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PRIVATE ORDERING OF PROXY ACCESS: WHAT ARE "FIX-IT" PROPOSALS ACTUALLY FIXING?

***2** As an AFL-CIO official says of proxy access, "You're opening up the kitchen inside these companies. That's a dark secret. That's a place where the insiders really play inside ball." [1]

I. Introduction

The process by which shareholders vote on a firm's directors (and other issues) at annual meetings is known as proxy voting. [2] Shareholders typically do not attend meetings to vote in person, but rather fill out proxy cards, which function as ballots containing the names of director candidates. [3]

Currently, at most corporations, CEOs and/or directors handpick nominees for election to the board. [4] Usually, directors ***3** "pick themselves and their allies, and the shareowners' right to nominate directors to run against these individuals is largely illusory." [5] Because corporate directors typically are elected by a plurality of votes in uncontested elections, a director who owns one share of a company can re-elect him- or herself, even if every other shareowner votes against that person. [6] Of fifty-one directors who failed to receive majority votes in 2016, forty-four remain on the board as "zombie directors," unelected but still serving. [7]

Proxy Access is the right of shareholders to nominate directors and to have their nominees included in the company's proxy statement. [8] Historically, shareholders gained seats on the Board of Directors ("Board") through proxy fights or ***4** negotiation. [9] Private ordering of proxy access bylaws have flourished in 2015 and 2016. [10] Prior to 2015 there were fifteen recorded proxy access bylaws, 118 in 2015, and 224 in 2016. [11] Interested parties seem equally divided on the desirability of proxy access. David Katz and Laura McIntosh of Wachtell, Lipton, Rosen & Katz have said that proxy access has the "potential to wreak havoc with American business" [12] and an SEC promulgated rule ***5** would be "unwise and unnecessary." [13] On the other hand, James McRitchie, author of corpgov.net and advocate of proposals for proxy access, considers "... proxy access as the most fundamental right of shareowners that isn't built in as a legal right ..." [14]

Furthermore, companies have recently been tending to adopt proxy access. Every month, more and more companies vote for proxy access, such as Kellogg Co. (vote to Amend, April 28, 2017), [15] International Business Machines Corp. (vote to adopt April 25, 2017), [16] and Starbucks Corp. (vote to reform March 22, 2017) [17] will be voting on proxy access.

***6** Although it is very early in the policy's lifetime, there has been significant strides in its use. Indeed, the growing popularity of proxy access is reflected by its first recorded use in November 2016 by GAMCO Asset Management Inc. at the annual meeting of National Fuel Gas ("NFG"). [18] In late December 2016, proxy access reached a tipping point in regards to adoption by large companies, with over fifty percent of the S&P 500 companies adopting proxy access. [19] With the first recorded attempt in November 2016, [20] and the tipping point in December 2016, proxy access will be pivotal in practical shareholder ***7** access to the nomination of directors. This paper will explore the history of proxy access, the first use and withdrawal of a nomination via proxy access, and discuss the continued private ordering of proxy access.

II. Historical Context

The rules governing proxy voting have long imposed substantial barriers to activist shareholders seeking board representation. [21] One of these impediments affects the shareholders' ability to nominate directors by limiting access to the firm's proxy materials. [22] Under current rules, management has the sole right to place director nominees on a company's own proxy ballot, which is distributed at the company's expense. [23] A dissident ***8** shareholder, one who wishes to nominate alternative directors, must typically produce and distribute a separate proxy ballot to shareholders at his own expense. [24] A dissident shareholder distributing such a ballot initiates what is known as a proxy contest, with management and the dissident each soliciting shareholder votes for their candidates. [25]

a. Proxy Access Before 2003 Formal Proposal

Proxy access has been highly controversial. As SEC Commissioner Troy Paredes pointed out in dissenting from adoption of then new Rule 14a-11, proxy access marks a considerable displacement of state corporate law by federal securities regulation: "Rule 14a-11's immutability conflicts with state law. Rule 14a-11 is not limited to facilitating the ability of shareholders to exercise their state law rights, but instead confers upon shareholders a new substantive federal right that in many respects runs counter to what state corporate law otherwise provides." [26]

Section 14 of the Securities Exchange Act gave the SEC "broad regulatory power over the solicitation of public company ***9** proxies with an eye toward the problem of management's ability to dominate the proxy process." [27] In 1942, the Securities and Exchange Commission ("Commission" or SEC) first attempted to address shareholder proxy access, with a solicitation for comments. [28] In 1977, the Commission solicited comments on proxy access at hearings held as part of a broad re-examination of its proxy solicitation rules, but did not ultimately propose a proxy access rule. [29] In 1992, the Commission mentioned the issue of ***10** shareholder access, in connection with amendments to the *bona fide* nominee rules, Exchange Act Rule 14a-4, but declined to adopt a shareholder access rule. [30]

b. First SEC Proposal

Most notably, in 2003, the Commission proposed amendments to its proxy rules that would have enabled shareholders, under certain circumstances, to present candidates for election as directors, using the company's proxy materials and at the company's

expense.[31] Although the Commission had discussed ***11** allowing shareholders to place director nominees on a company's proxy materials for roughly sixty years, the first proposal for a new rule, Rule 14a-11, did not occur until 2003.[32] Implementing meaningful access to the proxy was reinvigorated by the SEC in 2003 as a way to end the "Imperial CEO" in response to board failures at Enron and WorldCom.[33]

***12** This attempt focused on increasing shareholder participation in director nominations, as examined in the July 2003 Commission staff report.[34] A large number of comments, both supportive and critical of the Commission's proxy access proposal, discussed the proposal in the context of the wave of scandals that followed the collapse of Enron.[35] In 2003, the SEC proposed a rule that would provide shareholders owning five percent of a company's securities for two years the ability to include the shareholders' director candidates on management's proxy, if either i) a director nominee received higher than 35% withhold vote; or ii) a shareholder proposal regarding proxy access received majority shareholder support. The Commission took no further action after the comments period.[36]

13 c. Short-lived Victory for Proxy Access, *AFSCME v. AIG

In 2006, proxy access proponents won a major victory when the Second Circuit held in *AFSCME v. AIG* that a company could not use the Rule 14a-8(i)(8) "election exclusion" to exclude shareholder proxy access proposals.[37] The significance of this decision proved to be short-lived, however, when in 2007 the SEC proposed changes to Rule 14a-8(i)(8) in response to the Second Circuit's ruling.[38]

***14** Shortly after withdrawing its proposed rule, the SEC granted no action relief to AIG to exclude a shareholder proposal seeking proxy access put forth by AFSCME.[39] The SEC allowed AIG to exclude the proposal on the basis that it involved matters related to the election of directors.[40] On appeal, the Second Circuit court overruled the SEC's interpretation of its rule allowing the exclusion of such proposals and held a company could not exclude proxy access proposals.[41] The court's ruling was based on the fact that these proposals dealt with election procedures, rather than with a specific election.[42] While specific elections were subject to exclusion, election procedures were not.[43] There was a brief window in 2007 during which shareholder proposals requesting proxy access were still allowable under SEC rules.[44] During this time, shareholder proposals were filed at Hewlett Packard, United Health and Cryo- ***15** Cell International, garnering significant shareholder support: 43% at Hewlett Packard, 45% at United Health and passing with 53% of the vote at Cryo-Cell International.[45]

After the short-lived window, the SEC proposal presented two alternative amendments to Rule 14a-8.[46] The first would have codified the pre-AFSCME position that shareholder proposals on election procedures could be excluded, directly counter to the holding in the case.[47] The second would have permitted shareholders to include binding proxy access bylaw amendments in the company proxy materials provided that the proponents had held at least 5% of the company's stock for one year (an "opt-in" proxy access approach).[48] The same group of proxy access opponents that defeated the 2003 proposal were again successful as the SEC adopted its first proposal upholding the election exclusion.[49]

***16 d. Rule 14a-11, First SEC Promulgated Rule**

In 2009, the Commission proposed Rule 14a-11, which would provide shareholders meeting certain eligibility standards with access to corporate proxy materials for their nominees as directors. [50] Former Chairman Schapiro, together with Commissioners Walter and Aguilar, expressed support, stating that,

> "... the most effective means of providing accountability--in a way that is both cost effective and timely-- is to ensure that shareholders have a meaningful opportunity to effectuate the rights that they already have under state law to nominate directors. Under the proposal before us today, shareholders who otherwise have the right to nominate directors at a shareholder meeting will be able to have their nominees included in the company proxy ballot that is sent to all voters. Given the reality of how the proxy process works, this would turn what would otherwise be a somewhat illusory right to nominate into something that is real-- and has a real chance of holding boards of directors accountable to company owners." [51]

***17** On August 25, 2010 the Commission approved final proxy access rules in a 3-2 split vote along party lines. [52] The main component, Rule 14a-11, was promulgated shortly after Section 971 of Dodd-Frank expressly authorized, but did not mandate, the Commission's authority to promulgate a proxy access rule. [53] The SEC also amended Rule 14-8(i)(8), the shareholder proposal rule's "election exclusion." This amendment would require the company to include shareholder proposals to amend the company's governing documents with respect to director nomination procedures. [54]

***18** Before Dodd-Frank, the SEC's authority to adopt a proxy access rule was subject to doubt. [55] While Section 14(a) empowered the SEC to adopt rules for the solicitation of proxies, it arguably did not authorize the Commission to regulate the internal affairs of corporations or intrude on matters traditionally relegated to state law, such as director nomination and election processes. [56] Dodd-Frank § 971 affirms that the SEC has authority to adopt a proxy access rule. [57] At the same time, however, the legislative history makes clear that Congress intends that the SEC "should have wide latitude in setting the terms of such proxy access." [58] In particular, § 971 expressly authorizes the SEC to exempt "an issuer or class of issuers" from any proxy access rule and specifically requires the SEC to "take into account, among other considerations, whether [proxy access] disproportionately burdens small issuers." [59]

e. Dodd-Frank and Proxy Access

***19** Dodd-Frank § 971 was not an easily-passed provision. On June 16, 2010 Senator Christopher Dodd proposed that investors, or groups of investors, who own at least 5% of a firm's shares gain access to the firm's proxy. [60] At that time, the Commission's proposed rule had a tiered system for different sized businesses. [61] Compared to the SEC's proposed rule, Dodd's proposal would have substantially raised the hurdle to gaining proxy access for medium and large firms, but not for small firms. Senator Dodd's proposal was withdrawn shortly thereafter on June 24, 2010 in last-minute negotiations over the final ***20** bill. [62] Under the new rule approved by the Commission in 2011, shareholders seeking access to corporate proxy materials would:

1. have to own at least 3% of the total voting power entitled to vote at the meeting.

2. be able to aggregate holdings to meet the 3% requirement.

3. be required to have held their shares for at least three years.

4. not be able to use the new rule "if they are holding the securities for the purpose of changing control of the company."

***21** 5. be able to include one nominee or a number up to 25% of the board, whichever is greater. [63]

In addition, Rule 14a-11 require shareholders to submit nominees no later than 120 days before the anniversary date of the mailing of the prior year proxy statement. [64] This is a significant, but not overbearing, administrative hurdle for shareholders who would like to nominate directors. The advanced notice provision requires shareholders to be organized and "not miss their chance", almost a third of a year in advance, and half a year in advance in other cases. [65] It also varies among companies so it requires shareholders be aware of another administrative detail. In short, this notice provides another administrative task, but is not overbearing.

f. Delaying of Rule 14a-11 and Subsequent Vacation

On October 4, 2010, the SEC delayed implementation of the proxy access rule in response to a petition filed by the Business Roundtable (BRT) with the D.C. Circuit Court of Appeals ***22** challenging the legality of the rule. The Business Roundtable, a consortium of prominent corporate executives, challenged Rule 14a-11 in the Court of Appeals for the D.C. Circuit as based "on a fundamentally flawed assessment of the rules' costs, benefits, and effects on efficiency, competition, and capital formation." [66]

Ultimately in the 2011 decision *Business Roundtable v. SEC*, the District of Columbia Circuit vacated Rule 14a-11 holding that the Commission failed to adequately assess the economic effects of the proposed rule, and thus the rule was "arbitrary and capricious". [67] The court found that Rule 14a-11 was arbitrary and capricious on three basic grounds. [68] First, and most prominently, the court adjudged the SEC's analysis of costs and benefits to be insufficient. [69] The SEC underestimated the expenses that directors would incur campaigning against ***23** shareholder nominees because the Commission relied on projections with "no basis beyond mere speculation." [70] The SEC similarly erred when, to support its position that Rule 14a-11 would improve board performance and increase shareholder value, it "relied exclusively and heavily upon two relatively unpersuasive studies" instead of following "the numerous studies submitted by commenters that reached the opposite result." [71] The SEC's analysis also broke down when it explained that existing state law rights, not the SEC rules designed to enforce them, were to blame for potential costs: "[T]his type of reasoning, which fails to view a cost at the margin, is illogical and, in an economic analysis, unacceptable." [72] Second, the court held that the SEC failed to consider properly how institutional investors like unions and pension funds might manipulate Rule 14a-11. [73] Such concerns pervaded corporate comment letters but ***24** were strenuously opposed by shareholder advocates. [74] Judge Ginsburg sympathized with the Business Roundtable's view of institutional investors, finding arbitrary action because, though "[t]he Commission did not completely ignore these

potential costs, ... it [did not] adequately address them." [75] Third, the court criticized the SEC's projections of the frequency of election contests. [76] The Commission argued that its figures were correct, and that they applied only for purposes of the Paperwork Reduction Act, [77] but the court was not persuaded, declaring the estimates "internally inconsistent and therefore ***25** arbitrary." [78] The court delivered a hollowing blow to proxy access regulation, and set the path for private ordering.

g. The Beginning of Proxy Access Private Ordering: Boardroom Accountability Project

In late 2014, New York City Comptroller Stringer ("Comptroller Stringer") launched the Boardroom Accountability Project (the "BAP"). [79] BAP is a groundbreaking campaign to give shareowners the right to nominate directors at U.S. companies using the corporate ballot, known as "proxy access." [80] Comptroller Stringer and the New York City pension funds are set apart from any other proxy access movement insofar that by private ordering, they initiated a tidal wave. [81] In fall 2014, Comptroller Stringer, through BAP, targeted seventy-five ***26** companies with non-binding shareholder proxy access proposals. [82] Comptroller Stringer believes that proxy access facilitates more responsive incumbents, or new directors; more meaningful director elections; shareholder choice. [83] Comptroller Stringer argues, that as a result, proxy access causes stronger board oversight [84] which leads to better long-term performance. [85]

The proposals request that the board adopt, and present for shareholder approval, a bylaw to give shareholders who meet a threshold of owning 3% of the company's stock for three or more years the right to include their director candidates, representing up to 25% of the board, in the company's proxy materials, with no limit on the number of shareholders that could comprise a nominating group. [86] According to Comptroller Stringer, the targeted companies were selected due to concerns about the following three priority issues:

> "• Climate change (i.e., carbon-intensive coal, oil and gas and utility companies).
>
> ***27** • Board diversity (i.e., companies with little or no gender, racial or ethnic diversity on the board).
>
> • Excessive executive compensation (i.e., companies that received significant opposition to their 2014 say-on-pay votes)." [87]

On January 11, 2016 Comptroller Stringer announced that the New York City Pension Funds expanded BAP for the 2016 proxy season by submitting proxy access proposals at seventy-two companies. [88] Thirty-six companies targeted by BAP in the 2015 proxy season received subsequent proposals for the 2016 proxy season for failure to adopt proxy access at a three percent ownership threshold. [89] Two companies that adopted a five percent ownership threshold in response to BAP received binding proposals from the New York City Pension Fund for 2016. [90] These binding proposals failed to receive majority support at Cabot Oil & Gas Corporation and Noble Energy, Inc., but the companies have since reduced the required ownership threshold from five percent to three ***28** percent. [91] By December 31, 2016 88% of the companies targeted by BAP have adopted proxy access. [92] This significant success shows the impact that pension funds have had with proxy access. But for BAP, proxy access would be even less widespread than it currently is.

III. First Nomination via Proxy Access and "Fix-It" Proposals

a. First Use of Proxy Access, and Subsequent Withdrawal

***29** In March 2016, National Fuel Gas Company ("NFG" or the "Company") adopted a proxy access bylaw that allowed shareholders who have held at least three percent of its shares for three years or longer to nominate up to twenty percent of the board. [93] In November 2016, GAMCO Investors, Inc. ("GAMCO" or "GAMCO Asset Management Inc.") and its affiliated funds [94] filed a Schedule 14N disclosing their nomination of a proxy access candidate for election to the board of directors of NFG pursuant to the company's proxy access bylaw. [95] The company rejected the nomination on the grounds that the funds did not satisfy the "passive investment" requirement of the Company's proxy access ***30** bylaw. [96] The funds' nominee subsequently withdrew and the funds announced that they would not pursue proxy access. [97]

On November 23, 2016 the Company responded to November 9 and 10, 2016 letters and the Schedule 14N Notice GAMCO Asset Management Inc. filed. [98] The Company rejected GAMCO's proxy access attempt for lack of passivity, and exhibiting an intent of control. [99] As of November 28, 2016 GAMCO owned 7.8 percent of NFG. [100] GAMCO nominated former Goldman Sachs partner Lance Bakrow to the nine-member board of NFG. [101] Bakrow withdrew his nomination in a November 28 filing with the SEC. [102] On November ***31** 28, 2016, NFG Director of Corporate Communications, Karen Merkel told Bloomberg BNA that the company's proxy access procedures are "limited for use by an investor who wants to nominate a board candidate but has not advocated and is not advocating to change or influence control of the Company." [103]

One of the main restrictions to proxy access is the passivity requirement that many companies include to limit activist shareholders access to the company proxy. Like now-vacated Rule 14a-11, proxy access bylaws require that the nominating shareholders be passive investors without the intent to influence the control of the company. [104] NFG, when enacting proxy access, included a similar provision requiring a shareholder to make certain representations and warranties. If these representations are not correct, the stockholder is not eligible to use proxy access. These representations include that an Eligible Stockholder "i) acquired the Proxy Access Request Required Shares in the ordinary course of business and not with ***32** the intent to change or influence control of the Corporation, and does not presently have such intent[.]" [105]

The SEC deems a shareholder to have "acquired or [be] holding equity securities with the purpose or effect of changing or influencing control of the issuer" if, based on relevant facts and circumstances, a shareholder "engages with the issuer's management on matters that specifically call for the ***33** sale of the issuer to another company, the sale of a significant amount of the issuer's assets, the restructuring of the issuer, or a contested election of directors." [106] A non-passive shareholder must file a Schedule 13D, which the SEC requires must state whether the shareholder has or may have "any plans or proposals ... which relate to or would result in" the following events, among others: [107]

> (b) An extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer or any of its subsidiaries;
>
> (c) A sale or transfer of a material amount of assets of the issuer or any of its subsidiaries; ....

> (e) Any material change in the present capitalization or dividend policy of the issuer;
>
> (f) Any other material change in the issuer's business or corporate structure ...; .... or
>
> (j) Any action similar to any of those enumerated above." [108]

NRG, the Company, disqualified GAMCO's proxy access notice for failure to meet the passivity requirement. [109] The Company ***34** argues that GAMCO falls squarely within the definition of "control" application to Section 13 under Rule 12b-2, which defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." [110] The Company argues that GAMCO (i) possessed an intent to change or influence control while acquiring the shares required for a proxy access request and (ii) continues to have the intent to change or influence control. [111]

The main argument showing GAMCO's intent for control is evinced through communications in 2010 and 2014, regarding GAMCO's failed proposals for a spin-off company throughout ***35** 2014. [112] For example, at the time GAMCO bought 800,000 shares in May 2010, Mr. Gabelli stated,

> "We [GAMCO] think they [National Fuel] could take their exploration and production business, Seneca, and offer a piece of it to the public in order to raise capital .... Entities are paying significant dollars to get in the shale, which validates our premise." [113]

GAMCO submitted a supporting statement for its 2015 stockholder proposal to spin off the Company's utility, which stated: "We believe that a spin-off of NFG's local distribution utility segment into a separately traded public company, ... would help to enhance the underlying value of the Company." [114] On November 10, 2016 GAMCO again expressed this interest, noting that "reducing the costs of activism was appealing; 'you can ***36** piggyback on someone else's proxy.'" [115] The Company relies on these statements and acts to represent GAMCO's intent to "change or influence control of the Corporation" in violation of Section 6(E)(i), Article IA of the By-Laws. [116]

The second use of proxy access involves Paragon Offshore, Texas-based U.K. penny stock company that (i) is in Chapter 11 bankruptcy proceedings, (ii) just replaced its CEO and CFO in November 2016, after (iii) a net third-quarter loss of $64 million. [117] Unlike in GAMCO, there is no billionaire asset ***37** manager, but rather a North Carolina- based paralegal (turned adviser representative). [118] Two of the three director candidates nominated are familiar with Paragon. [119] The first is former Paragon CEO, Randall D. Stilley, who left after recent third-quarter losses. [120] The second nominee is Mark B. Slaughter, former CEO of RigNet, Inc., a business vendor of Paragon. [121] Beyond the obvious conflicts of interest disclosed, the former CEO and Michael R. Hammersley, adviser representative proponent, are seeking protection of stockholder interests in the bankruptcy proceedings. [122] Hammersley and another proponent, Marcel de Groot, filed an $11.1 billion lawsuit against Paragon, its

subsidiaries and directors, and its audit firm. [123] All of these attendant circumstances show that the second attempted use ***38** of proxy access is not precedent-setting, and unlikely to contribute to the development of proxy access. [124]

The first apparent use of proxy access, GAMCO, failed for lack of passivity, which is one of many restrictions incorporated into proxy access. [125] Although Rule 14a-11 included the same passivity requirement, the new chapter of the proxy access battle, "fix-it" proposals, is beginning for the 2017 proxy season. [126]

b. Two Waves of No-Action Letters

The first wave of no-action letters related to proxy access were in relation to adopting proxy access. The Division of Corporation Finance, within the Commission, can issue a no-action letter to a company seeking to exclude a shareholder proposal. [127] Under Rule 14a-8(i) there are multiple circumstances ***39** under which a company's request may be granted. [128] Rule 14a-8(i)(9) is one of the substantive bases for exclusion of a shareholder proposal in Rule 14a-8. [129] It permits a company to exclude a proposal "[i]f the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting." [130]

Companies were using Rule 14a-8(i)(9) as a tool to limit shareholder proxy access proposals. [131] Following the staff's issuance of a no-action letter to Whole Foods Market, Inc., [132] ***40** the staff began to reevaluate the use of Rule 14a8(i)(9). Whole Foods sought to exclude from its proxy materials a shareholder proposal to allow shareholders or a group of shareholders that, for the preceding three years, had continuously held at least 3% of Whole Food's voting shares to nominate up to 20% of the company's Board of Directors. [133] In arguing the proposal was excludable under Rule 14a-8(i)(9), Whole Foods advised the staff that it was also submitting a proxy access proposal at the upcoming shareholder meeting. [134] Whole Foods further advised that its proposal featured different terms. [135] The staff agreed the proposal was conflicting and therefore excludable, and granted the company's no-action request. [136] This opened the door for companies that wished to follow the Whole Foods model, and a number of issuers soon attempted to exclude shareholder proposals on proxy access by offering their own access proposals with more company-favorable terms. [137] Ultimately, this led SEC ***41** Chair White to suspend the application of Rule 14a-8(i)(9) and call for further review of the rule. [138]

The Division of Corp Fin, in response to SEC Chair White's request, issued guidance providing that Rule 14a-8(i)(9) cannot be used to exclude shareholder proposals that conflict with management proposals; [139] however, Rule 14a-8(i)(10) provides for management exclusion of proposals that have been "substantially implemented." [140] Under the SLB's new "direct conflicts" standard for counter proposals, Corp Fin will only allow exclusion "if a reasonable shareholder could not logically vote in favor of both proposals." [141] In other words, proposals won't be found conflicting unless they "directly conflict." [142]

In the SLB, "SEC staff interprets the Rule 14a 8(i)(9) exclusion narrowly, limiting its scope to 'direct conflicts.'" [143] ***42** Under the new guidance, exclusions of shareholder proposals under Rule 14a 8(i)(9) are only permissible "if a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other." [144] The SLB provides four examples about how a shareholder proposal and management proposal may be found to directly conflict - or not. [145] In the proxy access context, the upshot is that a more restrictive management proposal - like the one that Whole Foods came up with - will not be considered by Corp Fin as conflicting (and thus won't be excludable). [146] Overall, (i)(9) will rarely be used as an exclusion basis going forward.

The second wave, "fix-it" proposals, are aimed at companies that have already adopted a proxy access bylaw, and are thus seeking to *amend* specific aspects of adopted bylaws. [147] "Fix-it" proposals typically address limiting factors or companies that delineate from the vacated Rule 14a-11 3/3/20/20 formula. [148] The 3/3/20/20 formulation "received wide spread support from ***43** shareholders voting on the *adoption* of proxy access during the 2016 proxy season. However, proxy access proponents, including John Chevedden and James McRitchie ("Chevedden *et al.*" or "Chevedden Group"), and the New York City Comptroller, are now advocating that companies go beyond this formulation." [149] Chevedden, in response to Commission refusals to grant no-action requests, continued to submit proposals amending a single element of company proxy access bylaws. For instance, multiple proposals would raise the aggregation level from 20 shareholders to 50. In response, these companies would request no-action relief, relying on Rule 14a-8(a)(i)(10). Only OshKosh and NVR were granted no-action relief on these grounds, but in early 2016, the SEC staff granted no-action relief under Rule 14a-8(i)(10) to more than 30 companies that have previously adopted proxy access. [150] Opening the door to these "fix-it" proposals, the SEC Staff denied no-action relief to seven of the nine companies that originally sought exclusion on the ground that the proposal had been "substantially implemented" by the ***44** original bylaw. [151] The SEC has also denied no-action letters to companies requesting reconsideration, with one exception. [152] In one case, Sempra Energy, the staff denied no-action by analyzing the shareholders of the company. [153] For Sempra, it's largest 20 institutional shareholders,

> "... hold approximately 51.3% of the Company's outstanding shares, and of these 20 institutional shareholders, it appears that 13 (holding 37.6% of the Company's outstanding shares) have held shares for at least three years. Further, based on this data, it appears that three of the Company's institutional shareholders have owned more than 3% of the Company's outstanding shares for at least three years and 13 of the current top 20 largest institutional shareholders have held more than 0.5% for at least three years. Accordingly, any of these 13 institutional shareholders could, on their own or in combination with only a few other shareholders, achieve the 3% ownership threshold in the Proxy Access Bylaw. Moreover, utilizing proxy access at the Company is not dependent on a shareholder being one of the Company's largest institutional shareholders." [154]

***45** However, Citigroup, on reconsideration, successfully argued that a fix-it proposal was excludable because the company's largest stockholders each held over 3%, and "... any stockholder seeking to form a group to nominate a director candidate, regardless of the size of its holdings, could meet the ownership threshold in any number of ways[.] ..." [155] Citigroup also argued that the proxy access bylaw amendment would not substantively increase the number of stockholders who may be able to utilize proxy access. [156] Therefore, it seems as though one of the key elements in analyzing "fix-it" proposals, the number of stockholders able to utilize proxy access, is entirely dependent on an analysis of a company's shareholder base.

Further, in the second half of 2016 the Commission declined to grant no-action relief to H&R Block, [157] Microsoft, [158] Cisco ***46** Systems, Inc. [159] and Apple [160] on substantial implementation grounds. The shareholders in each case were seeking to amend the ***47** terms of a previously enacted proxy access bylaw, and the company was not proposing to make any further changes. [161] The companies argued that the proposal is excludable under rule 14a-8(i)(10), but the staff were "unable to concur." [162] The staff did not find that company revisions showed a substantial implementation, because the company did not meet its burden. [163] Companies seeking to establish the availability of subsection (i)(10) have the burden of showing both the insubstantiality of any revisions made to the shareholder proposal and the actual implementation of the company alternative. [164]

In 1983, the Commission determined that a proposal would be "moot" if substantially implemented. [165] The rule was changed to reflect this administrative interpretation in 1997. [166]

***48** In November 2016, the Commission staff confirmed its stance, rejecting no-action relief, in Walgreens, [167] Walt Disney, [168] and Whole Foods. [169] The Commission staff also rejected ***49** an argument for exclusion under Rule 14a-8(c), which prevents multiple submissions by shareholders. In January 2017, the Commission staff rejected United Health Group, Inc.'s request for no action to exclude a proposal to loosen aggregation limits under rule 14a-8(i)(10).

However, the Commission staff granted no-action relief where the company, Oshkosh, amended its existing proxy access to address half the changes requested by the proponent before seeking no-action relief, including the reduction of the ownership threshold from 5% to 3%. [170] The Staff had, at that point, denied relief to seven companies, SBA Communications, H&R Block, Microsoft, Apple, Walgreens, Whole Foods and Disney, and ***50** granted relief to two, NVR Inc. [171] and Oshkosh Corporation. In denying no-action relief, the Staff appeared to be distinguishing between a proposal to adopt proxy access and a proposal to amend an existing bylaw.

However, this distinction now appears more nuanced in light of the relief granted to NVR and Oshkosh. After receipt of a fix-it proposal, each of NVR and Oshkosh amended its existing access bylaw to address half of the changes requested by the proponent, including lowering the required ownership threshold from 5% to 3%. [172] The Staff ultimately granted no-action relief to each company under (i)(10), indicating that the company's policies, practices and procedures compare favorably with the ***51** guidelines of the proposal, and therefore the company had substantially implemented the proposal. [173]

The past two years have proven to be immensely action-packed for proxy access. Over 50% of the S&P 500 companies have adopted proxy access, and some have begun amending their proxy access bylaws. [174] However, as of December 31, 2016, only 347 U.S. companies had adopted access bylaws. [175] With the recent developments regarding fix-it proposals, the Commission has signaled support of proxy access bylaws, and refused to grant relief on substantial implementation grounds simply because a company has a proxy access bylaw. Because proxy access is evolving more quickly with each passing year, companies need to be prepared with manager-supported bylaws and seriously consider shareholder proposals to amend existing bylaws.

IV. Why Private Ordering, Why Now?

a. Institutional Investor Support

Private ordering is occurring now because of pension fund support through BAP and institutional investor support. Black ***52** Rock, State Street, [176] and T. Rowe [177] have each adopted proxy access themselves, [178] and have signaled support for proxy access in their portfolio companies. [179] Both ISS and Glass Lewis generally support proxy access. [180] ISS's 2016 voting guidelines state that ISS will generally recommend in favor of management or shareholder proposals on proxy access that have the following features: (i) 3% beneficial ownership; (ii) a holding period no longer than three continuous years; (iii) minimal or no limits ***53** on the number of shareholders permitted to form a nominating group; and (iv) a cap on the number of proxy access nominee seats at no less than 25% of the board. [181] The guidelines state that ISS will also review the reasonableness of any other restrictions on the right of proxy access. [182]

There are 5 companies in 2016 that ISS targeted for lack of adherence to majority-supported shareholder proxy access proposals. [183] In making its voting recommendations, ISS called out ***54** differences between the shareholder proposal and

the company-adopted proxy access bylaw, stating that the company-adopted bylaw was "significantly more restrictive than the majority-supported shareholder proposal," or, in the case of Netflix, that the company had not adopted a proxy access bylaw. Glass Lewis' voting guidelines indicate that it generally supports proxy access as a means to ensure that significant, long-term shareholders have an ability to nominate candidates to the board; however, it considers each proposal on a case-by-case basis. [184] Overall, the larger institutional investors, proxy advisory firms, and pension funds support private ordering of proxy access. Now that pension funds and other institutional investors support proxy access, there will be pressure on companies to adopt proxy access for long-term efficiency.

b. Internationally, Proxy Access Does Not Adversely Impact company

In considering how proxy access may impact corporate governance in the U.S., it may be helpful to consider ***55** international experiences. The CFA Institute Report on Proxy Access indicates that proxy access has historically been used sparingly to elect directors in countries that have adopted proxy access, including Canada, the UK, Australia, France, Germany, the Netherlands, Norway, Switzerland and Brazil. [185] For example, the report cites to a 2009 finding that proxy access nominations at Canadian companies are often withdrawn prior to a vote because companies are "more willing and more likely to reach agreements with investors to avoid a vote." [186]

***56** The CFA Institute Report on Proxy Access also evaluates the relationship between company returns and proxy access elections in Canada, the UK and Australia, and states that "[t]o the extent that proxy access provides governance benefits from a policy perspective, a preliminary analysis suggests that adverse financial impacts are negligible." [187]

c. Private Ordering Restrictions Does Not Directly Impede the Spirit of Proxy Access

Companies have converged on a majority of proxy access provisions, including how to define ownership, the threshold, and minimum holding period before a nominating shareholder may attempt to use proxy access. [188] Simply acquiring the number of shares necessary to reach the ownership threshold does not guarantee compliance, as illustrated in November 2016 during the first attempt to utilize proxy access. [189] Gamco Investors had sought to nominate one candidate at National Fuel Gas (NFG). The ***57** investor withdrew its candidate after NFG said that Gamco's shares were not acquired according to the method prescribed in the bylaws; specifically, without intent to change or influence control of the company. [190] Proxy access restrictions limit a nominator's ability to control the board. [191]

Ownership thresholds and holding periods through private ordering are in close proximity to Rule 14a-11. Ninety-eight percent of proxy access bylaws adopted opt for a three-year holding period. [192] Ninety-nine percent require the nominator to hold the minimum shares through the election. [193] Divergence begins with less substantive clauses, such as thirty-one percent of companies requiring a nominator to state whether it intends to continue to own the minimum required shares for at least one year following the meeting. [194] Five companies actually require ***58** continued ownership. [195] Unusual ownership requirements include 5% ownership for at least one year (Hooper Holmes (2/16/10), KSW (1/5/12), (now private), LSB Industries (8/20/09), and Panhandle Oil & Gas (12/11/13)). [196] Out of 347 companies surveyed, only two, Nabors Industries (4/4/14), and VCA (10/29/15), require 5% ownership for three years. [197] Two extreme outliers, Covanta Holding (3/1/04) and Emcore (8/7/08), do not require any holding period, but do require 20% ownership. [198]

In addition, the maximum board seats available through proxy access and aggregation limits have aligned with Rule 14a11 also. [199] Sixty-three percent of board caps are the greater of 2 seats or twenty percent of the board. [200] An additional seventeen percent of companies have a board cap of twenty percent. [201] Board nominees previously-elected via proxy access do ***59** not necessarily count against the maximum. [202] The most common approach (49 percent of all proxy access bylaws) is to count nominees against the maximum only if they were elected through proxy access within the past two years. [203] The second most popular approach (13 percent of all proxy access bylaws) is to count those elected through proxy access within the past three years. [204] Eighty-seven percent of companies with proxy access have an aggregation limit of up to 20. [205] Ninety-two percent of all proxy access bylaws generally provide that families of affiliated funds count as one shareholder for the purpose of the aggregation limit. [206] These statistics show that although there is no mandate or requirement promulgated, companies generally fall within a close range of the Commission's Rule 14a-11 attempt. [207] This close proximity is significant in showing that companies are adopting best practices in order to promote shareholder access, thereby promoting the spirit of proxy access without government intervention.

***60** Furthermore, restrictions on proxy access do not defeat the spirit and purpose of proxy access. [208] One such restriction bars re-nomination of access candidates, a "lockout" provision. [209] Eighty-two percent of proxy access bylaws have some type of re-nomination constraint, including nominees who fail to receive twenty-five percent of votes or withdraw cannot be nominated again for two years at fifty-three percent of all proxy access bylaws. [210] This restriction, simplified, states that a company supports shareholder nominations, but do not want to burden their proxy card with a nominee who could not receive a fourth of the vote or withdrew. [211] There are outliers, such as LSB Industries and Panhandle Oil & Gas who raised the limit for re-nomination to fifty percent. [212] Another restrictive term is advance notice requirements. [213] This too does not defeat the purpose of proxy access. [214] Three-quarters of proxy access bylaws ***61** require 120-150 days' notice, in advance of the anniversary of prior proxy. [215]

Concurrent proxy contests are also limited at eighty-nine percent of all proxy access bylaws. [216] At these companies, the bylaws allows a board to omit an access candidate if the nominator is also waging a proxy contest with a different candidate on the dissident card. [217] Some bylaws include language protecting the ability of the nominator to run at least one proxy access candidate during a proxy contest. [218] Examples include CVS Health, Express Scripts Holding, Salesforce.com, Noble Energy, Textron and WEC Energy. [219] Nonetheless, this restriction may somewhat impact the purpose of proxy access. [220] However, proxy contests are usually waged in order to gain control, whereas proxy access has normally required passivity. [221]

***62** In short, most proxy access restrictions are in place to limit nominators seeking to control the board. [222] Although proxy contests are expensive, proxy access was not about giving away company control to anyone who holds three percent of the company. [223] Proxy access has been contemplated for sixty years, in one form or another, for the purpose of opening the doors to the boardroom, not relinquishing control. [224] Therefore, proxy access by private ordering has largely fallen in line with what the Commission promulgated, thus reflects best practices. [225]

V. Conclusion

Companies should consider adopting proxy access. Although only a small percentage of companies have proxy access, a large percentage of the S&P 500 have already adopted proxy access and are currently attempting to keep it restrictive. With the wait-and-see approach, shareholders may pass an unfavorable version of proxy access at your company. The SEC has denied

no-action support to companies, but not categorically. In evaluating claims, the SEC has taken note of practical impact on a specific ***63** company's shareholders. In addition, a company should be aware that activist shareholders are limited in their proxy access campaigns to corporate gadflies and pension funds.

A “do-nothing” approach could leave the company entirely unprepared, whereas address proxy access outright or waiting for a period of further development can lead to more favorable terms. Companies should be prepared to either act on a drafted management-friendly bylaw, but also be ready to react to developments of no-action policy (including evaluating their shareholder base) and shareholder supported proposals. Because the Commission has limited no-action relief, a company and its counsel should be ready to adopt or amend the 3/3/20/20 consensus, in addition to any normally accepted restrictions discussed above.

Footnotes

1 Sanford M. Jacoby, *Finance and Labor: Perspectives on Risk, Inequality, and Democracy*, Symposium Presentation (2007) Pg. 23 (citing Damon Silvers and Michael Garland, “The Origins and Goals of the Fight for Proxy Access,” in Lucian Bebchuk, ed., Shareholder Holder Access to the Proxy Ballot (Cambridge 2005); Interviews with Ron Blackwell and with Damon Silvers, AFL-CIO, March 26, 2007).

2 *See generally* Robert J. Brown, Jr., *The Proxy Rules and Restrictions on Shareholder Voting Rights*, 47 SETON HALL L. REV. 45 (2016).

3 *Id.*

4 New York City Comptroller Scott M. Stringer, *Boardroom Accountability Project Overview*, http://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/overview/.

5 *Id.*

6 *Id.*

7 *Id.*

8 Council of Institutional Investors, *Proxy Access By Private Ordering*, (Feb. 2017) http://www.cii.org/files/publications/misc/02_02_17_proxy_access_private_ordering_final.pdf pg. 2.

9 Thomas W. Christopher & Tony Richmond, *Preparing for the 2017 Proxy Season*, HARV. L. SCH. FORUM ON CORP. AND FIN. REG., (Jan. 31, 2017) https://corpgov.law.harvard.edu/2017/01/31/preparing-for-the2017-proxy-season/.

10 Kevin H. Douglas, *Should Public Cos. Voluntarily Adopt Proxy Access*, LAW360 (Sept. 13, 2016). https://www.law360.com/articles/839066/should-public-cos-voluntarily-adopt-proxy-access.

11 *See* Kayla Sierra, *Proxy Access Reaches the Tipping Point: Adopted by Just Over 50% (251) of S&P 500 Companies as of December 31, 2016*, http://www.sidley.com/~/media/update-pdfs/2016/12/proxy-access-corporate-governance-report-december-2016.pdf.

12 David A. Katz & Laura A. McIntosh, *Senate Bill Adversely Affects the Landscape*, N.Y. L.J., (May 27, 2010), at 5.

13 David A. Katz & Laura A. McIntosh, *Populists' Wish Lists Offer Legislative Parade of Horribles*, N.Y. L.J., (July 23, 2009).; see also David A. Katz & Laura A. McIntosh, *Proxy Access: Not Then, Not Now*, N.Y. L.J., (Sept. 28, 2006), at 5; David A. Katz & Laura A. McIntosh, *SEC Revisits Shareholder Access to Director Nominations*, N.Y. L.J., (Aug. 30, 2007), at 5.

14 James McRitchie, *Proxy Access*, (Apr. 1, 2017). http://www.proxydemocracy.org/fund_owners/focus_lists/38302.

15 *Id.*

16 *Id.*

17 *Id.*

18 Was withdrawn due to a challenge of eligibility to use proxy access. *See generally* Exh. 99 Letter from Paula M. Ciprich, General Counsel of National Fuel Gas Company to David Goldman, General Counsel of GAMCO Asset Management Inc. (November 23, 2016) https://www.sec.gov/Archives/edgar/data/70145/000119312516776709/d296488dex99.htm.

19 *See* Kayla Sierra, *Proxy Access Reaches the Tipping Point: Adopted by Just Over 50% (251) of S&P 500 Companies as of December 31, 2016*, SIDLEY AUSTIN http://www.sidley.com/~/media/update-pdfs/2016/12/proxy-access-corporate-governance-report-december-2016.pdf.

20 *Ciprich,* supra, n. 18.

21 *See* Thomas W. Christopher & Tony Richmond *supra* n. 9.

22 Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,677-93 (Sept. 16, 2010) (75 Fed. Reg. 56,668, 56,677-93) (to be codified 17 C.F.R. pt. 200, 232,240, 249).

23 *See generally id.*

24 *See generally* Lucian Arye Bebchuk & Marcel Kahan, Article, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CALIF. L. REV. 1073, 1075 (1990).

25 *See* id. at 1074-75 (explaining further that dissidents may also wage a proxy contest and solicit votes for issues unrelated to director elections).

26 Troy Paredes, Comm'r, Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt the Final Rule Regarding Facilitating Shareholder Director Nominations (“Proxy Access”) (Aug. 25, 2010), http://www.sec.gov/news/speech/2010/spch082510tap.htm.

27 *See* Damon A. Silvers & Michael I. Garland, The Origins and Goals of the FIght for Proxy Access, in Shareholder Access to the Corporate Ballot 1, 1-2 (Lucian Bebchuk ed., Harvard Univ. Press 2004) (citations omitted).

28 Exchange Act Release No. 34-3347, 7 Fed. Reg. 10,653 (Dec. 18, 1942) (discussing that minority stockholders have the opportunity to support their own nominees for directorship by using “management's proxy material”).

29 *See* Exchange Act Release No. 34-13482, 42 Fed. Reg. 23,901 (Apr. 28, 1977); Exchange Act Release No. 34-13901, 42 Fed. Reg. 44,860 (Aug. 29, 1977); *see also* Task Force on Corp. Accountability, Staff Report on Corporate Accountability (Sept. 4, 1980) (printed for the use of Senate Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 2d Sess.), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1/collection/papers/1980/1980_0904_CorpFinStaffReport.pdf.

30 Exchange Act Release No. 34-31326, 57 Fed. Reg. 48,276 (Oct. 16, 1992).

31 *See* Exchange Act Release No. 34-48626, 68 Fed. Reg. 60,784 (Oct. 14, 2003); see also Letter from Sarah A.B. Teslik, Exec. Dir., Council of Institutional Investors, Jeanine Markoe Raymond, Dir. of Fed. Relations, Nat'l Ass'n of State Ret. Administrators, and Jim Mosman, Exec. Dir., Nat' Council on Teacher Ret., to Jonathan Katz, Sec'y, Sec. and Exch. Comm'n (Dec. 12, 2003) (on file with the Securities and Exchange Commission), https://www.sec.gov/rules/proposed/s71903/ciinasranctr121203.htm (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 see also* Letter from Sean Harrigan, President, Bd. of Admin, Cal. Pub. Employees' Ret. Sys., to Jonathan Katz, Sec'y, Sec. and Exch. Comm'n (Dec. 5, 2003) (on file with Securities and Exchange Commission) (proposing the possible rule could be the “most significant reform to come as a result of the financial market crisis in the U.S.”)

32 17 C.F.R. § 240.14a-11 (2011). Before its recent rulemaking, the SEC considered but did not adopt proxy access reform in 1942, 1977, 1992, and 2003. Facilitating Shareholder Director Nominations, Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024, 29,029 (proposed June 18, 2009); Silvers & Garland, *supra* n. 27, at 2

33 Boardroom Accountability Project Overview, *supra* n. 4.

34 Div. of Corp. Fin. Staff, Comm'n Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors (July 15, 2003) https://www.sec.gov/news/studies/proxyrpt.htm.

35 Surprisingly, the Commission's proposal itself makes no mention of these events. Exchange Act Release No. 34-48626, 68 Fed. Reg. 60,784 (Oct. 14, 2003)

36 The proposed rule, including some exceptions, would have required a company to include nominees and information concerning the nominees on their proxy card. *See* id.; *see also SEC Proxy Access Reform: Key Positions and Potential Outcomes*, ROCK CTR. FOR CORP. GOVERNANCE 1, 4 (Apr. 10, 2010), http://law.stanford.edu/wpcontent/uploads/sites/default/files/event/264193/media/slspublic/Stanford%20Rock%C20Center%C20Proxy%C20Access%C20Reform%20Paper_1.pdf (explaining the proposed rule, including some exceptions, would have required a company to include nominees and information concerning the nominees on their proxy card).

37 Am. Fed'n of State, Cty. and Mun. Employees v. Am. Int'l Grp., Inc., 462 F.3d 121, 129-31 (2d Cir. 2006).

38 Noam Noked, *Reacting to Shareholder Proxy Access Proposals*, HARV. L. SCH. F. ON CORP. GOV. AND FIN. REG. (Nov. 5, 2011). https://corpgov.law.harvard.edu/2011/11/05/reacting-to-shareholder-proxy-access-proposals/.

39 *AFSCME v. AIG*, 462 F.3d 121, 124 (2nd Cir. 2006).

40 *Id.*

41 *See* *id.* at 129-31.

42 *Id.*

43 Noked, *supra* note 38.

44 *In-Depth: Proxy Access*, GLASS LEWIS 1, 1 (March 2016) http://www.glasslewis.com/wpcontent/uploads/2016/03/2016-In-Depth-Proxy-Access.pdf.

45 *Id.*

46 Noked, *supra* n. 38.

47 Noam Noked, *Reacting to Shareholder Proxy Access Proposals*, HARV. L. SCH. F. ON CORP. GOV. AND FIN. REG. (Nov. 5, 2011). https://corpgov.law.harvard.edu/2011/11/05/reacting-to-shareholder-proxy-access-proposals/.

48 *Id.*

49 *Id.*

50 Proposed May 20, 2009, with a final rule passed in 2010. *See* Facilitating Shareholder Director Nominations, 17 C.F.R. 200, 232,240, and 249. (Sept. 16, 2010) (75 Fed. Reg. 56,668, 56,677-93).

51 Mary L. Schapiro, Chairman, Securities Exchange Commission, Speech at SEC Open Meeting on Facilitating Shareholder Director Nominations (May 20, 2009) http://www.sec.gov/news/speech/2009/spch052009mls.htm.

52 Dodd-Frank Act Release Nos. 33-9136 and 34-62764, 75 Fed. Reg. 56668 (September 16, 2010) (adopting release).

53 Dodd-Frank Act § 971; Exchange Act Release No. 33-9136 (2010).

54 Not all inclusive, only under certain circumstances. Steven Mark Levy, *Regulation of Securities: SEC Answer Book*, 10-60 (Wolters Kluwer Law and Business, 5th ed. 2016). The Rule 14a-8 amendments were originally adopted in 2010 in conjunction with the SEC's adoption of a universal proxy access rule. Rule 14a-11 would have required all companies to provide shareholders with direct access to company proxy materials for their director nominees. The SEC stayed the effectiveness of both rule changes pending resolution of litigation brought by business groups challenging Rule 14a-11.

55 *See id.*

56 *See id.*

57 S. Rep. No. 111-176, at 146 (2010) (discussing proxy access provision then numbered § 972)

58 *Id.*

59 Dodd-Frank § 971(c).

60 Jonathan B. Cohn, Stuart L. Gillan, & Jay C. Hartzell, *On Enhancing Shareholder Control: A (Dodd-) Frank Assessment of Proxy Access*, 71 J. Fin. 1623, 1624 (2016), available at https://irrcinstitute.org/wp-content/uploads/2016/12/2016-Honorble-Mention-Winner-by-Cohn.pdf.

61 *See id.* Generally referred to as large, medium, and small firms for simplicity. The minimum holdings of 1%, 3%, and 5% for firms with market capitalization greater than $700 million, between $75 and $700 million, and less than $75 million, respectively.

62 Regarding the Dodd proposal, one observer noted, "... the sucker was like a bolt from the heavens. It came out of nowhere" Ryan Grim & Shahien Nasiripour, Frank Battling White House on Proxy Access (Last updated Dec. 06, 2017), https://www.huffpost.com/entry/white-house-guts-reformt_n_615952. The move resulted in outrage on the part of investor groups, with suggestions that the revised threshold would "render this important shareowner right useless," and lobbying of White House representatives in an attempt to move away from the 5% constraint Victoria McGrane, *Group Targets Obama Adviser Jarrett on Proxy Access*, DOW JONES NEWSWIRES, (Jun. 18, 2010) https://www.lse.co.uk/news/group-targets-obama-adviser-jarrett-on-proxy-access-jbvgy93iypf5g1y.html.

63 For example, if a board had three members, shareholders could nominate one; if a board had eight members, up to two nominees could be proposed. The SEC also delayed the rule for three years for "smaller reporting companies". *See generally* Exchange Act Release No. 33-9136, 75 Fed. Reg. 56668, 56675 (2010).

64 *See id.*

65 *See id.*

66 Brief for Petitioner at 31, Bus. Roundtable v. S.E.C., 647 F.3d 1144 (No. 10-1305), 2010 WL 5116461, at *31

67 *Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1154 (D.C. Cir. 2011). As the final rule exempted firms with market capitalization below $75 million, this delay would have had a much smaller effect on the anticipated level of shareholder control in these firms.

68 *Id.*

69 *Id.* at 1149-51

70 *Id.* at 1150 The SEC "did nothing to estimate and quantify the costs it expected companies to incur" even though "empirical evidence about expenditures in traditional proxy contests was readily available." *Id.*

71 *Id.* at 1150-51

72 *Id.* at 1151

73 *Id.* at 1151-52

74 *Id.*

75 *Id.* at 1152

76 *Id.* at 1152-54

77 Final Brief of the Securities and Exchange Commission at 42-43, *Bus. Roundtable*, 647 F.3d 1144 (No. 10-1305), 2011 WL 2014799, at *42-43 (claiming that estimates for the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521 (2006 & Supp. IV 2011), designed to assess the burden of collecting and reporting information, did not have wide implications); *cf.* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 105 (1983) (suggesting a faulty projection was not necessarily arbitrary and capricious if it was made for a limited purpose).

78 *Bus. Roundtable*, 647 F.3d at 1153.

79 Press Release, Scott M. Stringer, Comptroller, N. Y. City, *NYC Pension Funds Launch National Campaign to Give Shareowners a True Voice in How Corporate Boards Are Elected* (Nov. 6, 2014) (on file with the NYC Comptroller's Office)., http://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-pension-funds-launch-national-campaign-to-give-shareowners-a-true-voice-in-how-corporate-boards-are-elected/.

80 *See id.*

81 Stringer, *supra* n. 4.

82 *Id.*

83 *See id.*

84 *See id.* Stronger board oversight effects executive pay, human capital, environmental risk, business strategy, and financial risk.

85 Stringer, *supra* n. 4

86 *Id.*

87 *Id.*

88 Press Release, Scott M. Stringer, N.Y. City Comptroller, *Announce Expansion of Boardroom Accountability Project (*Jan. 11, 2016) (on file with author/N.Y. Comptrollers Office), http://comptroller.nyc.gov/wp-content/uploads/2016/01/PR16-01-005.pdf.

89 *See id.*

90 *See id.*

91 Lyuba Goltser & Ellen Odoner, *Heads Up for the 2017 Proxy Season*, WEIL GOVERNANCE & SECURITIES ALERT (Nov. 11, 2016). http://www.weil.com/~/media/publications/sec-disclosure-corporate-governance/2016/pcag_alert_nov_11_2016.pdf.

92 Press Release, Scott M. Stringer, N.Y. City Comptroller, *Boardroom Accountability Enters Next Phase as Campaign Achieves Critical Mass* (Apr. 26, 2016) (on file with author/N.Y. City Comptrollers Office), http://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-funds-boardroom-accountability-enters-next-phase-as-campaign-achieves-critical-mass/.; *see also* N.Y. City Comptrollers

Office, *Boardroom Accountability Project Focus List*, N.Y. City Comptrollers Office, http://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/focus-companies/

93 Exh. 99 Furnished letter to GAMCO dated November 23, 2016. https://www.sec.gov/Archives/edgar/data/70145/000119312516776709/d296488dex99.htm.

94 *See id.* Including, as stated in the November 9 letter, GAMCO, Gabelli Funds, LLC, The Gabelli Dividend And Income Trust, The Gabelli Asset Fund, The Gabelli Value 25 Fund Inc., The Gabelli Utility Trust, The Gabelli Equity Trust Inc., The Gabelli Small Cap Growth Fund, The Gabelli Equity Income Fund, The Gabelli Global Rising Income & Dividend Fund, The Gabelli ABC Fund, The Gabelli Capital Asset Fund, The Gabelli Utilities Fund, and The Gabelli Global Utility & Income Trust (referred to collectively herein with GAMCO as "GAMCO").

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *See id.*

100 Michael Greene, GAMCO WITHDRAWS PROXY ACCESS NOMINEE AT NATIONAL FUEL GAS, BNA (Nov. 28, 2016) https://news.bloomberglaw.com/securities-law/gamco-withdraws-proxy-access-nominee-at-national-fuel-gas. (Stock ownership is based on GAMCO's disclosure in its Schedule 14N aggregate beneficial ownership.) According to its Schedule 13D filings, GAMCO has beneficially owned more than 3% for more than three years.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Proxy Access Bylaw Developments and Trends*, 2, SULLIVAN & CROMWELL LLP, (Aug. 18, 2015), https://sullcrom.com/siteFiles/Publications/SC_Publication_Proxy_Access_Bylaw_Developments_and_Trends.pdf.

105 *Id.* (citing NFG By-Laws Article IA, Section 6(E).) "This representation is derived from the standard under which an investor is required to file a Schedule 13D versus a Schedule 13G." *Id.* A shareholder may file a Schedule 13G only if it "has acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect." 17 CFR § 240.13d-1(b)(1). Similarly, a shareholder is no longer qualified to file a Schedule 13G, and *must* file a Schedule 13D, if it "[h]as acquired or holds the securities with a purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect." *Id.* § 240.13d-1(e)(1).

106 SEC Compliance and Disclosure Interpretations, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting at Question 103.11, https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm.

107 17 C.F.R § 240.13d-101.

108 *Id.*

109 *Exhibit 99*, S.E.C. letter to GAMCO (Nov. 23, 2016), https://www.sec.gov/Archives/edgar/data/70145/000119312516776709/d296488dex99.htm.

110 *Id.* at 2 (citing 17 CFR § 240.12b-2).

111 *Id.* at 3. GAMCO communicates its "disappointment" regarding decision not to pursue a failed shareholder proposal to establish a spin-off of NRG.

112 *See generally Id.* (internal citations omitted)(discussing GAMCO's repeated failed attempts in April 2014, May 2014, and September 2014 to have shareholders vote on a proposal that the Issuer's Board either spin off the Issuer's regulated natural gas utility business or its non-regulated operations.).

113 *Id.* at 5 (citing Mina Kimes, *Mario Gabelli Bets Big on Natural Gas*, FORTUNE (May 18, 2010).).

114 *Id.* at 4 (citing National Fuel Gas Company, Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Sched. 14A) (Jan. 23, 2015) (for Annual Stockholders Meeting to be held on March 12, 2015)).

115 *Id.* (citing VW Staff, *GAMCO Investors' First Proxy Access Nomination To The Board of National Fuel Gas*, ACTIVIST INSIGHT (Nov. 11, 2016).) Exhibit 99 also references two other recent incidents from November 10th and 14th. On the 10th, Mr. Gabelli reported that he wants the Company to explore other sources of capital and did not disavow desire to split up the company. On the 14th, an article noted Mr. Gabelli's unhappiness and frustration with management's failure to implement his proposal two years earlier to spin off the utility and buy other gas companies.

116 *Id.* at 5.

117 N. Peter Rasmussen, *The Curious Case of Proxy Access*, BLOOMBERG CORPORATE TRANSACTIONS BLOG (Feb. 27, 2017), https://www.bna.com/curious-case-proxy-b57982084512/.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.* Another interesting layer to Paragon is that this $11 billion law suit is filed against a six-million dollar company, "with the possible deep pockets of the audit firm."

124 *Id.*

125 Goltser & Odoner, *supra* n. 88.

126 *Id.*

127 Staff Legal Bulletin No. 14H (Oct. 22, 2015), https://www.sec.gov/interps/legal/cfslb14h.htm. Elaborating upon the nature of the no-action process, the Court has stated:

> "The no-action process works as follows: Whenever a corporation decides to exclude a shareholder proposal from its proxy materials, it "shall file" a letter with the Division explaining the legal basis for its decision. See Rule 14a-8(d)(3). If the Division staff agrees that the proposal is excludable, it may issue a no-action letter, stating that, based on the facts presented by the corporation, the staff will not recommend that the SEC sue the corporation for violating Rule 14a-8 .... The no-action letter, however, is an informal response, and does not amount to an official statement of the SEC's views .... No-action letters are deemed interpretive because they do not impose or fix legal relationship upon any of the parties."

AFSCME v. Am. Int'l Grp., Inc., 462 F.3d 123 n.1. (citing N.Y. City Employees' Ret. Sys. v. SEC, 45 F.3d 7, 12 (2d Cir. 1995).).

128 *Id.*

129 *Id.*

130 *Id.*

131 See *id.*

132 Whole Foods Market, Inc., Rule 14a-8 No-Action Letter (Jan. 16, 2015), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/jamesmcritchiecheveddenrecon011615-14a8.pdf.

133 *See id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *See* Staff Legal Bulletin No. 14H (CF), *supra* n. 121.

138 *James McRitchie,* SEC Withdraws No-Action: Rule 14a-8(i)(9) Suspended, CORPGOV (Jan. 19, 2015) http://www.corpgov.net/2015/01/sec-withdraws-no-action-from-whole-foods-rule-14a-8i9-suspended/.

139 *Id.*

140 *Id.*

141 Staff Legal Bulletin No. 14H (CF), *supra* n. 130.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 Fredrickson, *supra* n. 126.

147 Goltser & Odoner, *supra* n. 88.

148 *Id.*

149 *Id.*

150 Council of Institutional Investors, *Proxy Access By Private Ordering*, 2, (Feb. 2017), http://www.cii.org/files/publications/misc/02_02_17_proxy_access_private_ordering_final.pdf.

151 Goltser & Odoner, *supra* n. 88.

152 Cydney Posner, SEC continues to grant no-action relief in connection with proxy access fix-it proposals, COOLEY PUBCO BLOG (Mar. 7, 2017) https://cooleypubco.com/2017/03/07/sec-continues-to-grant-noaction-relief-in-connection-with-proxy-access-fix-it-proposals/.

153 *Id.*

154 *Id.*

155 *Id.* (citing E-mail from Shelley J. Dropkin, Deputy Corporate Secretary and General Counsel, Corporate Governance, Citigroup Inc. to SEC, Office of Chief Counsel, Division of Corporation Finance) (Feb. 16, 2017), (https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/kennethsteinercitigrouprecon030217-14a8.pdf.

156 *Id.*

157 *Compare* Letter from Commission staff to H&R Block, Inc. rejecting request for No-Action letter. (July 21, 2016) https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/mcritchieyoung072116-14a8.pdf., *with* Newell Rubbermaid No-Action Letter (March 9, 2016) https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/johncheveddennewell030916-14a8.pdf. (where the registrant adopted a new proxy access bylaw after a proxy access proposal was submitted).

158 Letter from Matt S. McNair, Senior Special Couns., SEC, Division of Corp. Fin., to Ronald O. Mueller, Gibson, Dunn & Crutcher, LLP (Sept. 27, 2016) https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchie092716-14a8.pdf.

159 Letter from Matt S. McNair, Senior Special Couns., SEC, Division of Corp. Fin., to Daniel J. Winnike, Esq., Fenwick & West, LLP (Sept. 27, 2016) https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchiecisco092716-14a8.pdf.

160 Letter from Matt S. McNair, Senior Special Couns., SEC, Division of Corp. Fin., to Gene D. Levoff, Apple, Inc. (Oct. 27, 2016) https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchieapple102716-14a8.pdf.

161 *See* No-Action Letters, *supra* n. 148-153.

162 *See, e.g.,* McNair, *supra* n. 152, at 3.

163 *Id.*

164 *See* Exchange Act Release No. 12999 (Nov. 22, 1976) ("[Mootness] has not been formally stated in Rule 14a- 8 in the past but which has informally been deemed to exist.")(alteration in original).

165 Exchange Act Release No. 20091 (August 16, 1983) ("The Commission proposed an interpretative change to permit the omission of proposals that have been 'substantially implemented by the issuer.' While the new interpretative position will add more subjectivity to the application of the provision, the Commission has determined that the previous formalistic application of this provision defeated its purpose.").

166 *See* Exchange Act Release No. 39093 1997 WL 578696 (Sept. 18, 1997) (proposing to alter standard of mootness to "substantially implemented").

167 Letter from Matt S. McNair, Senior Special Couns., SEC, Division of Corp. Fin., to Martin P. Dunn, Morrison & Foerster LLP (Nov. 2, 2016) (explaining a rejected request for a no-action letter) https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/johncheveddenwalgreens110316-14a8.pdf.

168 Letter from Matt S. McNair, Senior Special Couns., SEC, Division of Corp. Fin., to Lillian Brown, Wilmer Cutler Pickering Hale and Dorr LLP (Nov. 3, 2016) (explaining a rejected request for a no-action letter), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchiewalt110316-14a8.pdf.

169 Letter from Matt S. McNair, Senior Special Couns., SEC, Division of Corp. Fin., to Martin P. Dunn, Morrison & Foerster LLP (Nov. 3, 2016) (explaining a rejected request for a no-action letter), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchiewhole110316-14a8.pdf.

170 Letter from Matt S. McNair, Senior Special Couns., SEC, Division of Corp. Fin., to Mark S. Gerber, Skadden, Arps, Slate, Meagher & Flom LLP (Nov. 4, 2016) (explaining a granted request for a no-action letter), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/johncheveddenoshkosh110416-14a8.pdf.

171 Goltser & Odoner, *supra* n. 88. at 7. NVR first received a proposal from the NYC Comptroller for its May 2015 annual meeting. The NYC proposal failed to garner majority support, but NVR adopted proxy access in November 2015 with a 5/3/20/20 formulation. Upon receiving a proposal to amend its proxy access bylaw for the 2016 annual meeting, NVR requested and was denied no-action relief. NVR subsequently amended its bylaw to address two of the four requested amendments (including lowering the ownership threshold to 3%) and, upon reconsideration, the Staff granted relief.

172 *Id.*

173 *Id.*

174 *See* Sierra, *supra* n. 19.

175 *Id.*

176 *See* State Street Global Advisors, Proxy Voting and Engagement Guidelines (March 2016), https://www.ssga.com/investment-topics/environmental-social-governance/2016/Proxy-Voting-and-Engagement-Guidelines-US-20160301.pdf.

177 *See* T. Rowe Price, Proxy Voting Policies, https://www3.troweprice.com/usis/content/trowecorp/en/about/investment-philosophy/esg-investment-policy/_jcr_content/band-wrapper/paragraph_pdfs/right-pdf-01/pdffile.

178 Goltser & Odoner, *supra* n. 88. Stayed close to the 3/3/20/20 consensus, Black Rock increased the cap on number of nominees to 25%, whereas T. Rowe adopted at least 2 or 20% cap. State Street also limited aggregation of shares in regards to what kind of shares count for the ownership threshold.

179 *Id.*

180 *Id.*

181 *Id.* In 2016, ISS issued "against" or "withhold" recommendations in director elections at five companies that ISS viewed as not having been responsive to a majority-supported shareholder proxy access proposal voted on the prior year: CBL & Associate Properties, Inc., Cheniere Energy, Inc., Cloud Peak Energy Inc. (recommendation reversed after company amended its bylaw), Nabors Industries Ltd. and Netflix, Inc. It is important to note that many of the features that ISS identified as "problematic" in these cases are included in the proxy access bylaws adopted by a large number of companies to date.

182 *Id.*

183 *See id.* at 10. "ISS targeted (i) a lead director and a governance committee chair at one of these companies, (ii) the entire governance committee at two of these companies, and (iii) the entire board at two of these companies, that, in ISS's view, had a history of non-responsiveness." *Id.*

184 *See id.* at 9 (citing Glass Lewis & Co., Guidelines: *2016 Proxy Season, An Overview of the Glass Lewis Approach to Proxy Advice* 21 (2016), http://www.glasslewis.com/wp-content/uploads/2016/01/2016_Guidelines_United_States.pdf.

185 *See* CFA Inst., *Proxy Access in the United States: Revisiting the Proposed SEC Rule app. D* at 98 (2014), https://www.cfainstitute.org/-/media/documents/article/position-paper/proxy-access-in-united-states-revisiting-proposed-sec-rule.ashx (citing Peter Cziraki et al., Shareholder Activism Through Proxy Proposals: The European Perspective, 16 European Fin. Mgmt. 738, 738-77 (2010), https://ssrn.com/abstract=1510248

186 *See* CFA Inst., *Proxy Access in the United States: Revisiting the Proposed SEC Rule app. D* at 98 (2014), https://www.cfainstitute.org/-/media/documents/article/position-paper/proxy-access-in-united-states-revisiting-proposed-sec-rule.ashx (citing Jun Yang et al., An Empirical Analysis of Canadian Shareholder Proposals (Jul. 20, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1510248

187 *See* CFA Inst., *supra* n. 178, at 17-21. Subsequently, the CFA Institute conducted a cost-benefit analysis, finding proxy access would "benefit both the markets and corporate boardrooms, with little cost or disruption," raising US market capitalization by up to $140.3 billion. Id. at 8-9.

188 *See* Council of Institutional Investors, *supra* n. 8, at 2-4.

189 *See id.* at 2.

190 *Id.*

191 *See* Cydney Posner, *SEC continues to grant no-action relief in connection with proxy access fix-it proposals*, *supra* 133.

192 *See* Council of Institutional Investors, *supra* n. 8, at 2.

193 *See id.* at 3.

194 *Id.*

195 *Id.* Five companies (Boyd Gaming, CenturyLink, FirstMerit LSB Industries and TCF Financial) are known to require such continued ownership.

196 *See id.* at 4.

197 *Id.*

198 *Id.*

199 *Id.* at 5.

200 *Id.* at 4.

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id. at 5.*

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.* at 6.

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*

222 *See* Posner, *supra* note 145.

223 *Id.*

224 *See generally* 78 CONG. REC. S1,17-19 (1943)(testimony of Chairman Ganson Purcell).

225 *See generally* Section IV, Subsection c of this paper.

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Table of Authorities (14)

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—	**2. Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders** 1983 WL 33272, S.E.C. Release No., 1983 AGENCY: Securities and Exchange Commission. ACTION: Final rule. SUMMARY: The Commission announces the adoption of amended Rule 14a-8, which provides security holders a right to...	Administrative Decision & Guidance	—	63
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—	**4. American Federation of State, County & Municipal Employees v. American Intern. Group, Inc.** 462 F.3d 121, 2nd Cir.(N.Y.), 2006 BUSINESS ORGANIZATIONS - Officers and Directors. Shareholder proposal to establish procedural rules governing elections generally did not relate to election.	Case	—	63+
—	**5. Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.** 103 S.Ct. 2246, U.S.Dist.Col., 1983 Remand of orders of the Nuclear Regulatory Commission with respect to licensing of nuclear power plants, 547 F.2d 633, was reversed by the United States Supreme Court, 435 U.S....	Case	—	63

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—	**7. Business Roundtable v. S.E.C.** 647 F.3d 1144, D.C.Cir., 2011 SECURITIES REGULATION - Proxy Solicitation. SEC neglected its statutory obligation to assess economic consequences of proxy contest rule.	Case	—	63+
—	**8. FACILITATING SHAREHOLDER DIRECTOR NOMINATIONS** 2010 WL 3343532, S.E.C. Release No., 2010 AGENCY: Securities and Exchange Commission. ACTION: Final rule. SUMMARY: We are adopting changes to the federal proxy rules to facilitate the effective exercise of shareholders'...	Administrative Decision & Guidance	—	63+
—	**9. In re Sec. Holder Director Nominations** 2003 WL 22350515, S.E.C. Release No., 2003 AGENCY: Securities and Exchange Commission ACTION: Proposed rule. SUMMARY: We are proposing new rules that would, under certain circumstances, require companies to include in their...	Administrative Decision & Guidance	—	63+
—	**10. New York City Employees' Retirement System v. S.E.C.** 45 F.3d 7, 2nd Cir.(N.Y.), 1995 Institutional investors sued Securities and Exchange Commission (SEC) to enjoin it from announcing its new interpretation of agency rule in no-action letter without first...	Case	—	63+
—	**11. RE-EXAMINATION OF RULES RELATING TO SHAREHOLDER COMMUNICATIONS, SHAREHOLDER PARTICIPATION IN THE CORPORATE ELECTORAL PROCESS AND CORPORATE GOVERNANCE GENERALLY** 1977 WL 173444, S.E.C. Release No., 1977 AGENCY: Securities and Exchange Commission. ACTION: Request for Written Statements and Announcement of Hearings. SUMMARY: The Commission has requested written statements...	Administrative Decision & Guidance	—	63

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—	**13. Securities and Exchange Commission Release Notice** 1977 WL 173489, S.E.C. Release No., 1977 AGENCY: Securities and Exchange Commission. ACTION: Publication of issues to be considered at hearings and order of hearings. SUMMARY: In Securities Exchange Act Release No. 13482...	Administrative Decision & Guidance	—	63
—	**14. Securities and Exchange Commission Release Notice** 1942 WL 34864, S.E.C. Release No., 1942 The Securities and Exchange Commission today announced the adoption of several revisions to its proxy rules applicable to all solicitations after January 15, 1943. At the same time...	Administrative Decision & Guidance	—	63