

## **APPENDIX A**

### **SUMMARY OF COMMENTS In Response to the Commission's Solicitation of Public Views Regarding Possible Changes to the Proxy Rules**

**Exchange Act Release No. 34-47778  
File No. S7-10-03**

**Prepared by:**

**Division of Corporation Finance  
July 15, 2003**

## TABLE OF CONTENTS

I.	List of Commenters.....	3
II.	Overview.....	21
III.	General Observations on the Need for Greater Corporate Accountability.....	24
	A.    Corporate Abuses and the Current Corporate Governance Environment.....	24
	B.    The Current State of Director Elections.....	25
IV.	Efficacy of Existing Accountability Mechanisms.....	26
	A.    Sarbanes-Oxley and the Markets' Listing Standards.....	26
	B.    Exchange Act Rule 14a-8.....	27
	C.    Contested Elections.....	28
	D.    Shareholder Recommendations to the Nominating Committee.....	29
	E.    Dialogue with the Company.....	30
V.	Shareholder Access to Company Proxy Materials.....	31
	A.    Specific Proposals.....	31
	B.    Specific Guidelines for Shareholder Access.....	32
	1.    Minimum Ownership Threshold.....	32
	2.    Minimum Holding Period.....	34
	3.    Maximum Permissible Slate.....	35
	4.    Competing Nominating Shareholders.....	36
	5.    Disclosure.....	36
	6.    Exchange Act Regulation 13D.....	38
	7.    Broker Votes.....	38
	8.    Expenses and Fees.....	39
	9.    Miscellaneous Guidelines.....	40
	C.    Advantages and Disadvantages.....	40
	D.    Federal and State Authority.....	44
VI.	Other Alternatives to Increase Corporate Accountability.....	46
	A.    Variations of Shareholder Access.....	46
	B.    Disclosure Regarding Nominating Committees.....	47
	C.    Communications with Independent Directors.....	49
	D.    Reform of Exchange Act Rule 14a-8.....	49
	E.    Revise Exchange Act Regulation 13D.....	51
	F.    Other Miscellaneous Alternatives and Comments.....	52
	1.    Disclosure.....	52
	2.    Proxy Regulations.....	53
	3.    Corporate Governance.....	53
	4.    Other Recommendations.....	54

## I. List of Commenters

### A. Academics

1. Jayne W. Barnard, College of William & Mary,  
School of Law (“Barnard”)
2. Lucian Arye Bebchuk, Harvard Law School (“Bebchuk”)
3. Jennifer E. Bethel, Babson College and Stuart L. Gillan,  
University of Delaware (“Bethel & Gillan”)
4. Harvard Business School/Harvard Law School  
ad hoc group on the study of corporate governance (“Harvard”)
5. Ivo Welch, Yale University (“Welch”)

### B. Associations

6. American Bankers Association (“ABASS”)
7. American Corporate Counsel Association (“ACCA”)
8. American Society of Corporate Secretaries (“ASCS”)
9. Association of California School Administrators (“ACSA”)
10. Association of the Bar of the City of New York (“ABCNY”)
11. The Business Roundtable (“BRT”)
12. The Committee on Investment of Employee Benefit Assets (“CIEBA”)
13. Investment Company Institute (“ICI”)
14. Investment Counsel Association of America (“ICAA”)
15. LPA, the HR Policy Association (“LPA”)
  - a. Letter dated June 4, 2003
  - b. Letter dated June 9, 2003
16. National Association of Corporate Directors (“NACD”)
17. National Association of State Retirement  
Administrators (“NASRA”)
18. National Association of State Treasurers (“NAST”)
19. New York State Bar Association (“NYSBA”)
20. Task Force on Shareholder Proposals,  
Section of Business Law of the  
American Bar Association (“ABA”)
21. U.S. Advocacy Committee of the Association  
for Investment Management and Research (“AIMR”)

### C. Corporations and Corporate Executives

22. Abbott Laboratories (“Abbott”)
23. Agilent Technologies, Inc. (“Agilent”)
24. AutoZone, Inc. (“AutoZone”)
25. Robert H. Bohannon, Viad Corp. (“Viad”)
26. ConocoPhillips (“ConocoPhillips”)
27. CSX Corporation (“CSX”)

- 28. Patrick T. Mulva, Exxon Mobil Corporation (“ExxonMobil”)
- 29. Intel Corporation (“Intel”)
- 30. Richard P. Thomas, Ashland Inc. (“Ashland”)
- 31. G. Richard Wagoner, Jr., GM (“GM”)

**D. Governmental Representatives**

- 32. Senator Carl Levin, Ranking Minority Member, Permanent Subcommittee on Investigations (“Levin”)
- 33. Daniel P. Vrakas, State Representative (Wisconsin) and Co-Chair of the Joint Survey Committee on Retirement Systems (“Vrakas”)

**E. Investment Advisors and Managers**

- 34. Barclays Global Investors (“Barclays”)
- 35. Jerome L. Dodson, Parnassus Investments (“Parnassus”)
- 36. Hermes Pension Management Limited (“Hermes”)
  - a. Letter dated June 10, 2003
  - b. Letter dated June 13, 2003
- 37. ISIS Asset Management (“ISIS”)
- 38. Lawndale Capital Management, LLC (“Lawndale”)
- 39. Marco Consulting Group, Inc. (“MCG”)
- 40. Relational Investors LLC (“Relational”)
- 41. Tweedy, Browne Company LLC (“Tweedy”)

**F. Law Firms and Attorneys**

- 42. Richard A. Bennett, Lens Governance Advisors, P.A. (“LENS”)
- 43. Daniel R. Blickman, Klehr Harrison Harvey Branzburg & Ellers LLP (“Blickman”)
- 44. Terence P. Boyle, Boyle Partnership, P.C. (“Boyle”)
- 45. David E. Brown, Jr., Bryan E. Davis, Dennis O. Garris, Gary C. Ivey, Kathryn C. Kling, and Mark F. McElreath, Alston & Bird LLP (“Alston & Bird”)
- 46. Sue Ellen Dodell, Esq.
- 47. Eric M. Fogel, Schuyler, Roche & Zwirner, P.C.
- 48. Harshbarger Governance Practice at Murphy, Hesse, Toomey & Lehane, LLP (“Harshbarger”)
- 49. Gay L. Harwin, Esq.
- 50. Cornish F. Hitchcock (“Hitchcock”)
- 51. Halsey G. Knapp, Jr., Foltz Martin, LLC
- 52. Ian D. Lanoff
- 53. Benjamin P. Pugh, Enterprise Counsel Group (“Pugh”)
- 54. Lisa Greer Quateman, Quateman & Zidell LLP
- 55. Stephen M. Rosenblatt, Esq.

- 56. David A. Simpson, Simpson Partners LLP
- 57. Sullivan & Cromwell LLP (“Sullivan”)
- 58. Dorothy B. Vinski, Rein Evans & Stestanovich LLP
- 59. Wachtell, Lipton, Rosen & Katz (“Wachtell”)

**G. Shareholder Resource Providers**

- 60. Neil J. Cohen, Bank and Corporate Governance  
Law Reporter
- 61. Davis Global Advisors, Inc. (“Davis”)
- 62. D.F. King & Co., Inc. (“DF King”)
- 63. Georgeson Shareholder Communications Inc. (“Georgeson”)
- 64. Institutional Shareholder Services (“ISS”)
- 65. Mark Latham, The Corporate Monitoring Project (“Latham”)
- 66. Nell Minow, The Corporate Library (“Minow”)
- 67. James McRitchie, CorpGov.Net and PERSWatch.Net (“McRitchie”)
  - a. Letter dated May 26, 2003
  - b. Letter dated June 13, 2003
- 68. Pension & Investment Research Consultants Ltd. (“PIRC”)
- 69. Providence Capital, Inc. (“Providence”)

**H. Unions, Pension Funds, Institutional Investors and Institutional Investor Associations**

- 70. 1199 National Pension Fund\*
- 71. Amalgamated Bank LongView Funds (“AMBANK”)
- 72. American Federation of Labor and Congress of  
Industrial Organizations (“AFL-CIO”)
- 73. American Federation of State, County and  
Municipal Employees (“AFSCME”)
- 74. Anheuser-Busch Cartersville Brewery/Teamsters  
Local 1129 Pension Plan\*
- 75. Arkansas Public Employees Retirement System (“APERS”)
- 76. Board of Investment Trustees (“BIT”)
- 77. Brewery and Beverage Drivers Pension Fund (Teamsters  
Local 67)\*
- 78. Brewery and Related Workers Pension Plan of the  
Rochester, New York Area\*
- 79. Bricklayers and Trowel Trades International  
Pension Fund\*
- 80. California Labor Federation\*
- 81. California Public Employees’ Retirement System,  
California State Teachers’ Retirement System,  
Connecticut Retirement Plans and Trust Funds,  
Los Angeles County Employees’ Retirement  
Association, Maine State Retirement System, New

- York City Board of Education Retirement System,  
New York City Employees' Retirement System,  
New York City Fire Department Pension Fund,  
New York City Police Pension Fund, New York  
Teachers' Retirement System, New York  
State Common Retirement Fund, Pennsylvania  
State Employees' Retirement System, State Teachers'  
Retirement System of Ohio, and State of Wisconsin  
Investment Board ("RETIREFUNDS")
82. California Public Employees' Retirement System ("CalPERS")
83. California School Employees Association ("CSEA")
84. California State Teachers' Retirement System ("CalSTRS")
85. Central Laborers' Pension, Welfare & Annuity Funds ("CLPWAF")
86. Central Pennsylvania Teamsters Pension Fund (Local Union 229)\*
87. Central States Pension Fund
- a. Local Union 71\*
  - b. Local Union 568\*
  - c. Local Union 574\*
  - d. Local Union 654\*
  - e. Local Union 838\*
  - f. Local Union 886\*
  - g. Local Union 974\*
88. Central States Southeast and Southwest Areas Health  
and Welfare and Pension Fund
- a. Local Union 509\*
  - b. Local Union 1196\*
  - c. 20 letters signed by individuals\*
89. Jack H. Chapman, Ohio State Teachers Retirement System
90. Chicago Newspaper Publishers' Drivers Union  
Pension Plan\*
91. Colorado Public Employees' Retirement Association
92. Communications Workers of America Pension Fund ("CWA")
93. Connecticut Retirement Plans and Trust Funds ("CRTPF")
94. Council of Institutional Investors ("CII")
- a. Letter dated April 15, 2003
  - b. Letter dated May 10, 2003
95. CWA/ITU Negotiated Pension Plan ("CWA/ITU")
96. Dairy Union Employees Benefit Fund\*
97. District of Columbia Retirement Board ("DCRB")
98. Employees Retirement System of Texas
99. Employer-Teamsters Locals 175 & 505 Pension Fund\*
100. Fresno County Employees Retirement Association ("FCERA")
101. General Teamsters, Chauffeurs and Helpers, Local 378\*
102. Health, Welfare and Annuity Pension Fund (Local 1180)\*
103. Alan G. Hevesi, Comptroller of the State of New York,  
New York State and Local Retirement Systems

- And New York State Common Retirement Fund (“Hevesi”)
- 104. Hotel Employees and Restaurant Employees International Union Pension Fund
  - a. Letter from Ron Richardson dated May 22, 2003
  - b. Letter dated June 10, 2003
- 105. I.A.M. National Pension Fund\*
- 106. IBEW 769 -- Management Pension Plan
- 107. IBEW/NECA Chicago Area Construction Industry Pension Fund\*
- 108. Illinois Teachers’ Retirement System
- 109. Indiana Teachers’ Retirement Fund
- 110. International Association of Machinist and Aerospace Workers, AFL-CIO\*
- 111. International Brotherhood of Electrical Workers’ Pension Benefit Fund\*
- 112. International Brotherhood of Teamsters (“IBT”)
- 113. International Union, UAW
- 114. Iron Workers’ Local 25 Pension Plan\*
- 115. IUE-CWA Pension Fund
- 116. Kern County Employees’ Retirement Association
- 117. Robert S. Leggett, Kentucky Retirement Systems
- 118. Dale McCormick, State Treasurer of Maine (“McCormick”)
- 119. Local 111 Pension Fund\*
- 120. Local 212 IBEW Pension Fund\*
- 121. Local 400 Food Terminal Pension Fund\*
- 122. Local 418 Pension Fund\*
- 123. Local 535 (Marin County)\*
- 124. Local 550 Pension Fund\*
- 125. Local 638 Health and Welfare Fund\*
- 126. Local 705 International Brotherhood of Teamsters Pension Fund\*
- 127. Local 734 Pension Fund\*
- 128. Los Angeles City Employees’ Retirement System (“LACERS”)
- 129. Los Angeles County Employees Retirement Association (“LACERA”)
- 130. Maine State Retirement System (“MSRS”)
  - a. Letter from Kay R. H. Evans dated May 30, 2003
  - b. Letter from Dale McCormick, State Treasurer dated June 12, 2003.
- 131. Massachusetts Pension Reserves Investment Management Board (“MPRIM”)
- 132. Midwestern Teamsters Pension Fund\*
- 133. Milwaukee Employees’ Retirement System (“MERS”)
- 134. Minnesota State Board of Investment
- 135. Brian N. Minturn, Teachers’ Retirement System of Louisiana
- 136. Missouri State Employees’ Retirement System
- 137. Montana Board of Investments

138. Richard H. Moore, State Treasurer of North Carolina (“Moore”)  
(North Carolina Pension Funds)
139. Municipal Fire & Police Retirement System of Iowa
140. N.C.L.H. and W.T.F. (Hod Carriers and General  
Laborers No. 326)\*
141. New England Teamsters and Trucking Industry Pension Fund\*
142. New Hampshire Retirement System (“NHRS”)  
a. Letter from Eric Henry dated May 29, 2003  
b. Letter dated June 12, 2003
143. New York City Employee Retirement System  
a. Letter from Lillian Roberts, Executive Director,  
dated June 3, 2003\*  
b. City Employees Union Local 237
144. New York State Teachers’ Retirement System (“NYSTRS”)
145. New York Teamsters Conference Pension & Retirement Fund\*
146. North Carolina Department of State Treasurer
147. Ohio Public Employees Retirement System
148. PACE Industry Union-Management Pension Fund\*
149. Pennsylvania State Employees’ Retirement System (“SERS”)
150. Plumbers and Pipefitters National Pension Fund\*
151. Public Employee Retirement System of Idaho
152. Public Employees’ Retirement Fund (State of Indiana)
153. Rochester Dairy Industry Individual Pension Account Plan\*
154. Sacramento County Employees’ Retirement System
155. San Diego City Employees’ Retirement System (“SDCERS”)
156. San Jose Police and Fire Department Retirement Plan\*
157. SEIU Local 113 (Twin City Hospital Pension Fund)\*
158. SEIU National Industry Pension Plan\*
159. The Sheet Metal Workers National Pension Fund
160. South Dakota Investment Council
161. Southern California Pipe Trades Retirement Fund\*
162. Southern States Savings and Retirement Plan Trust Fund\*
163. Southwestern Pennsylvania & Western Maryland  
Area Teamsters & Employers Pension Fund\*
164. Marlyn J. Spear, Building Trades United Pension Trust Fund
165. State Board of Administration of Florida (“SBA”)
166. State of Wisconsin Investment Board (“SWIB”)
167. State Retirement and Pension System of Maryland (“SRPSM”)
168. State Teachers Retirement System of Ohio
169. Paul J. Tavares, General Treasurer of Rhode Island (“Tavares”)
170. Teacher Retirement System of Texas (“TRST”)
171. Teamsters Affiliates Pension Fund\*
172. Teamsters Coverage on Health & Welfare of the Joint Benefit Trust Fund\*
173. Teamsters Joint Council No. 46 Pension Plan\*
174. Teamsters Joint Council No. 83 of Virginia  
Pension Fund\*



- 175. Teamsters Local 52 Pension Fund\*
- 176. Teamsters Local 264 Income Replacement Plan\*
- 177. Teamsters Local 293 Pension Fund\*
- 178. Teamsters Local 264 Moving Division Pension Fund\*
- 179. Teamsters Local 301 Pension Fund\*
- 180. Teamsters Local 338 Pension and Welfare Funds\*
- 181. Teamsters Local 408 Pension Fund\*
- 182. Teamsters Local 682 Health and Welfare Funds\*
- 183. Teamsters Union 142 Pension Trust Fund\*
- 184. Tennessee Consolidated Retirement System
- 185. William C. Thompson, Jr., Comptroller of the City of  
New York, New York Pension Funds (“Thompson”)
- 186. U.A. Plumbers Local #68 Welfare Fund Trust\*
- 187. UFCW and Food Employers Pension Plan of Central Ohio\*
- 188. Union of Needletrades, Industrial and Textile Employees
- 189. United Brotherhood of Carpenters and Joiners of  
America (“UBCJA”)
- 190. United Food and Commercial Workers International  
Staff Trust Fund and UFCW International Savings and Retirement Fund\*
- 191. UPS/177 Pension Fund and 177 Pension Fund
- 192. Upstate New York Bakery Drivers & Industry Pension Fund\*
- 193. Utah Retirement Systems
- 194. David S. Wakelin, Maine State Retirement System (“Wakelin”)
- 195. Washington State Investment Board (“WSIB”)
- 196. Western Conference of Teamsters Pension Fund
  - a. Local Union 38\*
  - b. Local Union 87\*
  - c. Local Union 386\*
  - d. Local Union 439
  - e. Local Union 601\*
  - f. Local Union 896\*
- 197. Western Pennsylvania Electrical Employees Pension  
Trust Fund\*
- 198. Western Pennsylvania Teamsters and Employers  
Pension Fund (Local 397)\*
- 199. Western Pennsylvania Teamsters and Employers  
Pension Fund (Local 926)\*
- 200. West Virginia Investment Management Board (“WVIMB”)
- 201. William Caspar Graustein Memorial Fund\*
- 202. Wisconsin Laborers’ Pension Fund\*

**I. Social, Environmental and Religious Funds and Related Service Providers**

- 203. Alaska Conservation Foundation, As You Sow Foundation,  
Beldon Fund, Bullitt Foundation, Conservation Land Trust  
Foundation for Deep Ecology - Patagonia Land Trust,

	Educational Foundation of America, Nathan Cummings Foundation, Jessie Smith Noyes Foundation, Rose Foundation for Communities and the Environment, Seventh Generation Fund for Indian Development, and the Shefa Fund	("SOCFUNDS")
204.	Joe Breddan, Colorado Environmental Committee‡	
205.	Boston Common Asset Management, LLC	("BC")
206.	Calvert Group, Ltd.	("Calvert")
207.	Christian Brothers Investment Services, Inc.	("CBIS")
208.	Citizens Funds	("Citizens")
209.	Coalition for Environmentally Responsible Economics	("CERES")
210.	Creative Investment Research	("CRI")
211.	Domini Social Investments	("Domini")
212.	Granary Foundation and Center for Rural Affairs‡	
213.	Green Corporate Accountability Project	
214.	Harrington Investments, Inc.‡	
215.	Conrad MacKerron‡	
216.	Laurie McClain Socially Responsive Investments‡	
217.	The Nathan Cummings Foundation	("Cummings")
218.	Needmor Fund‡	
219.	Progressive Investment Management‡	
220.	Rockefeller & Company's Socially Responsible Investment Division	("Rockefeller")
221.	Shefa Fund	("Shefa")
222.	Sisters of Notre Dame de Namur‡	
223.	Social Investment Forum	("SIF")
224.	Southwest Center for Economic Integrity	("Southwest")
225.	Trillium Asset Management Corporation	("Trillium")
226.	Walden Asset Management	("Walden")

**J. Other Shareholder Groups**

227.	Committee of Concerned Shareholders	("CCS")
	a. Letter dated May 5, 2003	
	b. Letter dated May 22, 2003	
	c. Letter dated June 7, 2003	
228.	eRaider.com Inc.	("eRaider")
	a. Letter from Staff dated June 12, 2003	
	b. Letter from CEO dated June 12, 2003	
229.	Fund for Stockowners Rights	("FSR")
230.	The Horizon/Alaska Customer/Employee Co-Ownership Association, Inc.	("Horizon")
231.	The Responsible Wealth Project (United for a Fair Economy)	("RWP")

## **K. Individuals**

232.	Brad Abel	
233.	Norm Achen	("Achen")
234.	John Adler and Sherri Levine	("Adler & Levine")
235.	Abbie Agner	
236.	Matthew Aiello	("Aiello")
237.	David L. Althoff	
238.	Jeff Altman	
239.	Mike and Cindy Amirault	("Amirault")
240.	James D. Amstutz	
241.	Carol J. Andreae	("Andreae")
242.	Michael Asato	("Asato")
243.	Randy Ashway†	
244.	Stuart Auchincloss	("Auchincloss")
245.	Lee and Renee Augustine	
246.	Mary Ann Avasino†	
247.	Barbara L. Baer‡	
248.	Alexis Bailey	
249.	Christine L. Baker	("Baker")
250.	Colleen Dooling Ball	
251.	George H. Ball	
252.	Larry F. Ball	("Ball")
253.	Nancy C. Ball	
254.	Susan Marya Baronoff	
255.	Harry C. Barr	("HBarr")
256.	Pamela Barr	("PBarr")
257.	M. Barrows	("Barrows")
258.	Abdullah Baytops	("Baytops")
259.	Tanya Baytops	
260.	Bill Belding	
261.	Dana J. Belding	
262.	Lamonica D. Bell	("Bell")
263.	Dr. Gregory Benford	
264.	Pauline Berberian	
265.	Rose M. Berkowitz	
266.	Dr. Andrew Berman	
267.	Michael Berns	
268.	John D. Berryman, M.D.	
269.	Carolyn Beshara	
270.	Jennifer Bethel	("Bethel")
271.	James Biedenbender	("Biedenbender")
272.	Carrie Biggs-Adams	
273.	Jim Blau	("Blau")
274.	Rand Bleimeister	
275.	Brian Bomer	("Bomer")

276. Elizabeth Boschee  
277. Jennie Bowen  
278. TA Bower  
279. Boy2crow@aol.com  
280. Bart Bracken  
281. Jan Brawner  
282. Austin Brentley  
283. Bettye Brentley  
284. Joyce Ann Brentley  
285. Robert Brittian  
286. James N. Brophy†  
287. Elisabeth Brown  
288. Eva Brown  
289. Joshua Brown  
290. John W. Bullard  
291. Doug Bullock  
292. George Burgoyne (“Burgoyne”)  
293. Tracy Burt‡  
294. Ben Bycel  
295. Carl A. Cappello  
296. Barri Carian (“Carian”)  
297. Don Carlson (“Carlson”)  
298. Robert Carnevale  
299. Ed Carroll  
300. Kathleen Carter  
301. Grace Chang  
302. Jacob Cherian  
303. John Chevedden (“Chevedden”)  
  - Four letters dated June 13, 2003
304. Leila Chirayath  
305. Jeff Chivers  
306. Portia Clark†  
307. Richard W. Clayton III  
308. Alan P. Cleveland (“Cleveland”)  
309. Joseph and Donna Cocalis  
310. Eliot Cohen (“ECohen”)  
311. Richard W. Cohen (“RCohen”)  
312. Terry L. Colling (“Colling”)  
313. Donna Corry  
314. Matthew Corsaro (“Corsaro”)  
315. Cportm101@aol.com  
316. Mary Crane  
317. CRice445@aol.com (“CRice”)  
318. E. David and Mary Jean Cronon  
319. Jason Croston  
320. Joseph Crump

- 321. Graef Crystal
- 322. Edward T. Cunneen
- 323. Lori Dale
- 324. Evelyn Y. Davis (“Davis”)
  - a. Letter dated May 15, 2003
  - b. Letter dated June 13, 2003
- 325. Carl and Shari DeLong (“DeLong”)
- 326. Scott Detienne
- 327. David Di Fiore
- 328. Scott Dillingham
- 329. Dana Dillon†
- 330. Kelly Dillon
- 331. dlippin04@yahoo.com
- 332. docelc@webtv.net
- 333. Jim Dollinger
- 334. Hank Drabin
- 335. Joe Drain
- 336. Richard Drapkin (“Drapkin”)
- 337. Gary K. Duberstein (“Duberstein”)
- 338. Maureen Dwyer
- 339. Janice Edwards
- 340. Peter Edwards
- 341. Lisa Strauch Eggers, Esq. (“Eggers”)
- 342. Steven A. Elias
- 343. Katy Ellis
- 344. Kevin Ellsworth
- 345. emercier@webtv.net
- 346. Craig J. Englander (“Englander”)
- 347. Douglas C. Estes (“Estes”)
- 348. Kay R. H. Evans
- 349. Francis M. Fandrick (“Fandrick”)
- 350. Michael R. Fanning (“Fanning”)
- 351. George Farmer (“Farmer”)
- 352. Mary Feay
- 353. Robert D. Feinstein (“Feinstein”)
- 354. David Feit
  - a. Letter dated June 11, 2003
  - b. Letter dated June 16, 2003
- 355. William Finkle
- 356. Thomas and Nancy Finnegan
- 357. Fired Broker
- 358. Sarah Flick (“Flick”)
- 359. Richard D. Foley
- 360. Nathaniel Forster
- 361. John Foss
- 362. Powell Foster

363. Mark Foulon (“Foulon”)  
364. Edward E. Foxworth  
365. Alexandre Freedman  
366. Joseph C. Friedman  
367. Barbara Fritz (“Fritz”)  
368. J.W. Fuleky  
369. John Furqueron  
370. Dorothy W. Gach, Ph.D. (“Gach”)  
371. Fred Gaffney  
372. Gordon Garney (“Garney”)  
373. Shirley H. Garris  
374. GBowers677@aol.com  
375. Barbara Genzel  
376. Martin Glotzer  
377. Richard Goette‡  
378. Charles Goins (“Goins”)  
379. Michelle Goins  
380. Phillip Goldstein (“Goldstein”)  
381. Ben Gong  
382. Kevin F. Granger (“Granger”)  
383. Richard E. Greenberg  
384. Judy Groves  
385. John Guarrera  
386. Valerie Gutierrez  
387. Carl T. Hagberg (“Hagberg”)  
388. Elizabeth B. Haile (“Haile”)  
389. Joseph S. Handler, M.D. (“Handler”)  
390. Michael Harder  
391. James P. Haren  
392. Victoria Harris  
393. Dan Hartley  
394. Dixon R. Harwin  
395. Lois W. Harwin  
396. John Hayes (“Hayes”)  
397. Dave Heggen  
398. Alan Helig  
399. Nell Hennessy  
400. Ken Hennika  
401. Tom Herndon (“Herndon”)  
402. Jay Hill (“Hill”)  
403. Melissa Hill  
404. Gregory L. Hirsch, M.D.  
405. Kathy A. Holewinski  
406. Suzanne Hopgood  
407. Joseph P. Horgan  
408. Patrick Howell

- 409. Lawrence Hubenak
- 410. Adam Hughes
- 411. Ronald W. Hunt
- 412. Jeni Incontro
- 413. Ashwin Jacob
- 414. Relly Jacob
- 415. Taylor Janis
- 416. Crystal Jiang
- 417. Kent Johnson†
- 418. Lola L. Johnson
- 419. Mary Joyce
- 420. Susan Kaiser
- 421. Jane Kallander
- 422. Bruce Kallos
- 423. Peter Kandel
- 424. Edward Karecki
- 425. Dorothy Karlsen
- 426. Mitchell Karton
- 427. Adrienne Katzow
- 428. Michelle Katzow
- 429. John Keane
- 430. Francesca Kearney
- 431. Peter J. and Clare J. Kearney
- 432. Margaret L. Keon (“Keon”)
- 433. Ken Kesler
- 434. Charles Kimmel
- 435. Philip Klein, Esq.
- 436. Thomas A. Kornfeld (“Kornfeld”)
- 437. Judith Krain
- 438. Marsha Kramarck
- 439. Lyn Krause†
- 440. Jason Kressel
- 441. Joseph Krislov and Louise Miller
- 442. Bob Kroetch
- 443. Mark Kronenberg
- 444. Janet Krueger
- 445. Ivan J. Krupit
- 446. Henry Kuehn
- 447. Ilyana Kuziemko
- 448. Olena Berg Lacy
- 449. J Bushrod Lake (“Lake”)
- 450. Mary Lake
- 451. Story Landis
- 452. Jason Lawley
- 453. Abbott A. Leban
- 454. Huan Lee

455. Claude and Jean LeTien
456. Paul Levin
457. Barton T. Lewis
458. Joe Lexa
459. Bridget E. Lidy
460. Chris Lidy
461. Daniel Link (“Link”)
462. Ron Linton
463. Steve Lomax
464. William F. Long, Jr.
465. Mary K. Lund†
466. Sophia Lynn
467. Alyssa Machold
468. Roland M. Machold
469. Ernest Patrick Mahar
470. Kevin D. Mahar
471. majohns@fas.harvard.edu
472. Lucy Malcolm
473. Corrinne Mann
474. Rafael Manrique (“Manrique”)
- a. Letter dated June 9, 2003
- b. Letter dated June 10, 2003
475. Willis and Kay Martin
476. Jeffrey S. Masarek (“Masarek”)
477. David Kratz Mathies (“Mathies”)
478. Jim Matthews (“Matthews”)
479. Keith B. Maynard
480. Gerald Maynus
481. Karen M. Mazza, Esq.
482. Lynne McCartin
483. Michael McCartin
484. Patty McCarty†
485. William D. McGrath
486. Joel Mcintosh
487. Don A. McKenzie
488. Mary Meeker
489. Glenn Melero†
490. Mike Mellon†
491. Frank Mester Jr. (“Mester”)
492. Dena Mihovich
493. Tracy Moavero
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497. Cindy Mui
498. Bill Murphy



499.	Jodi Nagel	
500.	Ken Nathanson	
501.	Bartlett Naylor	("Naylor")
502.	Joshua C. Needle	
503.	Sarah Nelson	
504.	James Nesfield	("Nesfield")
505.	Hans-Dieter Neuen	
506.	Gordon Newland	
507.	Thomas Newren	
508.	Donelle Nieman	("Nieman")
509.	Robert J. Noble	
510.	Carol Nolan†	
511.	Sally Northcutt	
512.	Barbara Norton	
513.	Bill Nugent	
514.	Gary L. Nystrom	
515.	Ed and Peg O'Hara	
516.	Elleen Okada	("Okada")
517.	Maidie E. Oliveau	
518.	William J. and Priscilla-Anne O'Neill	
519.	Joseph L. Oppenheimer	
520.	Pamela Palmer†	
521.	Thomas O. Pandick	("Pandick")
522.	Jackie Panos	
523.	Billy Parish	
524.	James F. Parker	
525.	Will Pattison	
526.	Kyle Paulson	
527.	Andrew Pavelchek	
528.	Rich Peppers	
529.	Robert A. and Kay Perkins	("Perkins")
530.	Paul Perritt	
531.	Ruth Petersen	("Petersen")
532.	Joel W. Pett	
533.	Richard Pilgrim	
534.	Tyrone Pitts	
535.	Philip Pulliam	
536.	Justin Purnell	
537.	Beverly Rajnes	
538.	Christy Rajnes	
539.	David Rajnes	
540.	John Rajnes	
541.	Andrew Randall	("Randall")
542.	Patty Rath	("PRath")
543.	Roger J. Rath	("RRath")
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- 552. Barry N. Riu
- 553. Glenn W. Robertson
- 554. Robert Rocco
- 555. Lee Rodgers
- 556. Sally Rodgers
- 557. John Paul Rollert
- 558. Sigmund J. Roos
- 559. Nick Rossi, Chris Rossi, and Emil Rossi
- 560. Barbara Roth
- 561. Lori L. Roth
- 562. Steve Roth
- 563. Robert Russ
- 564. Saman Saedi
- 565. Sairah Saeed
- 566. Wayne Sage
- 567. Sheila J. Salenger
- 568. Ann Sanders
- 569. Charles Sandmel
- 570. Rowena Santos
- 571. Ralph S. Saul ("Saul")
- 572. Arnold Scarpitti
- 573. Kurt N. Schacht ("Schacht")
  - a. Letter dated June 11, 2003
  - b. Letter dated June 12, 2003
- 574. L. Scheffler ("Scheffler")
- 575. Gerald Schissell†
- 576. Leslie Schmuhl
- 577. Kevin Schneider
- 578. Joyce Schorr
- 579. Scot Schulte
- 580. Lisa Schultz
- 581. Anne-Marie Zell Schwerin
- 582. Payson Schwin
- 583. Susan F. Scott†
- 584. Joe Seal
- 585. Harold J. Sealman
- 586. Peter Seidman
- 587. Gene Sensale
- 588. Brad Sherwood

- 589. Joan Sherwood
- 590. Paul B. Shiring
- 591. Donald W. Shuper
- 592. Richard A. Sigler†
- 593. Lisa Rebecca Silverman
- 594. Jane Sindell
- 595. Amar Singh
- 596. Ned A. Skipper
- 597. Dan M. Slack
- 598. Kim Slack
- 599. Mary Slack
- 600. R. Gene Slack
- 601. Robin Slocum
- 602. Donna Spell
- 603. Dick Spinazzola
- 604. Joseph Stackpoole
- 605. Bob Stanfield
- 606. W.J. Sterner
- 607. Eric Stockel
- 608. Susan R. Stockel (“Stockel”)
- 609. F. Barron Stone, C.P.A.
- 610. Rick Strassman
- 611. Ellen Strauss
- 612. Kelly Sullivan
- 613. JoAnne Svendsgaard
- 614. Summer Sweeney†
- 615. Melissa Sweet
- 616. Allen Sykes (“Sykes”)
- 617. Elizabeth Sykes
- 618. Denise Szkatulski
- 619. Trish Taniguichi
- 620. Larry R. Taylor
- 621. Duane and Marilynne Temple†
- 622. Chris Terlecky
- 623. Lee Teslik
- 624. Carol M. Thomas
- 625. Marnie Thompson (“Thompson”)
- 626. Constance Thurber
- 627. Andy Timchalk
- 628. Mary Tkach
- 629. Paul Tomasik
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- 633. Deborah Underwood
- 634. Mike Vajdos

- 635. Stuart Vance
- 636. Dru van Hengel
- 637. Elise Varela
- 638. Anoo Verghis
- 639. Mary Vogel (“Vogel”)
- 640. Martin Wachs
- 641. Michael Wanyama
- 642. Anne Webb
- 643. Sean H. Webb
- 644. Raymond L. Wehling (“Wehling”)
- 645. Arnold Weiner
- 646. Francine Weiss
- 647. Jerry White
- 648. Wendy Widlus
- 649. Katherine Wigent (“Wigent”)
- 650. Jay S. Wiley
- 651. Ilene J. Williger (“Williger”)
- 652. Frank G. Winant
- 653. Michael Yu
- 654. Kristen Zehner
- 655. Leita Zeugner (“Zeugner”)

**L. Miscellaneous**

- 656. Martin Cohen, Balanced Financial Securities
- 657. FlyRight, Inc.‡
- 658. Public Sector Superannuation Scheme and  
Commonwealth Superannuation Scheme (“PSS & CSS”)

- \* Form Letter A (“FORM A”)
- † Form Letter B (“FORM B”)
- ‡ Form Letter C (“FORM C”)

## II. Overview

In Press Release 2003-59, issued on May 1, 2003, the Commission solicited public views in connection with the Division's review of the proxy rules and regulations relating to the nomination and election of directors.<sup>1</sup> The 690 commenters who responded to the solicitation were comprised of the following groups:<sup>2</sup>

- 424 individuals;
- 165 unions, pension funds, institutional investors, and institutional investor associations;
- 24 social, environmental, and religious funds and their related service providers;
- 18 law firms and attorneys;
- 16 associations;
- 10 corporations and corporate executives;
- 10 shareholder resource providers;
- 8 investment advisers and managers;
- 5 academics;
- 5 other shareholder groups;
- 2 governmental representatives; and
- 3 miscellaneous commenters.

Commenters generally supported the Commission's examination of the proxy rules or specifically supported granting shareholders access to company proxy materials to nominate directors. The exceptions were all of the corporations and corporate executives, the majority of law firms and individual attorneys, and most of the associations (mostly business associations).

The majority of commenters who advocated a change to the proxy rules referenced past and current corporate scandals as an indication of an overall problem in the system of corporate governance. Although many of these commenters acknowledged the importance of current initiatives under the Sarbanes-Oxley Act of 2002 and the markets' amendments to listing standards in addressing director conflicts of interests, a majority were of the view that greater accountability of board members to shareholders was a necessary step in addressing these systemic issues. A number of commenters also expressed dissatisfaction with the effectiveness of current mechanisms to effect changes in corporate governance, such as submitting shareholder proposals under Exchange Act Rule 14a-8, conducting election contests, submitting candidates

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<sup>1</sup> See Release No. 34-47778 (May 1, 2003). In addition, the Division spoke with interested parties representing shareholders, the business community and the legal community, including members from AMBANK, ABA, ADP, AFL-CIO, AFSCME, ASCS, BRT, CalPERS, CCS, CorpGov.Net, CRPTF, Hermes, IBT, Laborer's International Union of North America and the UBCJA. Public comments can be viewed in the Commission's Public Reference Room at 450 Fifth Street, NW, Washington, DC 20549, in File No. S7-10-03. Public comments submitted by electronic mail also are available on the Commission's website, [www.sec.gov](http://www.sec.gov).

<sup>2</sup> The list of commenters does not reflect all 690 commenters because the local chapters from the Central States Pension Fund, the Central States Southeast and Southwest Areas Health and Welfare and Pension Fund, and the Western Conference of Teamsters Pension Fund submitted comments individually but identified themselves with the general fund.

as potential board nominees to the nominating committee, and generally communicating with the board about shareholder concerns. At least ten commenters found that recommendations made to the nominating committee were not an effective means to place shareholder nominees on the board.<sup>3</sup>

Although the vast majority of responses supported a change to the proxy rules to allow shareholders to access company proxy materials to include nominees to the board, the majority of these commenters did not provide any specific suggestions about how the proxy rules should be reformed. The commenters who did provide specific guidelines suggested the following parameters in promulgating a shareholder access rule:

- *Minimum Ownership Threshold* – Although the majority of commenters supported setting an ownership threshold, many commenters differed on the need for such a threshold and, if needed, the proper threshold amount. One commenter suggested no minimum threshold. Those who favored a minimum threshold suggested up to 10% of the outstanding shares, with the majority of commenters suggesting a range between 3% and 5% of the outstanding shares. Some commenters also suggested a lower ownership threshold for each individual if a coalition of shareholders could be formed (e.g., 1% minimum threshold with a coalition of 25 individuals each owning at least \$2,000 worth of shares). Also, upon noting the unlikelihood of a single shareholder holding even 3% of shares in a large corporation, most commenters favored allowing shareholders to aggregate their shares to meet any required threshold.
- *Minimum Holding Period* – Nearly all of the commenters supported the idea of a minimum holding period. The majority of commenters suggested a period of one to three years.
- *Maximum Permissible Slate* – The vast majority of commenters agreed that any enhanced shareholder access rule should be limited to shareholders who nominate candidates for less than a majority of the board. A few commenters suggested enhancing shareholders’ ability to replace all or a majority of the board. Those who favored a possible shareholder access rule for less than a majority of the seats suggested allowing shareholders to nominate from one seat up to the number of seats equal to one seat less than 50% of the board.
- *Competing Nominating Shareholders* – The majority of commenters agreed that, in a situation where there were more shareholder nominees than permitted, the nominating shareholder who represented the largest shareholder block should be allowed to nominate candidates to the board. Several of these commenters expressed concern with this solution, however, on the basis that companies could use board-friendly nominating shareholders to nominate candidates to the board. These commenters suggested that any access rule include safeguards against these types of “collusive” activities.

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<sup>3</sup> Barnard; CRice; PRath; RRath; RWP; SOCFUNDS; Southwest; Shefa; SIF; Thompson.

- *Disclosure* – The majority of commenters advocated allowing shareholder nominees to include in company proxy materials information similar to the information currently provided for board nominees. Some commenters requested “equal space and equal treatment” of all shareholder nominees. Some commenters also suggested that shareholder nominees be allowed to include a statement of support varying from 200 to 500 words.
- *Exchange Act Regulation 13D* – The majority of commenters recommended that the Commission provide relief (*e.g.*, an exemption or safe harbor) from Exchange Act Regulation 13D filing requirements for activities relating to shareholder nominations of directors. This relief would be available to shareholders and shareholder groups who beneficially own over 5% of a company’s shares and are not seeking control. The majority of commenters did not address whether these shareholders would still need to file an Exchange Act Schedule 13G.
- *Broker Votes* – A large majority of commenters recommended that New York Stock Exchange Rule 452, which allows brokers to vote shares where the beneficial owner has not provided voting instructions 10 days prior to a scheduled meeting, not be used during contested or uncontested elections.
- *Expenses and Fees* – Several commenters suggested that corporations reimburse nominating shareholders for expenses regardless of the election outcome. Several commenters also suggested a reimbursable nomination fee of between \$2,000 to \$3,000.

Most of the commenters who opposed shareholder access to company proxy materials suggested that the Commission defer any action until the current reforms under Sarbanes-Oxley and the markets’ listing standards are implemented. These commenters also expressed concern over the detrimental effects that a shareholder access rule could have on boards. For example, commenters stated that shareholder access to company proxy materials could be costly to shareholders, result in special interest directors, disrupt and polarize boards, discourage qualified candidates from serving on boards, increase the likelihood of election contests and result in director nominees who do not meet legal requirements. Several commenters also noted that the nomination and election of directors is an area that generally is governed by state law. Many commenters questioned the appropriateness of federal rules in an area that is traditionally governed by state law. Other commenters questioned the Commission’s authority to promulgate a shareholder access rule.

Commenters also suggested alternatives, in addition to, or in lieu of, a shareholder access rule. These alternatives included the following:

- greater disclosure from the nominating committee on the nomination process;
- more meaningful ways to communicate with independent directors;
- revisions to Exchange Act Rule 14a-8 or the staff’s interpretation of Exchange Act Rule 14a-8; and

- revisions to clarify the application of when there is “control” under Exchange Act Regulation 13D for certain activities such as the performance of management, evaluations of proposed corporate actions, evaluation of proposed shareholder actions, and “vote no” campaigns.

The comments are discussed in more detail below.

### **III. General Observations on the Need for Greater Corporate Accountability**

#### **A. Corporate Abuses and the Current Corporate Governance Environment**

The majority of commenters who supported changes to the proxy rules relating to the election of directors pointed to past and current corporate scandals as evidence of the need to reform the current system of corporate governance.<sup>4</sup> Many of the individual commenters expressed frustration and disappointment with declining share prices and sought any change that would improve the value of their investments.<sup>5</sup> The commenters called upon the Commission to restore public confidence in the markets.<sup>6</sup>

Many commenters, particularly individuals and pension funds, sought to enhance the value of their investments through better corporate governance.<sup>7</sup> One commenter noted the view that corporate governance is different today because investors have “greater direct financial exposure, are more informed, and are more willing to be involved in governance matters than in the past.”<sup>8</sup> In addition, though one commenter noted that active managers of mutual funds can sell their shares in a company with an “ineffective or unresponsive board,”<sup>9</sup> pension fund managers noted that the issue of director accountability is more important to them because they are necessarily long-term investors who cannot easily sell.<sup>10</sup> One commenter noted that “[c]ompanies should be run ultimately in the long-term interests of shareholders.”<sup>11</sup>

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<sup>4</sup> See, e.g., Amirault; CWA; CWA/ITU; Englander; Form A; Georgeson; Harshbarger; Levin; Relational; Tavares.

<sup>5</sup> See, e.g., Adler & Levine; Andreae; Auchincloss; Carian; Colling; DeLong; Fandrick; Foulon; Goins; Manrique; Moskalik; Petersen; RCohen; Williger.

<sup>6</sup> See, e.g., Achen; Bakers; Ball; Baytops; CLPWAF; DCRB; Drapkin; Fanning; Form B; Form C; Granger; Harshbarger; NASRA; Tavares; Vogel; Zeugner.

<sup>7</sup> See, e.g., Aiello; AMBANK; Eggers; MERS; Pandick; RETIREFUNDS.

<sup>8</sup> Bethel.

<sup>9</sup> AFL-CIO.

<sup>10</sup> See e.g., AFL-CIO; AMBANK. Cf CalSTRS (as a long term investor, CalSTRS is “keenly interested” in restoring investor confidence).

<sup>11</sup> Sykes.



The majority of commenters who sought corporate governance reforms specifically sought greater board accountability to shareholders<sup>12</sup> and greater shareholder oversight over boards.<sup>13</sup> Many commenters contended that the only way to make boards accountable to shareholders is to reform the proxy rules to allow shareholders to nominate directors in company proxy materials.<sup>14</sup>

## **B. The Current State of Director Elections**

Commenters specifically expressed dissatisfaction with the current rules governing the election of corporate directors. Commenters indicated their view that the current system insulates incumbent directors.<sup>15</sup> Commenters also noted that boards run virtually unopposed because of the prohibitive cost of conducting an election contest<sup>16</sup> and, when there is an election contest, companies can avail themselves of the corporate treasury to solicit shareholders.<sup>17</sup> Two commenters expressed their view that the cost of running an election contest is prohibitive in relation to the benefit that a minority shareholder will receive (*e.g.*, a 5% shareholder will pay 100% of the cost of running an election contest but will capture only 5% of the benefits).<sup>18</sup>

Commenters noted the lack of a democratic process and called for “authentic” elections of directors.<sup>19</sup> One commenter noted that corporate elections are different from a democratic political process because “boards that nominate candidates are under a fiduciary duty to make decisions in the best interest of all shareholders. Voters in political elections are free to make choices based on which candidate would serve the voter’s own individual interest.”<sup>20</sup> Another commenter noted that “the debate should not center on whether . . . a proposed change is more or less ‘democratic’ but, rather, whether the proposal will contribute positively to the achievement of the function of a corporation.”<sup>21</sup>

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<sup>12</sup> *See, e.g.*, AFSCME; CalPERS; CWA; DCRB; Naylor; Relational.

<sup>13</sup> *See, e.g.*, Bell; BIT; Crane; Foulan; Gach; PBarr.

<sup>14</sup> *See, e.g.*, Burgoyne; CCS; Levin; SOCFUNDS.

<sup>15</sup> *See, e.g.*, AFSCME; Bebhuk; CWA/ITU; Harvard.

<sup>16</sup> *See, e.g.*, AFL-CIO; AFSCME; AMBANK; Bebhuk; CalSTRS; CII; CWA; CWA/ITU; Hill; ISS; Form A; Form C; MERS; MCG; Pugh; RETIREFUNDS.

<sup>17</sup> *See, e.g.*, AFL-CIO; AMBANK; Calvert; CII; Form C; Harvard; MCG; Pugh; Randall.

<sup>18</sup> Bebhuk; Tweedy.

<sup>19</sup> CWA. *See also* Adler & Levine; AFSCME; Blau; Estes; Flick; Form C; Hevesi; LENS; McRitchie; RCohen.

<sup>20</sup> ASCS.

<sup>21</sup> ABA.

Some commenters expressed the belief that the election of directors is a self-selecting process because the nominating committee or board selects incumbent nominees.<sup>22</sup> A number of commenters believed that shareholders are merely “rubberstamping” board nominees.<sup>23</sup> Some commenters suggested that the Chief Executive Officer effectively chooses board nominees.<sup>24</sup> This process leaves board members beholden to each other and to the CEO, despite regulations governing conflicts of interest.<sup>25</sup> Although this may make the board a more cohesive group, commenters noted that this also makes board members less likely to challenge management or other board members.<sup>26</sup>

Commenters indicated that the current nomination and election process leaves board members less accountable to shareholders and more able to ignore shareholder concerns.<sup>27</sup> Commenters suggested that the way to make boards accountable to shareholders is to create a mechanism to challenge board insulation by allowing shareholders to nominate directors in company proxy materials.<sup>28</sup>

#### **IV. Efficacy of Existing Accountability Mechanisms**

##### **A. Sarbanes-Oxley and the Markets’ Listing Standards**

The overall response regarding the efficacy of Sarbanes-Oxley’s reforms and the markets’ listing standards was split, based on whether the commenters supported or opposed shareholder access.

Nearly all of the commenters who opposed shareholder access stated that there has not been enough time to evaluate the impact that Sarbanes-Oxley’s reforms and the markets’ listing standards will have on corporate governance and, therefore, there currently is no need to amend the proxy rules.<sup>29</sup> One commenter noted that these reforms are directed at “assuring that

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<sup>22</sup> See, e.g., AFSCME; LENS; MERS.

<sup>23</sup> See, e.g., BC; Form A; Form C; Garney; Granger; Handler; Perkins; Stockel.

<sup>24</sup> See, e.g., Carlson; LENS; Link; Matthews; Mester; Monks; Perritt. See also ABA (referred to CEO-domination of the nomination process as a principle viewpoint that has been raised).

<sup>25</sup> See, e.g., LENS; Monks. See also ABA (referred to the board’s obligation to the CEO as a principle viewpoint that has been raised); Fanning (“the CEO runs the company as a personal fiefdom, populating the Board with yes-men and yes-women”); Nieman.

<sup>26</sup> See, e.g., AFL-CIO; AFSCME; LENS; Sykes.

<sup>27</sup> See, e.g., AFL-CIO; CWA; Davis; Form A.

<sup>28</sup> See, e.g., Adler & Levine; AFL-CIO; Auchincloss; Form A; Form C; Calvert; Chevedden; NAST.

<sup>29</sup> ABASS; Abbott; ABCNY; ACCA; Agilent; Alston & Bird; ASCS; Ashland; Boyle; BRT; CIEBA; CSX; ExxonMobil; GM; ICI; Intel; NYSBA; Sullivan; Viad. See also ABA (referred to current corporate governance reforms as an argument against shareholder access).

directors are independent and accountable to all shareholders.”<sup>30</sup> One commenter noted that the reforms “are designed to enhance dramatically the overall corporate accountability to shareholders and potential investors” and will lead to more “meaningful long-term improvements in corporate governance than ... the adoption of an access proposal.”<sup>31</sup> One commenter noted that these reforms would promote “sound corporate governance and transparent business practices.”<sup>32</sup> One commenter noted that the system of selecting directors would be strengthened by these reforms.<sup>33</sup> One commenter contended that these reforms would serve to make boards “even more responsive to input from shareholders on board nominations.”<sup>34</sup>

Nearly all of the commenters who supported shareholder access and who discussed current corporate governance reforms recognized the importance of the reforms. These commenters did not believe, however, that Sarbanes-Oxley’s reforms or the markets’ listing standards amendments would remedy board accountability problems.<sup>35</sup> Several commenters explained that Sarbanes-Oxley and the markets’ listing standards related to independent directors, thus addressing the problem of director conflicts of interest, not director accountability.<sup>36</sup> Commenters noted that independent boards alone would not remedy the problem with board accountability, as the current system does not provide any incentive for boards to be accountable to shareholders.<sup>37</sup>

## **B. Exchange Act Rule 14a-8**

The majority of commenters who discussed Exchange Act Rule 14a-8 expressed varying degrees of dissatisfaction with the rule.

A large number of commenters sought to revise Exchange Act Rule 14a-8, either partially or completely, as discussed below. On the other hand, a primary complaint about using the Exchange Act Rule 14a-8 process was the lack of board response to shareholder concerns. Several commenters noted that many companies have ignored a number of resolutions that received a majority shareholder vote when put to shareholder votes.<sup>38</sup> One commenter specifically noted that in 2002, 98 shareholder resolutions received a majority of votes, but only

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<sup>30</sup> ACCA.

<sup>31</sup> ABCNY.

<sup>32</sup> NYSBA.

<sup>33</sup> DF King.

<sup>34</sup> Alston & Bird.

<sup>35</sup> *See, e.g.*, APERS; ACSA; CalPERS; CalSTRS; Cummings; Duberstein; MERS; RETIREFUNDS.

<sup>36</sup> AFL-CIO; CWA/ITU; ISS.

<sup>37</sup> AFSCME; RETIREFUNDS; Thompson.

<sup>38</sup> *See, e.g.*, AFL-CIO; AMBANK; Auchincloss; Chevedden; CLPWAF; Herndon; Kornfeld.

14 proposals were adopted.<sup>39</sup> Commenters also noted that boards have failed to act on resolutions even where the proposal received majority votes for several consecutive years.<sup>40</sup> One commenter noted these concerns but cautioned that the Commission “not blur the important distinctions between the issues surrounding majority vote proposals and issues involving control of the corporation.”<sup>41</sup>

### C. Contested Elections

The comments on the effectiveness of the current proxy rules for governing election contests were also divided based on whether the commenters supported or opposed shareholder access.

One commenter noted that there is “the very real alternative of conducting an election contest under the existing rules.”<sup>42</sup> One commenter noted that “bank and bank holding company shareholders are not at all reticent to conduct election contests.”<sup>43</sup> Several commenters who opposed shareholder access contended that the current proxy rules are the best mechanism for election contests.<sup>44</sup> These commenters had several specific responses. One commenter noted that the current rules “assure[] transparency in the election process and allow[] both sides to the contest to present their cases.”<sup>45</sup> One commenter stated that the current rules “promote full disclosure and a proper level of accountability.”<sup>46</sup> One commenter contended that the current proxy rules “provide the information necessary to vote in an informed manner.”<sup>47</sup> One commenter noted that the rules provide “increased disclosure and clear identification of the soliciting party.”<sup>48</sup> Three commenters contended that, to the extent that a shareholder access rule includes a minimum threshold, the cost of an election contest would not provide a greater impediment than the ownership threshold because shareholders holding a large percentage of shares in large companies already can afford their own proxy solicitations.<sup>49</sup> One commenter noted that “when [] investors encounter instances where they believe the expenditure of such

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<sup>39</sup> AFL-CIO.

<sup>40</sup> AFL-CIO; Barclays.

<sup>41</sup> ASCS.

<sup>42</sup> ABCNY.

<sup>43</sup> ABASS.

<sup>44</sup> ABCNY; Agilent; Alston & Bird; ASCS; Boyle; BRT; ExxonMobil; Intel; Saul; Wachtell.

<sup>45</sup> Alston & Bird.

<sup>46</sup> ASCS.

<sup>47</sup> BRT.

<sup>48</sup> ABCNY.

<sup>49</sup> BRT; ExxonMobil; NYSBA.

effort is justified, monetary expense is not often an obstacle to action.”<sup>50</sup> Two commenters also cited to Exchange Act Rule 14a-4(d), the short slate rule, and stated that it already contemplates shareholders seeking to nominate less than a full slate.<sup>51</sup>

Commenters who supported shareholder access noted the prohibitive cost of conducting an election contest.<sup>52</sup> Commenters estimated that the cost of running a contest ranges from “several hundred thousand to over a million dollars”<sup>53</sup> into “the millions of dollars.”<sup>54</sup> Commenters also noted that the federal regulatory requirements deter investors from undertaking election contests.<sup>55</sup>

One commenter noted that “[a]ttempts to elect directors not nominated by the company are extremely rare outside the takeover context.”<sup>56</sup> This commenter explained that while there are “several dozens” of contests each year to seek control, contests where directors seek only a seat to improve a company’s operations are “exceedingly rare.”<sup>57</sup> Further, although commenters estimated that there have been between 33 to 40 contests a year, one commenter who supported shareholder access stated that contests are “exceedingly rare.”<sup>58</sup> Another commenter who opposed shareholder access stated that contests are conducted on a “regular basis.”<sup>59</sup>

#### **D. Shareholder Recommendations to the Nominating Committee**

Although the commenters were divided in their opinions about nominating committees, commenters who opposed shareholder access did not appear to believe that recommending candidates to the board has been effective.

Two commenters who opposed shareholder access noted that shareholders have an existing right to recommend board candidates, but the commenters did not address the efficacy of this alternative.<sup>60</sup> Commenters contended that screening by nominating committees is the best

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<sup>50</sup> ABCNY.

<sup>51</sup> ABCNY; Wachtell.

<sup>52</sup> *See, e.g.*, AFL-CIO; AFSCME; AMBANK; Bebchuk; CalSTRS; CII; CWA; CWA/ITU; Duberstein; Hill; ISS; Form A; Form C; MERS; MCG; Pugh; RETIREFUNDS.

<sup>53</sup> AFSCME.

<sup>54</sup> AMBANK.

<sup>55</sup> *See, e.g.*, AFSCME; CII; Duberstein; MERS; Providence.

<sup>56</sup> Bebchuk. *See also* Harvard (similar statement).

<sup>57</sup> Bebchuk.

<sup>58</sup> AFSCME. AFSCME estimated that there were an average of approximately 33 contests per year.

<sup>59</sup> Wachtell. Wachtell estimated that there were approximately 40 contests last year.

<sup>60</sup> ABCNY; Alston & Bird.

way to assess the skills and qualities of potential nominees<sup>61</sup> and ensure that nominees meet the markets' listing standards' definition of independence.<sup>62</sup> One commenter noted that institutional investors and special interest groups do not necessarily know the specific needs of a particular company and may not be the most qualified group to nominate directors.<sup>63</sup>

Several commenters who supported shareholder access to company proxy materials were of the opinion that recommendations to the nominating committee are not effective.<sup>64</sup> One commenter noted that “talk is not enough” and shareholders need a way to “effectively compete with the nominating committee.”<sup>65</sup> One commenter believed that shareholder access would induce the nominating committee to include shareholder nominees who have a broad base of support.<sup>66</sup>

### **E. Dialogue with the Company**

The commenters' views on the effectiveness of communicating with the board varied based on the individual commenters' experiences with particular companies.

Two companies noted that they already have mechanisms in place to facilitate good investor relations with their shareholders. One noted that it “engage[d] directly with [its] institutional and retail investors through [its] Investor Relations and Corporate Social Responsibility groups” and sought to meet with proponents about shareholder proposals.<sup>67</sup> The other company noted that it hosted regional stockholder forums and has set up a phone line and e-mail account to allow shareholders to express their views.<sup>68</sup>

One commenter who supported shareholder access to company proxy materials expressed that it has had “considerable success” in “engaging companies in dialogue to effect changes in company practices.”<sup>69</sup> Two commenters noted that the annual meeting is one of the few means to access board members but noted that boards often are not responsive to shareholders at the meetings.<sup>70</sup> One commenter noted that the proxy rules should not be revised based on “anecdotal

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<sup>61</sup> Abbott; Agilent; AutoZone; BRT; ConocoPhillips; GM; NACD; Viad.

<sup>62</sup> Agilent; AutoZone; Boyle; BRT; Sullivan; Wachtell.

<sup>63</sup> Intel.

<sup>64</sup> Barnard; CRice; PRath; RRath; RWP; Shefa; SIF; SOCFUNDS; Southwest; Thompson.

<sup>65</sup> Barnard.

<sup>66</sup> Bebhuk.

<sup>67</sup> Intel.

<sup>68</sup> GM.

<sup>69</sup> AMBANK.

<sup>70</sup> Hevesi; LENS.

input” suggesting that “institutional investors and special-interest groups are being uniformly kept from meaningful discussions with companies.”<sup>71</sup>

## V. Shareholder Access to Company Proxy Materials

### A. Specific Proposals

The CII and the AFL-CIO each drafted specific proposals that received support from other commenters. At least nineteen individuals and entities stated that they supported the CII proposal,<sup>72</sup> and at least four individuals and entities stated that they supported the AFL-CIO proposal.<sup>73</sup>

The CII proposal would allow shareholders or shareholder groups who own at least 5% of a company’s voting shares for at least three years to nominate less than a majority of the board of directors. Under the proposal, company proxy materials and related mailings would provide “equal space and equal treatment” for shareholder nominations. The CII proposal seeks a safe harbor from the Exchange Act Regulation 13D filing requirements for shareholder communications related to the nomination of directors for less than a majority of the board. The CII proposal also seeks to prohibit uninstructed broker votes during contested or uncontested elections.

The AFL-CIO proposal would allow shareholders or shareholder groups who own a substantial block (*e.g.*, 3%) of a company’s shares, a majority of which have been held for over one year, to nominate the greater of two directors or one-third of nominees standing for election at a particular meeting, but in no case a majority of the board. Under the proposal, each shareholder nominee would be allowed to include a background statement to support his or her candidacy (*e.g.*, 500 words maximum). The AFL-CIO also seeks an exemption from Exchange Act Regulation 13D for communications limited to efforts to nominate directors. In the case of competing shareholder groups, a “simple” rule (*e.g.*, the largest shareholder block) would prevail. The AFL-CIO proposal indicates that the board should not be allowed to collude with management-friendly shareholders to nominate someone of the board’s choosing.

Two commenters also provided examples of companies who have adopted proposals to allow shareholders to nominate directors as examples to “inform the debate”<sup>74</sup> or “as a model for rulemaking.”<sup>75</sup> Relational outlined a shareholder access policy that was recently adopted at Apria Healthcare Group Inc. The policy allows shareholders who hold at least 5% for two years

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<sup>71</sup> ACCA.

<sup>72</sup> AMBANK; CLPWAF; CRPTF; Davis; Farmer; Feinstein; LACERS; Lake; Moore; MPRIM; NYSTRS; SBA; SDCERS; SERS; SRPSM; SWIB; TRST; WSIB; WVIMB.

<sup>73</sup> AMBANK; Davis; Hayes; Mathies.

<sup>74</sup> LENS.

<sup>75</sup> Relational.

to nominate up to two candidates. If more than two candidates are submitted, the nominee of the nominating shareholder holding the greater number of shares will be included in company proxy materials. The information about the candidate is limited to the proxy disclosure requirements. If the nominee fails to receive 25% of the vote, the nominee will be prohibited from running for four years. LENS outlined the Hanover Compressor settlement, which included a number of corporate governance reforms including the nomination of two outside directors by shareholders. The settlement requires the nominating committee to select two nominees from a list of candidates provided by plaintiff's counsel, including shareholders who own from between 1% to 10% of the company's shares. If the nominating committee does not determine that the candidates are qualified, plaintiff's counsel will be required to submit additional candidates.

## **B. Specific Guidelines for Shareholder Access**

The majority of shareholder access supporters did not provide any specific comments on the parameters of a new rule. The vast majority of commenters who did not support shareholder access also did not provide specific comments.

Of those who did provide specific guidelines, nearly all of the commenters agreed that any new rule must be drafted to ensure that the rule is not used to facilitate hostile takeovers or overburden companies with excessive proxy disclosure.<sup>76</sup> The following describes the responses of the commenters who made specific recommendations regarding shareholder access.

### **1. Minimum Ownership Threshold**

Of the specific recommendations made, commenters varied the most with regard to an appropriate ownership eligibility threshold. One commenter noted that “only those with a serious and sustained financial commitment to the company should be afforded access to the proxy.”<sup>77</sup> Nearly all of the commenters agreed that a minimum ownership threshold was necessary.

Some commenters did not make any specific recommendations but provided some of the following general guidelines:

- Four commenters generally supported a requirement for a “reasonable,”<sup>78</sup> “meaningful,”<sup>79</sup> “significant”<sup>80</sup> or “substantial”<sup>81</sup> ownership threshold.

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<sup>76</sup> See, e.g., ABA; AFL-CIO.

<sup>77</sup> Barnard.

<sup>78</sup> *Id.*

<sup>79</sup> ACSA.

<sup>80</sup> RETIREFUNDS.

<sup>81</sup> Bomer.



- One commenter suggested a “substantial ownership stake” that is not so high as to make it impractical to use the shareholder access rule.<sup>82</sup>
- Two commenters suggested “strong screens (high minimum, long holding period)” initially, with the possibility of relaxing the screens only after “substantial experience demonstrated that greater shareholder participation in the director selection process would not have a significant negative effect on corporate performance or boardroom cohesion of successful companies.”<sup>83</sup>

Other commenters suggested specific minimum thresholds or lower minimum thresholds per investor if a shareholder coalition could be formed. One commenter did not support requiring shareholder coalitions since a nominating shareholder would already have a sense of the “strength of its coalition,” making this requirement “superfluous and an unnecessary burden.”<sup>84</sup> The range of thresholds included the following:

- One commenter recommended no minimum threshold.<sup>85</sup>
- Three commenters suggested a \$2,000 minimum threshold, similar to the requirement under Exchange Act Rule 14a-8.<sup>86</sup>
- One commenter suggested a \$100,000 minimum threshold.<sup>87</sup>
- Several commenters suggested a 1% minimum threshold with a coalition of at least 25 investors who each own at least \$2,000 worth of shares.<sup>88</sup>
- One commenter suggested a 1% minimum threshold or, in the alternative, 0.1% with a coalition of 10 individuals.<sup>89</sup>
- One commenter suggested the greater of \$5 million or 1% as a minimum threshold.<sup>90</sup>
- Three commenters suggested a 1% minimum threshold.<sup>91</sup>
- Several commenters suggested a 1% - 3% minimum threshold.<sup>92</sup>

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<sup>82</sup> RETIREFUNDS.

<sup>83</sup> Harvard; Barnard (concurring with Harvard).

<sup>84</sup> Barnard.

<sup>85</sup> ECohen.

<sup>86</sup> CCS; Davis; Horizon.

<sup>87</sup> Parnassus.

<sup>88</sup> CRice; PRath; RRath; RWP; Southwest; Thompson.

<sup>89</sup> PIRC.

<sup>90</sup> RCohen.

<sup>91</sup> Keon; Rockefeller; Trillium.

<sup>92</sup> CBIS; CERES; Form C; Shefa; SIF.

- Several commenters suggested a 3% minimum threshold.<sup>93</sup> One commenter noted that 3% is ideal because: (1) it is the figure required for resubmission of an Exchange Act Rule 14a-8 proposal; (2) it is the figure proposed by the Commission five years ago to override the exclusion in Exchange Act Rule 14a-8; and (3) this figure would be a significant barrier at many publicly-traded companies.<sup>94</sup>
- Two commenters suggested a 3% - 5% minimum threshold.<sup>95</sup>
- Several commenters suggested a 5% minimum threshold.<sup>96</sup>
- One commenter suggested a 10% minimum threshold.<sup>97</sup>
- One commenter suggested a higher threshold, such as a 10% minimum threshold, for smaller companies.<sup>98</sup>

Nearly all commenters would allow shareholders to aggregate their holdings to meet any minimum threshold requirements.<sup>99</sup>

## 2. Minimum Holding Period

Commenters generally supported a requirement that nominating shareholders hold their shares for a specified period of time. This period ranged from one year or at least a year,<sup>100</sup> to in “excess of one year,”<sup>101</sup> to “a period of years.”<sup>102</sup> Several commenters supported a holding period of three years.<sup>103</sup> One commenter disagreed with any holding period and stated, “property rights should attach to ownership.”<sup>104</sup>

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<sup>93</sup> AFL-CIO; AFSCME; AMBANK; BC; Citizens; Domini; Duberstein; IBT; Kornfeld. *See also* AMBANK; Davis; Hayes; Mathies (supported AFL-CIO proposal).

<sup>94</sup> AMBANK.

<sup>95</sup> CWA/ITU; ISS.

<sup>96</sup> Barclays; CalPERS; CII; ISIS; Lawndale. *See also* AMBANK; CLPWAF; CRPTF; Davis; Farmer; Feinstein; LACERS; Lake; Moore; MPRIM; NYSTRS; SBA; SDCERS; SERS; SRPSM; SWIB; TRST; WSIB; WVIMB (supported CII proposal).

<sup>97</sup> Hagberg.

<sup>98</sup> ISS.

<sup>99</sup> *See, e.g.*, AFL-CIO; AFSCME; CII; Citizens; Form C; ISS.

<sup>100</sup> AFSCME; AMBANK; CalPERS; CERES; CWA/ITU; Duberstein; Form C; ISS; Parnassus.

<sup>101</sup> AFL-CIO; McRitchie. *See also* AMBANK; Davis; Hayes; Mathies (supported AFL-CIO proposal).

<sup>102</sup> RETIREFUNDS.

<sup>103</sup> CII. *See also* AMBANK; CLPWAF; CRPTF; Davis; Farmer; Feinstein; LACERS; Lake; Moore; MPRIM; NYSTRS; SBA; SDCERS; SERS; SRPSM; SWIB; TRST; WSIB; WVIMB (supported CII proposal).

<sup>104</sup> Tweedy.

One commenter noted that the average holding period of an institutional investor is 11 months.<sup>105</sup>

### 3. Maximum Permissible Slate

Most commenters agreed that a shareholder access rule should not be used to replace an entire slate of directors.<sup>106</sup> Three commenters suggested that the Commission, at some point, examine going beyond a “short slate proposal” and “enhance shareholders’ ability to replace all or a majority of the directors.”<sup>107</sup> One commenter reasoned that the election of a new slate of directors can “ensure change when one is needed.”<sup>108</sup>

Commenters’ views on the number of candidates that should be permitted under a shareholder access rule varied as follows:

- Most commenters suggested that nominating shareholders be allowed to nominate candidates for less than a majority of the seats.<sup>109</sup> One commenter explained that one nominee less than a majority is proper because a meaningful number of shareholder—nominated directors must be present in order to be effective.<sup>110</sup>
- One commenter suggested a minimum of three shareholder nominees.<sup>111</sup>
- Some commenters suggested that the number be limited to the greater of two directors or one-third of the board.<sup>112</sup>
- Several commenters suggested nominees for up to 25% of the board.<sup>113</sup>
- Two commenters sought at least one seat.<sup>114</sup>

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<sup>105</sup> Intel.

<sup>106</sup> ABA; ACSA; Barnard; CalSTRS; Calvert; CII; CWA/ITU; DCRB; MSRS; SOCFUNDS; Thompson; Vrakas. *See also* AMBANK; CLPWAF; CRPTF; Davis; Farmer; Feinstein; LACERS; Lake; Moore; MPRIM; NYSTRS; SBA; SDCERS; SERS; SRPSM; SWIB; TRST; WSIB; WVIMB (supported CII proposal).

<sup>107</sup> Bebchuk. Bebchuk recommends that shareholders with a sufficiently large ownership and holding period be allowed to add an alternative slate to the company’s proxy card, and companies be required to distribute the shareholder’s proxy statement. *See also* Georgeson; Lawndale.

<sup>108</sup> Bebchuk.

<sup>109</sup> *See, e.g.*, AFSCME; AMBANK; CalPERS; CERES; Citizens; Form C; ISS; Lawndale; McRitchie; RETIREFUNDS.

<sup>110</sup> Lawndale.

<sup>111</sup> Sykes.

<sup>112</sup> AFL-CIO. *See also* AMBANK; Davis; Hayes; Mathies (supported AFL-CIO proposal).

<sup>113</sup> CRice; PRath; RRath; RWP; Southwest; Thompson.

<sup>114</sup> HBarr; Okada.

#### 4. Competing Nominating Shareholders

Where more than one nominating shareholder seeks to nominate candidates, most commenters suggested that the nominating shareholder group with the largest percentage of shares be allowed to include nominees in the proxy materials.<sup>115</sup> Two commenters suggested instant run-off voting where there are three candidates for one seat.<sup>116</sup> One commenter characterized instant run-off voting as a “complicated exercise[.]”<sup>117</sup> One commenter suggested allowing all nominees to run.<sup>118</sup>

Commenters noted that a potential problem with allowing the largest shareholder group to nominate board members is that that the board could “collud[e]” with management-friendly shareholder groups to put together a larger percentage of shareholder votes to nominate directors who are in effect board nominees.<sup>119</sup> One commenter suggested safeguards against this, such as “strong language prohibiting such collusive activity” and allowing only incumbent directors who were originally elected by a shareholder nominee or who were being ousted by the incumbent board without adequate justification to shareholders to be eligible to be nominated by shareholders.<sup>120</sup>

#### 5. Disclosure

Comments varied on the type of disclosure concerning a shareholder nominee that would need to be provided in the proxy materials.

- Most commenters recommended that shareholder nominees be able to include background disclosure similar to the information provided for board nominees.<sup>121</sup>
- Commenters recommended that all nominees be provided “equal space” in company proxy materials with a reasonable word limit to provide background information, a supporting statement, relevant experience and material relationships to the company.<sup>122</sup>

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<sup>115</sup> See, e.g., AFL-CIO; AFSCME; AMBANK; Barnard (concurring with AFL-CIO); CCS; CERES; CWA/ITU; Form C; McRitchie.

<sup>116</sup> McRitchie; Lawndale.

<sup>117</sup> Barnard.

<sup>118</sup> Duberstein.

<sup>119</sup> AFL-CIO. See also AFSCME; AMBANK; Barnard (concurring with safeguards against “gaming” the system); Calvert; CERES; CWA/ITU; McRitchie; RETIREFUNDS; Shefa; SIF.

<sup>120</sup> AFL-CIO.

<sup>121</sup> See, e.g., AFSCME; AMBANK; CalSTRS; Parnassus; RETIREFUNDS; SOCFUNDS.

<sup>122</sup> Form C. See also BC; Bomer; Calvert; CBIS; Citizens; CWA/ITU; Keon; SOCFUNDS.

- Commenters also recommended “equal space and equal treatment” of nominations presented by nominating shareholders in the proxy statement and/or related mailings.<sup>123</sup>
- One commenter recommended a “reasonable” statement of support for the shareholder nominee.<sup>124</sup> Several commenters suggested a limit of 500 words for such shareholder nominee disclosure.<sup>125</sup> Several commenters suggested 200 words.<sup>126</sup> One commenter stated that a 500-word limit would provide insufficient disclosure for decisions to add directors to the board.<sup>127</sup>

Several commenters suggested that the shareholder nominee be clearly identified as such.<sup>128</sup> One commenter suggested disclosing the identity of the nominating shareholder or shareholder group including “organized special interests.”<sup>129</sup> Several commenters suggested that directors be listed alphabetically, rather than as a slate.<sup>130</sup>

One commenter noted that disclosure standards under Exchange Act Rule 14a-9 should not be “undermined.”<sup>131</sup> Two commenters recommended that the Division review the nominating shareholder’s materials to ensure that the disclosure does not violate the proxy rules, specifically Exchange Act Rule 14a-9.<sup>132</sup> One commenter expressed concern about who would be responsible for the accuracy of the shareholder nominee information in the company proxy materials.<sup>133</sup>

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<sup>123</sup> CII. *See also* AMBANK; CLPWAF; CRPTF; Davis; Farmer; Feinstein; LACERS; Lake; Moore; MPRIM; NYSTRS; SBA; SDCERS; SERS; SRPSM; SWIB; TRST; WSIB; WVIMB (supported CII proposal). *See also* CERES; Citizens; Domini; ISIS; ISS; Rockefeller; Schacht; Shefa; SIF (similar language but did not appear to seek equal space and treatment for related mailings).

<sup>124</sup> SOCFUNDS. *Cf.* ABA (allowed to include a statement of support of some prescribed maximum length).

<sup>125</sup> AFL-CIO; McRitchie; RETIREFUNDS; SOCFUNDS. *See also* AMBANK; Davis; Hayes; Mathies (supported AFL-CIO proposal).

<sup>126</sup> PRath; RRath; RWP; Southwest; Thompson.

<sup>127</sup> Bebchuk.

<sup>128</sup> *See, e.g.*, Barnard (concurring with clear disclosure that the nominee is shareholder-nominated); Bebchuk; Form C; Keon.

<sup>129</sup> Barnard.

<sup>130</sup> *See, e.g.*, Barnard (concurring with alphabetically listing candidates); PRath; RRath; RWP; Southeast; Thompson.

<sup>131</sup> ABA.

<sup>132</sup> AFSCME; RETIREFUNDS.

<sup>133</sup> NYSBA.

## 6. Exchange Act Regulation 13D

One commenter noted that the filing requirements under Exchange Act Rule 13d-1 deter some institutional investors from undertaking election contests.<sup>134</sup> Nearly all of the commenters who supported shareholder access recommended an “exemption” or “safe harbor” from Exchange Act Regulation 13D filing requirements for shareholders who collectively own over five percent of a company’s shares and seek to nominate candidates in a non-control context.<sup>135</sup> One commenter noted the difficulty of distinguishing when a shareholder or shareholder group intends to influence control, because of the difficulty in separating an intent to improve board performance from an intent to influence control in more far-reaching ways.<sup>136</sup>

The majority of commenters did not directly address whether nominating shareholders or shareholder groups would be required to file an Exchange Act Schedule 13G as a passive investor or whether they also sought an exemption from filing an Exchange Act Schedule 13G.<sup>137</sup> A few commenters specifically recommended that shareholder groups who collectively hold over five percent of a company’s shares and who seek to nominate candidates for less than a majority of the board should not constitute the “formation of a group within the meaning of Section 13(d)(3).”<sup>138</sup> One commenter recommended that discussions or agreements related to shareholder nominations should not cause a loss of eligibility to report on Exchange Act Schedule 13G.<sup>139</sup>

## 7. Broker Votes

Commenters noted the provision in NYSE Rule 452 that allows brokers to vote with regard to uncontested elections if the beneficial owner has not provided any voting instruction 10 days before a scheduled meeting. One commenter noted that these uninstructed broker votes are voted in favor of management’s recommendations.<sup>140</sup> The majority of commenters recommended that these broker votes or uninstructed share votes be prohibited generally, and

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<sup>134</sup> AFSCME.

<sup>135</sup> See, e.g., AFL-CIO; AFSCME; AMBANK; CalPERS; Calvert; CERES; CII; CWA/ITU; Duberstein; IBT; Lawndale; MSRS; Moore; RETIREFUNDS; Shefa; SIF; SOCFUNDS; Trillium. See also AMBANK; CLPWAF; CRPTF; Davis; Farmer; Feinstein; Hayes; LACERS; Lake; Mathies; Moore; MPRIM; NYSTRS; SBA; SDCERS; SERS; SRPSM; SWIB; TRST; WSIB; WVIMB (supported CII and/or AFL-CIO proposal).

<sup>136</sup> ABA.

<sup>137</sup> See, e.g., CII (“The Council urges the SEC to consider amending the rules to clarify that the 13D/G regulatory scheme is only intended to capture shareholders or groups of shareholders who intend to change or modify control”); AFL-CIO (“Communications among shareholders together holding more than 5% should be exempted from burdensome requirements under Regulation 13-D so long as that communication is limited to efforts to nominate director candidates”). See also CRPTF; CWA/ITU; IBT; NHRS; SBA; SERS.

<sup>138</sup> See, e.g., AFSCME; AMBANK; RETIREFUNDS; SWIB.

<sup>139</sup> Duberstein.

<sup>140</sup> Bethel and Gillan.

that they be prohibited specifically during contested and uncontested elections.<sup>141</sup> One commenter stated that it failed to “perceive advantages to issuers or shareholders arising from the elimination of discretionary voting authority.”<sup>142</sup> One commenter expressed the view that a change to this “decades-old practice will likely lead to unintended disenfranchisement of a large group of shareholders” because most “street name” owners know that if they do not provide voting instruction, their votes will be voted in favor of management’s recommendation.<sup>143</sup> One commenter recommended that if this requirement is changed, companies should be provided access to the beneficial owners’ names.<sup>144</sup>

## 8. Expenses and Fees

Two commenters suggested that nominating shareholders should be able to seek reimbursement for reasonable expenses regardless of the outcome of the election.<sup>145</sup> One commenter stated that it would be “entirely justifiable” for all soliciting expenses to be reimbursed.<sup>146</sup> Other commenters advocated reimbursement for “reasonable” expenses, but indicated that the reimbursement should not be mandated through rulemaking.<sup>147</sup>

One commenter suggested some proportional access to company funds for advertising and solicitation if some “screens” (e.g., minimum ownership threshold and holding period) are passed.<sup>148</sup> One commenter suggested that, if a shareholder nominee has “sufficient initial support,” the company distribute the shareholder’s proxy statement and bear “reasonable” costs, such as legal fees, incurred in connection with the proxy process.<sup>149</sup>

Two commenters suggested that nominating shareholders pay a reimbursable nomination fee of \$2,000.<sup>150</sup> Another commenter suggested a \$3,000 reimbursable nomination fee.<sup>151</sup>

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<sup>141</sup> Barclays; BC; CERES; CII; Citizens; ECohen; Davis; Domini; Duberstein; eRaider; Form C; Hagberg; Hermes; Horizon; ISIS; ISS; Lawndale; MSRS; MCG; McRitchie; Moore; PIRC; Rockefeller; PRath; RRath; RWP; Southwest; Shefa; SIF; Thompson; Trillium; Vrakas; Walden. *See also* AMBANK; CLPWAF; CRPTF; Davis; Farmer; Feinstein; LACERS; Lake; Moore; MPRIM; NYSTRS; SBA; SDCERS; SERS; SRPSM; SWIB; TRST; WSIB; WVIMB (supported CII proposal).

<sup>142</sup> DF King.

<sup>143</sup> ABA.

<sup>144</sup> Georgeson.

<sup>145</sup> Bebchuk; Lawndale.

<sup>146</sup> Duberstein.

<sup>147</sup> CalPERS; SOCFUNDS; RETIREFUNDS.

<sup>148</sup> Harvard.

<sup>149</sup> Bebchuk.

<sup>150</sup> Lawndale; Barnard (concurring with a \$2,000 registration fee).

<sup>151</sup> McRitchie.

## 9. Miscellaneous Guidelines

Commenters suggested several other guidelines and points to consider in formulating a shareholder access rule.

- One commenter suggested that a shareholder holding less than 5% be permitted to make a nomination if that nomination is seconded by shareholders representing 5% or more of the shares.<sup>152</sup>
- One commenter sought an exemption from the proxy rules for solicitations in connection with shareholder access.<sup>153</sup> One commenter suggested that the nominating shareholder be required to comply with current proxy rules when communicating about directors.<sup>154</sup>
- One commenter suggested that the limitation on the number of directors that can be nominated be eliminated if a shareholder proposal that received a majority vote is repeatedly ignored.<sup>155</sup>
- One commenter suggested allowing “shareholder access to the director nomination process” only when the board “ignores” majority votes on shareholder proposals.<sup>156</sup>
- Two commenters suggested that a nominating shareholder be prevented from resubmitting a nominee the following year if that nominee does not receive a certain threshold of support.<sup>157</sup>

### C. Advantages and Disadvantages

Commenters noted several advantages and disadvantages of shareholder access to company proxy materials to nominate directors.

- *Efficacy* – Two commenters who supported shareholder access stated that any shareholder nomination rule should be used sparingly, as most boards would not be improved by having shareholder-nominated directors on boards.<sup>158</sup> One commenter noted there is no evidence that shareholder access would lead to better managed companies or decrease the likelihood of problems associated with bad governance.<sup>159</sup>

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<sup>152</sup> Lawndale.

<sup>153</sup> Parnassus.

<sup>154</sup> ACSA.

<sup>155</sup> Lawndale.

<sup>156</sup> Barclays.

<sup>157</sup> Hagberg; Kornfeld.

<sup>158</sup> Bebchuk; Harvard.

<sup>159</sup> ABCNY. *See also* ABA (no evidence that shareholder access will have any effect, good or bad, on corporate governance).



Another commenter stated that this alternative would have “dubious” benefits.<sup>160</sup> Three commenters noted that if there are adequate threshold requirements, the shareholder access rule would not be used very often, particularly with well—performing boards.<sup>161</sup> Further, one commenter noted that giving shareholders replacing incumbent directors will likely be limited since boards can increase their size to accommodate additional nominees.<sup>162</sup> One commenter noted that shareholder access would address only part of the director nomination and election process because state law and companies’ governing instruments play a “dominant role in the process.”<sup>163</sup>

- *Accountability* – The overall response by commenters who supported greater access by shareholders to company proxy materials was that it would increase board accountability and responsiveness.<sup>164</sup> Commenters also noted that shareholder access would be used more as a tool to promote positive director accountability and not necessarily to change boards.<sup>165</sup> One commenter cited to Chancellor William B. Chandler and Vice-Chancellor Leo Strine, Jr. of the Delaware Court of Chancery, who noted, “The very fact that an open access process is created would influence independent directors to be more responsive on an ongoing basis and to consult with key stockholder constituencies in shaping the management slate. Put differently, by facilitating fair contests, the new rules of the game will cut down on the need for them.”<sup>166</sup>
- *Boardroom Dynamics* – Commenters who advocated a shareholder access rule believed that shareholder nominated directors would provide a fresh perspective<sup>167</sup> and improve board dynamics.<sup>168</sup> Commenters who did not support shareholder access contended that allowing shareholders to access company proxy materials to nominate directors would be disruptive to the board and to the corporate governance process<sup>169</sup>

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<sup>160</sup> DF King.

<sup>161</sup> AFL-CIO; Bebchuk; MERS.

<sup>162</sup> AFL-CIO.

<sup>163</sup> ABA.

<sup>164</sup> See, e.g., AMBANK; AFL-CIO; AFSCME; CalPERS; CSEA; CWA; MERS; RETIREFUNDS.

<sup>165</sup> See, e.g., AFL-CIO; AFSCME; CalPERS; MCG; RETIREFUNDS.

<sup>166</sup> AFSCME.

<sup>167</sup> AFSCME; Chevedden.

<sup>168</sup> MERS; RETIREFUNDS.

<sup>169</sup> Abbott; ABCNY; Alston & Bird; Ashland; AutoZone; Boyle; BRT; ConocoPhillips; GM; NYSBA; Saul; Sullivan; Viad; Wachtell. See also ABA (referred to disruption to the board as an argument against shareholder access).

and would lead to polarized boards.<sup>170</sup> One commenter noted that boards have become so engaged in process that “there is less time to adequately engage in strategic and long-term thinking.”<sup>171</sup> Another commenter noted that, although shareholder access may be disruptive, it may be worth the cost if it increases accountability.<sup>172</sup> This commenter explained that “[t]he better boards perform, the less they will have to be concerned about challenges and the easier it will be for them to defeat a challenge should it occur.”<sup>173</sup> One commenter noted that, although shareholder access may polarize the board, the lack of cohesiveness may be helpful when a board is “paralyzed or severely dysfunctional.”<sup>174</sup> One commenter also suggested that shareholders would not elect directors who would adversely affect corporate governance.<sup>175</sup>

- *Special Interest Directors* – Several commenters expressed concern that shareholder access could be used by special interest groups who may have interests different from shareholders generally.<sup>176</sup> In particular, commenters expressed concern that shareholder nominees would have special interests because of their affiliation with the nominating shareholder.<sup>177</sup> One commenter suggested minimizing the number of “special interest” nominations where the “underlying motives or likely goals of the nominees do not relate to broad-gauged corporate performance.”<sup>178</sup> Commenters suggested various factors that would limit special interest directors including:

-- “the election process itself” since shareholders must nominate a candidate who attracts favorable votes from a sufficient number of shareholders;<sup>179</sup>  
--minimum ownership thresholds (*e.g.*, large shareholders with significant long-term commitment);<sup>180</sup>

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<sup>170</sup> ABASS; ABCNY; ConocoPhillips; CRPTF.

<sup>171</sup> ASCS.

<sup>172</sup> Bebchuk.

<sup>173</sup> *Id.*

<sup>174</sup> AFSCME.

<sup>175</sup> Bebchuk.

<sup>176</sup> *See, e.g.*, ABASS; ABCNY; Agilent; Boyle; BRT; CIEBA; DF King; ExxonMobil; Harvard; NYSBA; Saul; Sullivan.

<sup>177</sup> Boyle; Harvard; NYSBA.

<sup>178</sup> Harvard.

<sup>179</sup> Harvard. *See also* Bebchuk (similar statement).

<sup>180</sup> Harvard.

- disclosure of the identity of the nominating shareholder or shareholder group;<sup>181</sup>  
and  
-- application of the markets' proposed independence standards to shareholder nominees.<sup>182</sup>
- *Qualified Board Members* – Commenters expressed concern about ensuring that boards include members with a diversity of skills and backgrounds.<sup>183</sup> Several commenters also noted that shareholder access may discourage qualified candidates from serving in a time when it is becoming increasingly difficult to find qualified nominees.<sup>184</sup> At least three commenters also contended that shareholder nominees may not meet legal requirements under state and federal law.<sup>185</sup> One commenter noted that nominating committees must perform an “extensive amount of due diligence on both nominees and incumbent directors” to determine whether there are any relationships that may impact an individual’s independence, and that members of the audit committee are subject to financial literacy requirements.<sup>186</sup> One commenter noted that the election of a director who is employed by a company’s competitor could result in violation of the Clayton Act.<sup>187</sup>
  - *Cost* – One commenter noted that, given the need to disclose conflicts of interest between the nominating shareholder and shareholder nominee, “lengthy additional disclosure would be required,” which could increase mailing costs.<sup>188</sup> One commenter noted that a “free ride” on company proxy materials defrays only a small part of the expenses of conducting a “serious proxy challenge with a meaningful chance of success.”<sup>189</sup> One commenter noted that the increased cost of shareholder access would be borne by “all shareholders.”<sup>190</sup>

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<sup>181</sup> Barnard.

<sup>182</sup> Boyle.

<sup>183</sup> ASCS; CRPTF.

<sup>184</sup> See, e.g., Abbott; ABCNY; ASCS; Ashland; AutoZone; ConocoPhillips; GM. See also ABA (referred to qualified directors being discouraged from running as an argument against shareholder access).

<sup>185</sup> BRT; ExxonMobil; NYSBA.

<sup>186</sup> ACCA. See also ASCS (similar statement).

<sup>187</sup> BRT.

<sup>188</sup> ASCS. The ASCS provided an example, in which increasing the weight of a company’s proxy materials by two ounces could increase the cost of mailing 100,000 packages from \$86,175 to \$395,000.

<sup>189</sup> ABCNY.

<sup>190</sup> NYSBA.

- *Election Contests* – Several commenters suggested that the number of election contests would increase if shareholder access is implemented, since including shareholder nominees on the company’s proxy card will effectively constitute a contest.<sup>191</sup>
- *Quorums* – Two commenters stated that a company may have difficulties meeting quorum requirements since brokers may not vote shares held in street name in an election contest without voting instructions from the beneficial owner.<sup>192</sup> One commenter noted that 28% to 40% of all companies would not have a quorum if these “broker non-votes” were not counted.<sup>193</sup> Several commenters suggested allowing broker non-votes to be used for quorum purposes.<sup>194</sup>
- *Other concerns* – One commenter stated that the diversity that exists among the 14,000 publicly-owned companies must be considered.<sup>195</sup> One commenter also noted the burden on the Commission in reviewing soliciting materials.<sup>196</sup> Three commenters noted that shareholder access would result in fewer Exchange Act Rule 14a-8 proposals being submitted.<sup>197</sup> Four commenters suggested that having both board and shareholder nominees on one card would be confusing to shareholders.<sup>198</sup>

#### **D. Federal and State Authority**

Commenters agreed that shareholders’ power to nominate directors is granted under state law.<sup>199</sup> Some commenters also believed that the Commission should not regulate matters that are traditionally governed by state law.<sup>200</sup>

Two commenters suggested that shareholder access would violate state law because the board is vested with the power to manage the business affairs of the corporation and because shareholders of the same class would be treated disparately.<sup>201</sup> In responding to the issue of

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<sup>191</sup> Abbott; Agilent; Ashland; Boyle; BRT; ConocoPhillips; Viad; Wachtell.

<sup>192</sup> DF King; NYSBA.

<sup>193</sup> Hagberg.

<sup>194</sup> Form C.

<sup>195</sup> ABA.

<sup>196</sup> Sullivan.

<sup>197</sup> DF King; Harvard; NASRA.

<sup>198</sup> ABA; ABASS; ASCS; Sullivan.

<sup>199</sup> See, e.g., ABCNY; AFL-CIO; AFSCME; CWA/ITU; MERS; NYSBA; RETIREFUNDS; SOCFUNDS.

<sup>200</sup> See, e.g., ABCNY; ACCA; Sullivan.

<sup>201</sup> BRT; NYSBA.

disparate treatment of shareholders, one commenter noted that “state corporate law has long permitted variation between the equity interest shares represent and the voting power accorded the shares” but also noted that to the extent that shareholder access gives “preference to the ability of a group of shareholders to nominate a director ... without providing equivalent access and capabilities to other members of the same class or series of shares, the alternative may implicate Delaware’s equal treatment doctrine.”<sup>202</sup>

Four commenters noted that the board, as opposed to nominating shareholders, has a fiduciary duty to act in the best interest of the company and shareholders,<sup>203</sup> and one commenter suggested that only fiduciaries who manage the business of the company may use corporate funds.<sup>204</sup> This commenter noted that shareholder access “may implicate” this principle.<sup>205</sup>

Commenters also expressed doubt about the Commission’s authority to promulgate rules to allow shareholders to include nominees in the company proxy materials to nominate directors.<sup>206</sup> Commenters stated that shareholder access would be substantive regulation rather than regulation based on disclosure or process.<sup>207</sup> One commenter was of the view that a Congressional grant of authority would be required for the Commission to adopt a shareholder nomination rule.<sup>208</sup>

Other commenters believed that a shareholder access rule would merely require disclosure of existing rights. One commenter believed that shareholder access would only improve communication and disclosure of rights already existing under state law.<sup>209</sup> One commenter expressed the view that shareholder access would only be disclosing matters that will be put forth at the annual meeting.<sup>210</sup> Commenters also contended that providing shareholder access is completely within the Commission’s authority and analogized to the Commission’s authority under Exchange Act Rule 14a-8.<sup>211</sup> One commenter distinguished the Commission’s authority under Exchange Act Rule 14a-8, on the basis that board elections go to the heart of corporate governance.<sup>212</sup> One commenter stated that “the SEC undoubtedly has the authority to

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<sup>202</sup> ABA.

<sup>203</sup> ABA; ABCNY; ASCS; BRT.

<sup>204</sup> ABA.

<sup>205</sup> *Id.*

<sup>206</sup> *See, e.g.*, ABCNY; Sullivan; NYSBA.

<sup>207</sup> *See, e.g.*, ABCNY; Boyle.

<sup>208</sup> Boyle.

<sup>209</sup> AFSCME.

<sup>210</sup> Hitchcock.

<sup>211</sup> AFSCME; Hitchcock.

<sup>212</sup> Wachtell.

adopt appropriate rules regarding the solicitation of votes for the election of directors, as it has done with respect to contested elections of directors under Exchange Act Rule 14a-12.”<sup>213</sup>

## **VI. Other Alternatives to Increase Corporate Accountability**

### **A. Variations of Shareholder Access**

Commenters proposed several variations on shareholder access.

- One commenter suggested that companies be required to adopt bylaws to establish procedures for nominating directors.<sup>214</sup>
- One commenter suggested that the board nominate more candidates than there are slots (*e.g.*, 10 candidates for 6 seats).<sup>215</sup>
- One commenter recommended that shareholders who own over 10% for 3 years work with the nominating committee to nominate a director;<sup>216</sup> however, another commenter stated that this idea was “window dressing” since a 10% shareholder “has the means already to communicate with the nominating committee.”<sup>217</sup>
- One commenter suggested that shareholders who hold 1% or more of a company’s shares be allowed to make inquiries of the company in order to make the board more accountable. Under this model, this “oversight shareholder” would be provided a safe harbor from the insider trading rules, exempted from the proxy rules governing solicitations, and exempted from the Exchange Act Schedule 13D filing requirements.<sup>218</sup>
- One commenter suggested that one institutional or professional director be placed on each board.<sup>219</sup>
- One commenter suggested that certified board members who meet specific education and testing requirements be placed on boards.<sup>220</sup>
- Two commenters suggested that shareholders be given the power to remove directors.<sup>221</sup>

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<sup>213</sup> ABA.

<sup>214</sup> Goldstein.

<sup>215</sup> Wehling.

<sup>216</sup> Georgeson.

<sup>217</sup> Barnard.

<sup>218</sup> Fogel.

<sup>219</sup> Wakelin.

<sup>220</sup> Biedenbender.

<sup>221</sup> CRI, PSS & CSS.

- One commenter suggested that the Commission promulgate rules requiring that, when a shareholder with a certain percentage of shares seeks to nominate directors, the company pay for both the board and shareholder nominees' solicitations or not pay for either solicitation.<sup>222</sup>
- One commenter stated that one way to expand shareholder involvement in the director selection process would be to require companies to mail a separate card for shareholder nominees, which would include a website address for the nominating shareholder. The website would include information about the shareholder nominees. This alternative contemplates that the nominating shareholder would meet minimum ownership threshold requirements and have a non-control intent.<sup>223</sup>
- One commenter suggested that an alternative to expanded shareholder access would be to change the markets' listing standards to require that a certain number of board seats be selected by shareholders. Under this alternative, only shareholders who met a minimum ownership requirement would be able to nominate directors. Nominees would be submitted by a specified deadline and the nominating shareholder would provide the company with information about the candidate. The nominating committee would then perform due diligence on the candidate.<sup>224</sup>
- One commenter advocated replication of the system in the United Kingdom where any shareholder who holds over 5% of a company's shares may introduce any resolution in company proxy materials and any shareholder who holds over 10% of a company's shares may call a special meeting. This system would include the ability to remove or nominate a director.<sup>225</sup> Another commenter opposed an "absolute right" to have any proposal included in company proxy materials solely because a shareholder holds a "significant" number of shares.<sup>226</sup>
- Two commenters suggested making election contests simpler by allowing shareholders who meet certain ownership thresholds to add an alternative slate of directors to the company's proxy card.<sup>227</sup>

## **B. Disclosure Regarding Nominating Committees**

Commenters suggested that, in addition to, or in lieu of, shareholder access, the Commission require enhanced disclosure about the nominating process.<sup>228</sup> Suggested disclosure includes:

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<sup>222</sup> Pugh.

<sup>223</sup> ABA.

<sup>224</sup> *Id.*

<sup>225</sup> Hermes.

<sup>226</sup> DF King.

<sup>227</sup> Bebchuk; Lawndale.

<sup>228</sup> ABCNY; ACCA; Alston & Bird; NACD; Rockefeller.

- all shareholder recommendations received by the company;<sup>229</sup>
- for companies without separate nominating committees, whether the board will consider shareholder recommendations;<sup>230</sup>
- a specific description of the procedures to be followed in submitting recommendations, including any substantive requirements for board nominees;<sup>231</sup>
- whether any shareholder recommended nominees are included in the current slate of directors;<sup>232</sup> and/or
- for those companies with nominating committees, whether the board has adopted a written charter for the nominating committee and inclusion of the charter as an appendix to the proxy statement at least once every three years.<sup>233</sup>

Three commenters recommended a nominating committee report.<sup>234</sup> One commenter suggested that this report disclose “whether the committee received any shareholder nominations during the year; the procedure used by the committee to evaluate such nominees, and whether the committee recommended the inclusion of any shareholder nominees in the proxy statement.”<sup>235</sup> One commenter suggested that the report include the process used to evaluate qualified candidates and evaluate shareholder nominations.<sup>236</sup> One commenter discouraged the requirement of a report since such detailed information may either provide only boilerplate disclosure or prove embarrassing to potential candidates who were rejected by the committee.<sup>237</sup>

One commenter stated that increased disclosure about the nominating committees in the past has not remedied board accountability issues.<sup>238</sup> One commenter stated that many companies already disclose their criteria for selecting directors.<sup>239</sup>

One commenter suggested that an alternative to increasing shareholder involvement in the director selection process would be to change the markets’ listing standards to require that

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<sup>229</sup> ABCNY; NYSBA.

<sup>230</sup> Alston & Bird.

<sup>231</sup> Alston & Bird; CRPTF; NACD.

<sup>232</sup> ASCS.

<sup>233</sup> Alston & Bird.

<sup>234</sup> ACCA; ASCS; UBCJA.

<sup>235</sup> ASCS.

<sup>236</sup> ACCA.

<sup>237</sup> Alston & Bird.

<sup>238</sup> AFSCME.

<sup>239</sup> Abbott.



the nominating committee “establish, disclose and administer” a process for considering candidates recommended by shareholders who meet minimum ownership requirements and have a non-control intent. The shareholder would need to include information about the candidate, including confirmation of his or her willingness to serve. The shareholder proponent also would provide disclosure related to the beneficial ownership of the proponent and candidate and their relationships with and intentions regarding the company. A reasonable deadline for submitting candidates would need to be provided. The nominating committee would conduct due diligence on the candidate and would issue a report.<sup>240</sup>

Two commenters also recommended that the Commission suggest that the markets change their listing standards to require nominating committees to consider shareholder nominees.<sup>241</sup> One commenter suggested that the Commission’s ability to require the markets to change their listing standards may be limited under Exchange Act Section 19.<sup>242</sup> One commenter suggested that the Commission seek authority from Congress to mandate market listing standards.<sup>243</sup>

### **C. Communications with Independent Directors**

One commenter recommended that shareholders be provided more meaningful ways to communicate with independent directors.<sup>244</sup> One commenter sought “transparency in communications between investors, boards of directors, and management.”<sup>245</sup> One commenter recommended a mandatory process to allow shareholders to communicate with independent directors.<sup>246</sup>

### **D. Reform of Exchange Act Rule 14a-8**

Many commenters suggested reforming Exchange Act Rule 14a-8 completely, eliminating some bases for exclusion under the rule, or revising some of the staff’s interpretations of the rule, as discussed below.<sup>247</sup> One commenter suggested that the Commission defer a review of Exchange Act Rule 14a-8 until all of the current corporate governance reforms have been implemented.<sup>248</sup> Another commenter stated that “we are more

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<sup>240</sup> ABA.

<sup>241</sup> NYSBA; Georgeson.

<sup>242</sup> ABA.

<sup>243</sup> ISS.

<sup>244</sup> CII.

<sup>245</sup> NASRA.

<sup>246</sup> CRPTF.

<sup>247</sup> *See, e.g.*, Harvard; MSRS; Moore.

<sup>248</sup> ICI.

cautious to suggest reform to the current rules pertaining to shareholder proposals for fear that it may result in a disruptive process; however, we believe that there may be room for reform, so that relevant proposals actually get presented for shareholder vote.”<sup>249</sup> This commenter suggested that the appropriate balance in deciding whether shareholder proposals should be included in the proxy materials is to consider whether the proposal directly, as opposed to indirectly, affects shareholders’ wealth.<sup>250</sup>

One commenter suggested that an alternative to shareholder access would be to amend Exchange Act Rule 14a-8 to permit proposals that set up a process for shareholders to nominate directors.<sup>251</sup> Several commenters generally suggested revoking or amending Exchange Act Rule 14a-8(i)(8).<sup>252</sup> One commenter noted that shareholder proposals to set up a process to allow shareholders to nominate directors in company proxy materials would not sufficiently address accountability problems.<sup>253</sup>

Although some commenters addressed Exchange Act Rule 14a-8 specifically with regard to the election of directors, many more commenters sought a reform of Exchange Act Rule 14a-8 more generally.

- One commenter recommended that companies be required to implement proposals that receive a majority of the vote.<sup>254</sup> Other commenters suggested revising Exchange Act Rule 14a-8 to allow shareholders to make bylaw proposal amendments.<sup>255</sup> Two commenters noted that making shareholder proposals binding could be beyond the Commission’s authority and raise concerns under state law.<sup>256</sup>
- Two commenters suggested that companies be required to consider shareholder resolutions that receive a majority of the vote and communicate with all shareholders on what actions the company implemented, if any.<sup>257</sup>
- Two commenters suggested that shareholder proposals that receive a majority of the vote automatically be included in the proxy the following year.<sup>258</sup>

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<sup>249</sup> AIMR.

<sup>250</sup> *Id.*

<sup>251</sup> ASCS.

<sup>252</sup> BC; CBIS; CERES; Citizens; CRice; Domini; Form C; ISIS; Keon; Monks; PIRC; Rockefeller; Shefa; SIF; Thompson; Trillium; Walden.

<sup>253</sup> AFL-CIO.

<sup>254</sup> CLPWAF.

<sup>255</sup> Bomer; Cleveland; Masarek; Matthews; NHRS.

<sup>256</sup> ACCA; AFL-CIO.

<sup>257</sup> ACCA; CRPTF.

<sup>258</sup> Lawndale; McRitchie.

- One commenter called for sanctions on companies that do not implement shareholder proposals that receive a majority of the vote.<sup>259</sup>
- Several commenters sought to modify or eliminate the “ordinary business” exclusion under Exchange Act Rule 14a-8(i)(7).<sup>260</sup>
- Four commenters sought to eliminate the requirement that shareholders attend the annual meeting in order to have their shareholder proposal presented in the proxy materials.<sup>261</sup>
- Two commenters sought to expand the word limitation for shareholder proposals.<sup>262</sup>
- Two commenters suggested increasing the levels of approval necessary to resubmit a proposal by using the percentage of shares outstanding, rather than the percentage of shares voted, and increasing the percentages required to resubmit a proposal.<sup>263</sup>
- One commenter suggested a mechanism where shareholders who own at least 5% of a company’s shares would be able to override the exclusions in Exchange Act Rules 14a-8(i)(4), (i)(5) and (i)(7).<sup>264</sup>
- Two commenters suggested higher eligibility thresholds to submit proposals.<sup>265</sup>
- One commenter sought greater transparency in the Division’s review of Exchange Act Rule 14a-8 no-action requests by “provid[ing] a consistent and detailed explanation of the determining factors so that shareholders can more fully understand the rationale and thus better prepare future submissions.”<sup>266</sup>

## **E. Revise Exchange Act Regulation 13D**

One commenter suggested that the Commission consider amendments to or interpretations of Exchange Act Regulation 13D that would permit shareholders who hold, in the aggregate, more than 5% of a security to communicate among themselves regarding the issuer without being required to file an Exchange Act Schedule 13D or an Exchange Act Schedule 13G.<sup>267</sup> This commenter noted that institutional investors, including investment advisers, may wish to discuss “common concerns” such as “performance of management, evaluations of

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<sup>259</sup> MSRS.

<sup>260</sup> *See, e.g.*, Barnard (concurring with “liberalizing” the ordinary business exclusion); Calvert; CII; CRPTF; Cummings; Davis; Duberstein; Fritz; FSR; Hermes; Lawndale; MCG; McRitchie; Thompson.

<sup>261</sup> CII; Davis; Lawndale; McRitchie.

<sup>262</sup> FSR; Lawndale.

<sup>263</sup> DF King; Georgeson.

<sup>264</sup> Georgeson.

<sup>265</sup> DF King; Saul.

<sup>266</sup> AIMR.

<sup>267</sup> ICAA.

proposed corporate actions, or subjects of various proxy proposals.”<sup>268</sup> Another commenter suggested “providing, either through formal rulemaking or further interpretive guidance, an Exchange Act Schedule 13G safe harbor for large institutional investors making recommendations to nominating committees” which includes the following limitations:

- available only to institutional investors qualified to report on Exchange Act Schedule 13G pursuant to Exchange Act Rule 13d-1(b);
- limited to one nominee per investor; and
- not available if the nominee is affiliated with the investor.<sup>269</sup>

Other commenters suggested a general reexamination of the current Exchange Act Regulation 13D framework so that activities that do not seek to change control, such as “vote no” campaigns or the use of any shareholder access rule, are not subject to Exchange Act Regulation 13D.<sup>270</sup>

## **F. Other Miscellaneous Alternatives and Comments**

Commenters presented various alternatives to shareholder access and also provided their views on corporate governance generally.

### **1. Disclosure**

- One commenter suggested additional disclosure in the proxy statement that addresses “how the qualifications of each nominee or current director provides diversification to, and strengthens the Board.”<sup>271</sup>
- Several commenters expressed concern over large executive compensation packages.<sup>272</sup> Commenters called for increased disclosure of executive and director compensation.<sup>273</sup> One commenter requested shareholder approval of total executive compensation packages.<sup>274</sup>
- Three commenters sought increased disclosure of proxy printing costs and the cost of the election process and the solicitation of votes to ensure that management does not use corporate funds excessively.<sup>275</sup>

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<sup>268</sup> *Id.*

<sup>269</sup> Alston & Bird.

<sup>270</sup> *See, e.g.*, CII; ICAA; Georgeson; Lawndale.

<sup>271</sup> AIMR.

<sup>272</sup> *See, e.g.*, AFSCME; Blickman; Haile; Levin.

<sup>273</sup> Barrows; CII; Hermes; FCERA; ISS; LACERA; Levin; MSRS; Moore; Saul.

<sup>274</sup> Corsaro.

<sup>275</sup> CERES; Shefa; SIF.

- Several commenters recommended disclosure in the proxy statement of material familial, professional and financial ties to the company and its executives.<sup>276</sup>
- Several commenters suggested encouraging board attendance at annual meetings and disclosing when board members do not attend.<sup>277</sup>
- One commenter suggested that the Commission “consider whether additional rulemaking or other initiatives should be undertaken to assure that electronic and telephonic voting instruction services are available to beneficial owners in contested election situations to the same extent as it is available to beneficial owners in uncontested elections.”<sup>278</sup>
- Three commenters suggested that the Commission require real-time disclosure of voting results.<sup>279</sup>
- One commenter suggested disclosure of boardroom disagreements.<sup>280</sup>
- One commenter suggested that each director disclose his evaluation of his own, his committee’s, the chairman’s, and the board’s performance in the past fiscal year.<sup>281</sup>

## 2. Proxy Regulations

- One commenter suggested that the proxy statement be reorganized by topic.<sup>282</sup>
- Three commenters suggested an examination of the takeover rules more generally.<sup>283</sup>
- One commenter suggested eliminating the proxy statement and replacing it with an information circular and absentee ballot.<sup>284</sup>
- One commenter sought to eliminate the SEC staff review of contested solicitations.<sup>285</sup>

## 3. Corporate Governance

- Commenters also advocated other corporate governance initiatives, such as the annual election of directors,<sup>286</sup> cumulative voting,<sup>287</sup> allowing “for,” “against” and “abstain”

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<sup>276</sup> Barclays; BC; CERES; Citizens; Domini; Form C; ISS; McRitchie; Rockefeller; Shefa; SIF.

<sup>277</sup> BC; CERES; Citizens; Domini; Form C; Rockefeller; Shefa; SIF; Walden.

<sup>278</sup> Alston & Bird.

<sup>279</sup> Horizon; ISS; Schacht.

<sup>280</sup> ISS.

<sup>281</sup> Asato.

<sup>282</sup> Saul.

<sup>283</sup> Bebchuk; Georgeson; Lawndale.

<sup>284</sup> Goldstein.

<sup>285</sup> *Id.*

<sup>286</sup> CERES; Davis; Form C; Horizon; Keon; McRitchie; PIRC; Rockefeller; Shefa; SIF.

- votes in the election of directors,<sup>288</sup> and separating the position of Chairman and CEO.<sup>289</sup>
- One commenter suggested requiring shareholder approval of major corporate matters, such as the adoption of a poison pill.<sup>290</sup>
  - One commenter sought a Shareholder Advisory Committee that would have the right to meet with the company, propose candidates for the board and publish its views annually in the proxy statement.<sup>291</sup>

#### **4. Other Recommendations**

- Three commenters recommended that the Commission evaluate the impact of, or provide more regulation of, proxy advisory services.<sup>292</sup> One commenter noted that institutional investors rely heavily on shareholder advisory services.<sup>293</sup> One commenter noted that negative recommendations from Institutional Shareholder Services are associated with fewer votes cast favorable to management.<sup>294</sup> One commenter stated that shareholder access would place too much power and influence in the hands of proxy advisory services.<sup>295</sup> Two commenters suggested implementing a system to allow shareholders to follow the votes of third parties, such as institutional investors.<sup>296</sup>
- Several commenters suggested the use of technology in the election of directors as well as in other areas. One commenter suggested that a way to simplify the election process would be to use technological advances to elect shareholders in non-control contests. Under this suggestion, shareholders would be provided greater flexibility in the use of the Internet to communicate with other shareholders and the nominating shareholder would be required to file with the SEC and post on a website disclosure mandated under the proxy rules. Further, all other solicitations would be posted on the website.<sup>297</sup> Two commenters suggested the use of the Internet for disclosure and

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<sup>287</sup> CERES; Citizens; Davis; Form C; Horizon; Keon; Parnassus.

<sup>288</sup> BC; Citizens; Domini; Form C; Lawndale; NACD; Shefa; SIF; Walden.

<sup>289</sup> Barrows; Scheffler; Welch.

<sup>290</sup> Davis.

<sup>291</sup> Monks.

<sup>292</sup> Alston & Bird; Intel; LPA.

<sup>293</sup> LPA.

<sup>294</sup> Bethel & Gillan.

<sup>295</sup> ASCS.

<sup>296</sup> Latham; McRitchie.

<sup>297</sup> ABA.

- polling on significant issues.<sup>298</sup> Several commenters suggested the use of the Internet for all proxy materials and voting.<sup>299</sup> Commenters also suggested using the Internet as a polling tool for shareholder proposals (as a shareholder referendum).<sup>300</sup> One commenter suggested generally the use of available technology.<sup>301</sup>

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<sup>298</sup> BRT; Intel.

<sup>299</sup> CRI; DF King; ECohen; Horizon; Nesfield.

<sup>300</sup> Asato; Intel.

<sup>301</sup> ASCS.