that both the nominator and nominee should be required to submit a notice, each making representations about information they are in a position to know first-hand. In a sense, one party would file to make the nomination, and the other would file to accept it. Where there is overlap in what each might report (i.e. in disclosing any relationship between the nominator and nominee), both parties should include the disclosure in their notice.

A system of dual notice would, we believe, discourage the making of misleading statements by one party to the other, who would then rely on those misleading statements in submitting a single, combined notice.

Regardless of whether the Commission requires one or two notices, we believe it is imperative that the Commission facilitate the submission of notices by providing standardized forms, detailed instructions, and a web-based form through which each party can make its notice EDGAR-ready.

D.16. Should there be a nominee eligibility criterion that would exclude an otherwise eligible nominee where that nominee has been included in the company's proxy materials as a candidate for election as director but received a minimal percentage of the vote? If so, what would be the appropriate percentage (e.g., 5%, 10%, 15%, 25%, or 35%)? If so, for how long should the nominee be excluded (e.g., 1 year, 2 years, 3 years, 4 years, 5 years, permanently)?

We believe this would needlessly complicate shareowner nominations and be of no benefit to shareowners. The fact that a candidate does poorly in one election does not mean that the same candidate won't do well in another. The mood of an electorate (the shareowners) can change, so a candidate who is unpopular at one point may be popular at another.

E.1. Is it appropriate to include a limitation on the number of shareowner director nominees? If not, how would the proposed rules be consistent with our intention not to allow Rule 14a-11 to become a vehicle for changes in control?

People are often surprised to hear that bank capital regulations are written with the intention that a certain fraction of banks will fail. This is appropriate because, if capital requirements wee so conservative as to preclude any bank failures, those onerous requirements would cripple the banking industry. In order for the banking industry to succeed, some banks must fail.

A similar philosophy should guide the drafting of Rule 14a-11. While we generally agree that it is desirable that Rule 14a-11 not be used as a vehicle for changes in "control," single-minded pursuit of that goal—to the exclusion of all else—will cripple the rule. The goal must be balanced against other legitimate goals, such as ending the era of entrenched boards. As we explain in our response to Question D.1, this goal is *not incompatible with* the goal that Rule 14a-11 not be used as a vehicle for changes in "control," but it will need to be *balanced* with that goal. Another legitimate goal, which should be balanced with others, is that of liberalizing director elections as described in our response to Question A.1 and in our closing comments at the end of this letter. We also believe that facilitating full participation of average shareowners in corporate governance is a critical goal.

As it is currently written, proposed Rule 14a-11 attempts to totally preclude a change of "control" by limiting the number of shareowner nominations. This has three destructive consequences:

1. By restricting the number of shareowner nominees, the rule creates a need to somehow ration opportunities to nominate. There is no good way to do that, so the rule takes the elitist approach of limiting nominations to only shareowners or groups of shareowners who control very large blocks of a company's stock. Average investors, and even many institutional investors, are shoved aside.

2. The above rationing system is imperfect. Several independent investor groups might collectively submit more nominations than the allowed number. To preclude this eventuality, a secondary, first-come-first-served rationing scheme is also imposed under the Commission's proposal. This will make every nomination a race. Even if there are no competing groups preparing nominations, a would-be nominator will not know this and will race to get its nomination in, just as if there were. If the Commission sets a window during which nominations must be made, all nominations will come in as soon as the window opens. If the Commission sets no earliest date for nominations to be made, nominations will be made years in advance. Entrenched boards, which effectively control hundreds of billions of dollars in defined benefit pension plan assets, will likely use those assets to make frivolous "shareowner" nominations for the purpose of frustrating other, legitimate nominations. Certain mutual fund companies, with an interest in currying favor with entrenched boards, might also pitch in with frivolous nominations. The first-come-first-served rationing scheme will prove complicated, largely random, and open to abuse.

3. By limiting the number of shareowner nominations, the proposed rule makes it impossible for shareowners to give the existing board less than a majority of seats on the new board. Under Rule 14a-11, in the absence of a traditional proxy contest, shareowners are required to leave an entrenched board in "control." The desirable scenario of shareowners dividing board seats among various nominees so that no one faction has "control" is impossible under Rule 14a-11, as currently written. If there is one goal Rule 14a-11 should achieve, it is breaking the control of entrenched boards. In its current form, Rule 14a-11 is explicitly precluded from doing that.

We believe there should be no limit on the number of shareowner nominations. This may not be achievable in a manner that will, with absolute certainty, ensure Rule 14a-11 will never be used as a vehicle for changes in "control"— just as workable bank regulations that make absolutely certain no bank will fail cannot be implemented. As we explain in our response to Question D.1, the solution is to liberalize director elections so there are many high-caliber nominees and a free and open exchange of information. The new rule for electronic shareowner forum is a step in this direction. The new Rule 14a-11 should be too.

What we are saying, in essence, is "trust in democracy." Remove onerous controls; maintain basic safeguards against misinformation or abuse; let the shareowners decide. In a director election where there are thirty nominees competing for twelve seats, so long as there is an open and lively debate on electronic shareowner forums, no narrow faction is likely to gain "control." Shareowners won't let it happen. They do not need to be forced with some onerous limitation on the number of shareowner nominees. Left to their own devices, they are prudent. *They won't let it happen.*

If measures are desired to limit nominations to a manageable number, here are some practical options:

1. The Commission could limit individuals to being nominated to no more than five for-profit corporate boards. This would be consistent with the Council of Institutional Investors' policy standard that no individual sit on more than five for-profit boards. As a practical matter, no one has the time to sit on too many boards, so this limit would be perfectly reasonable.

2. There could be a modest fee—perhaps $100—for each board nomination.

3. Nominations could be required to receive "endorsements." This concept is similar to the discredited proposal for 1%, 3% and 5% shareholding thresholds, but would be less onerous, would not exclude individual shareowners, and would be somewhat similar to a ballot-access rule in the UK that allows any group of 100 shareowners, each with shares worth a minimum of £100, to nominate. We recommend that, in order to nominate, a shareowner would need to have held $2,000 of a company's stock for a year, and twenty-five other (institutional or individual) shareowners satisfying the same requirement would have to endorse the nomination. This would be analogous to motions requiring a "second" before they can be considered in a deliberative assembly, but instead of a single "second," twenty-five "endorsements" would be required. To make it difficult to nominate a slate of candidates, the rule could specify that each shareowner can endorse just one candidate per company per year. A slate of ten candidates would then require endorsements by 250 eligible shareowners. Such a provision would go a long way toward achieving the Commission's goal of Rule 14a-11 not being used by factions to take "control" of a board. It would do so without arbitrarily shutting out individual shareowners or small and mid-sized institutional shareowners. To prevent abuses, institutions controlled by a single entity or with largely overlapping boards would be consolidated for the purpose of making endorsements. This would prevent a situation where some financial institution warehoused $2,000 blocks of stock in numerous special-purpose vehicles in order to sell or otherwise grant bulk endorsements. It would also

preclude a mutual fund company from having all the mutual funds it manages endorse one-another's nominees.

4. All candidates, including the boards own nominees, could be required to file pre and post election estimates and accounting of all campaign expenditures, including in-kind contributions and those expended by the corporation or other entities on behalf of candidates they support.

The last option proved effective for the California Public Employees Retirement System (CalPERS). For many years, CalPERS had only minimal filing requirements to run for the board. Sometimes they would get close to 100 candidates running for the board, many of whom made little effort to actually get elected. Once legislation was enacted that required campaign, financial and other disclosures from CalPERS candidates, their numbers became more manageable—just a handful for most positions.

Another question is that of how to handle board elections where there are multiple candidates. To avoid situations where candidates win board elections with low pluralities, and to avoid the expense of run-off elections, we believe all contested board elections should be conducted with "instant run-off" majority voting or a similar ranked voting system.

E.2. If there should be a limitation, is the proposed maximum percentage of shareowner nominees for director that we have proposed appropriate? If not, should the maximum percentage be higher (e.g., 30%, 35%, 40%, or 45%) or lower (e.g., 10%, 15%, or 20%)? Should the percentage vary depending on the size of the board? Should the limitation be the greater or lesser of a specified number of nominees or percentage of the total number of directors on the board? Is it appropriate to permit more than one shareowner nominee regardless of the size of the company's board of directors?

As we indicate in our responses to Questions D.1 and E.1, there should be no limitations on the number of shareowner nominations.

E.3. In instances where 25% of the board does not result in a whole number, the maximum number of shareowner nominees for director that a registrant will be required to include in its proxy materials will be the closest whole number below 25%. Is it appropriate to round down in this instance? Should we instead round up to the nearest whole number above 25%? Is a rounding rule necessary?

As we indicate in our responses to Questions D.1 and E.1, there should be no limitations on the number of shareowner nominations. However, if a limitation is imposed, fractions should be rounded up to avoid a situation where only one shareowner nominee is permitted to run. That unfortunate possibility has been discussed in a comment letter by Jeff Mahoney of the Council of Institutional Investors. We agree with his concerns and conclusions.

E.8. Should any limitation on shareowner nominees take into account shareowner nominees for director that a company includes in its proxy materials other than pursuant to Rule 14a-11 (e.g., voluntarily)?

This would open the door to abuse, as entrenched managers might arrange for such back-door nominations and "voluntarily" include the nominees in order to preclude legitimate shareowner nominees under Rule 14a-11.

E.10. We have proposed a limitation that permits the nominating shareowner or group that first provides notice to the company to include its nominee or nominees in the company's proxy materials where there is more than one eligible nominating shareowner or group. Is this appropriate? If not, should there be different criteria for selecting the shareowner nominees (e.g., largest beneficial ownership, length of security ownership, random drawing, allocation among eligible nominating shareowners or groups, etc.)? Rather than using criteria such as that proposed, should companies have the ability to select among eligible nominating shareowners or groups? If so, what criteria should the company be required to use in doing so?

As we indicated in our response to question E.1, a first-come-first-served policy will make every nomination a race. Even if there are no competing groups preparing nominations, a would-be nominator will not know this and will race to get its nomination in, just as if there were. If the Commission sets a window during which nominations must be made, all nominations will come in as soon as the window opens. If the Commission sets no earliest date for nominations to be made, nominations will be made years in advance.

Other solutions are just as contrived—are potentially arbitrary—and would open the door to abuse or manipulation. With any solution, there will be significant risk of the community of entrenched board members, which effectively control hundreds of billions of dollars in defined benefit pension plan assets, systematically using those assets to make frivolous "shareowner" nominations for the purpose of frustrating other, legitimate nominations. Certain mutual fund companies, with an interest in currying favor with entrenched boards, might also pitch in with frivolous nominations.

Problems like these go away if there is no limitation on the number of shareowner nominees.

E.11. If the Commission adopts a "first-in" approach, should the first shareowner or group get to nominate up to the total number of nominees required to be included by the company or, where there is more than one nominating shareowner or group and more than one slot for nominees, should the slots be allocated among proposing shareowners according to, for example, the order in which the shareowner or group provided notice to the company?

We believe a "first in" approach is unworkable under any circumstance and will open the door to abuse. As we indicate in our response to Question E.1, every nominating process will become a race.

Suppose shareowners are limited to three nominations at some corporation. As soon as the window opens for nominations, that corporation receives nine nominations—three by e-mail, five by courier, and two by express mail packages (actually delivered the night before). If all nine nominations "arrive" at exactly 9:00AM on the day the window opens (and they will) the corporation will be left to decide which was "first," which was "second," etc. It will be able to cherry-pick the nominations. If a few of the nominations are frivolous—arranged by friendly entrenched boards at other corporations through a defined benefit pension plan, perhaps—you know which nominations the corporation will select.

F.1. Are the proposed content requirements of the shareowner notice on Schedule 14N appropriate? Are there matters included in the notice that should be eliminated (e.g., should the nominating shareowner be required to provide disclosure of its intention with regard to continued ownership of the shares after the election, as is proposed)?

We generally support the proposed disclosures for Schedule 14N.

We believe a certification that the nominating group has no intention to change the "control" of the issuer or to gain more than a limited number of seats on the board of directors is inappropriate. To our knowledge, the notion of "control" has not been formally defined. It is ambiguous.

Suppose some faction of shareowners is aware that a number of board members at a corporation are already sympathetic to the faction's interests and that, if they added a couple more sympathetic directors via Rule 14a-11, directors sympathetic to their interests would form a majority on the board. In submitting Rule 14a-11 nominations for two candidates they perceive as sympathetic, would the faction be seeking "control?"

Having a majority of directors sympathetic to a faction is not the same as that faction having "control" over the board. Sympathy and control are two different things. Then again, they don't have to be. It depends on how strong the sympathies are.

Because "control" is an ambiguous term, the proposed certification would be meaningless. We believe that requiring such meaningless certifications would be misleading for shareowners. We would not want them relying on it as they decide how to vote in a director election.

We indicated in our response to Questions B.2 and D.1 that shareowner nominations under rule 14a-11 should not be subject to exclusion for perceived violation of state law, exchange rules or securities association rules. Accordingly, any representation that a candidate's nomination or initial service on the board would not violate controlling state law, federal law, or applicable listing standards would be inappropriate.

We proposed in our response to Question D.1 that the Commission specify its own eligibility rules, consistent with federal law, for Rule14a-11 nominations. A representation that a nomination is in compliance with that standard rule would be appropriate.

We indicated in our response to Question D.3 that shareowner nominations under rule 14a-11 should not be subject to existing independence rules. Accordingly, we believe a representation that a nomination is in accordance with any such rules is neither necessary nor appropriate.

With regard to disclosing compliance with specific items in Exchange Act Schedule 14A, Schedule 14A deals generally with proxy solicitations. Accordingly, it is not clear exactly what information the Commission is seeking, with regard to several of those items, Item 4(b) in particular.

The required disclosure of any website address on which the nominating shareowner or group may publish soliciting materials is ambiguous. For this purpose (and taking into account exemptions under the new rule for electronic shareowner forums) what would constitute "solicitation materials"? What happens if, after making a Rule 14a-11 nomination, a nominator discovers a new website and chooses to post information to that site relating to the nomination. Would this require that an amended Schedule 14N be filed?

It is not clear to us that a disclosure of intent to continue ownership of shares after the election would be useful.

F.2. Are there additional matters that should be included? For example, is there additional information that should be included with regard to the nominating shareowner or group or with regard to the shareowner nominee?

No.

F.3. Are the required representations appropriate? Should there be additional representations (e.g., should the nominee be required to make a representation concerning their understanding of their duties under state law if elected and their ability to act in the best interest of the company and all shareowners)? Should any of the proposed representations be eliminated?

No further representations are needed.

F.4. Is five years a sufficient time period for information about whether the nominating shareowner or member of a nominating shareowner group has been involved in any legal proceeding? Should it instead be ten years?

Five years should be fine and comports with our wish that, wherever possible, rules be harmonized. In this case, there are similar requirements in Regulation S-K and Rule 14a-101.

F.6. What should be the consequence to the nominating shareowner or group of submitting the notice on Schedule 14N to the company after the deadline? What should be the consequence of filing the notice on Schedule 14N with the Commission after the deadline? Should a late submission to the company or late filing with the Commission render the nominating shareowner or group ineligible to have a nominee included in the company's proxy materials under Rule 14a-11 with respect to the upcoming meeting, as is currently proposed?

We generally support a company being able to exclude submissions after the deadline, similar to the procedure followed for shareowner proposals under Rule 14a-8.

F.8. Should a company's advance notice provision govern the timing of the submission of shareowner nominations for directors? If not, should the Commission adopt a specific deadline instead? Should the Commission make no reference to advance notice provisions as they may apply to proxy solicitations and adopt a generally applicable federal standard? Would such an approach better enable consistent exercise by shareowners of their voting and nominating rights across public companies? If the Commission were to establish a federal standard, would 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting be appropriate? Should it be longer (e.g., 150 or 180 calendar days before the date that the company mailed its proxy materials for the prior year's annual

meeting), or shorter (e.g., 90 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting)?

We believe the Commission should make no reference to advance notice provisions as they may apply to proxy solicitations and should adopt a generally applicable federal standard. This would facilitate consistent exercise by shareowners of their voting and nominating rights across public companies. A 120 day period should be sufficient. The schedule for proxy access nominations should track the schedule for shareowner proposals where practicable to harmonize requirements.

F.9. In the absence of an advance notice provision, the nominating shareowner or group would be required to submit the notice to the company and file with the Commission no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting. Is this deadline appropriate and workable? If not, what should be the deadline (e.g., 80, 90, 100, 150, or 180 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting)?

See our response to F.8.

F.10. Should there be a specified range of time in which a shareowner is permitted to submit a nominee (e.g., no earlier than 150 days before and no later than 120 days before the date the company mailed its proxy materials the previous year)? Should a different range be used (e.g., should the submission of nominations be limited to no earlier than 120 days and no later than 90 days; no earlier than 180 days and no later than 150 days; or no earlier than 180 days and no later than 120 days before the date the company mailed its proxy statement the previous year)? Does permitting submission of a nominee at any time prior to 120 days before the company mailed its proxy materials the previous year skew the process in favor of certain shareowners? If so, why? If not, why? If a different date range would be more workable, please tell us the range and why.

There should be a specific window for shareowner nominations under Rule 14a-11, and it should be consistent for all companies. As noted above, deadlines should track those in Rule 14a-8.

F.13. Should a registered investment company be required to disclose on Form 8-K the date by which a shareowner or shareowner group must submit the notice to the company of its intent to require its nominees on the company's proxy card? Should this date also be required to be disclosed on the company's

Web site, if it has one? Should registered investment companies instead be permitted to provide this disclosure in a different manner?

As we indicated in our response to B.4, Rule 14a-11 should apply to all registered investment companies in the same manner it applies to other companies subject to the proxy rules.

F.14. As proposed, a shareowner's or group's notice of intent to submit a nomination for director is required to be filed with the Commission on Schedule 14N. Is such a filing appropriate? Should additional or lesser information be filed with the Commission? Should a shareowner or group be required to send the notice to the company without filing the notice on Schedule 14N?

We believe Schedule 14N should be filed with the Commission, as proposed.

F.15. When should the notice on Schedule 14N be filed with the Commission? Is it sufficient to require the Schedule 14N to be filed at the time it is provided to the company? Should an abbreviated version of the Schedule 14N be filed sooner, before the nominating shareowner or group provides notice to the company, such as at the time a shareowner or group first decides to make a nomination, when the nominating shareowner first identifies a nominee for director, or some other time? Should it be filed later?

We believe the same 14N should be filed with the company and the Commission, and that the filings should be concurrent, as proposed.

F.16. The notice on Schedule 14N would be required to be amended promptly for any material change in the facts set forth in the originally-filed Schedule 14N. Should the nominating shareowner or group be required to amend the Schedule 14N for any material change in the facts? Why or why not?

Since materiality is ambiguous, it would be helpful if the Commission identified specific items that, if changed, would require an amended 14N.

F.17. The nominating shareowner or group would be required to file a final amendment to the Schedule disclosing, within 10 days of the final results of the election being announced by the company, the nominating shareowner's or group's intention with regard to continued ownership of their shares. Should the nominating shareowner or group be required to amend the Schedule 14N to disclose their intent regarding continued ownership? Why or why not?

It is not clear to us what purpose these additional amendments to Schedule 14N would serve. They would complicate the nominating process, making it more onerous for shareowners. As we briefly indicated in our response to QuestionF.1, we don't believe a disclosure of intent regarding continued ownership of shares is necessary.

F.19. Should a nominating shareowner or group be required to file Schedule 14N on EDGAR, as proposed?

Yes. However, because shareowners may have no prior experience preparing EDGAR-ready filings, the Commission should implement user-friendly web-based forms to facilitate the process.

F.21. Should the nominating shareowner or group and/or nominee be required to disclose any holdings of more than 5% of the securities of any competitor of the company (i.e., any enterprise with the same SIC code)?

We generally would not oppose requiring the nominating shareowner or nominee to disclose any holdings of more than 5% of the securities of any company competitor. If eligibility requirements are harmonized with Rule 14a-8—$2,000 of stock held for a year—such disclosure will be unnecessary.

G.1. Under proposed Rule 14a-11(a) a company would not be required to include a shareowner nominee where: (1) applicable state law or the company's governing documents prohibit the company's shareowners 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 shareowner or group does not meet the rule's eligibility requirements; (4) the nominating shareowner's or group's notice is deficient, (5) any representation in the nominating shareowner'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. Proposed Rule 14a-11(f)(1) provides that the company shall determine whether any of these events have occurred. Will companies be able to make this determination? Why or why not?

If the Commission adopts our recommendations in response to Question D.1, D.3 and E.1, most of these determinations will not need to be made.

As we indicated in our response to Question E.1, if a “first in” rule is adopted, every nominating process will be a race. If there is a window for submitting nominations for a particular company’s board, all nominations can be expected to be received the instant that window opens. This will allow the company to determining which nominations were “first in” and therefore eligible for inclusion. Since this is an obvious opportunity for cherry-picking, we believe it would be inappropriate to allow companies to make such a determination.

G.2. As proposed, neither the composition of a nominating shareowner group nor a shareowner nominee could be changed as a means to correct a deficiency identified in the company’s notice to the nominating shareowner or group. Should we permit the nominating shareowner group to change its composition to correct an identified deficiency, such as a failure of the group to meet the requisite ownership threshold? Should the nominating shareowner or group be permitted to submit a replacement shareowner nominee in the event that it is determined that a nominee does not meet the eligibility criteria?

If the Commission adopts our recommendations in response to Question D.1, D.3 and E.1, there will be few deficient candidates.

If the Commission rejects our recommendations, we fear there will be numerous frivolous challenges of shareowner nominations, based on dubious technicalities or invented legal theories. To try to forestall this undesirable activity, it would be advisable to allow a nominating group whose nominee is disallowed to submit a replacement nominee. This might require that the Commission specify an accelerated review process for such replacement nominees.

G.3. As proposed, inclusion of a shareowner 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 proposed rules make clear that inclusion of a shareowner nominee would not be deemed a “solicitation in opposition.” Is this appropriate or should the inclusion of a nominee instead be viewed as a solicitation in opposition that would require a company to file its proxy statement in preliminary form? Should we view inclusion of a shareowner nominee as a solicitation in opposition for other purposes (e.g., expanded disclosure obligations)?

If the Commission adopts a combined proxy assignment card or a single absentee ballot, as discussed in B.20, these issues would largely or entirely be rendered moot.

G.4. Under the proposal, companies would not be able to provide shareowners the option of voting for the company's slate of nominees as a whole. Should we allow companies to provide that option to shareowners? Are any other revisions to the form of proxy appropriate? Would a single ballot or "universal ballot" that includes both company nominees and shareowner nominees be confusing? Would a universal ballot result in logistical difficulties? If so, please specify.

As has been demonstrated time and time again, elections can be manipulated or downright stolen through the design of ballots that are misleading. We believe the commission should do more than specify some aspects of an appropriate proxy card. The Commission should fully specify the proxy card (and any on-line variant)—instructions, layout, fonts, ordering of candidates names, etc. Processes for tabulating physical or electronic ballots, the Commission should specify how items left blank or marked ambiguously ("hanging chads") should be handled.

See Rulemaking Petition File 4-583 at http://www.sec.gov/rules/petitions.shtml for a timely example of how things can go awry when it is left to entrenched boards or their agents to formulate their own policies for tabulating electronic ballots.

All candidates' names should be on the same card or electronic ballot. There should be no option of voting for the company's slate of nominees as a whole, since that would give their candidates an unfair advantage. Shareowners should be voting for the best potential board members, not for a controlling group likely to entrench itself.

G.5. Is it appropriate to require that the company include in its proxy statement a supporting statement by the nominating shareowner or group? If so, should this requirement be limited to instances where the company wishes to make a statement opposing the nominating shareowner's nominee or nominees or supporting company nominees? Is it appropriate to limit the nominating shareowner's or group's supporting statement to 500 words? If not, what limit, if any, is more appropriate (e.g., 250, 750, or 1000 words)? Should the limit be 500 words per nominee, or some other number (e.g., 250, 750, or 1000 words)? Should the company's supporting statement be similarly limited? Why or why not?

It is appropriate to require that the company include in its proxy statement a supporting statement by the nominating shareowner or group. Statements should be limited to 750 words *per candidate*. Nominating shareowner groups should have the option, if they nominate more than one candidate, of providing separate statements for each, or of presenting one combined statement for their entire slate.

Since some candidates may want to write their own statement, a bold byline should appear at the end of each statement indicating who was the author.

It should be clear that “supporting statements” may contain more than mere statements in support of a particular candidate. They should be allowed to address any issue related to the election, including the shortcomings of the current board or the record of a particular incumbent. Nominating groups should also be allowed to include up to 16 square inches of black & white graphs, charts or tabular data for inclusion per candidate. This should be submitted in camera-ready (physical or digital) form and should be limited to no more than six inches wide and nine inches high. The corporation should be required to include such graphical or tabular content directly with the statement for the candidate, without scaling or modification.

Identical provisions should apply to the corporation’s nominees. Their supporting statements should not be allowed to explicitly allude to, reply to, or challenge anything in another candidate’s supporting statement (since, as a practical matter, a similar opportunity for reply cannot be extended to all).

G.6. Should the rule explicitly state that the nominating shareowner’s or group’s supporting statement may contain statements opposing the company’s nominees? Would it be appropriate to require a company to include a nominating shareowner’s or group’s statement of opposition in its proxy materials?

Debate lubricates democracy. We believe supporting statements should be allowed to include statements of opposition. It is to make room for such additional material that we propose that statements be allowed to be as long as 750 words. We do not believe separate statements of opposition should be allowed. To be fair, any statements of opposition by the corporation should be required to be made as a part of the supporting statements of their candidates.

G.7. Is the 14-day time period for the company to respond to a nominating shareowner’s notice or for the nominating shareowner to respond to a company’s notice of deficiency sufficient? Should the time period be longer (e.g., 20 days, 25 days, 30 days) or shorter (e.g., 10 days, 7 days, 5 days)? Should the rule explicitly set out the effect of a company providing the notice late (e.g., the company may not exclude the nominee) or of a shareowner responding to this notice late (e.g., the nominee may be excluded)?

Twenty-one days would be more appropriate. People sometimes take two-week vacations. Things come up. People’s calendars may be filled, leaving them little time to address these matters.

G.9. Is the 14-day time period for the nominating shareowner to respond to the receipt of a company's notice to the Commission of its intent to exclude the nominee sufficient? Should it be longer (e.g., 20 days, 25 days, 30 days) or shorter (e.g., 10 days, 7 days, 5 days)? Should the rule explicitly set out the effect of a shareowner responding to the company's notice late (e.g., the nominee may be excluded)?

Twenty-one days would be more appropriate.

G.10. Is the requirement that the company notify the nominating shareowner or group of whether it will include or exclude the nominating shareowner's or group's nominee or nominees no later than 30 calendar days before the company files its definitive proxy statement and form of proxy with the Commission appropriate and workable? If not, what should the deadline be (e.g., 40 calendar days before filing definitive proxy materials, 35 days before filing definitive proxy materials, 25 calendar days before filing definitive proxy materials, 20 calendar days before filing definitive proxy materials)? Should the rule explicitly set out the effect of a company sending this notice late?

Thirty days would leave little time between the time when a candidate learns she will actually be in the proxy statement (hence a viable candidate) and the date of the election. This will leave her little time to organize a campaign. She will be at a distinct disadvantage compared to the company's nominees, who will likely know months in advance that they are running. For this reason, sixty days would be more reasonable.

G.13. What should happen if one of the deadlines specified in the proposed process in Rule 14a-11(f) falls on a Saturday, Sunday, or federal holiday? Should the deadline be counted from the preceding or succeeding federal work day?

The deadline should go to the next working day if one of the deadlines falls on a Saturday, Sunday, or federal holiday.

G.14. Should the informal staff review process be the same for reporting companies (other than registered investment companies), registered investment companies, and business development companies? Should there be unique procedures for different types of entities? If so, what is unique to a particular type of entity that would require a unique process?

To the fullest extent possible, the process should be uniform so as to facilitate shareowner understanding and participation.

G.15. Should there be a method for a company to obtain follow-up information after a nominating shareowner or group submits an initial response to the company's notice of determination? If so, should that follow-up method have similar time frames as those related to the initial request and response? What adjustments to timing might be required for the nominating shareowner or group to respond to any such follow-up request?

If the Commission adopts our recommendations in response to Question D.1, D.3 and E.1, there will be few deficient candidates.

G.16. The proposed requirement for a legal opinion regarding state law is modeled on the requirement in Rule 14a-8. Is such a requirement necessary and appropriate in the context of proposed Rule 14a-11? Should it be changed in any way (e.g., should it be revised to require a legal opinion regarding foreign law for those instances where there may be a conflict with a company's country of incorporation where the company is organized in a non-U.S. jurisdiction but does not meet the definition of foreign private issuer)?

If shareowner nominations must be subject to state law under Rule 14a-11, then such legal opinions are appropriate. The rule should require a legal opinion regarding foreign law in the above-mentioned instances.

G.17. What process would be appropriate for addressing disputes concerning a company's determination? Is the proposed staff review process an appropriate means to address disputes concerning the company's determination? If not, by what other means should a company's determination be subject to review? Exclusively by the courts? Are there other processes we should consider?

If the Commission adopts our recommendations in response to Question D.1, D.3 and E.1, there will be few disputes and the proposed staff review process will be appropriate and infrequently needed. In instances where companies exclude candidates after failing to obtain a no-action outcome from the SEC, nominating shareowners should be able to treat the company's determination as a violation of federal securities law and pursue litigation against the company to compel inclusion of the materials in the company-prepared proxy.

H.1. Should the Commission provide a new exemption for soliciting activities undertaken by shareowners seeking to form a nominating shareowner group pursuant to Rule 14a-11? If so, is the proposed exemption appropriate? If not, why not? What specific changes to the exemption would be appropriate?

Should the rule require that a shareowner meet any of the requirements of Rule 14a-11 to rely on the exemption (e.g., have held the securities they seek to aggregate for the required holding period)? Is it appropriate to require filing with the Commission on the date of first use, as proposed?

We generally believe that solicitations should be exempt with no filing requirement prior to giving the company notice and filing a Schedule 14N.

H.2. Should the Commission expand the proposed exemption for soliciting activities undertaken by shareowners seeking to form a nominating shareowner group pursuant to Rule 14a-11 to apply also to oral communications? If so, what amendments to the proposed exemption would be necessary?

We generally believe that oral communications should be exempt, as they are in other contexts. Oral communications are difficult to monitor and regulate, and there are sufficient disclosure requirements otherwise.

H.3. What requirements should apply to soliciting activities conducted by a nominating shareowner or group? In particular, what filing requirements and specific parameters should apply to any such solicitations? For example, we have proposed a limited content exemption for certain solicitations by shareowners seeking to form a nominating shareowner group. Is this content-based limitation appropriate? Should shareowners, for example, also be permitted to explain their reasons for forming a nominating shareowner group? Should shareowners be permitted to identify any potential nominee, as proposed, and why that person was chosen? If not, what, if any, limitations would be more appropriate? For example, should an exemption for certain solicitations by shareowners seeking to form a nominating shareowner group be limited to no more than a specified number of shareowners, but not limited in content (e.g., fewer than 10 shareowners, 10 shareowners, 20 shareowners, 30 shareowners, 40 shareowners, more than 40 shareowners)?

We generally believe that all pre-filing communications should be exempt.

H.4. Should communications made to form a group be permitted to identify a possible or proposed nominee or nominees, as proposed?

Yes, communications made to form a group should be permitted to identify a possible or proposed nominee or nominees.

I.1. Should the Commission amend Rule 14a-8(i)(8), as proposed, to allow proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareowner nominations, provided the proposal does not conflict with proposed Rule 14a-11? Should the rule instead require such proposals to be included only in particular circumstances? For example, should inclusion of such proposals be required only when a company already has a provision in place regarding the inclusion of shareowner director nominees, or disclosure about those nominees, in company proxy materials?

Yes. We generally support the amendment of Rule 14a-8(i)(8), as proposed. See our response to Question A.9.

Before we close, there is one important topic the Commission did not raise in the request for comments. It is the matter of what happens to a shareholder nominee after he is elected to a board. He will have some sort of reception from his entrenched colleagues on the board. This is likely to take one of two forms. His entrenched colleagues may:

- marginalize him, or
- attempt to co-opt him.

Entrenched colleagues will have powerful and unfair tools for this purpose. It is essential that the Commission review this matter and implement reasonable safeguards to ensure the directors shareowners place on boards through Rule 14a-11 have a reasonable prospect of effectively and independently represent shareowner interests. Safeguards should prohibit specific forms of discrimination against individual board members. We do not believe two classes of board members should be allowed to emerge—entrenched and Rule 14a-11. Accordingly, safeguards should uniformly apply to—and uniformly benefit—all individual board members.

Starting with the concern that Rule 14a-11 board members will be marginalized, we have already mentioned a need to ensure that shareowners are able to nominate a minimum of two candidates to a board. Jeff Mahoney of the Council of Institutional Investors raised this issue, and a number of commenters have endorsed his position. The challenge is, unfortunately, greater than that. The Commission has noted, and we have elaborated on, the likelihood of frivolous nominations being made under Rule14a-11 merely to frustrate others' ability to nominate. Ensuring shareowners can nominate at least two candidates will not solve the problem if one of those candidates is a straw man. We have already recommended that the Commission do away with hard limits on the number of shareowner nominations and implement instead non-coercive measures to limit nominations to a manageable but unspecified number. Doing so will solve this problem.

Les Greenberg of the Committee of Concerned Shareowners cites in his comment letter the paper “Social Distancing as a Control Mechanism in the Corporate Elite” by Westphal and Poonam Khanna. That paper should be required reading for anyone involved in finalizing Rule 14a-11.

In addition to the sorts of social and psychological discrimination that Rule 14a-11 directors can expect to face, there will also be financial discrimination. Most entrenched board members have been earning lavish incomes as executives or directors for years. They are members of this country’s wealthy-elite. Rule 14a-11 directors may not be members of the wealthy-elite. Many (hopefully) will be average people of modest means. This will leave them vulnerable to financial coercion.

To our knowledge, there is no requirement that companies give directors identical compensation. We know of no requirement that they reimburse directors for expenses in a consistent, uniform manner. Imagine that a company chooses to continue paying entrenched board members lavishly but only pays Rule 14a-11 directors a pittance. Now imagine the company holds board meetings in far-away locations that are expensive to travel to and provides directors inadequate compensation for travel expenses. Next, the company arranges for frivolous legal proceedings against Rule 14a-11 directors and refuses to cover their legal fees. In ways like these, companies could financially ruin Rule 14a-11 directors of modest means. With her savings running out, and no income to speak of coming in from the company, such a Rule 14a-11 director might be unable to travel to distant board meetings. After missing a few, she could be removed from the board for failing to perform her duties.

Experience with Rule 14a-8 shareowner proposals has shown that entrenched boards will engage in such petty, not-professional behavior. “Foxhole meetings” are one example. These are shareowner meetings held in distant locations for the express purpose of making it difficult for shareowners to attend and move proposals.

The United States does not compensate senators differently based on their resume or tenure. This is because senate seats are *elective* positions. Similarly, board seats are *elective* positions. A company’s directors should enjoy generally equal compensation, benefits and reimbursement of expenses. The Commission should mandate minimal requirements for equitable treatment of directors for the express purpose of preventing coercion of directors.

Turning now to the issue of Rule 14a-11 directors being co-opted, it is worth reviewing experience with so-called “independent directors.” The one thing we can say about independent directors is that they are not “independent.” They may satisfy certain “independence” criteria, but they are hand-picked—often by CEOs—receive lavish compensation and perks, and are dependent on their fellow board members for renomination. Experience has shown independent directors to be little different from other entrenched board members. There is considerable risk that some Rule 14a-11 directors will be similarly co-opted.

We have already detailed the sorts of social, psychological and financial pressures that may be brought to bear on committed Rule 14a-11 directors. Forced to choose between those and the lavish compensation, perks and social acceptance enjoyed by entrenched board members, some Rule 14a-11 directors will be co-opted. For those who resist, there will be an additional, compelling inducement: entrenched board members will hold the key to their renomination.

In its current form, proposed Rule 14a-11 erects significant barriers to the nomination and election of shareowner nominated directors. In addition, as it is currently written, the proposed rule imposes those same barriers on a Rule 14a-11 director *every year* so long as she wants to remain on the board. Every year, she will have to return to the group of shareowners who nominated her—or form a new group—just to be renominated. Not only will this be burdensome, it will also be highly uncertain. Perhaps the investor group that nominates her one year is distracted or pursuing other initiatives the next. Perhaps they will decide to nominate someone different in subsequent years. Perhaps the director won't be able to form a new investor group to nominate her.

Faced with this unpleasant and unpredictable process year in and year out, committed Rule 14a-11 directors will have a tempting alternative: be co-opted and enjoy automatic renomination by the boards nominating committee each year. Entrenched boards will hold the key to renominating Rue 14a-11 directors, and it will be a powerful weapon for co-opting those directors.

Nominating committees routinely renominate entrenched board members who are eligible for renomination, almost as a matter of course. Pretty much, an eligible entrenched board member has to decide not to run for this not to happen. While, technically, a nominating committee *decides* to renominate a director, automatic renomination is largely a *courtesy* extended to all entrenched board members. We believe the Commission should mandate that the same courtesy be extended to Rule 14a-11 directors. The rule should state that all current board members eligible for renomination be renominated unless they choose not to run. Of course, if the Commission accepts our recommendations of eligibility, which provides for minimal barriers to nominate ($2,000 of stock held for a year), then renomination should not be a problem. Should the Commission not accept that recommendation, shareowner-nominated directors should not be forced to run the onerous Rule 14a-11 nomination gauntlet again and again, year after year, just to remain on the board. Mandating renomination of eligible Rule 14a-11 directors will relieve entrenched directors of their most powerful tool for co-opting such directors. *It must be done.* Shareowners have a right to nominate and elect directors of their choosing. Implicit in that right is a requirement that such directors not be subject to overwhelming pressure to be co-opted.

Also, we have recommended that the Commission not limit the number of Rule 14a-11 nominations. However, should it proceed to do so, we recommend that automatically renominated Rule 14a-11 directors not count against such limits. As we indicated, it is desirable that two classes of directors—entrenched and Rule 14a-11—*not emerge*. The solution is to ensure that both types of directors receive equal treatment.

Another important issue is the freedom of directors to communicate with shareowners. Today's entrenched boards are a wall of silence. They routinely conduct entire board meetings behind closed doors. They disclose nothing of the day-to-day decisions of the board. Shareholders know essentially nothing of the actions of individual board members in representing them.

Imagine if the US Senate always conducted business in executive session, communicated essentially nothing about day-to-day activities, addressed the citizenry only as a group, and rarely did so. Elections of senators would be all but meaningless because the electorate would have no knowledge of their senators' individual actions on their behalf. Yet, this is exactly what shareowners experience in director elections. Today's director elections are all but meaningless for a host of reasons. Just one of them is the wall of silence.

We anticipate that entrenched boards will try to force Rule 14a-11 directors to participate in their wall of silence. They will do so with policies, procedures and the threat of personal lawsuits. Denied the ability to communicate freely and openly about their actions as directors and other important matters related to the company, Rule 14a-11 directors will be marginalized. We understand that the Commission hopes Rule 14a-11 directors will remain a minority on boards. However, to force them to be a *silent minority* is to deny them any meaningful role in restoring shareowner property rights.

The Commission needs to implement a broad safe harbor for individual director communications with shareowners. This should allow them to pierce the wall of silence, describe their own actions on behalf of shareowners, and detail what other directors are or are not doing. The safe harbor will need to be harmonized with existing rules governing corporate disclosures and insider information.

We are aware that the community of entrenched board members has organized a letter writing campaign around proposed Rule 14a-11, circulating fill-in-the-blank letters for submission. The letter submitted on August 12 by J. L. Wallace is as amusing as it is unfortunate. He neglected to fill in the blanks.

We empathize with Commission staff who will have to read all those planted letters. If you prepare a summary of comments and mention the number of comment letters that endorsed various positions, you may want to include a note warning that totals are distorted by the numerous fill-in-the-blank letters. We have written a single letter and all signed it.

We are the United States Proxy Exchange. Our co-signers are prominent shareowner activists, small institutional investors, and average shareowners. We appreciate this opportunity to comment. We hope our feedback is helpful, and we welcome an opportunity for further dialogue on these important issues. Our executive director, Glyn Holton, can be reached at (617) 945-2484 or mail@glynholton.com.

Sincerely,

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