

FORTHCOMING IN:

Lucian Bebchuk, ed., *Shareholder Access to the Corporate Ballot*  
(Harvard University Press, 2004)

5

---

## THE ORIGINS AND GOALS OF THE FIGHT FOR PROXY ACCESS

*Damon A. Silvers and Michael I. Garland\**

The current vigorous debate on the place of shareholder nominated directors in the public company proxy solicitation process is in one sense a direct outgrowth of the wave of corporate scandal that began with Enron's collapse in the Fall of 2001.<sup>1</sup> But upon closer examination the effort to gain access to management's proxy for shareholder-nominated board candidates is the logical culmination of trends in the capital markets and the U.S. corporate governance system since World War II.

Although the Commission has contemplated this reform four times in the past 60 years, this is the first time it has moved beyond consideration to propose new rules.<sup>2</sup> Since the Securities and Exchange Commission took up the issue of proxy access in the spring of 2003, the Commission has received numerous comments from both institutional and individual investors stating that granting long-term shareholders a meaningful say in picking directors is the most important investor reform to be considered by the Commission in decades.<sup>3</sup>

This paper seeks to set the context in which the Commission has taken up the issue of proxy access, and in particular to set out the considerations that have motivated the institutional investor proponents of proxy access.

### BACKGROUND

Since the rise of public equity markets in the early twentieth century, commentators have generally understood the principal-agent problem in U.S. corporate governance in the context of a fragmented shareholder base.<sup>4</sup> Section 14 of the Securities Exchange Act gave the SEC broad regulatory power over the

\*Damon A. Silvers is an Associate General Counsel of the AFL-CIO. Michael Garland is on the staff of the AFL-CIO's Office of Investment. The views expressed herein are their own and not necessarily those of the AFL-CIO.

solicitation of public company proxies with an eye toward the problem of management's ability to dominate the proxy process.<sup>5</sup> Rule 14a-8 and its predecessors were substantially designed to give the small individual investors who compromised the fragmented shareholder base an opportunity to have their voice heard on certain governance issues through shareholder proposals included on management's proxy.<sup>6</sup>

In this world of fragmented share ownership, securities and corporate law developed in the direction of holding public company management accountable through the corporate control market, through shareholder litigation, and through SEC enforcement activity.

However, throughout the postwar era, the ownership of U.S. public companies has slowly become more concentrated. This trend accelerated rapidly in the 1990s with the phenomenal growth of the mutual fund industry, and in particular of indexed equity money management. The result was that by the end of the twentieth century, ownership of corporate America was concentrated in mutual funds, pension funds, and money managers working for pension funds in a manner unprecedented since the enactment of the federal securities laws.<sup>7</sup>

But the change was not simply the concentration of ownership. The growing popularity of indexed equity investment strategies meant that increasingly large amounts of the equity investment in U.S. companies is locked in for the long run — unable to avail itself of the Wall Street Walk.<sup>8</sup> While some have been critical of the rising popularity of indexing, large pension funds like CalPERS point out that indexing is simply a reflection of the fact that their size requires them to be invested across the entire U.S. economy, and increasingly across the entire global economy.<sup>9</sup>

When the corporate scandals of the last few years hit, institutional investors were heavily affected both by the collapse of individual large-cap companies and by the prolonged secular decline in the equities markets.<sup>10</sup> Institutional investors experienced firsthand in a particularly painful fashion their vulnerability to management misconduct.

At the same time, institutional investors became increasingly aware of the limitations of the traditional forms of managerial accountability. During the 1980's, the market for corporate control intensified dramatically, driven by the availability of debt financing. In the 1990s, rising equity markets gave operating companies currency for strategic acquisitions. Studies conducted in the aftermath of this activity, though, called into question whether ultimately it resulted

in added value to investors.<sup>11</sup> This was particularly an issue for investors who held both the target and acquirer, and who held both debt and equity securities. Of course this is a description of the typical large pension fund, which increasingly looks like a universal owner.

In this context, even before the collapse Enron, governance or “voice” approaches to management accountability gained popularity in the 1990s. This was reflected in academic literature and in institutional investor behavior. Some commentators in particular saw governance approaches as less disruptive and conflictual than the traditional takeover market.<sup>12</sup>

However, as institutional investors engaged in ever more intensive activism on issues ranging from antitakeover defenses to executive compensation, a growing level of frustration developed over the generally toothless nature of the means available to shareholders who wished to hold the managers of public companies accountable for their actions. As the trends discussed above led to institutional investors passing shareholder proposals by majority votes, they discovered that in most cases management could ignore the votes.<sup>13</sup> While efforts to withhold votes from management candidates have become more popular, they have no binding effect in states such as Delaware — i.e., a candidate could receive the vote of only one share, and so long as there was no other candidate they would still be elected.<sup>14</sup>

Finally, as institutional investors became more engaged in shareholder litigation, the limitations of litigation as a device for internal governance reform became more apparent. Though there have been significant exceptions since the collapse of Enron, institutional investors have generally concluded that litigation is both a blunt instrument and one that is most powerful when value has already been largely dissipated.<sup>15</sup>

All of these developments increasingly led institutional investors to conclude that shareholders could not directly hold managers accountable, nor in many circumstances should they. Long-term institutional owners also increasingly are aware that their interests diverge from those of active traders, such as hedge funds, with shorter time horizons, and are correspondingly skeptical of governance ideas designed to tie executive behavior to the interests of short-term investors. Consequently, institutional investors became more focused on effective boards as the key to good corporate governance. But for boards to do their job, there need to be mechanisms of accountability to shareholders more powerful than the shareholder proposal but less conflictual and disruptive than the control contest or the shareholder lawsuit.

## THE RISE OF THE INDEPENDENT DIRECTOR PARADIGM AFTER ENRON AND ITS LIMITS

During the later 1990s institutional investors had urged public companies to ensure the majority of their boards were independent of management, and that certain committees, particularly audit and compensation committees, were also composed of a majority of independent directors.

In the aftermath of the Enron scandal, board independence was adopted as a principle by the New York Stock Exchange, the Conference Board, and the Business Roundtable, as well as by Congress in the Sarbanes-Oxley Act.<sup>16</sup>

However, just as this was happening, institutional investors were taking note of the fact that the boards at companies like Enron and WorldCom complied with the independence requirements in force at the time; . that, even under the new NYSE listing standards, boards had sufficient discretion in determining whether a particular director was independent; and that individuals who in fact had ties to company management could continue to serve on the audit and compensation committees.<sup>17</sup> In addition, close scrutiny of the conduct of the boards at scandal-wracked companies led many observers to note that the problems of psychologically captive boards were not susceptible to bright-line tests for board independence. All of these issues increasingly led institutional investors to become concerned that the independence standards being promoted as solutions to the U.S. corporate governance crisis were not only simply too weak, but were conceptually incomplete solutions to the problem of passive or captive boards.

As a result, a debate began to coalesce between those who viewed disinterested directors as the goal and those whose goal was holding corporate directors accountable. Those who supported the ideal of disinterestedness were desirous of keeping directors free of the influence of both the CEO and of the shareholders. Those who were looking for accountability took the view that in light of the power of the CEO in the typical public company, the only way to have an active board was to counterbalance the influence of management with real structures of accountability to shareholders.

## THE ROLE OF WORKER PENSION FUNDS IN LAUNCHING THE PROXY ACCESS DEBATE

Union members participate in the capital markets as individual investors and through a variety of benefit plans with over \$5 trillion in assets. Union-spon-

sored pension plans (“union funds”) account for \$400 billion of that amount.

A variety of shareholders had sought at various times in the 1990s to bring shareholder proposals to a vote; urging companies to voluntarily adopt procedures for shareholder nominated directors to gain access to management’s proxy. Though the SEC staff had required companies to include these proposals in their proxy solicitation materials in the early 1990s, by the late 1990s the SEC was allowing companies to omit these proposals on the grounds that they “related to the election of directors.”<sup>18</sup>

Starting in the spring of 2002, labor-affiliated investors began to seriously advocate the adoption of measures requiring management to include shareholder nominated director candidates on management’s proxy. In the spring of 2003, the public employee union the American Federation of State County and Municipal Employees’ Employees Pension Plan submitted six shareholder proposals on access to the proxy for shareholder nominated directors. In response, the Commission reasserted its view that these proposals were excludable from management’s proxy under Rule 14a-8 in its current form, but simultaneously the Commission announced the Division of Corporation Finance staff would conduct a study of the proxy rules relating to the election of corporate directors with an eye toward possible reforms.<sup>19</sup>

On May 15, 2003, the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) submitted a rule-making petition to the SEC seeking a rule creating a right of access to management’s proxy for shareholder nominated directors.<sup>20</sup> The AFL-CIO is the federation of America’s labor unions, representing sixty-four national and international unions and their membership of more than 13 million working women and men. The AFL-CIO’s petition asked the Commission to adopt new regulations providing that shareholder nominated directors with support from a broad base of long-term holders should have access to management’s proxy.

The petition sought an access rule that was oriented toward long-term institutional investors who were looking for voice on company board. The AFL-CIO sought to have protections to ensure the rule did not become a vehicle for subsidized takeover efforts, and to ensure the access proposal did not impractically crowd the proxy materials of myriad companies with frivolous candidates by including significant ownership and holding period requirements for nominating shareholders and a maximum number of shareholder nominees.

On July 15, 2003, the SEC staff issued a report recommending the Commission consider revising its rules issued pursuant to Section 14 of the Securities Exchange Act to allow limited access by shareholder nominated

directors to the issuer management's proxy.<sup>221</sup> On October 14, 2003, the Commission proposed rules for public comment embodying the concepts outlined in the staff paper.<sup>22</sup> Since then a healthy debate has been underway over that basic idea. When the comment period on the proposed access rule ended in December, the Commission had received over 13,000 comments, the vast majority of which were supportive of the Commission's proposal and urged the Commission consider toughening the rule. The authors believe this is the largest number of comments ever received by the Commission on a single proposed rule. In the remainder of this paper, we will try to sketch the contours of that debate and describe the worker fund perspective on that debate.

### RESPONSE TO ARGUMENTS OPPOSING PROPOSED PROXY REFORM

The opponents to director election reform, as the Commission first observed in its July 15, 2003 Staff Report, include "all of the corporations and corporate executives, most of the legal community, and the majority of associations (mostly business associations)." Among the most outspoken are the Business Roundtable ("BRT"), an association comprised of the chief executives of the nation's largest corporations, the Business Law Section of the American Bar Association, and Wachtell, Lipton, Rosen & Katz ("Wachtell, Lipton"), a leading law firm that advises executives of the nation's largest corporations, whose views are ably represented elsewhere in this book.<sup>23</sup>

The opponents to the proposed rules generally cite three basic substantive arguments. They say the rules are being put forward before other recent regulatory reforms have had time to take effect, will be disruptive to board operations, and that they will allow special interests to hijack the election process.<sup>24</sup>

#### *Opponents Say Recent Regulatory Reforms Are Sufficient*

Opponents to proxy reform, including the BRT and Wachtell, Lipton, argue that the Commission should give the reforms included in the Sarbanes-Oxley Act of 2002 and new exchange listing standards a chance to operate before moving forward with the proposed rules.

Institutional investors supporting the Commission's proxy access proposal are strongly supportive of recent reforms such as Sarbanes-Oxley as essential to reining in the conflicts of interest that can compromise directors' loyalty to the corporation and its shareholders. But these and other possible regulatory

reforms cannot ensure that directors act independently, are responsive to shareholder concerns and contribute to building the long-term value of the corporations they serve. Given the current incumbent-controlled election process, shareholders have no cost effective means of holding directors accountable for failing to live up to these fundamental standards. By granting shareholders reasonable access to the proxy to nominate directors, investors believe the Commission will not only remedy this problem but also lessen investors' reliance on regulatory action and oversight.

### OPPONENTS ARGUE THE PROPOSED RULES WILL DISRUPT BOARD OPERATIONS

This really appears to be the fundamental difference between proponents and opponents of proxy access. Opponents argue the proposed rules will lead to significant disruption from annual election contests, Balkanization of the board, creation of adversarial relationships, and adverse impact on director recruiting and increased aversion to risk. These arguments all appear to be premised on the notion that collegiality among directors should be preserved regardless of the consequences to the corporation and its shareholders.

Proponents of the rule acknowledge that good working relationships among directors and between directors and officers are important. But for proponents, a more important objective is that boards be effective monitors of management. This view is heavily influenced by the institutional losses in corporate scandals associated with weak boards. The AFL-CIO estimates that union members' benefit funds lost in excess of \$35 billion in value from the collapse of Enron and Worldcom alone. These funds tend to be of the belief that they would have been much better off today had those companies' boards been less collegial and more willing to challenge their CEOs with uncomfortable questions.

Proponents see a need for directors willing to challenge management that extends well beyond the potential to uncover the kind of wrongdoing that nearly destroyed companies like Enron, Worldcom, Tyco and HealthSouth. Directors must be willing to challenge management to ensure that management's business strategy is in the long-term interests of the corporation and its shareholders, and that management is effectively executing that strategy and managing risk. Directors must also be willing to deny demands for excessive compensation by executives, including the majority of CEOs who also chair their boards. Skyrocketing executive pay that bears little relation to long-term

performance suggests that directors are not as independent as CEOs would like their shareholders to believe.<sup>25</sup>

Finally, the argument regarding widespread board disruption presumes that the new rules would be used frequently at many companies. As discussed below, there is considerable basis for the conclusion that any new rule with significant ownership (e.g., 3%) and holding period (e.g., more than one year) requirements for nominating shareholders would only be used on a limited basis. As currently proposed, the rules include a 5% ownership requirement, two-year minimum holding period, and an additional triggering event requirement that would make them particularly difficult to utilize.

### *Opponents Warn that Shareholders Will Nominate Special-Interest Directors*

The BRT, ConocoPhillips, and others have warned in their comment letters that shareholders “may nominate director candidates for any number of purposes, regardless of whether those purposes are self-interested or designed to promote other agendas.”<sup>26</sup> Wachtell, Lipton is more specific, arguing that “the institutional shareholders most likely to take advantage of the proposed election contest rules are the politically active institutions, such as labor unions and public pension funds, that have interests and agendas beyond the economic performance of the company.”<sup>27</sup> A similar concern is expressed by the 350 individuals who signed a letter drafted by Americans for Tax Reform<sup>28</sup> (see Form Letter E on the Commission’s Web site).

If we understand correctly, the BRT and others are concerned that a shareholder nominee will be elected to a board, even though the nominee is seeking to pursue interests other than those of shareholders. In order to protect shareholders, therefore, the BRT believes “the nominating committee is best positioned to assess the skills and qualities desirable in new directors.”<sup>29</sup>

These arguments are often used by those who oppose democratic elections. They must contend with the fact that, in a contested director election, a shareholder nominee must receive a substantial plurality of votes from the company’s shareholders to be elected to its board. Moreover, institutional shareholders such as the large mutual fund complexes generally place the onus on the dissidents to demonstrate why they are better qualified than the incumbent directors.<sup>30</sup> Thus, it appears highly unlikely that in a widely held company a nominee intent upon using his or her directorship to pursue an agenda at odds with the interests of the corporation and its shareholders would be elected. In

practice, we expect shareholders — including the union and public pension funds whose interests Wachtell, Lipton and others question — will nominate highly qualified and widely respected candidates who are likely to win support from a majority of a company’s shareholders.

In response to Wachtell, Lipton’s specific concerns, it is true that union and public pension funds have been the most active institutional shareholders in calling for company-specific and regulatory reforms to enhance corporate governance and performance. During the 2003 proxy season, for example, Georse Shareholder Communications, Inc. estimates that union pension funds sponsored 48% of the 427 governance proposals that actually came to a vote.<sup>31</sup> By contrast, investment managers and mutual funds submitted fewer than 4%.

Most of these proposals sought to rein in excessive executive compensation or enhance auditor and board of director independence.<sup>32</sup> Union fund shareholders have been calling for these reforms since well before recent corporate scandals contributed to a \$7 trillion collapse in the capital markets. In 1998, the International Association of Bridge, Structural and Ornamental Iron Workers Local 25 Pension Fund sponsored a proposal at HealthSouth calling for an independent compensation committee. That same year the International Brotherhood of Electrical Workers Pension Benefit Fund sponsored a proposal at Tyco calling for a majority of independent directors on the company’s board. Neither proposal passed, but their underlying reforms are now required of all listed companies as a result of new exchange listing standards and the Commission’s implementation of Sarbanes-Oxley.<sup>33</sup>

As long-term shareholders, often through passively managed index funds, union fund fiduciaries undertake these activities to comply with their duties under the Employee Retirement Income Security Act of 1974 (ERISA), which regulates most private sector pension plans. Although public pension funds are governed by state laws and regulations rather than ERISA, the ERISA fiduciary principles often are found in state law as well. As interpreted by the Department of Labor, ERISA both encourages fiduciaries to exercise their legal rights as shareholders and requires that they act solely in the “economic best interests” of plan participants and beneficiaries. With respect to shareholder activism, the DOL states:

An investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock is consistent with a fiduciary’s obligations under ERISA where the responsible fiduci-

ary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, is likely to enhance the value of the plan's investment in the corporation, after taking into account the costs involved. Such a reasonable expectation may exist in various circumstances, for example, where plan investments in corporate stock are held as long-term investments or where a plan may not be able to easily dispose of such an investment. Active monitoring and communication activities would generally concern such issues as the independence and expertise of candidates for the corporation's board of directors... Other issues may include such matters as consideration of the appropriateness of executive compensation, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans, the corporation's investment in training to develop its work force, other workplace practices, and financial and non-financial measures of corporate performance. Active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder.<sup>34</sup>

To the extent that shareholders have differing interests, for example with respect to time horizon or appetite for risk, it is a company's long-term shareholders whose interests are most closely aligned with those of the corporation. In light of ERISA's requirements, what is notable is not that union funds have been such active long-term shareholders, but that other institutional shareholders have been so passive. This is particularly the case with the large mutual funds that are in a powerful position to demand pro-shareholder reforms as owners of one-fifth of U.S. publicly-traded equities.<sup>35</sup>

Although mutual funds have a similar fiduciary duty to act in the best interests of their investors, they have interests and agendas beyond the economic performance of their portfolio companies, notably selling employee benefit and other fee-based services to these same companies. For example, Fidelity Investments, the nation's largest mutual fund company, earned \$2 million in 1999 managing employee benefit plans for Tyco. Fidelity also voted

against the above proposal at Tyco in 1998.<sup>36</sup> We note that none of the large mutual fund companies are among those mutual funds that sponsored the above referenced 4% of corporate governance proposals in 2003.<sup>37</sup>

The Commission's recent rules requiring mutual fund proxy voting disclosure are likely to lead to voting practices that are more consistent with the best interests of fund investors.<sup>38</sup> But there remains a considerable risk that the same conflicts that transformed mutual fund proxy votes into rubberstamps for corporate management will deter the large institutional money managers from using the proposed rules to nominate directors.

Opponents' final argument is often that investors with unique interests separate and apart from other investors will seek to gain advantages for themselves by running candidates for the board or threatening to do so even if they cannot win. Of course it is true that each actual shareholder is likely to have some interests beyond their interest as a shareholder in any particular corporation. Money managers, mutual funds, and bank trust departments seek business from public companies, fully diversified ERISA funds are likely to be invested in the companies' competitors, unions, and employee owners (including executives) are likely to have interests as employees in the fate of the issuer, individual investors may bring any number of unique views to the corporate governance process. By the way, not all of these differences are illegitimate — each investor's view of the best strategy for the company they invest in will be a product of what kind of person or institution that investor is. But the real response to this fear on the part of opponents is that the thresholds required in the Commission's proposal effectively require any shareholder who wishes to even credibly threaten to use the rule to build a broad coalition of shareholders based on those shareholders' common interest as investors in the particular company.

Of course, there is some considerable irony in the Business Roundtable expressing concerns about those who might have interests and agendas beyond the economic performance of the company. For of course the CEOs who make up the Business Roundtable have their own interests — interests in their own personal economic situation, as well as in intangibles such as power and prestige. And absent strong, independent board oversight, they also have virtually unrestrained power to pursue those interests at the expense of the corporation and its shareholders.

#### THE SEC'S PROPOSAL — A CUP HALF FULL

In the period leading up to the SEC's staff recommendation in July, 2003,

investor advocates of proxy access generally conceived of their goal as a general right of access to management's proxy for candidates supported by a certain percentage of long-term investors.

Of course the proposed rule issued by the Commission is considerably more complex and less user-friendly than some advocates had hoped for. As a result some influential institutional investors have been critical of the proposal for not going far enough.<sup>39</sup> Others have taken the view that the Commission's proposal, while imperfect, is of great value because it recognizes the wisdom of the basic idea of access to management's proxy for shareholder board nominees.<sup>40</sup> The remainder of this paper will be devoted to describing some of the concerns institutional investors have had about the weakness of the Commission's proposal, and to considering some possible changes the Commission could make in the final rule to address these concerns.

### *Triggering Events*

As proposed, the Commission's rules would apply only to those companies at which one of two triggering events has occurred. The right of access would remain in effect for two years after the occurrence of either event. The events are:

1. the receipt of withhold votes from more than 35% of the votes cast with regard to one or more directors; or
2. a shareholder proposal submitted by a shareholder or shareholder group that has held more than 1% of the company's stock for one year seeking to opt in to the new proxy access rules receives support from more than 50% of the votes cast on that proposal.

The AFL-CIO has taken the view that triggering events are unnecessary because the 3% minimum ownership requirement recommended in the AFL-CIO's petition — not to mention the more restrictive 5% proposed by the Commission — already represents a sufficiently high barrier to utilizing any proxy access rule at large capitalization companies. Given this requirement, shareholders would only undertake to organize such an effort, and could only do so effectively, at companies where they could clearly demonstrate that the board of directors had already failed to respond to serious shareholder concerns.

In addition, each of the two proposed triggering events raise particular problems, and both entail a two-year delay between the point at which shareholders wish to nominate a candidate and when one could actually be elected. This delay could be untenable at a company in crisis.

With respect to the proposed withhold trigger, the 35% threshold is far too high to serve as a useful trigger in light of historical experience with such votes. A random survey of 308 companies by the Council of Institutional Investors found only six companies in the S&P 1500 at which a director received a withhold vote above 35% in 2003, and none of these are S&P 500 firms.<sup>41</sup>

The AFL-CIO's experience urging fellow Lockheed Martin shareholders to withhold their votes from former Enron director Frank Savage, now twice renominated to the Lockheed Martin board, illustrates how difficult it can be to achieve a 35% withhold vote, regardless of how compelling one's case.

These "vote no" campaigns followed a report by a special committee of Enron's own board that concluded the board failed in its oversight duties. The AFL-CIO did a mailing to shareholders holding a substantial majority of outstanding shares in which we detailed Mr. Savage's specific role on Enron's board, held follow-up conversations with institutional shareholders, and obtained the support of independent proxy voting services like Institutional Shareholder Services — Lockheed Martin shareholders withheld 28% of the votes cast from him in 2001 and again in 2002.<sup>42</sup> Nonetheless these "vote no" efforts were among the most successful ever conducted at a large capitalization company and would appear to reflect very substantial shareholder dissatisfaction. Yet they would fail to constitute a triggering event under the Commission's proposal.

The Commission's 1% ownership requirement for sponsoring an opt-in proposal is also problematic. A shareowner of the average S&P 500 company would need to hold shares worth over \$180 million merely to sponsor an opt-in proposal (see Appendix B). Moreover, as discussed above, the few institutional shareholders large enough to individually satisfy the 1% threshold are unlikely to make use of the proposed rules. While it may be appropriate to require shareholders to organize into groups for the purposes of nominating directors using the corporate proxy, such a requirement is too burdensome for the purposes of sponsoring an opt-in proposal that may or may not receive a majority vote.

It appears the Commission may be considering an additional triggering event premised on a company's not implementing a shareholder proposal that received a majority shareholder vote. Institutional investor opinion is split on

this question. Some shareholder activists favor this proposal, however the AFL-CIO and many union-sponsored funds do not.<sup>43</sup> There is widespread agreement that corporate boards that ignore majority votes on shareholder proposals are perhaps the starkest example of directors failing to respond to shareholder concerns. However, there is no way to clearly determine when an issuer has sufficiently responded to a shareholder proposal. As a result of negotiations with shareholders, for example, companies often adopt reforms that address shareholders' underlying concern without necessarily implementing the specific proposal. On the other hand, one can easily imagine companies acting unilaterally to adopt changes that appear to address a shareholder proposal while in reality leaving the proponents' fundamental concern unaddressed.

In addition, this additional trigger could lead to a proliferation of shareholder proposals designed to receive majority votes, where the proponent may be more interested in creating a triggering event than in the underlying change sought by the proposal.

Certain types of event triggers, such as material restatements in issuers' audited financials, are attractive because they would allow shareholders at these companies to nominate directors at the most immediate annual meeting. However, such triggers are too inflexible to be a substitute for a general right of access.

In general, the debate about triggers shows the inherent problems associated with mechanical tests for determining when a particular company has a poorly performing board. The thinking behind the AFL-CIO's original rule-making petition was to use a requirement of significant long-term shareholder support for the director candidates themselves as the test because it allowed the greatest flexibility and the least potential for perverse outcomes. In light of the Commission's interest in additional threshold tests, the challenge, which we address in greater detail below, is to craft tests that are similarly adoptable to a wide range of specific business situations.

### *Ownership Threshold Considerations*

The Commission believes its proposed ownership threshold of more than 5% for two years strikes an appropriate balance between shareholders' interest in using the corporate proxy to nominate directors against companies' concerns about the potential disruption that some contend may result from frequent use of the process by shareholders who do not represent a significant ownership stake in the subject company. The Commission notes that roughly 42% of

filers have at least one shareholder that can meet this threshold, while roughly 50% of filers have two or more shareholders that each has held at least 2% for the appropriate period.<sup>44</sup>

One cannot estimate the frequency with which shareholders will use the proposed rules based solely on the potential number of shareholders that meet the eligibility requirements. Interpreting these data requires corresponding, qualitative information on who these large shareholders actually are. A review of the shareholder list of most publicly traded companies, and in particular the nation's largest 150 companies whose executives comprise the Business Roundtable, would show that it is almost exclusively a small number of large mutual fund companies and investment management firms that meet these thresholds.

Appendix A identifies those institutional shareholders holding more than 2% of eight publicly traded companies (regardless of holding period), and each one's percentage ownership. The companies are listed in order of market capitalization, which exceeds \$1 billion in all eight cases. The companies include Pfizer and Boeing, whose CEO and recently departed CEO respectively, are co-chairs of the BRT, and six other companies that oppose the proposed rules. With the exception of ATA Holdings — which has 70% inside ownership, only two institutions holding more than 2%, and a market value of \$111 million — we believe the table includes all of the publicly traded companies whose opposing letters were posted to the Commission's Web site as of December 11, 2003. The table also shows the union or public fund with the single largest holding at each company, in each case a public pension fund.

The eight companies have an average of 7.13 shareholders holding 2% or more of outstanding shares, which is consistent with the BRT's survey of 80 member companies that found an average of 6.89 shareholders with this ownership amount. The table reveals that there is substantial overlap among the institutions holding these large stakes. Barclays Global Investors and State Street Global Advisors own more than 2% at all eight companies, Fidelity at seven, Vanguard at four and Capital Research at three. Based on their historical reluctance to engage in shareholder activism, including sponsoring no shareholder proposals in 2003, we believe these institutions will rarely, if ever, use the proposed rules.

In fact, while Barclays, the largest investment management firm in the world and a substantial manager of union fund assets, signaled its support for the proposed rules in its June 13, 2003 comment letter, it appears that Fidelity, Vanguard, and Capital Research and Management, the three largest mutual

fund companies in the world, appear to have serious reservations about proxy access.<sup>45</sup>

By contrast, not one of the union or public pension funds that Wachtell, Lipton, and other opponents believe will most likely take advantage of the proposed rules holds even 1% of any of the eight companies. On average, the pension fund with the largest stake holds only 0.50%. Moreover, there are only a handful of public funds, and no union-sponsored funds, large enough to hold such a significant stake in these companies given their diversified portfolios.

This data takes on particular importance in the context of the Commission's proposed requirement that for a shareholder proposal on access to management's proxy for shareholder-nominated directors to constitute a triggering event, it must not only get a majority of the votes, it must be sponsored by investors whose holdings total at least 1%. However, we have been unable to identify an example of a sponsor of a shareholder proposal holding individually 1% of any large capitalization company.

Finally, it is worth looking at what these percentages mean in terms of actual dollars invested in public companies, particularly in light of issuers' oft-expressed concerns about frequent use of the process by shareholders who do not represent a significant ownership stake in the subject company. A shareholder or group of shareholders that held 3% of outstanding shares of the average S&P 500 company (the level of support suggested in the AFL-CIO's petition for a candidate to get access) would own securities with a market value in excess of \$550 million. As the table in Appendix B shows, this same percentage stake would be worth \$64 million at the average S&P Mid-Cap 400 company and \$19 million at the average S&P Small-Cap 600 company.

## RECOMMENDATIONS FOR IMPROVEMENTS TO THE COMMISSION'S PROPOSAL

### *Five Key Items*

As of this writing, it seems that the SEC is fairly committed to the basic structure defined in the proposed rule. As noted above, we believe the simpler structure laid out in the AFL-CIO's rulemaking petition is both more responsive to the crisis in corporate boardrooms and more workable. However, the SEC's proposal could be dramatically improved from the institutional investor perspective while retaining the SEC's proposed trigger-based structure. Here are five key ways in which it could be improved.

1. *Reduce the percentage of withhold votes required of the first trigger to 20% of votes cast, exclusive of broker votes.* This is still a very high withhold level in terms of historic results of “vote no” campaigns, but it is a level of withholds that has been achieved in a handful of cases.

2. *Modify the requirements for submitting an opt-in proposal to be identical to those in the existing 14a-8 requirements (i.e., \$2,000 minimum ownership for one year). An affirmative vote on this proposal by a majority of votes cast, exclusive of broker votes, would then constitute a triggering event.* Simply put, if a proposal can get a majority vote, it really shouldn't matter who sponsored it, from the perspective of whether it should be a triggering event since the majority vote test shows broad shareholder support and no candidate can get access without being nominated by a shareholder or group with substantially more than 1%.

3. *Allow a shareholder or shareholder group that has beneficially owned more than 3% of the company for two years to include nominees in the corporate proxy once a triggering event has occurred.* The Commission's addition of a triggering requirement should be accompanied by an ownership threshold significantly below 5%, given the degree of shareholder support that the triggering event would evidence.

4. *Allow a shareholder or shareholder group that has beneficially owned more than 5% of the company for two years to include nominees in the corporate proxy regardless of whether a triggering event has occurred.* As discussed above, the Commission cannot through rule making anticipate the various corporate crises that would justify shareholder access to the proxy at a particular company's most immediate annual meeting. Developing additional triggers to address these crises is therefore not a realistic option. A general right of access, unencumbered by triggers but predicated on a higher ownership requirement, would address this problem in a flexible and responsible manner. Members of the Harvard Business School/Harvard Law School ad hoc group on the study of corporate governance recommend a similar two-tiered approach in their December 3, 2003 comment letter, although they recommend a higher ownership threshold.<sup>46</sup>

5. *Allow eligible shareholders to include a minimum of two nominees in a company's proxy statement regardless of the size of its board of directors.* Access to the proxy should not be means for those promoting a change in control to run majority slates. However, a single board candidate, if elected, will need to both command the respect of her fellow directors while bringing a constructively critical perspective to bear on the operations of the company and the policies of management. This is a very difficult task for a single individual, particularly

because many of the most important matters will be confidential and a single director will have no one outside of other directors to consult with. Two people, on the other hand, are less likely to either be marginalized or co-opted.

### *Other Recommended Changes*

The Commission should also consider the following changes that would further enhance the proposed rules:

1. *Reduce ownership requirement for mutual fund investors to 1/2% and remove trigger event requirement for access to mutual fund proxies.* One of the key background issues to the mutual fund scandals of the last year has been the cozy relationships between investment companies and their advisors. One less publicized effect of the access to the proxy proposal would be to potentially contribute to the Commission's broader effort to enhance the transparency and independence of investment company boards. Mutual funds, however, generally have highly fragmented investor bases consisting overwhelmingly of individuals rather than institutions. This argues for the Commission granting mutual fund shareholders holding at least 1/2% of the company the right to place nominees in the mutual fund's proxy without any triggering event requirement. Given that mutual funds typically hold shareholder meetings only once every three years, the triggering event requirement would create a six-year delay before shareholders could actually elect their nominees.

2. *Extend the time period for application of the rule following a triggering event to five years.* The Commission's proposal embodies the hope that the occurrence of a triggering event, and the rights that such an event would bestow upon a company's shareholders, would lead to greater responsiveness and accountability by a company's directors. The proposed two-year limitation, however, is too short to enable shareholders to monitor board performance and responsiveness and act accordingly, particularly in cases where the issue is less a short-term company threatening crisis and more a long-term failure of the board to monitor management expressed through a variety of problematic actions by the board or management.

3. *Eliminate or revise the requirement that nominees must be independent of nominating shareholders.* This requirement as proposed by the Commission appears designed to ensure directors elected through the access rule are not advocates for the particular interests of the shareholder or shareholders that nominated them. However, it would have the perverse impact of preventing pension funds from nominating employees of the money management firms

they use that are likely to be literally representative of large numbers of beneficial holders and less likely to be representative of any given shareholders' interests. This is particularly an issue for large public pension funds that have relationships with numerous money managers and consultants, and is less an issue for union-sponsored funds. In those few instances when union-sponsored funds have run board candidates, they have been individuals in large part selected for their independence from both the labor movement and the management of the company involved.

## CONCLUSION

With all of its shortcomings, the Commission's access to the proxy proposal is the most significant proposed change to the proxy rules since the adoption of Rule 14-a-8. It could easily be the most effective single reform of the post-Enron era because it creates the possibility of real-time accountability of boards to long-term investors.

The growth of institutional investors and the trend toward indexed investing have created a constituency and a clear rationale for a conception of corporate governance as a genuine long-term process of consultation between shareholders and management. In this context, access for short slates of director candidates is a necessary tool for investors to engage with unresponsive boards.

To the extent the arguments against the Commission's proposal have merit, they reflect a basic disagreement over whether boards should be accountable to anyone but themselves. The events of recent years strongly suggest there is a compelling public interest in counterbalancing the inevitable power of the CEO in the boardroom with mechanisms for board accountability to long-term investors.

Ultimately, not everyone is an investor, but everyone is harmed when major public companies collapse — shareholders, lenders, employees, customers, suppliers, and citizens. Enron was bitterly instructive on this subject. And companies can also fail slowly — gradually becoming nothing more than the instrument of the greed, vanity, or incompetence of a handful of people — with equally devastating consequences. Litigation and government regulation will sometimes punish the guilty and provide some compensation to the wronged. But they are no substitute for real accountability in the daily life of the corporation. Proxy access is about creating that accountability to long term investors — those best positioned to ensure that public companies really create wealth over time — the public purpose for which the public corporation exists.

## APPENDIX A

<b>1. Pfizer (\$264.6B)</b>		<b>% O/S</b>	<b>5. Tribune Co. (15.2B)</b>		<b>% O/S</b>
Barclays Global Investors, N.A.		4.39	MFS Investment Management		3.14
Fidelity Management & Research Co.		2.77	Barclays Global Investors, N.A.		2.99
SSgA Funds Management		2.68	Lord, Abnett & Co.		2.58
Alliance Capital Management, Inc.		2.28	Fidelity Management & Research Co.		2.48
Vanguard Group		2.02	SSgA Funds Management		2.21
<i>CalPERS</i>		<i>0.48</i>	Northern Trust Global Investments		2.00
			<i>New York State Common</i>		<i>0.47</i>
<b>2. Abbott Laboratories (\$71.5B)</b>		<b>% O/S</b>	<b>6. Praxair (\$12.0B)</b>		<b>% O/S</b>
Barclays Global Investors, N.A.		3.35	Fidelity Management & Research Co.		8.33
Fidelity Management & Research Co.		3.27	Barclays Global Investors, N.A.		3.60
Wellington Management Co. LLP		3.24	Lord, Abnett & Co.		3.35
SSgA Funds Management		2.52	Northern Trust Global Investments		2.92
Putnam Investment Management, Inc.		2.13	MFS Investment Management		2.72
Northern Trust Global Investments		2.02	INVESCO Institutional (N.A.) Inc.		2.71
<i>CalPERS</i>		<i>0.48</i>	SSgA Funds Management		2.63
			JPMorgan Investment Management		2.40
			ING Furman Selz Capital Management		2.07
			<i>New York State Teachers'</i>		<i>0.46</i>
<b>3. ConocoPhillips (\$41.5B)</b>		<b>% O/S</b>	<b>7. Convergys Corp. (\$2.2B)</b>		<b>% O/S</b>
Alliance Capital Management, Inc.		6.35	Barclays Global Investors, N.A.		12.78
Barclays Global Investors, N.A.		3.52	Ft. Washington Investment Advisors		5.18
Capital Research & Management Co.		3.49	SSgA Funds Management		4.28
Fidelity Management & Research Co.		3.46	Merrill Lynch Investment Managers		3.23
SSgA Funds Management		2.47	Goldman Sachs Asset Mgmt. (U.S.)		2.77
Davis Selected Advisers LP		2.33	Blum Capital Partners LP		2.66
Dodge & Cox, Inc.		2.09	Aronson + Johnson + Ortiz LP		2.43
<i>New York State Teachers' Retirement</i>		<i>.047</i>	Vanguard Group		2.35
			Putnam Investment Management, Inc.		2.11
			<i>CalSTRS</i>		<i>0.56</i>
<b>4. Boeing (\$31.7B)</b>		<b>% O/S</b>	<b>8. Cummins (\$2.0B)</b>		<b>% O/S</b>
SSgA Funds Management		11.59	Capital Research & Management Co.		6.87
Capital Research & Management Co.		5.31	Lord, Abnett & Co.		6.55
United States Trust Co. of New York		4.05	Fidelity Management & Research Co.		5.94
Barclays Global Investors, N.A.		3.44	LSV Asset Management		3.19
Fidelity Management & Research Co.		2.21	Barclays Gloval Investors, N.A.		2.98
Barrow, Hanley, Mewhinney & Strauss		2.03	Capital Guardian Trust Co.		2.36
Vanguard Group		2.01	Vanguard Group		2.32
<i>New Jersey Division of Investment</i>		<i>0.49</i>	SSgA Funds Management		2.28
			<i>New York State Teachers' Retirement</i>		<i>0.62</i>

For each of the above companies, the table lists the institutional shareholders holding more than 2% of outstanding shares and the pension fund (in italics) with the single largest shareholding. The eight companies are shown in order of market capitalization as of December 11, 2003, as listed in parenthesis following the company's name. (Source: Lionshares (from 13G & 13D filings, mostly for September 30, 2003); Market capitalizations are as of 12/11/03.)

APPENDIX B

Market Capitalization of S&P 1500 Companies, September 30, 2003.

\$millions	S&P 500	S&P Mid-Cap 400	S&P Small-Cap 600	*S&P Composite 1500
<i>Number of Companies</i>	500	400	600	1,500
<b>Total Market Capitalization</b>	9,207,650	855,400	385,090	10,448,140
<b>Avg. Company Cap.</b>	18,415	2,139	642	6,965
1% Ownership Value	84.2	21.4	6.4	69.7
3% Ownership Value	552.5	64.2	19.3	209.0
5% Ownership Value	920.8	106.9	32.1	348.3
<b>Largest Company Cap.</b>	300,520	11,260	3,340	300,520
1% Ownership Value	3,005.2	112.6	33.4	3,005.2
3% Ownership Value	9,015.6	337.8	100.2	9,015.6
5% Ownership Value	15,026.0	563.0	167.0	15,026.0
<b>Smallest Company Cap.</b>	530	260	50	50
1% Ownership Value	5.3	2.6	0.5	0.5
3% Ownership Value	15.9	7.8	1.5	1.5
5% Ownership Value	26.5	13.0	2.5	2.5
<b>Median Company Cap.</b>	7,990	1,840	530	na
1% Ownership Value	79.9	18.4	5.3	na
3% Ownership Value	239.7	55.2	15.9	na
5% Ownership Value	399.5	92.0	26.5	na

\*S&P Composite 1500 consists of S&P 500, Mid-Cap 400, and Small-Cap 600 companies.

Source: Standard and Poors, 9/30/03.

Prepared by: AFL-CIO Office of Investment.

## NOTES

1. A large number of comments, both supportive and critical of the Commission's proposed proxy access proposal (Proposed Rule: Security Holder Director Nominations, Exchange Act Release No. 34-48626, October 14, 2003), discussed the proposal in the context of the wave of scandals that followed the collapse of Enron. Surprisingly, the Commission's proposal itself makes no mention of these events. The public comment file is available at <http://www.sec.gov/rules/proposed/s71903.shtml>.

2. See *Securities and Exchange Commission Proxy Rules: Hearings Before the House Comm. On Interstate and Foreign Commerce*, 78th Cong., 1st Sess., 17–19 (1943) (testimony of Chairman Ganson Purcell); Exchange Release No. 34-13482 (April 28, 1977); Release No. 34-13901 (August 29, 1977); Exchange Release No. 34-14970 (July 18, 1978); Exchange Release No. 34-15384 (December 6, 1978); Staff Report on Corporate Accountability, Division of Corporation Finance, Securities and Exchange Commission (September 4, 1980); and Exchange Release No. 34-31326 (October 16, 1992); all of which are referenced in Staff Report, Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance, U.S. Securities and Exchange Commission (July 15, 2003).

3. See Joint comment letter from the Council of Institutional Investors, National Association of State Retirement Administrators, and the National Council on Teacher Retirement, to Jonathan Katz, Secretary, Securities and Exchange Commission (December 12, 2003) (stating that adoption of the Commission's proposed rules on proxy access would be "the most significant and important investor reform adopted by any regulatory or legislative body in decades"); and comment letter from Sean Harrigan, President, Board of Administration of the California Public Employees' Retirement System to Jonathan Katz, Secretary, Securities and Exchange Commission (December 5, 2003) (calling proposed rule "perhaps the most significant reform to come as a result of the financial market crisis in the U.S.")

4. ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1933).

5. 15 U.S.C. 78a et seq. For legislative history see H.R. Rep. No. 1383, 73rd Cong. 2d Sess. 13 (1934).

6. 17 CFR 240.14a-8. For an early history of the shareholder proposal rule and the various changes made to it over time, see Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals and Corporate Democracy*, 23 GA. L. REV. 97; Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129. In the 1990s the SEC enacted two major changes to the proxy rules, in 1992 relaxing the regulation of communications between shareholders, embodied in 17 C.F.R. 240.14a-1 et seq. In 1998, the Commission made further changes to the shareholder proposal rule, see Final Rule: Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 (May 21, 1998).

7. Pension fund holdings in U.S. equities went from 9.2% of total equity holdings in 1970 to 21.5% in 2002. Total institutional holdings in U.S. institutional investors went from 28.2% in 1970 to 49.8% in 2002. NEW YORK STOCK EXCHANGE FACT BOOK

(2003), available at <http://www.nysedata.com/factbook>.

8. John C. Bogle, Founder and Former CEO of the Vanguard Group, estimates that “[i]ndex funds — the consummate long-term investors, who simply buy and hold the stocks in their benchmark portfolios — now represent 12% of mutual fund assets and an estimated 25% of pension fund assets.” John C. Bogle, “What We Must Do To Restore Owners Capitalism,” Keynote Speech to the Directors’ Summit of the State of Wisconsin Investment Board (October 1, 2003) (transcript in the possession of the authors).

9. See Robert F. Carlson, Director on the Board of Administration, California Public Employees’ Retirement System (CalPERS), “Using Corporate Governance To Increase Portfolio Returns,” Speech to International Corporate Governance Network, Paris, France (July 9, 1997) available at <http://www.calpers.com>. Mr. Carlson states that “Because of our size, we cannot simply sell the stocks of companies that are poorly performing, without negatively impacting the market as a whole. This would also be contrary to our indexing strategy, and even more importantly, deprive us of the ‘upside’ when the companies begin to improve.” *Id.*

10. Beth Healy, *Shared Pain: Bay State Isn’t Alone in Taking a Hit from Enron*, BOSTON GLOBE, Sept. 10, 2002, at C1; *Worldcom Pensions Hi: State-Owned Funds Faced with Losses*, BLOOMBERG NEWS, June 28, 2002, available at 2002 Lexis-Nexis; Amy Feldman et al., *How Bad Is It?* MONEY, Sept. 2002, 76; Pension Benefit Guaranty Corporation, 2003 ANNUAL REPORT AT 5–6.

11. George Andrade, Mark Mitchell, and Erik Stafford, *New Evidence and Perspectives on Mergers*, 15 J. OF ECON. PERSPECTIVES 103 (2001); David Henry, *Mergers: Why Most Big Deals Don’t Pay Off*, BUSINESS WEEK, October 14, 2002; Martin Sikora, *Spotting Deals that Destroy Value*, MERGERS AND ACQUISITIONS J., September 1, 2002.

12. Martin Lipton and Jay Lorsch, *A Modest Proposal to Improve Corporate Governance*, 48 BUSINESS LAWYER 55 (Nov. 1992); Ronald Gilson and Reinier Kraakman, *Reinventing the Outside Director*, STAN. L. REV. 863 (April 1991); William T. Allen, “The Evolving Role of Corporate Boards,” Address at the Harvard University Graduate School of Business Administration (June 24, 1994) (on file with the Delaware Journal of Corporate Law).

13. See Joint comment letter, *supra* note 1 at 2–3.

14. 8 Del. Code Ann. 216.

15. Two instances where litigation has produced forward looking governance reforms are the HealthSouth derivative action brought by the Teachers’ Retirement System of Louisiana and the Waste Management securities class action where the Connecticut Retirement Plans and Trust Funds was the lead plaintiff. Barry B. Burr, *HealthSouth Settlement Could Raise the Bar for Proxy Access*, PENSIONS AND INVESTMENTS, January 12, 2004, at 12; Thomas D. Williams, *Deal Forged in Fraud Lawsuit; \$457 Million Settlement Would End Stock Case Against Waste Handler*, HARTFORD COURANT, November 8, 2001, at E1.

16. REPORT OF THE NEW YORK STOCK EXCHANGE CORPORATE ACCOUNTABILITY AND LISTING STANDARDS COMMITTEE (June 6, 2002); FINDINGS AND RECOMMENDATIONS, THE CONFERENCE BOARD COMMISSION ON PUBLIC TRUST AND PRIVATE ENTERPRISE (January 9, 2003) THE BUSINESS

ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE, (MAY 2002) *available at* <http://www.businessroundtable.org/pdf/704.pdf>). The Sarbanes-Oxley Act of 2002 Pub. L. No. 107-204, 116 Stat. 745 (codified at scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

17. Among the most thorough examinations of the impact of the Enron experience on the concept of director independence is Delaware Vice Chancellor Leo Strine's article, *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron*, 57 Bus. Law. 1371 (2002). Regarding the NYSE Listing Standards, see NEW YORK STOCK EXCHANGE, FINAL NYSE CORPORATE GOVERNANCE RULES, (November 4, 2003) (to be codified as Section 303A of the NYSE Listed Company Manual, and available at [www.nyse.com/pdfs/finalcorpgovrules.pdf](http://www.nyse.com/pdfs/finalcorpgovrules.pdf)) at 4-7. Vice Chancellor Strine is also a co-author with Delaware Chancellor William B. Chandler III of an influential article critical of incumbents' domination of the election process for corporate directors, *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, Working Paper No. CLB 03-01 Center for Law and Business, New York University (February 26, 2002) *available at* <http://papers.ssrn.com/abstract=367720>.

18. Compare Dravo Corporation, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 308 (Feb. 21, 1995) and Pinnacle West Capital Corp., SEC No-Action Letter, 1993 SEC No-Act. LEXIS 539 (Mar. 26, 1993) to Black and Decker Corp. SEC No-Action Letter, 2000 SEC No-Act. LEXIS 35 (Jan. 8, 2000)

19. The AFSCME Plan's request for Commission review was denied in Citigroup Inc., SEC No-Action Letter, 2003 SEC No-Act. LEXIS 534 (April 14, 2003). Earlier no-action letters included AOL Time Warner Inc., SEC No-Action Letter, 2003 SEC No-Act. LEXIS 284 (February 28, 2003); Sears, Roebuck and Co., SEC No-Action Letter, 2003 SEC No-Act. LEXIS 285 (February 28, 2003). AFSCME subsequently issued a report on its effort to win access for shareholder candidates, AFSCME, SHAREHOLDER ACCESS TO THE PROXY: INCREASING DEMOCRACY AND ACCOUNTABILITY IN CORPORATE GOVERNANCE, (June 2003). The Commission staff review was announced in SEC Press Release No. 2003-46 (April 14, 2003).

20. Letter from Richard Trumka to Jonathan Katz, Secretary, Securities and Exchange Commission (May 15, 2003) *available at* <http://www.sec.gov/rules/other/s71003/aflcio051503.htm>.

21. Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance, U.S. Securities and Exchange Commission (July 15, 2003).

22. Proposed Rule: Security Holder Director Nominations, Exchange Act Release No. 34-48626, October 14, 2003.

23. Staff Report, *supra* note 19 at 6. The key opponent comment letters are letter of Henry A. McKinnell, Jr., Chairman, Business Roundtable, to Jonathan Katz, Secretary, Securities and Exchange Commission (December 22, 2003) *available at* <http://www.sec.gov/rules/proposed/s71903/brt122203.htm>; letter from Dixie Johnson, Robert Todd Lang, and Charles Nathan on behalf of the Committee on Federal Regulation of Securities of the Business Law Section of the American Bar Association to Jonathan Katz, Secretary, Securities and Exchange Commission (January 7, 2004) *available at*

<http://www.sec.gov/rules/proposed/s71903/wachtell111403.htm>; and letter from Wachtell, Lipton, Rosen & Katz to Jonathan G. Katz, Secretary, Securities and Exchange Commission (November 14, 2003) at 5 available at <http://www.sec.gov/rules/proposed/s71903/wachtell111403.htm>.

24. These arguments are set out at length in a recent volume of the *Business Lawyer* in the following articles: Martin Lipton and Steven A. Rosenblum, *Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come*, 59 BUSINESS LAWYER 67 (2003), which also appears as Chapter 2 of this volume; Robert C. Pozen, *Institutional Perspectives on Shareholder Nominations of Corporate Directors*, 59 BUSINESS LAWYER 95 (2003), which also appears as Chapter 3 of this volume; Task Force on Shareholder Proposals of the Committee on Federal Regulation of Securities Section of Business Law of the American Bar Association, *Report on Proposed Changes in Proxy Rules and Regulations Regarding Procedures for the Election of Corporate Directors*, 59 BUSINESS LAWYER 109 (2003). This issue also included an article arguing for the idea of proxy access, Lucian Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUSINESS LAWYER 43 (2003), which also appears as Chapter 1 of this volume.

25. Lucian Arye Bebchuck, Jesse M. Fried, and David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751–846 (2002).

26. Letter from Stephen F. Gates, Senior Vice President and General Counsel, ConocoPhillips, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (October 3, 2003) at 2 available at <http://www.sec.gov/rules/proposed/s71903/conocophillips100303.htm>. Similar views are expressed by the Business Roundtable in a Letter from Henry A. McKinnell, Chairman of the Board and CEO, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (June 13, 2003) available at <http://www.sec.gov/rules/other/s71003/brt061303.htm>.

27. Wachtell, Lipton, *supra* note 23.

28. In order to encourage its supporters to send comment letters opposing the proposed rules, Americans for Tax Reform, a conservative anti-tax group established by Grover Norquist, asserted on its Web site ([www.atr.org](http://www.atr.org)) that the Commission's proposal “. . . is being championed by union bosses even though they will not apply similar reform standards to their own actions. And many union leaders oppose change when it comes to providing members with the information necessary for robust union democracy, but now all of a sudden they are for giving shareholders these rights.” See Form Letter E at <http://www.sec.gov/rules/proposed/s71903/s71903typee.htm>. However, while incumbent management in a corporation are able to use the corporation's funds to defend their board seats in a contested election so long as the election involved a good faith policy dispute and the expenditures are reasonable under the circumstances, union officials who do the same with union funds commit a serious crime under federal labor law punishable by a substantial prison term. Compare *Steinberg v. Adams*, 90 F. Supp. 604 (S.D.N.Y. 1950) (holding defensive expenditures by directors proper under Delaware law) to 29 U.S.C. §§ 481(g) and 501(c). Moreover, unions are required to put any candidate who meets the nomination requirements on the ballot, which is printed and mailed to all eligible voters at the union's expense. 29 U.S.C. § 481(e).

29. Business Roundtable *supra* Note 23 at 2.

30. FIDELITY INVESTMENTS, FIDELITY GROUP OF MUTUAL FUNDS AND CORPORATE GOVERNANCE (July, 2003) at 5 *available at* <http://personal.fidelity.com/myfidelity/InsideFidelity/InvestExpertise/governance.html>. CALPERS, DOMESTIC PROXY VOTING GUIDELINES (February 16, 1999) at 8, *available at* <http://www.calpers-governance.org/principles/domestic/voting/page08.asp>.

31. GEORGESON SHAREHOLDER COMMUNICATIONS, INC., ANNUAL CORPORATE GOVERNANCE REVIEW: SHAREHOLDER PROPOSALS AND PROXY CONTESTS 2003 (2003) at 5.

32. *Id.* at 7. Based on internal surveys of proposals sponsored by labor movement affiliated entities in 2003, the AFL-CIO estimates approximately 75% of such proposals addressed issues of executive compensation.

33. In addition, in 1997, the General Pension Plan of the International Union of Operating Engineers sponsored a shareholder proposal at Enron Corporation asking the company to adopt cumulative voting in the election of directors. TYCO INTERNATIONAL LTD., 1998 DEFINITIVE PROXY STATEMENT (1998) at 16–17; HEALTHSOUTH CORPORATION, 1998 DEFINITIVE PROXY STATEMENT (1998) at 10–11; ENRON CORPORATION, 1997 DEFINITIVE PROXY STATEMENT (1997) at 31–32.

34. Department of Labor Interpretative Bulletin 94-2, 29 CFR 2509.94-2 (1994).

35. INVESTMENT COMPANY INSTITUTE, MUTUAL FUND FACT BOOK (2003) at 28.

36. For Fidelity's vote, see CENTER FOR WORKING CAPITAL, 1998 KEY VOTE SURVEY (1998) at 47. For the money management fee at Tyco see the Form 5500s for the following six plans sponsored by Tyco: RAYCHEM CORPORATION TAXSAVER INVESTMENT PLAN, 1999 FORM 5500 (1999); AMP INCORPORATED PENSION PLAN, 1999 FORM 5500 (1999); TYCO INTERNATIONAL U.S. INC. RETIREMENT SAVINGS AND INVESTMENT PLAN IV, 1999 FORM 5500 (1999); TYCO INTERNATIONAL U.S. INC. RETIREMENT SAVINGS AND INVESTMENT PLAN II, 1999 FORM 5500 (1999); TYCO INTERNATIONAL U.S. INC. RETIREMENT SAVINGS AND INVESTMENT PLAN III, 1999 FORM 5500 (1999); TYCO INTERNATIONAL U.S. INC. RETIREMENT SAVINGS AND INVESTMENT PLAN INC., 1999 FORM 5500 (1999).

37. GEORGESON, *supra*, note 28 at 6.

38. Final Rule: Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Release Nos. 33-8188, 34-47304, IC-25922 (January 31, 2003) *available at* <http://www.sec.gov/rules/final/33-8188.htm>.

39. This view was most prominently expressed in a letter from Alan G. Hevesi, William C. Thompson, Philip Angelides and Steve Westly to William Donaldson (October 1, 2003); Press Release, "State Officials Strongly Oppose Barriers in SEC's Proposed Proxy Access Rules" (October 2, 2003) *available at* <http://www.osc.state.ny.us/press/releases/oct03/100203.htm>.

40. For example, see Letter from Gary Findlay, Executive Director, Missouri State Employees Retirement System, et al., to Jonathan G. Katz, Secretary, Securities and Exchange Commission (December 22, 2003) *available at* <http://www.sec.gov/rules/proposed/s71903/publicrdsd122203.htm>.

41. As described in the Joint Comment Letter of December 12, 2003 of the Council of Institutional Investors (“CII”), the National Association of State Retirement Administrators and the National Council on Teacher Retirement, the CII conducted a random survey of 2003 director votes at 100 S&P 500 firms, 100 S&P MidCap 400 companies, and 108 S&P SmallCap companies, Joint Comment Letter, *supra* note 2 at 6.

42. Kathleen Johnston Jarboe, *Lockheed Martin Shareholders Re-Elect Former Enron Director to Board*, DAILY RECORD (Baltimore, Md.) (April 25, 2003).

43. Compare letter from Richard L. Trumka, Secretary-Treasurer, AFL-CIO, to Jonathan Katz, Secretary, Securities and Exchange Commission (December 19, 2003) at 8, to Joint Comment Letter, *supra* note 2, at 2–3.

44. Proposed Rule, *supra* note 22 at 20.

45. Compare letter from Linda S. Selbach, Proxy Manager, Barclays Global Investors, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (June 13, 2003) *available at* <http://www.sec.gov/rules/other/s71003/barclays061303.htm> to letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (June 13, 2003) *available at* <http://www.sec.gov/rules/other/s71003/ici061303.htm> and letter from Amy B. R. Lancellotta, Senior Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 22, 2003) *available at* <http://www.sec.gov/rules/proposed/s71903/ici122303.htm>. Neither Fidelity nor Vanguard, to take two of the major mutual fund complexes, have commented on the proxy access proposal.

46. Letter from Lucian Arye Bebchuck et al. to Jonathan G. Katz, Secretary, Securities and Exchange Commission (December 3, 2003) at 2.