AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Federal Register

Thursday,
June 18, 2009

Part II

Securities and Exchange Commission

17 CFR Parts 200, 232, 240 et al. Facilitating Shareholder Director Nominations; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 232, 240, 249 and 274

[Release Nos. 33–9046; 34–60089; IC–28765; File No. S7–10–09]

RIN 3235–AK27

Facilitating Shareholder Director Nominations

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing changes to the federal proxy rules to remove impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors. The new rules would require, under certain circumstances, a company to include in the company's proxy materials a shareholder's, or group of shareholders', nominees for director. The proposal includes certain requirements, key among which are a requirement that use of the new procedures be in accordance with state law, and provisions regarding the disclosures required to be made concerning nominating shareholders or groups and their nominees. In addition, the new rules would require companies to include in their proxy materials, under certain circumstances, shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with the Commission's disclosure rules—including the proposed new rules. We also are proposing changes to certain of our other rules and regulations—including the existing exemptions from our proxy rules and the beneficial ownership reporting requirements—that may be affected by the new proposed procedures.

DATES: Comments should be received on or before August 17, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–10–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–10–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/final.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

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

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

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I. The Need for Reforms to the Federal Proxy Rules

A. Overview

The nation and the markets have recently experienced, and remain in the midst of, one of the most serious economic crises of the past century. This crisis has led many to raise serious concerns about the accountability and responsiveness of some companies and boards of directors to the interests of shareholders, and has resulted in a loss of investor confidence. These concerns have included questions about whether boards are exercising appropriate oversight of management, whether boards are appropriately focused on shareholder interests, and whether boards need to be more accountable for their decisions regarding such issues as compensation structures and risk management. In light of the current economic crisis and these continuing concerns, the Commission has determined to revisit whether and how the federal proxy rules may be impeding the ability of shareholders to hold boards accountable through the exercise of their fundamental right to nominate and elect members to company boards of directors.

Regulation of the proxy process and disclosure is a core function of the Commission and is one of the original responsibilities that Congress assigned to the Commission in 1934. Section 14(a) of the Exchange Act [22] stemmed from a Congressional belief that ''[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.'' [23] The Congressional committees recommending passage of Section 14(a) proposed that ''the solicitation and issuance of proxies be left to regulation by the Commission'' [24] and explained that Section 14(a) would give the Commission the ''power to control the conditions under which proxies may be solicited.'' [25] Congress thus recognized a federal interest in the way public corporations handle the proxy process, and granted the Commission authority to prescribe rules to regulate the solicitation of proxies ''as necessary or appropriate in the public interest or for the protection of investors.'' [26]

Responding to the Commission's mandate from Congress, the Commission has actively overseen the development of the proxy process since 1934. The Commission has monitored the process and has considered changes when it appeared that the process was not functioning in a manner that adequately protected the interests of investors.[27] At the same time, the Commission has been mindful of the traditional role of the states in regulating corporate governance. For example, Exchange Act Rule 14a–8,[28] the shareholder proposal rule, explicitly provides that a company is permitted to exclude a shareholder proposal if it ''is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization'' [29] or ''[i]f the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject.'' [30]

In identifying the rights that the proxy process should protect, the Commission has sought to take as a touchstone the rights of shareholders under state corporate law. As Chairman Ganson Purcell explained to a committee of the House of Representatives in 1943:

> The rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law, to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on.[31]

This principle has given rise to a shorthand that explains much of the Commission's activity in regulating the proxy process. The proxy rules seek to improve the corporate proxy process so that it functions, as nearly as possible, as a replacement for an actual in-person meeting of shareholders.

Refining the proxy process so that it replicates, as nearly as possible, the annual meeting is particularly important given that the proxy process has become the primary way for shareholders to learn about the matters to be decided by the shareholders and to make their views known to company management.[32] Our recent examinations

[22] 15 U.S.C. 78n(a).

[23] H.R. Rep. No. 1383, 73d Cong., 2d Sess., 13. *See also Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 381 (1970); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 431 (1964).

[24] S. Rep. No. 792, 73d Cong., 2d Sess., 12 (1934).

[25] H.R. Rep. No. 1383, 73d Cong., 2d Sess., 14 (1934). The same report demonstrated a congressional intent to prevent frustration of the ''free exercise of the voting rights of stockholders.'' *Id.* Courts have found that the relevant legislative history also demonstrates an ''intent to bolster the intelligent exercise of shareholder rights granted by state corporate law.'' *Roosevelt* v. *E.I. Du Pont de Nemours & Co.,* 958 F.2d 416, 421 (D.C. Cir. 1992); *see Borak,* 377 U.S. at 431.

[26] 15 U.S.C. 78n(a).

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

[28] 17 CFR 240.14a–8.

[29] 17 CFR 240.14a–8(i)(1).

[30] 17 CFR 240.14a–8(i)(2).

[31] Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 before the House Committee on Interstate and Foreign Commerce, 78th Cong., 1st Sess. 172 (1943) (statement of SEC Chairman Ganson Purcell).

[32] *See, e.g.,* Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce, 78th Cong.,

Continued

of the proxy process and the comments that we have received in the course of these examinations suggest that the director nomination and shareholder proposal processes are two areas in which our current proxy rules pose impediments to the exercise of shareholders' rights.[33] These proposed amendments are intended to remove impediments so shareholders may more effectively exercise their rights under state law to nominate and elect directors at meetings of shareholders.

There are many competing policy arguments about the effect that shareholder-nominated directors or shareholder-proposed nomination procedures might have on a company and its governance. Some commenters believe that the presence of shareholder-nominated directors would make boards more accountable to the shareholders who own the company and that this accountability would improve corporate governance and make companies more responsive to shareholder concerns.[34] Some commenters further express the belief that, absent an effective way for shareholders to exercise rights to nominate and elect directors that state corporate law presumes shareholders have, the election of directors is a self-sustaining process of the board determining its members, with little actual input from shareholders.[35] Commenters have noted that without competition for director elections, directors are effectively unaccountable to shareholders and may lose sight of their proper role as representatives of the company.[36]

Similarly, foreign investors have noted the lack of accountability of directors in the United States compared with other countries, stating among other things that ''[t]he harsh reality is that U.S. corporate governance practices are on a relative decline compared to other leading markets.'' [37] In that vein, the Committee on Capital Markets Regulation has observed that this ''difference creates an important potential competitiveness problem for U.S. companies.'' [38] Other commenters have expressed concern that the relative inability of shareholders of U.S. companies to participate in the selection of directors compared with shareholders of their foreign competitors creates a competitiveness problem for U.S. companies.[39]

Academic literature also has highlighted the roles of boards of directors at companies that have demonstrated corporate governance failings. Such literature points to a link between board accountability and company performance.[40] In recognition of this link, Congress passed the Sarbanes-Oxley Act of 2002 to help strengthen corporate governance at public companies.[41] Commenters additionally have argued that competition for board seats might lead companies to nominate directors who are better qualified and more independent.[42]

On the other side of the debate, some commenters have raised concerns that shareholder-nominated directors could impede the proper functioning of companies and cause inefficiencies. For example, some argue that a shareholder-nominated director may be beholden to and focused solely on the concerns of the nominating shareholder or group, with the potential result being that a small number of shareholders could impose their unique concerns on the company and the rest of shareholders.[43] Additionally, some commenters have suggested that the presence of a shareholder-nominated director could disrupt the functioning of the board and could even lead to the company moving in a direction that does not reflect the interests of its shareholders overall.[44] Others have raised concerns that the possibility of a contested election could deter qualified candidates from seeking to serve as members of a board.[45]

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

[33] *See, e.g.,* Unofficial Transcript of the Roundtable Discussion on Proposals for Shareholders, May 25, 2007, comments of Leo E. Strine Jr., Vice Chancellor, Court of Chancery of the State of Delaware (Vice Chancellor Strine), at 112, *available at: http://www.sec.gov/news/openmeetings/2007/openmtg_trans052507.pdf* (observing that it is ''a little bit perverse'' that ''a bylaw dealing with the election process that might well have been viable under state law was kept off the ballot when you could have something that was precatory mandated to be on the ballot'').

[34] *See, e.g.,* comment letters on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from James McRitchie, Corporate Governance (October 1, 2007) (''McRitchie 2007''); and Stephen Abrecht, Executive Director, SEIU Master Trust (October 1, 2007) (''SEIU'').

[35] *See, e.g.,* 2004 Roundtable Submission of Lucian Bebchuk: Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot,* 59 The Business Lawyer 43, 49 (2003) (''Bebchuk 2003 Article'') (''Suppose that there is a widespread concern among shareholders that a board with a majority of independent directors is failing to serve shareholder interests. It is precisely under such circumstances that the nominating committee cannot be relied on to make desirable replacements of members of the board or even of members of the committee itself—at least not unless shareholders have adequate means of applying pressure on the committee.'').

[36] *See, e.g.,* comment letter on 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from William Apfel, et al., Walden Asset Management (September 11, 2007).

[37] Comment letter on 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from Michael O'Sullivan, President, Australian Council of Super Investors, et al. (October 2, 2007). *See also* Michelle Edkins, Acting Chairman, International Corporate Governance Network Shareholder Rights Committee (October 2, 2007) and Knut Kjer, CEO, Norges Bank Investment Management, et al. (September 28, 2007).

[38] Committee on Capital Markets Regulation, *Interim Report* (November 30, 2006) at 109, *available at: http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.*

[39] *See* comment letter on 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from Carl Levin, United States Senator, (September 27, 2007) at page 6.

[40] *See, e.g.,* Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors—A Decision-Making Analysis,* 5 Berkeley Bus. L.J. 131 (2008).

[41] *See, e.g.,* Section 301 of the Sarbanes-Oxley Act of 2002, inserting Section 10A(m) to the Exchange Act, which directed the Commission to promulgate rules requiring the national securities exchanges to ''prohibit the listing of any security of an issuer that is not in compliance'' with the Act's audit committee provisions. As a consequence, listed companies are now required to have audit committees composed solely of independent directors.

[42] *See generally* Bebchuk 2003 Article. *See also In re Oracle Corp. Derivative Litigation,* 824 A.2d 917, 941 (Del. Ch. 2003) (''The recent reforms enacted by Congress and by the stock exchanges reflect a narrower conception of who they believe can be an independent director. These definitions, however, are blanket labels that do not take into account the decision at issue. Nonetheless, the definitions recognize that factors other than the ones explicitly identified in the new exchange rules might compromise a director's independence, depending on the circumstances.'').

[43] *See, e.g.,* comment letters on 2007 Proposals from Thomas Wilson, President, The Allstate Corporation (October 2, 2007) and David T. Hirschmann, Senior Vice President, U.S. Chamber of Commerce (October 2, 2007).

[44] *See, e.g.,* comment letter on 2007 Proposals from Anne M. Mulcahy, Chairman, Business Roundtable Corporate Governance Task Force, Business Roundtable (October 1, 2007) (''Mulcahy, BRT'').

[45] *Id.*

We recognize that there are long-held and deeply felt views on both sides of these issues. The action we take today is focused on removing burdens that the federal proxy process currently places on the ability of shareholders to exercise their basic rights to nominate and elect directors. If we adopted rules to remove those burdens, we believe that these rules would facilitate shareholders' ability to participate more fully in the debates surrounding these issues. To the extent shareholders have the right to nominate directors at meetings of shareholders, the federal proxy rules should not impose unnecessary barriers to the exercise of this right.[46] The SEC's mission is investor protection, and we believe that investors are best protected when they can exercise the rights they have as shareholders, without unnecessary obstacles imposed by the federal proxy rules.

Based on the staff's and Commission's review of the proxy solicitation process and the extensive public input that we have received over the past several years on the topic of shareholders' ability to meaningfully exercise their rights to vote for and nominate directors of the companies in which they invest, we have decided to propose changes to the current proxy rules relating to the nomination of directors. First, we believe that we can and should structure the proxy rules to better facilitate the exercise of shareholders' rights to nominate and elect directors. The right to nominate is inextricably linked to, and essential to the vitality of, a right to vote for a nominee.[47] The failure of the proxy process to adequately facilitate shareholder nomination rights has a direct and practical effect on the right to elect directors.[48] As noted, the proxy rules have been designed to improve the proxy process so that it functions, as nearly as possible, as a replacement for an in-person meeting of shareholders. This is important because the proxy process today represents shareholders' principal means of participating effectively at an annual or special meeting of shareholders.[49] Based on the feedback we have received over the last few years, it appears that the federal proxy process may not be adequately replicating the conditions of the shareholder meeting. Second, we believe that parts of the federal proxy process may unintentionally frustrate voting rights arising under state law, and thereby fail to provide fair corporate suffrage. These two potential shortcomings in our regulations provide compelling reasons for us to reform the proxy process and our disclosure requirements relating to director nominations.[50] The comments received on the Commission's recent proposals on this topic in 2003 and in 2007, as well as the Roundtables held by the Commission in 2004 and 2007, helped form the basis for our beliefs.[51]

B. Shareholder Participation in the Nomination and Election Process

1. Existing Shareholder Options

Many commenters have noted that current procedures available for director nominations afford little practical ability for shareholders to participate effectively in the nomination process and, through that process, exercise their rights and responsibilities as owners of their companies.[52] If shareholders are dissatisfied with their company's performance and believe that the problem lies with the ineffectiveness of the company's board of directors, the existing proxy process provides shareholders with three principal options to attempt to effect change.[53] First, shareholders can mount a proxy contest in accordance with our proxy rules. Second, shareholders can use the shareholder proposal procedure in Rule 14a–8 to submit proposals and have a vote on topics that are important to them. Third, shareholders can conduct a ''withhold vote'' or ''vote no'' campaign against one or more directors.[54]

Shareholders also can use options that exist outside of the proxy process. For example, shareholders can sell their shares (sometimes referred to as the ''Wall Street Walk''); they can engage in a dialogue with management (including recommending a candidate to the

[46] *See, e.g.,* Unofficial Transcript of the Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007), comments of R. Franklin Balotti, Director, Richards, Layton & Finger, P.A., at 14–17, *available at: http://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf;* Unofficial Transcript of the Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007), comments of Vice Chancellor Strine, at 18–23; and Unofficial Transcript of the Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007), comments of Stanley Keller, Edwards Angell Palmer & Dodge LLP, at 142–143.

[47] *See, e.g., Durkin* v. *Nat'l Bank of Olyphant,* 772 F.2d 55, 59 (3d Cir. 1985) (stating that ''the unadorned right to cast a ballot in a contest for office, a vehicle for participatory decisionmaking and the exercise of choice, is meaningless without the right to participate in selecting the contestants. As the nominating process circumscribes the range of the choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed candidate selection process thus renders the former an empty exercise. This is as true in the corporate suffrage context as it is in civic elections, where federal law recognizes that access to the candidate selection process is a component of constitutionally-mandated voting rights. *See United States* v. *Classic,* 313 U.S. 299, 316–317, 85 L.Ed. 1368, 61 S.Ct. 1031 (1941) (article I, section 2, right to choose congressional representatives includes the right to participate in primary elections); *Smith* v. *Allwright,* 321 U.S. 649, 661–662, 88 L.Ed. 987, 64 S.Ct. 757 (1944) (fifteenth amendment prohibition of race-based abridgement of voting rights applies to primary as well as general elections). Banks do not exist for the purpose of creating an aristocracy of directors and officers which can continue in office indefinitely, immune from the wishes of the shareholder-owners of the corporation. And there is no more justification for precluding shareholders from nominating candidates for their board of directors than there would be for public officials to deny citizens the right to vote because of their race, poverty or sex. *Cf.* U.S. Const. amends. XV, XXIV, and XIX.'' *id.* at 59 (emphasis added)); and *Hubbard* v. *Hollywood Park Realty Enterprises, Inc.,* 1991 Del. Ch. LEXIS 9 (Del. Ch. Jan. 14, 1991) (quoting *Durkin*).

[48] *Shoen* v. *Amerco,* 885 F.Supp. 1332, 1342 (D. Nev. 1994) (''unadorned right to cast a ballot in a contest for office, after all, is meaningless without the right to participate in selecting the contestants'' (internal quotation marks omitted)).

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

[50] The Commission's proxy rules have required shareholder proposals on certain matters to be included in company proxy materials since 1940 (*see* Release No. 34–2376 (January 12, 1940)), subject to amendment from time to time pursuant to the Commission's dynamic regulation of the proxy process.

[51] *See* 2003 Proposal; Shareholder Proposals Proposing Release; Election of Directors Proposing Release; and Election of Directors Adopting Release. *See also,* Section II, below, regarding the Commission's consideration of the proxy rules.

[52] *See, e.g.,* 2003 Staff Report and summary of comments in response to the Commission's May 1, 2003 solicitation of comments.

[53] Commenters on the 2003 Proposal discussed the range of options currently available. *See, e.g.,* comment letters from Ashland, Inc. (December 17, 2003) (''Ashland''); Conoco-Phillips (December 31, 2003); Delphi Corporation (December 10, 2003); Emerson Electric Co. (December 15, 2003); Financial Services Roundtable (December 22, 2003); Kerr-McGee Corporation (December 22, 2003) (''Kerr-McGee''); Independent Community Bankers of America (December 22, 2003); Letter Type D; Malcom S. Morris (November 6, 2003) (''Morris''); Office Depot, Inc. (December 22, 2003) (''Office Depot''); Valero Energy Corporation (December 18, 2003) (''Valero''); and Wachtell Lipton Rosen & Katz (November 14, 2003) (''Wachtell''). *Cf. Blasius,* 564 A.2d at 659 (''Generally, shareholders have only two protections against perceived inadequate business performance. They may sell their stock (which, if done in sufficient numbers, may so affect security prices as to create an incentive for altered managerial performance), or they may vote to replace incumbent board members.'').

[54] In the case of plurality voting, shareholders may vote in the election of directors for, or withhold authority to vote for, each nominee rather than vote for, against or abstain, as is the case for other matters to be voted on by shareholders. *See* Exchange Act Rule 14a–4(b)(2).

nominating committee); or they can propose a board nominee at a shareholder meeting. Each of these options has drawbacks that limit its effectiveness.[55]

a. Options Using the Proxy Process

Shareholders' existing options under the proxy rules to exercise their ownership rights are often criticized. The chief complaint from shareholders about the existing options is the high cost involved in mounting a proxy contest under the Commission's proxy rules. Because this cost must be borne by the shareholders undertaking the contest, the option generally is not used outside the corporate-control context, where the cost may be better justified.[56] A shareholder or group of shareholders that is dissatisfied with the leadership of a company generally, but is not seeking a change in control must, as a result of our proxy rules, nevertheless undertake a proxy contest, along with its related expenses and other burdens, to put nominees before the shareholders for a vote. The shareholder proposal process in Rule 14a–8, under which a company may be required to include a shareholder proposal in the company proxy materials, also has been criticized as an ineffective tool for exercising ownership rights, as Rule 14a–8 is not available for proposals that relate to director elections.[57] With regard to withhold vote and vote no campaigns, because some companies use plurality voting for board elections and therefore candidates can be elected regardless of whether they receive more than 50% of the shareholder vote, withhold vote campaigns may be limited in their effectiveness. In addition, restrictions under the proxy rules may limit the effectiveness of withhold vote and vote no campaigns because shareholders cannot solicit proxy authority through these campaigns.

Further, in any vote for the election of directors, customary election processes may serve to amplify the practical effect that the proxy rules have in impeding shareholder nominees.[58] In particular, as noted with regard to withhold vote campaigns, for companies using plurality rather than majority voting for board elections, nominees generally can be elected as director regardless of whether they receive a majority of the shareholder vote.[59] Therefore, in an election in which there are the same number of nominees as there are board positions open, each nominee receiving even a single vote will be elected, regardless of the number of votes withheld from a nominee.

b. Options Outside the Proxy Process

Shareholders also are critical of the options available to them outside the proxy process. The ''Wall Street Walk'' is not an optimal solution because it may not be practical for large institutional shareholders and others who follow a passive management or indexing strategy, and it may require investors to lock in a loss.[60] Selling shares may be very costly for these types of investors because they may face liquidity issues as a result of the size of their holdings and may be forced to sell their holdings in a manner that results in capital gains and therefore is not tax efficient. In addition, while selling shares may depress the stock price, leading to higher cost of capital for the firm and thus may ultimately spur management changes,[61] the investor who sold its shares will not benefit from any improvement that follows the management change.

Engaging management in a dialogue also may not be an effective option for shareholders because company management may be unresponsive to investor concerns.[62] While shareholders can recommend an individual for nomination as director to a company's nominating committee, we understand these recommendations are rarely accepted by nominating committees.[63] Moreover, in some cases, shareholders may not be able to exercise their state law rights effectively because they have had difficulty gaining access to members of company boards and their committees.[64]

Finally, given the near universal use of proxy voting and the inability of shareholders to use the company proxy to vote for shareholder nominees, it can be futile to nominate a director in person at a shareholder meeting.[65]

[55] *See, e.g.,* comment letter on the 2003 Proposal from The Corporate Library (December 22, 2003) (''Corporate Library'') (''Shareholders can sell the stock at what they perceive to be a substantial discount. Or they can run their own slate of candidates, paying 100 percent of the costs, which may come to hundreds of thousands or even millions of dollars, for only a pro rata share of any increase in shareholder value as a result of the contested election. Meanwhile, management will spend the shareholders' money to fight them. This is not a level playing field. It is close to perpendicular.'').

[56] *See, e.g.,* Corporate Library. *See also* Bebchuk 2003 Article at 46. Surveying data from contested elections from 1996 to 2002, Professor Bebchuk concludes that ''the safety valve of potential ouster via the ballot is currently not working. In the absence of an attempt to acquire the company, the prospect of being removed in a proxy contest is far too remote to provide directors with incentives to serve shareholders.'' The principal reason the costs could be better justified in the corporate control context is because benefits that are expected to arise from a successful contest are internalized by the shareholder undertaking the contest.

[57] Exchange Act Rule 14a–8(i)(8).

[58] *See, e.g.,* Unofficial Transcript of the Security Holder Director Nominations Roundtable (March 10, 2004) (''2004 Roundtable Transcript''), comments of Ira M. Millstein, Weil, Gotshal & Manges, *available at: http://www.sec.gov/spotlight/dir-nominations/transcript03102004.txt.*

[59] Under plurality voting, the nominee with the greatest number of votes is elected. *But see* footnote 69, below (noting that some companies using a plurality standard have adopted policies requiring incumbent directors to resign if they receive less than majority support). Shareholders at companies using majority voting, or some other voting method other than plurality voting, may be better able to express dissatisfaction with a company's nominee or nominees. As discussed, in recent years, many companies have adopted a majority voting standard.

[60] *See* 2003 Summary of Comments, text at notes 9–10. Although the AFL–CIO noted that active managers of mutual funds can sell their shares in a company with an ''ineffective or unresponsive board,'' pension fund managers, including the AFL–CIO and Amalgamated Bank Longview Fund, noted that the issue of director accountability is more important to them because they may manage index funds that are necessarily long-term investors who cannot easily sell. *See* comment letters from American Federation of Labor and Congress of Industrial Organizations (December 19, 2003) (''AFL–CIO'') and Amalgamated Bank LongView Funds (December 21, 2003) (''LongView''). *See also* 2004 Roundtable Transcript, comments of Richard H. Moore, Treasurer of North Carolina.

[61] *See* 2004 Roundtable Transcript, comments of Peter J. Wallison, American Enterprise Institute.

[62] *See, e.g.,* comment letters on the 2003 Proposal from Lucian A. Bebchuk (December 22, 2003) (''Bebchuk''); California Public Employees' Retirement System (''CalPERS''); California State Teachers' Retirement System (''CalSTRS'') (December 4, 2003); Charles Capito (October 20, 2003); Council of Institutional Investors (''CII'') (December 12, 2003); Creative Investment Research (''CIR'') (December 22, 2003); Corporate Library; and Aaron Rosenthal (October 20, 2003).

[63] *See, e.g.,* Division of Corporation Finance, U.S. Securities and Exchange Commission, *Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors* (July 15, 2003), *available at: http://www.sec.gov/news/studies/proxyreport.pdf; see also,* comment letter on the 2003 Proposal from CII; and Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors—A Decision-Making Analysis,* 5 Berkeley Bus. L.J. 131 (2008).

[64] *See, e.g.,* comment letter on the 2003 Proposal from CII; comment letter on 2007 Proposals from SEIU. *See also* Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors—A Decision-Making Analysis,* 5 Berkeley Bus. L.J. 131 (2008). *See also* Division of Corporation Finance, U.S. Securities and Exchange Commission, *Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors* (July 15, 2003), *available at: http://www.sec.gov/news/studies/proxyreport.pdf.*

[65] *See* Unofficial Transcript of the Roundtable Discussion Regarding the Federal Proxy Rules and State Corporation Law (May 7, 2007), comments of Vice Chancellor Strine at 79 (commenting that ''this annual meeting thing could be a fix'' where the most active shareholder institutions gain representation on the board through other means such as through litigation settlement); *see generally,* 5 Fletcher Cyclopedia of Corporations § 2049.10 (Perm. Ed.) (''In large corporations, the shareholders' meeting is now only a necessary formality; the shareholders' expression can only be had by the statutory device of proxies and solicitation of proxies.'').

2. Recent Corporate Governance and Other Reforms

Over the past several years there have been a number of changes in corporate governance practices and the federal securities laws that may have mitigated some of the concerns expressed by commenters in 2003 and 2007 but, in our view, have not sufficiently addressed the central problem that we are seeking to solve—shareholders' limited ability to exercise their rights to nominate directors and have the nominations disclosed to and considered by the shareholders. For example, some commenters on the 2003 Proposal urged the Commission to defer action in order to assess the effectiveness of the then recently-enacted Sarbanes-Oxley Act of 2002 and other reforms, including enhanced director independence requirements and expansion of the nominating committee function at public companies.[66] Other commenters, while praising these reforms, doubted that they would be sufficient to address the problems that they hoped would be remedied through reform of the proxy process itself.[67] In particular, commenters in 2003 argued that objective independence standards for directors and the use of independent nominating committees, without more, may not counteract the perceived tendency of some boards to defer to management, given factors such as the significant personal relationships that can exist between directors and officers.[68] Therefore, shareholders may still want, but currently may not be able, to effectively nominate and elect directors that satisfy independence concerns specific to the companies in which they invest.

Since the 2003 Proposal, a number of other changes in the governance landscape have occurred, including a significant movement by larger companies toward majority voting rather than plurality voting in director elections,[69] and changes in state law to more expressly indicate that corporate governing documents may set out shareholders' right to nominate directors.[70] The Commission also has adopted changes to our rules, including enhanced disclosure requirements concerning nominating committees[71] and changes to our proxy rules to facilitate the use of electronic shareholder forums.[72] While these and other changes have been significant, after considering the views discussed throughout the release, we believe the federal proxy process could still be improved to further remove impediments to the exercise of shareholders' rights under state law to nominate directors.

II. Recent Commission Consideration of the Proxy Rules and Regulations Addressing the Election of Directors[73]

A. 2003 Review of the Proxy Process and Subsequent Rulemaking

In April 2003, the Commission directed the Division of Corporation Finance to review the proxy rules and regulations and interpretations regarding procedures for the nomination and election of corporate directors[74] and on May 1, 2003, the Commission solicited public input with respect to the Division's review.[75] Commenters generally supported the Commission's decision to review the proxy rules and regulations with respect to director nominations and elections and, in July 2003, the Division of Corporation Finance provided to the Commission its report and recommended changes to the proxy rules related to the nomination and election of directors.[76]

The Division recommended proposed changes in two areas: (1) Disclosure related to nominating committee functions and shareholder communications with boards of directors; and (2) enhanced shareholder access to the proxy process relating to the nomination of directors.[77] The Commission proposed and adopted the recommended disclosure requirements concerning nominating committee functions and shareholder communications with boards of directors.[78] In addition, in October 2003, the Commission proposed rules that would have created a mechanism for nominees of long-term shareholders, or groups of long-term shareholders, with significant shareholdings to be included in company proxy materials.[79]

[66] *See, e.g.,* comment letter from American Bar Association (January 7, 2004) (''ABA'').

[67] 2004 Roundtable Transcript, comments of Nell Minow and Ralph V. Whitworth.

[68] *See generally,* Bebchuk. *See also In re Oracle Corp.,* 824 A.2d at 941. *See* footnote 42, above.

[69] The Corporate Library reports that as of December 2008, 49.5 percent of companies in the S&P 500 had made the switch to majority voting for director elections and another 18.4 percent had, while retaining a plurality standard, adopted a policy requiring that a director that does not receive majority support must submit his or her resignation. On the other hand, the plurality voting standard is still the standard at the majority of smaller companies in the Russell 1000 and 3000 indices, with 54.5 percent of companies in the Russell 1000 and 74.9 percent of the companies in the Russell 3000 still using a straight plurality voting standard. The Corporate Library Analyst Alert, December 2008. *See also* Broadridge letter dated March 27, 2009 and attached analysis in response to File No. SR–NYSE–2006–92 (stating that in calendar year 2007, 373 NYSE-listed companies had a majority vote standard for the election of directors).

[70] In *CA, Inc.* v. *AFSCME,* 953 A.2d 227 (Del. 2008), the Delaware Supreme Court held that shareholders can propose and adopt a bylaw regulating the process by which directors are elected. In light of this ruling, Delaware recently amended the Delaware General Corporation Law to add new Section 112, effective August 1, 2009, clarifying that the bylaws of a Delaware corporation may provide that, if the corporation solicits proxies with respect to an election of directors, the corporation may be required to include in its solicitation materials one or more individuals nominated by a stockholder in addition to the individuals nominated by the board of directors. The obligation of the corporation to include such stockholder nominees will be subject to the procedures and conditions set forth in the bylaw adopted under Section 112. Delaware also added new Section 113, which will allow a Delaware corporation's bylaws to include a provision that the corporation, under certain circumstances, will reimburse a stockholder for the expenses incurred in soliciting proxies in connection with an election of directors. In addition, the American Bar Association's Committee on Corporate Laws, which is responsible for the Model Business Corporation Act, is considering similar changes to the Model Act. *See* American Bar Association, Section of Business Law, ''Corporate Laws Committee To Address Current Governance Issues,'' April 29, 2009 (noting that Delaware's recent statutory amendments ''are being actively considered by the Committee'') (*available at: http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=662*). Thirty states have adopted all or substantially all of the Model Act as their general corporation statute.

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

[71] *See Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors,* Release No. 33–8340 (December 11, 2003) [68 FR 69204].

[72] *See Electronic Shareholder Forums,* Release No. 34–57172 (January 18, 2008) [73 FR 4450] (''Electronic Shareholder Forums Release'').

[73] The Commission also has considered the topic on at least three earlier occasions—in 1942, 1977, and 1992. For a discussion, *see* 2003 Proposal.

[74] *See* Press Release No. 2003–46 (April 14, 2003).

[75] *See* Release No. 34–47778 (May 1, 2003) [68 FR 24530] and comment file number S7–10–03.

[76] *See* Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (July 15, 2003) (''2003 Staff Report''), *available at: http://www.sec.gov/news/studies/proxyrpt.htm. See also* Summary of Comments in Response to the Commission's Solicitation of Public Views Regarding Possible Changes to the Proxy Rules (July 15, 2003), attached as Appendix A to the Staff Report.

[77] *See* 2003 Staff Report.

[78] *Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors,* Release No. 33–8340 (December 11, 2003) [68 FR 69204].

[79] *See* 2003 Proposal. The proposal would have required shareholders to have held the requisite amount of securities to meet the ownership

Continued

The proposed new rules were intended to address perceived inadequacies in the proxy process with respect to director nominations and elections.[80] The proposal generated significant public comment, with shareholders generally supporting adoption of rules that would facilitate their right to nominate directors and companies and their advisors generally opposing such rules because of concerns that a requirement to include shareholder director nominees in the company's proxy materials would impede the proper functioning of boards and cause inefficiencies.[81] The Commission did not adopt final rules based on the proposal.

B. 2007 Rulemaking Concerning Shareholder Proposals Seeking to Establish Bylaw Procedures for Shareholder Director Nominations

One of the means that shareholders use to express their views on the management and affairs of a company is through shareholder proposals, which are addressed in Rule 14a–8. Rule 14a–8 provides shareholders with an opportunity to place a proposal in a company's proxy materials for a vote at an annual or special meeting of shareholders. Under this rule, a company generally is required to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the rule's 13 substantive bases for exclusion. One of the substantive bases that a company may rely on in excluding a shareholder proposal is Rule 14a–8(i)(8), which addresses shareholder proposals concerning director elections.[82] This provision frequently is referred to as the ''election exclusion.'' In interpreting this provision, the Commission took the position in 2007 that Rule 14a–8(i)(8) permits exclusion of a proposal that would establish a procedure that may result in contested elections to the board.[83]

In 2006, the U.S. Court of Appeals for the Second Circuit, in *American Federation of State, County and Municipal Employees, Employees Pension Plan* v. *American International Group, Inc.,*[84] held that AIG could not rely on Rule 14a–8(i)(8) to exclude a shareholder proposal that, if adopted, would have amended AIG's bylaws to require the company, under specified circumstances, to include shareholder nominees for director in the company's proxy materials at subsequent meetings. The Second Circuit interpreted the language of the rule[85] and the Commission's statements in adopting the rule in 1976 as limiting the election exclusion ''to shareholder proposals used to oppose solicitations dealing with an identified board seat in an upcoming election and reject[ing] the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures making such election contests more likely.''[86] The effect of the *AFSCME* decision was to permit the bylaw proposal to be included in company proxy materials and, had the bylaw been approved by shareholders, for subsequent election contests conducted under it to take place in the company's proxy materials without compliance with the disclosure requirements applicable to election contests under the Commission's other proxy rules.[87] The Commission was concerned that the Second Circuit's decision resulted in uncertainty and confusion with respect to the appropriate application of Rule 14a–8(i)(8), and that it could lead to contested elections for directors without the disclosure otherwise required under the proxy rules for contested elections.[88] This concern led the Commission to reopen the issue of shareholder involvement in the nomination and election process.[89]

In May 2007, the Commission hosted three roundtables on the proxy process during which a number of individuals and representatives from the public and private sector focused on the relationship between the proxy rules and state corporate law,[90] proxy voting mechanics,[91] and shareholder proposals.[92] Following the roundtables, in July 2007, the Commission published for comment two alternative proposals addressing the election exclusion in Rule 14a–8. The first would have amended Rule 14a–8 to enable

threshold for two years as of the date of the nomination.

[80] *See* 2003 Proposal (explaining that the proposal would ''apply only in those instances where criteria suggest that the company has been unresponsive to security holder concerns as they relate to the proxy process'').

[81] *See* 2003 Summary of Comments.

[82] Rule 14a–8(i)(8) provides that a company need not include a proposal that ''relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election[.]''

[83] *See* Election of Directors Adopting Release (citing Commission statements made in Release No. 34–12598 (July 7, 1976) (''[T]he principal purpose of [Rule 14a–8(i)(8)] is to make clear, with respect to corporate elections, that Rule 14a–8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature, since other proxy rules, including Rule 14a–[12], are applicable thereto.'')). *See also* Division of Corporation Finance no-action letters to *Citigroup, Inc.* (January 31, 2003) and *AOL Time Warner* (February 29, 2003). As noted in the Election of Directors Proposing Release, in each of 1993 and 1995, the Division issued one letter that took a contrary view. *See Dravo Corp.* (February 21, 1995); and *Pinnacle West Capital Corp.* (March 26, 1993) (not permitting exclusion under Rule 14a–8(i)(8) of proposals seeking to include qualified nominees in the company's proxy statement).

[84] 462 F.3d 121 (2d Cir. 2006) (*AFSCME*).

[85] At the time of the *AFSCME* decision, Rule 14a–8(i)(8) provided that a company need not include a proposal that ''relates to an election for membership on the company's board of directors or analogous governing body.'' *See id.* at 125. This language was amended in 2007. *See* Election of Directors Adopting Release.

[86] 462 F.3d at 128.

[87] Exchange Act Rule 14a–12(c) [17 CFR 240.14a–12(c)] defines an election contest as ''[s]olicitations by any person or group of persons for the purposes of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders * * *.'' Items 4(b) and 5(b) of Exchange Act Schedule 14A set out special disclosure requirements for solicitations subject to Rule 14a–12(c).

[88] *See* Election of Directors Proposing Release. In this regard, the Commission was concerned that shareholders and companies would be unable to know with certainty whether a proposal that could result in an election contest may be excluded under Rule 14a–8(i)(8), depending on where the company was incorporated or conducting business, and that the staff would be severely limited in their ability to interpret Rule 14a–8 in responding to companies' notices of intent to exclude shareholder proposals.

[89] Although the Second Circuit's decision was binding only within that Circuit, it created uncertainty elsewhere about the continuing validity of the interpretation of Rule 14a–8(i)(8). After the *AFSCME* decision and prior to the Commission's codification of the interpretation in December 2007, the staff of the Division of Corporation Finance received three no-action requests seeking to exclude similar proposals under Rule 14a–8(i)(8). In *Hewlett-Packard* (January 22, 2007), the staff took a position of ''no view'' on the company's request for no-action relief. A second request for no-action relief was submitted by Reliant Energy. Subsequent to the staff of the Division of Corporation Finance taking a ''no view'' position on Hewlett-Packard's request, Reliant Energy filed a complaint in the U.S. District Court for the Southern District of Texas seeking a declaratory judgment that the company could properly omit a similar proposal that it had received for inclusion in its proxy materials. During the pendency of this litigation and prior to the staff's response to Reliant's no-action request, the shareholder withdrew the proposal and the company therefore withdrew its no-action request. (*See Reliant Energy, Inc.* (February 23, 2007)). A third request for no-action relief from UnitedHealth Group, Inc. was withdrawn after the company agreed to include the proposal in its proxy materials. (*See UnitedHealth Group, Inc.* (March 29, 2007)).

[90] Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007). Materials related to the roundtable, including an archived broadcast and a transcript of the roundtable, are *available at: http://www.sec.gov/spotlight/proxyprocess.htm.*

[91] Roundtable on Proxy Voting Mechanics (May 24, 2007). Materials related to the roundtable, including an archived broadcast and a transcript of the roundtable, are *available at: http://www.sec.gov/spotlight/proxyprocess.htm.*

[92] Roundtable on Proposals of Shareholders (May 25, 2007). Materials related to the roundtable, including an archived broadcast and a transcript of the roundtable, are *available at: http://www.sec.gov/spotlight/proxyprocess.htm.*

shareholders to include proposals on shareholder director nomination bylaws in company proxy materials where certain conditions were met.[93] The conditions that could be included in such a proposal would not have been limited under the rule proposal so long as they complied with applicable state law and governing corporate documents. As noted in the proposing release, the goal underlying the proposal was to better align the proxy rules with shareholders' rights under state law, in particular the right to nominate directors. The Commission's alternative proposal sought to amend Rule 14a–8 so that a shareholder nomination bylaw proposal could be excluded by a company.[94] The Commission adopted this proposal in December 2007 to provide certainty to companies and shareholders in light of the *AFSCME* decision.[95] The Commission did not take final action on the first proposal, with the exception of the portion of the first proposal intended to facilitate the creation and use of electronic shareholder forums, which the Commission adopted in January 2008.[96]

III. Proposed Changes to The Proxy Rules

A. Introduction

We are proposing amendments to the proxy rules to require companies to include disclosures about shareholder nominees for director in the companies' proxy materials, under certain circumstances, so long as the shareholders are not seeking to change the control[97] of the issuer or to gain more than a limited number of seats on the board. These proposed amendments build on the Commission's 2003 and 2007 proposals. They also reflect our experience with, and continued consideration of, the issue of shareholder involvement in the proxy process, the interaction between the proxy rules and state law, and the extensive comment that we have received over the past six years on these topics. As stated previously, due to dispersed ownership, director elections are largely conducted by proxy rather than in person and, as a result, impediments that the Federal proxy rules create to shareholders nominating directors through the proxy process translate into the inability of shareholders to effectively exercise their rights to nominate and to elect those directors. We believe the proposed rule changes will provide shareholders with a greater voice and an avenue to exercise the rights they have to effect change on the boards of the companies in which they invest that they no longer can exercise effectively through attending a shareholder meeting in person.

The Commission's proposals would provide shareholders with two ways to more fully exercise their rights to nominate directors. First, we are proposing a new proxy rule (Exchange Act Rule 14a–11) that would, under certain circumstances, require companies to include shareholder nominees for director in the companies' proxy materials. This requirement would apply unless state law or a company's governing documents[98] prohibits shareholders from nominating directors.[99] In this regard, state law or a company's governing documents may provide for nomination or disclosure rights in addition to those provided pursuant to Rule 14a–11 (*e.g.,* a company could choose to provide a right for shareholders to have their nominees disclosed in the company's proxy materials regardless of share ownership—in that instance, the company's provision would apply for certain shareholders who would not otherwise have their nominees included in the company's proxy materials pursuant to Rule 14a–11). Second, we are proposing an amendment to Exchange Act Rule 14a–8(i)(8), the election exclusion, to preclude companies from relying on Rule 14a–8(i)(8) to exclude from their proxy materials shareholder proposals by qualifying shareholders that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11.

Request for Comment

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

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

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

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

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

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

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

A.8. We also note concerns about board accountability and shareholder participation in the proxy process. Would the proposed amendments to the proxy rules address concerns about board accountability and shareholder

[93] *See* Shareholder Proposals Proposing Release.

[94] *See* Election of Directors Proposing Release.

[95] *See* Election of Directors Adopting Release.

[96] *See* Electronic Shareholder Forums Release.

[97] A change in control could include any number of extraordinary transactions, including a sale of substantially all of the company's assets. *See, e.g.,* Item 14(a) of Schedule 14A.

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

[99] We are not aware of any law in any state or in the District of Columbia that prohibits shareholders from nominating directors. Nonetheless, should any such law be enacted in the future, then this condition would not be satisfied.

participation on the one hand, and board dynamics, on the other? If so, how? If not, why not? Please explain and provide empirical data in support of any arguments or analyses.

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

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

A.11. Would other revisions to our proxy rules achieve the same or similar objectives as the Commission's proposal? For example, regardless of what other action the Commission may take in this area, should we adopt new disclosure requirements and liability provisions to address recent changes in some state laws concerning the inclusion of shareholder nominees for director in company proxy materials pursuant to a company's governing documents?

A.12. Are there any states that prohibit, or permit companies to prohibit, shareholders from nominating a candidate or candidates for election as director?

B. Proposed Exchange Act Rule 14a–11

1. Overview

As discussed, currently, a shareholder or group of shareholders must undertake a proxy contest and incur the related expenses to have any reasonable chance at successfully putting director nominees before the shareholders for a vote. A board's nominees, on the other hand, are listed in the company's proxy materials, which are funded out of corporate assets.

We believe it is an appropriate time for us to revisit whether and how the federal proxy rules may be impeding the ability of shareholders to exercise their fundamental rights to nominate and elect board members. As mentioned above, we are aware of the concerns and questions about the accountability and responsiveness of some companies and boards of directors to the interests of shareholders, particularly in the current market environment. Additionally, based on the comments received in response to our solicitation of public input on the topic in prior releases and roundtables, we have learned that shareholders face significant obstacles to efficiently exercising their right to determine the leadership of the companies in which they invest. Much of the public input that we have received suggests that including shareholder nominees for director in company proxy materials would be the most direct and effective method of facilitating shareholders' rights in connection with the nomination and election of directors.[100]

On the other hand, the business community and many of its legal advisors have expressed concern that mandating shareholder access to company proxy materials could turn every election of directors into a contest, which would be costly and disruptive to companies and could discourage some qualified board candidates from agreeing to appear on a company's slate of nominees. Because the composition of the board of directors is fundamental to a company's governance, the current filing and other requirements applicable to shareholders who wish to propose an alternate slate are, in the view of these commenters, more appropriate than including shareholder nominees for director in company proxy materials.[101]

In light of the erosion of investor confidence that has taken place over the past several months, and after further consideration of the issue, we have determined to propose a rule that would require companies to include disclosure about shareholder nominees for director in company proxy materials under specified conditions.[102] These nominees would then also be included on a company's form of proxy in accordance with the requirements of Rule 14a–4.[103] Rule 14a–11 would not apply where shareholders relying on the rule are seeking to change the control of the issuer or to gain more than a limited number of seats on the board of directors. In this regard, we believe that shareholders who are seeking such a change should continue to use the procedures currently available for election contests.

2. Application of Exchange Act Rule 14a–11

Proposed Rule 14a–11 would apply to all companies subject to the Exchange Act proxy rules [104] (including investment companies registered under Section 8 of the Investment Company Act of 1940),[105] other than companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act. As proposed, a company would be subject to Rule 14a–11 unless applicable state law or a company's governing documents prohibits shareholders from nominating candidates for the board of directors. When a company's governing documents do prohibit nomination rights, shareholders who want to amend the provision may seek to do so by submitting a shareholder proposal.[106]

In the 2003 Proposal, the Commission proposed to make the new requirement concerning shareholder director nominations operative for a company only after the occurrence of one or both of two possible triggering events. The first triggering event was that at least one of the company's nominees for the board of directors for whom the company solicited proxies received withhold votes from more than 35% of the votes cast at an annual meeting of shareholders at which directors were elected (provided, that this triggering event could not occur in a contested election to which Rule 14a–12(c) would apply or an election to which the proposed shareholder nomination procedure would have applied). The second proposed triggering event was that a shareholder proposal submitted under Rule 14a–8 providing that the company become subject to the proposed shareholder nomination procedure was submitted for a vote of shareholders at an annual meeting by a shareholder or group of shareholders that (1) held more than 1% of the company's securities entitled to vote on the proposal and (2) held those securities for one year as of the date the proposal was submitted, and the proposal received more than 50% of the votes cast on that proposal at that meeting.[107]

Today's proposal does not require a triggering event. Instead, Rule 14a–11 would apply to all companies subject to

[100] *See* 2003 Summary of Comments.

[101] *See id.*

[102] *See* proposed Exchange Act Rule 14a–11.

[103] *See* proposed amendment to Rule 14a–4.

[104] Exchange Act Rule 3a12–3 [17 CFR 240.3a12–3] exempts foreign private issuers from the Commission's proxy rules. As such, the proposed rule would not apply to foreign private issuers.

[105] 15 U.S.C. 80a *et seq.* Investment companies currently are required to comply with the proxy rules under the Exchange Act when soliciting proxies, including proxies relating to the election of directors. *See* Investment Company Act Rule 20a–1 [17 CFR 270.20a–1] (requiring registered investment companies to comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to Section 12 of the Exchange Act).

[106] A company generally would not be permitted to exclude such a shareholder proposal under our proposed amendment to Rule 14a–8(i)(8), discussed in Section III.C., below.

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

Exchange Act Section 14(a), other than companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12. Accordingly, a company would be required to disclose the nominee or nominees of any shareholder or shareholder group meeting the proposed eligibility standards and other conditions in Rule 14a–11, discussed below. Our decision not to include triggering events in the current proposal reflects our concern that the federal proxy rules may be impeding the exercise of shareholders' ability under state law to nominate directors at all companies, not just those with demonstrated governance issues. In addition, we note that many commenters on the 2003 Proposal expressed concern about that proposal's complexity [108] and indicated that the multi-year process created by the trigger requirement could make it more difficult for shareholders to efficiently effect change in the composition of boards of directors.[109] Finally, in light of our concerns about restoring investor confidence to the greatest number of shareholders as quickly as possible, we do not want to add a layer of complexity and delay to the operation of the proposed rule that would frustrate our stated objectives.

Request for Comment

B.1. Would adoption of Rule 14a–11 conflict with any state law, federal law, or rule of a national securities exchange or national securities association? To the extent you indicate that the rule would conflict with any of these provisions, please be specific in your discussion of those provisions that you believe would conflict. How should the Commission address these conflicts? Should the rule also address conflicts with a company's country of incorporation where the company is organized in a non-U.S. jurisdiction but does not meet the definition of foreign private issuer? Should the rule also explicitly refer to conflicts with laws of U.S. possessions or territories?

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

B.3. As proposed, Rule 14a–11 would apply to all companies subject to the proxy rules, other than companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12. What effect, if any, will this application have on any particular group of companies (*e.g.,* on smaller reporting companies)? Are there modifications that would accommodate the needs of a particular group of companies (*e.g.,* smaller reporting companies) while accomplishing the goals of the proposal? Would it instead be more appropriate to exclude from operation of the procedure smaller reporting companies, either on a temporary basis through staggered compliance dates based on company size, or on a permanent basis? Should any other groups of companies be excluded from operation of the rule (*e.g.,* companies subject to the proxy rules for less than a specified period of time (*e.g.,* one year, two years, or three years))? If so, for what period of time should the companies be excluded from operation of the rule (*e.g.,* one year, two years, three years, permanently)?

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

B.5. Should companies that are subject to the proxy rules solely because they have a class of debt registered under Exchange Act Section 12 be excluded from application of Rule 14a–11, as proposed? Please explain why or why not.

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

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

B.8. The New York Stock Exchange has filed with the Commission a proposed rule change to amend NYSE Rule 452 and corresponding Section 402.08 of the Listed Company Manual to eliminate broker discretionary voting for the election of directors. The Commission published the proposed rule change, as amended on February 26, 2009, for comment in the Federal Register on March 6, 2009.[110] If the amendment to Rule 452 is approved, what would be its effect on operation of proposed Rule 14a–11? Would any changes to Rule 14a–11 be required? Please be specific in your response.

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

B.10. Should companies be able to take specified steps or actions, such as

[108] *See* 2003 Summary of Comments and Letter Type I from 5,858 individuals or entities.

[109] *See* 2003 Summary of Comments; *see also* comment letter from American Federation of State, County, and Municipal Employees (September 24, 2003) (''AFSCME 2003'').

[110] *See* Release No. 34–59464 (February 26, 2009) [74 FR 9864].

adopting a majority vote standard or bylaw specifying procedures for the inclusion of shareholder nominees in company proxy materials, to prevent application of proposed Rule 14a–11 where it otherwise would apply? If so, what such steps or actions would be appropriate and why would they be appropriate? For example, should companies that agree with a shareholder proponent not to exclude a shareholder proposal submitted by an eligible shareholder pursuant to Rule 14a–8 be exempted from application of the proposed rule for a specified period of time? Should a company that implements any shareholder proposals that receive a majority of votes cast in a given year be exempted?

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

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

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

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

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

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

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

B.18. If the proposed requirement applied only after a specified triggering event, how would the company make shareholders aware when a triggering event has occurred? If the rule became operative based on the occurrence of triggering events, should the rule require additional disclosures in a company's Exchange Act Form 10–Q,[111] 10–K,[112] or 8–K [113] or, in the case of a registered investment company, Form N–CSR? [114] For example, the rule could require the following:

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

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

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

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

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

B.23. Should the Commission consider rulemaking under Section 19(c) of the Exchange Act to amend the

[111] 17 CFR 249.308a.

[112] 17 CFR 249.310.

[113] 17 CFR 249.308.

[114] 17 CFR 249.331 and 17 CFR 274.128.

[115] Item 4 of Part II to Exchange Act Form 10–Q and Item 4 of Part I to Exchange Act Form 10–K currently require that companies disclose the results of the voting on all matters submitted to a vote of shareholders during the period covered by the report. We could add a provision to these items that would require disclosure of specific information relating to the application of Rule 14a–11 or a shareholder director nomination process provided for under applicable state law or in a company's governing documents.

listing standards of registered exchanges to require that shareholders have access to the company's proxy materials to nominate directors under the requirements and procedures described in connection with proposed Rule 14a–11 to reflect, for example, changes the Sarbanes-Oxley Act made to director and independence requirements, among other matters?

3. Eligibility To Use Exchange Act Rule 14a–11

In seeking to balance shareholders' ability to participate more fully in the nomination and election process against the potential cost and disruption to companies subject to the proposed new rule, we are proposing that only holders of a significant, long-term interest in a company be able to rely on Rule 14a–11 to have disclosure about their nominees for director included in company proxy materials. We are proposing that the requirement for a company to include a shareholder's nominee or nominees for director in the company's proxy materials and on its form of proxy be based on a minimum ownership threshold, which would be tiered according to company size. Assuming the other conditions of proposed Rule 14a–11 are met, companies would not be able to exclude a shareholder nominee or nominees if the nominating shareholder or group:

- Beneficially owns, as of the date of the shareholder notice on Schedule 14N, either individually or in the aggregate: [116]
- For large accelerated filers as defined in Exchange Act Rule 12b–2,[117] and registered investment companies with net assets of $700 million or more, at least 1% of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders); [118]
- For accelerated filers as defined in Rule 12b–2, and registered investment companies with net assets of $75 million or more but less than $700 million, at least 3% of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders); [119] and
- For non-accelerated filers as defined in Rule 12b–2, and registered investment companies with net assets of less than $75 million, at least 5% of the company's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders); [120]
- Has beneficially owned the securities that are used for purposes of determining the ownership threshold continuously for at least one year as of the date of the shareholder notice on Schedule 14N (in the case of a shareholder group, each member of the group must have held the securities that are used for purposes of determining the ownership threshold for at least one year as of the date of the shareholder notice on Schedule 14N); [121] and
- Represents that it intends to continue to own those securities through the date of the annual or special meeting.[122]

The issue of the appropriate eligibility ownership threshold generated a great deal of comment when proposed in the 2003 Proposal.[123] While some commenters believed that all shareholders, regardless of the amount of shares owned, should be able to include nominees in the company proxy materials for the purpose of nominating one or more directors, others advocated share ownership thresholds ranging from the $2,000 threshold required to submit a Rule 14a–8 proposal to share ownership percentages such as 3%, 5% or 10% of a company's outstanding common stock.[124] Those who advocated no threshold or a nominal dollar amount argued that the imposition of a threshold would discriminate against smaller investors or unfairly advantage larger shareholders who already may have the resources to run their own slates using the existing rules for contested elections.[125] Those who advocated a larger share ownership threshold argued that a nominating shareholder should have a substantial, long-term stake in the company in order to require the use of company funds to nominate a candidate.[126] In addition, advocates of a larger share ownership threshold pointed out that the composition of the board of directors is critical to a corporation's functions and, accordingly, shareholders should have to evidence a significant financial interest by satisfying a substantial ownership threshold in order to require a company to include in its proxy materials a shareholder director nominee or nominees.[127]

The tiered beneficial ownership thresholds that we are proposing represent an effort to balance the varying considerations and address the possibility that certain companies could be impacted disproportionately based on their size.[128] In determining the proposed ownership thresholds, we considered two different samples of data on security ownership as an indicator of the ownership of securities that are entitled to be voted on the election of directors. First, we considered the current ownership make-up of a sample provided by an outside source of 5,327 companies that have held meetings between January 1, 2008 and April 15, 2009.[129] In this sample, roughly 26% of the firms are classified as large accelerated filers, 35% are classified as accelerated filers, and 38% are classified as non-accelerated filers. The second sample is derived from CDA Spectrum and is based on filings of Forms 13F in the third quarter of 2008.[130] In this sample, roughly 26% of the firms are classified as large accelerated filers, 33% are classified as accelerated filers, and 40% are classified as non-accelerated filers.[131]

[116] The manner in which a nominating shareholder or group would establish its eligibility to use proposed Rule 14a–11 is discussed further, below.

[117] 17 CFR 240.12b–2.

[118] *See* proposed Rule 14a–11(b)(1)(i).

[119] *See* proposed Rule 14a–11(b)(1)(ii).

[120] *See* proposed Rule 14a–11(b)(1)(iii).

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

[122] *Id.* Pursuant to proposed Rule 14a–18(b), the nominating shareholder or group would be required to include in its notice to the company of the intent to nominate a representation that the nominating shareholder or group satisfies the conditions in Rule 14a–11(b).

[123] *See* 2003 Summary of Comments; comment letter on the Shareholder Proposals Proposing Release from California Public Employees' Retirement System (September 26, 2007) (''CalPERS 2007'') (noting that a 2003 analysis of the holdings of three of the largest public pension funds showed that their combined ownership exceeded 2% in only one instance, and exceeded 1.5% in only 12 instances).

[124] *See* 2003 Summary of Comments.

[125] *See id.*

[126] *See id.*

[128] In this regard, we believe that the relative resource requirement for larger issuers to fund and administer the process would be smaller. Therefore, the thresholds we are proposing will more likely result in more large accelerated and accelerated filers receiving qualifying nominations than non-accelerated filers.

[129] The staff received beneficial ownership information for these companies aggregated at various thresholds and matched the information on market value of the float (obtained from Datastream). The sample excludes mutual funds.

[130] Institutional investment managers who exercise investment discretion over $100 million or more in Section 13(f) securities must report their holdings on Form 13F with the SEC. The sample includes 6,700 companies that are referenced in the Form 13F form that have common equity and are traded on NYSE, NYSE Amex Equities, or NASDAQ. Of these we were able to match the information on the market value of float (obtained from Datastream) for 5,877 observations.

[131] Under Rule 12b–2, a large accelerated filer must have an aggregate worldwide market value of

Continued

In the first sample, nearly all (above 99%) of large accelerated filers have at least one shareholder that could meet the 1% threshold individually, while a somewhat greater number of large accelerated filers (also above 99%) have two or more shareholders that each have held at least 0.5% of the shares outstanding for the appropriate period and, thus, could more easily aggregate their securities in order to meet the 1% ownership requirement. In the CDA sample, 98% of large accelerated filers have at least one shareholder that could meet the 1% threshold individually, while 99% of large accelerated filers have two or more shareholders that each have held at least 0.5% of the shares outstanding for the appropriate period. By contrast, based on the first sample, using an ownership threshold of 3% would reduce the number of large accelerated filers where a single shareholder could make a nomination to 77% of large accelerated filers and reduce the number of large accelerated filers that have two or more shareholders that have held at least 1.5% of the shares for the appropriate period to 89%. Using the CDA sample these numbers would drop to 96% and 97% respectively.

With regard to accelerated filers, roughly 85% of filers have at least one shareholder that could meet the 3% threshold individually, while roughly 92% of accelerated filers have two or more shareholders that each have held at least 1.5% of the shares outstanding for the appropriate period and, thus, could more easily aggregate their securities in order to meet the 3% ownership requirement. In the CDA sample, 91% of accelerated filers have at least one shareholder that could meet the 3% threshold individually, while 93% of accelerated filers have two or more shareholders that each have held at least 1.5% of the shares outstanding for the appropriate period. By contrast, based on the first sample, using an ownership threshold of 5% would reduce the number of accelerated filers where a single shareholder could make a nomination to 58% of accelerated filers. Further, 78% of accelerated filers have two or more shareholders that have held at least 2.5% of the shares for the appropriate period. Using the CDA sample these numbers would drop to 66% and 88% respectively.

With regard to non-accelerated filers, roughly 59% of filers in the first sample have at least one shareholder that could meet the 5% threshold individually, while roughly 71% of non-accelerated filers have two or more shareholders that each have held at least 2.5% of the shares outstanding for the appropriate period and, thus, could more easily aggregate their securities in order to meet the 5% ownership requirement. In the CDA sample, 41% of non-accelerated filers have at least one shareholder that could meet the 5% threshold individually, while 49% of non-accelerated filers have two or more shareholders that each have held at least 2.5% of the shares outstanding for the appropriate period. By contrast, based on the first sample, using an ownership threshold of 7% would reduce the number of non-accelerated filers where a single shareholder could make a nomination to 41% of non-accelerated filers. Further, only 43% of non-accelerated filers have two or more shareholders that have held at least 4% and 62% have two or more shareholders that have held at least 3% of the shares for the appropriate period.[132] Using the CDA sample these numbers would drop to 33%, 37% and 45% respectively.

With regard to registered investment companies, we are proposing tiered thresholds based on the net assets of the companies.[133] Consistent with our approach to reporting companies (other than registered investment companies), the tiered beneficial ownership thresholds that we are proposing represent an effort to balance the various competing views and address the possibility that certain registered investment companies could be impacted disproportionately based on their size. Because registered investment companies are not classified as large accelerated filers, accelerated filers, and non-accelerated filers, we propose to base the tiers on the net assets of the companies.[134] In particular, we are proposing tiers for registered investment companies that are based on the worldwide market value levels used by reporting companies (other than registered investment companies) to determine filing status.[135] Under the proposal, the amount of net assets of a registered investment company for these purposes would be the amount of net assets of the company as of the end of the company's second fiscal quarter in the fiscal year immediately preceding the fiscal year of the meeting, as disclosed in the company's Form N–CSR filed with the Commission, except that, for a series investment company the amount of net assets would be the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting, as disclosed in a Form 8–K filed in connection with the meeting where directors are to be elected.[136]

The requirement that the net asset determination for investment companies other than series investment companies be made as of the end of the company's second fiscal quarter in the fiscal year immediately preceding the fiscal year of the meeting is similar to the requirements for reporting companies (other than registered investment companies), which determine large accelerated filer, accelerated filer, and non-accelerated filer status as of the end of the fiscal year, using the market value of the issuer's common equity as of the last business day of the immediately preceding second fiscal quarter.[137] However, we have chosen a single date, June 30 of the calendar year immediately preceding the calendar year of the meeting, for series investment companies, due to the fact that different series of a series company may have different fiscal year and semi-annual period ending dates. Moreover, although registered investment companies generally are not required to file Form 8–K, we are proposing to require a registered investment company that is a series company to file Form 8–K within four business days after the company determines the anticipated meeting date, disclosing the company's net assets as of June 30 of the

the voting and non-voting common equity held by its non-affiliates of $700 million or more, and an accelerated filer must have an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $75 million or more but less than $700 million. Filers that do not meet the criteria for accelerated or large accelerated filer status are classified as non-accelerated filers.

[132] The staff did not have information regarding the beneficial ownership for the 3.5% threshold.

[133] In the case of a registered investment company, in determining the securities that are entitled to be voted on the election of directors for purposes of establishing whether the applicable threshold has been met, the nominating shareholder or group may rely on information set forth in the following documents, unless the nominating shareholder or group knows or has reason to know that the information contained therein is inaccurate: (1) In the case of a series company, a Form 8–K that would be required to be filed in connection with the meeting where directors are to be elected (for a further discussion of Form 8–K filing requirements for registered investment companies, *see* footnote 138, below, and accompanying text); or (2) in the case of other registered investment companies, the company's most recent annual or semi-annual report filed with the Commission on Form N–CSR. *See* Instruction 1 to proposed Rule 14a–11(b).

[134] *See* Instruction 2 to proposed Rule 14a–11(b). For registered investment companies that are organized in series form, we are proposing that the net assets thresholds apply to the company as a whole, and not on a series by series basis, because directors are elected for the company by the shareholders of all series rather than separately for each series of the company. *See* Investment Company Act Rule 18f–2(g) [17 CFR 270.18f–2(g)].

[135] *See* footnote 131, above.

[136] *See* Instructions 2 and 3 to proposed Rule 14a–11(b).

[137] *See* Rule 12b–2.

calendar year immediately preceding the calendar year of the meeting and the total number of the company's shares that are entitled to vote for the election of directors (or if votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.[138] Registered investment companies, including series investment companies, currently disclose net asset and outstanding share information in their annual and semi-annual reports filed on Form N–CSR, but we believe that the additional Form 8–K filing is necessary for series companies because a series company may file multiple Form N–CSRs with respect to different series covering different fiscal year and semi-annual period ending dates and is required to disclose net asset and outstanding share information on a series by series basis, rather than for the company as a whole.

The purpose of the proposed rule would be to remove impediments the federal proxy rules create to shareholders' exercise of their rights to nominate and elect members of boards of directors. At the same time, we recognize that there are competing concerns that also need to be taken into account, such as the potential cost and disruption to the company of a rule with no shareholder eligibility requirements. To balance those interests, we are proposing a rule that includes shareholder eligibility requirements. In particular, we are proposing eligibility requirements based on the duration of ownership and minimum ownership levels.

With respect to duration of ownership eligibility criteria, we believe that long-term shareholders are more likely to have interests that are better aligned with other shareholders and are less likely to use the rule solely for short-term gain. We are proposing a one year holding requirement for each nominating shareholder or member of a nominating group rather than the two year requirement proposed in 2003. The holding period generated less comment in 2003 than the ownership threshold, with the majority of commenters that addressed the topic supporting the proposed holding period.[139] Some commenters, however, advocated either lowering the holding period to one year,[140] or raising it (*e.g.,* to 5 years).[141] Some of these commenters suggested that the two year holding period was too onerous.[142] After further consideration, we believe that a one year holding requirement would be sufficient to appropriately limit use of Rule 14a–11 to long-term shareholders without placing an undue burden on shareholders seeking to use the rule. In addition, a one year requirement is consistent with the existing eligibility requirement for shareholders to submit proposals under Rule 14a–8.

With regard to a minimum ownership level as a shareholder eligibility requirement, we believe it is important that any shareholder or group that intends to submit a nominee to a company for inclusion in the company's proxy materials continue to have a significant economic interest in the company. Therefore, we have proposed the requirement that a nominating shareholder or group provide a statement as to the nominating shareholder's or group's intent to continue to hold the requisite amount of securities through the date of the meeting. Commenters in 2003 generally supported a holding requirement through the date of the meeting,[143] with some suggesting an even longer holding period (*e.g.,* through the term of the nominee's service on the board, if elected).[144] We continue to believe that a requirement to hold the securities through the date of the meeting is appropriate to demonstrate the nominating shareholder's commitment to the director nominee and the election process; however, we also have proposed a disclosure requirement under which a nominating shareholder or group would state their intent with respect to continued ownership of their shares after the election.[145]

In addition, to rely on proposed Rule 14a–11 to have disclosure about their nominee or nominees included in the company proxy materials, a nominating shareholder or group must:

- Not acquire or hold the securities for the purpose of or with the effect of changing control of the company or to gain more than a limited number of seats on the board;
- Provide and file with the Commission a notice to the company on proposed new Schedule 14N[146] of the nominating shareholder's or group's intent to require that the company include that nominating shareholder's or group's nominee in the company's proxy materials by the date specified by the company's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting,[147] except that if the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 days from the prior year, then the nominating shareholder or group must provide notice a reasonable time before the company mails its proxy materials, as specified by the company in a Form 8–K filed within four business days after the company determines the anticipated meeting date pursuant to proposed Item 5.07;[148] and

[138] *See* proposed General Instruction B.1 and proposed Item 5.07(b) of Form 8–K; proposed Rules 13a–11(b)(3) and 15d–11(b)(3); and Instruction 3 to proposed Rule 14a–11(b).

[139] *See* 2003 Summary of Comments; *see also* comment letters from AFL–CIO; Alliance Capital Management L.P. (December 15, 2003) (''Alliance Capital''); American Society of Corporate Secretaries (December 22, 2003) (''ASCS''); Henry A. McKinnell, Chairman, The Business Roundtable (December 22, 2003) (''McKinnell, BRT''); United States Chamber of Commerce (December 19, 2003) (''Chamber''); Carl T. Hagberg (December 22, 2003); Committee on Securities Regulation, New York State Bar Association (December 22, 2003) (''NYS Bar''); State Teachers Retirement System of Ohio (December 18, 2003) (''STRS Ohio''); Sullivan & Cromwell LLP (December 22, 2003) (''Sullivan''); T. Rowe Price Associates, Inc. (December 24, 2003) (''T. Rowe''); Valero; and Wachtell.

[140] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CIR; Gary K. Duberstein (December 22, 2003) (''Duberstein''); Gary Tannahill (December 6, 2003) (''Tannahill''); and Wolf Haldenstein Adler Freeman & Herz LLP (December 19, 2003) (''Wolf Haldenstein'').

[141] *See* 2003 Summary of Comments; *see also* letters from Compass Bancshares, Inc. (December 22, 2003) (''Compass''); and W. Paul Fitzgerald, Director, EMC Corporation (December 19, 2003), Gail Deegan, Director, EMC Corporation (December 22, 2003), and Alfred Zeien, Director, EMC Corporation (December 22, 2003) (collectively, ''EMC Corporation'').

[142] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CIR; Duberstein; Tannahill; and Wolf Haldenstein.

[143] *See* 2003 Summary of Comments; *see also* comment letters from America's Community Bankers (December 18, 2003) (''ACB''); Alliance Capital; ASCS; Blackwell Sanders Peper Martin LLP (December 22, 2003) (''Blackwell Sanders''); McKinnell, BRT; CalPERS; Chamber; CIR; Compass; FedEx Corporation (December 19, 2003) (''FedEx''); Intel Corporation (December 22, 2003) (''Intel''); International Paper Company (December 22, 2003) (''International Paper''); Peter O. Clauss and J. Peter Wolf of Pepper Hamilton, LLP (December 16, 2003) (''Clauss & Wolf''); Sullivan; Tannahill; Valero; Wachtell; and Wells Fargo & Company (December 19, 2003) (''Wells Fargo'').

[144] *See* 2003 Summary of Comments; *see also* comment letters from ACB; McKinnell, BRT; Chamber; Compass; FedEx; Intel; International Paper; Clauss & Wolf; Sullivan; Valero; Wachtell; and Wells Fargo.

[145] *See* proposed Rule 14a–18(f) and proposed Item 5(b) of Schedule 14N.

[146] *See* Section III.B.6. for a discussion of Schedule 14N and the disclosure required to be filed.

[147] This date would be calculated by determining the release date disclosed in the previous year's proxy statement, increasing the year by one, and counting back 120 calendar days.

[148] *See* proposed Instruction 2 to paragraph (a) of Rule 14a–11 and proposed General Instruction B.1.

Continued

• Include in the shareholder notice on Schedule 14N disclosure about the amount and percentage of securities owned by the nominating shareholder or group, length of ownership of such securities, and the nominating shareholder's or group's intent to continue to hold the securities through the date of the meeting as well as intent with respect to continued ownership after the election, a certification that the nominating shareholder or group is not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors, and disclosure meeting the requirements of Rule 14a–18.[149]

Request for Comment

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

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

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

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

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

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

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

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

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

C.10. Should a registered investment company that is a series company be required to file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting and the total number of shares of the company that are entitled to vote for the election of directors (or if votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter? If not, how should shareholders of a series company determine whether they meet the applicable ownership threshold?

C.11. Is the 1% standard that we have proposed for registered investment companies with net assets of $700 million or more appropriate? Should the standard be lower (*e.g.*, $2,000 or 0.5%) or higher (*e.g.*, 2%, 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 3% standard that we have proposed for registered investment companies with net assets of $75 million or more, but less than $700 million, appropriate? Should the standard be lower (*e.g.*, 1% or 2%) or higher (*e.g.*, 4%, 5%, 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)? Is the 5% standard that we have proposed for registered investment companies with net assets of less than $75 million appropriate? Should the standard be lower (*e.g.*, 1%, 2%, 3%, or 4%) or higher (*e.g.*, 6%, 7%, 8%, 9%, 10%,

to Form 8–K. A late filing of such form would result in the registrant losing eligibility to file on Form S–3.

[149] *See* proposed Exchange Act Rules 14a–18 and 14n–1. *See* discussion in Section III.B.5. regarding proposed Rule 14a–11(d), which limits the number of nominees a company would be required to include in its proxy materials.

15%, 20%, or 25%)? Should the determination of whether a shareholder or shareholder group beneficially owns a sufficient percentage of a series company's securities to nominate a director be made on a series by series basis, rather than for the company as a whole (*i.e.*, should a shareholder be permitted to take advantage of the nomination process contained in proposed Rule 14a–11 if he or she owns the applicable percentage of shares of a series of the company, but does not own the applicable percentage of the company as a whole)? Should closed-end investment companies be subject to the same standards as open-end investment companies? As proposed, business development companies would be treated in the same manner as reporting companies (other than registered investment companies).[150] Should business development companies be subject to the same tiered approach as reporting companies (other than registered investment companies)? Why or why not?

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

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

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

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

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

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

C.18. In the 2003 Proposal the Commission solicited comment on whether the rule should include a provision that would deny eligibility for any nominating shareholder or group that has had a nominee included in the company materials where that nominee did not receive a sufficient percentage of the votes. Commenters were mixed in their responses[151] so we have not proposed a requirement in this regard, but are again requesting comment as to whether the rule should include a provision denying eligibility for any nominating shareholder or group who has had a nominee included in the company materials where that nominee did not receive a sufficient percentage of the votes (*e.g.*, 5%, 10%, 15%, 25%, or 35%) within a specified period of time in the past (*e.g.*, one year, two years, three years, four years, five years). If there should be such an eligibility standard, how long should the prohibition last (*e.g.*, one year, two years, three years)? Similarly, we are again requesting comment (see also Request for Comment D.16.) as to whether the rule should include a provision that would deny eligibility for any nominee that has been included in the company proxy materials within a specified period of time in the past (*e.g.*, one year, two years, three year, four years, five years) where that nominee did not receive at least a specified percentage of the votes (*e.g.*, 5%, 10%, 15%, 25%, or 35%). How long should any such prohibition last (*e.g.*, one year, two years, three years)?

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

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

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

[150] Business development companies are a category of closed-end investment companies that are not registered under the Investment Company Act, but are subject to certain provisions of that Act. *See* Sections 2(a)(48) and 54–65 of the Investment Company Act [15 U.S.C. 80a–2(a)(48) and 80a–53–64].

[151] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS, CII, and CIR (objecting to resubmission standards); and comment letters from ASCS, Blackwell Sanders, Investment Company Institute (December 22, 2003) (''ICI''), The New York City Bar Association (December 22, 2003) (''NYC Bar''), and Wells Fargo (expressing support for a resubmission standard).

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

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

C.24. Should the Commission limit use of the rule, as proposed, to shareholders that are not seeking to change the control of the company or to gain more than a limited number of seats on the board of directors? Why or why not? Would it be appropriate to require the shareholder to represent that it will not seek to change the control of a company or to gain more than a limited number of seats on the board for a period of time beyond the election of directors? How should the rules address the possibility that a nominating shareholder's or group's intent may change over time?

4. Shareholder Nominee Requirements

a. The Nomination Must Be Consistent With Applicable Law and Regulation

A company would not be required to include a shareholder nominee in its proxy materials if the nominee's candidacy or, if elected, board membership would violate controlling state law,[152] federal law,[153] or rules of a national securities exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors), and such violation could not be cured.[154] Because compliance with independence standards can depend on the overall make-up of a board, we have excluded independence standards from this requirement and have, instead, proposed a separate provision addressing independence standards. The nominating shareholder or group would be required to make a representation that the shareholder nominee is in compliance with the generally applicable independence requirements of a national securities exchange or national securities association that sets forth objective standards.[155] The representation would not be required in instances where a company is not subject to the requirements of a national securities exchange or a national securities association. We recognize that exchange rules regarding director independence generally include some standards that depend on an objective determination of facts and other standards that depend on subjective determinations.[156] As proposed, however, to comply with Rule 14a–11 the nominating shareholder or group would only be required to represent that the nominee meets the objective criteria for ''independence'' in any generally applicable national securities exchange or national securities association rules.[157] For this purpose, the nominee would be required to meet the definition of ''independent'' that is applicable to directors of the company generally and not any particular definition of independence applicable to members of the audit committee of the company's board of directors. To the extent a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination that the nominee has no material relationship with the listed company), this element of an independence standard would not have to be satisfied.

Specifically, as proposed, each nominating shareholder or each member of the nominating shareholder group would be required to represent in its notice to the company on Schedule 14N[158] that, to the knowledge of the nominating shareholder or group, the nominee, in the case of a registrant other than an investment company, satisfies the standards of a national securities exchange or national securities association regarding director independence that apply to the company, if any, except that, where a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board, this element of an independence standard would not have to be satisfied.[159] Where a

[152] Rule 14a–11, as proposed, would permit a company to exclude a shareholder nominee from its proxy materials if the nominee's candidacy or, if elected, board membership would violate controlling state or federal law. If a company's governing documents permit the inclusion of shareholder nominees in the company's proxy materials but impose more restrictive eligibility standards or mandate more extensive disclosures than those required by Rule 14a–11, the company could not exclude a nominee submitted by a shareholder in compliance with Rule 14a–11 on the grounds that the shareholder or the nominee fails to meet the more restrictive standards included in the company's governing documents. In other words, companies may not opt out of Rule 14a–11 by adopting alternate requirements for inclusion of shareholder nominees for director in the company's proxy materials.

[153] For example, in response to our 2003 Proposal, one commenter noted that without such a requirement, a shareholder could nominate and have elected a director who was employed by a company's competitor thereby ''potentially causing the company to violate Section 8 of the Clayton Act of 1914.'' *See* 2003 Summary of Comments; *see also* comment letter from McKinnell, BRT.

[154] This requirement is set forth in proposed Exchange Act Rule 14a–11(a)(2). Pursuant to proposed Exchange Act Rule 14a–18(a), the notice to the company by the nominating shareholder or group would be required to include a representation that, to the knowledge of the nominating shareholder or group, the nominee's candidacy or, if elected, board membership would not violate any of the specified provisions.

[155] Compliance with these existing independence standards would be established through the inclusion in the notice to the company by the nominating shareholder or group of a representation that the nominee satisfies the existing standard. This representation is required in proposed Exchange Act Rule 14a–18(c). In the case of a registered investment company or a business development company, a nominating shareholder or group would be required to represent that its nominee is not an ''interested person'' of the company as defined in Section 2(a)(19) of the Investment Company Act. [15 U.S.C. 80a–2(a)(19)].

[156] *See* proposed Rule 14a–18(c) and the Instruction to paragraph (c). For example, the NYSE listing standards include both subjective and objective components in defining an ''independent director.'' As an example of a subjective determination, Section 303A.02(a) of the NYSE Listed Company Manual provides that no director will qualify as ''independent'' unless the board of directors ''affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company).'' Section 303A.02(b) of the NYSE Listed Company Manual provides that a director is not independent if the director has any of several specified relationships with the company. On the other hand, Section 303A.02(b) provides that a director is not independent if he or she has any of several specified relationships with the company that can be determined by a ''bright-line'' objective test. For example, a director is not independent if ''the director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).''

[157] *See* Instruction to proposed Rule 14a–18(c).

[158] *See* proposed Rule 14n–101.

[159] *See* proposed Rule 14a–18(a). We note that our proposal addresses only the requirements under Rule 14a-11 to be included in a company's proxy materials—the proposal would not preclude a nominee from ultimately being subject to the subjective determination test of independence for board committee positions. A company could include disclosure in its proxy materials advising shareholders that the shareholder nominee for director would not meet the company's subjective criteria, as appropriate.

company is not subject to the standards of a national securities exchange or national securities association, the representation would not be required.

The proposals would require any nominating shareholder or group of shareholders of a registered investment company or a business development company to represent that its nominee to the board of the company is not an ''interested person'' of the company as defined in Section 2(a)(19) of the Investment Company Act,[160] rather than representing that the nominee satisfies the generally applicable objective standards of a national securities exchange or national securities association regarding director independence.[161] We are proposing to incorporate the Section 2(a)(19) test rather than the test applied to other companies because the Section 2(a)(19) test is tailored to capture the broad range of affiliations with investment advisers, principal underwriters, and others that are relevant to ''independence'' in the case of investment companies.

Some commenters on the 2003 Proposal stated that nominating committees should be able to apply their own director qualifications criteria to shareholder nominees;[162] however, a nominee required to be included by the company pursuant to Exchange Act Rule 14a–11 would be, notwithstanding the conditions in the proposal, the nominating shareholder's or group's nominee, not the company's nominee. Therefore, we do not believe it is appropriate that shareholder nominees be required to meet the nominating committee's or board's criteria.

b. Relationships Between the Nominee, the Nominating Shareholder or Group, and the Company

We recognize that a shareholder nomination process presents the potential risk of nominating shareholders or groups acting merely as a surrogate for the company or its management in order to block usage of the rule by another nominating shareholder or group. To balance the benefits of the new rule against these concerns, we propose that the nominating shareholder or group be required to represent that no relationships or agreements between the nominee and the company and its management, and between the nominating shareholder or group and the company and its management exist.[163] Specifically, as proposed, each nominating shareholder or each member of the nominating shareholder group would be required to represent in its notice to the company on Schedule 14N that neither the nominee nor the nominating shareholder (or any member of the nominating shareholder group, if applicable) has an agreement with the company regarding the nomination of the nominee.[164] This representation, along with the required disclosure, would provide some assurance to shareholders that certain shareholders or groups are not receiving special treatment by the company or acting on the company's behalf.[165] This proposed requirement also was included in the 2003 proposal. Commenters generally supported the proposed requirement,[166] though some suggested that the Commission provide an exception for negotiations and other communications between the nominating shareholder or group and the company regarding potential nominees.[167] Accordingly, we have proposed a clarifying instruction to proposed Rule 14a–18(d), which states that negotiations with the nominating committee of the company to have the nominee included on the company's proxy card as a management nominee, where those negotiations are unsuccessful, or negotiations that are limited to whether the company is required to include the shareholder nominee for director on the company's proxy card in accordance with Rule 14a–11, would not be considered a direct or indirect agreement with the company for purposes of the rule.[168]

The Commission also recognizes that some commenters feel that inclusion of shareholder nominees for director in company proxy materials could have a disruptive effect on board dynamics and board operation.[169] For example, we have heard from some commenters concerns about the possibility of ''special interest'' or ''single issue'' directors that would advance the interests of the nominating shareholder over the interests of shareholders as a group.[170] In response to this concern, in 2003, the Commission proposed a limitation on relationships between a nominating shareholder or group and the director nominee that is included in company proxy materials. For example, where the nominating shareholder or members of the nominating shareholder group were natural persons, the nominating shareholder or group would not have been able to nominate themselves or any member of the nominating shareholder group, or any member of the immediate family of the nominating shareholder or any member of the group. In addition, a nominating shareholder would not have been able to nominate an individual who had been employed by, or whose immediate family member had been employed by, the nominating shareholder or any member of the nominating shareholder group, or who had accepted consulting, advisory, or other compensatory fees from the nominating shareholder or any member of the nominating shareholder group. A number of commenters expressed concern about these requirements,[171] and questioned the

[160] 15 U.S.C. 80a–2(a)(19).

[161] *See* proposed Rule 14a–18(c).

[162] *See* 2003 Summary of Comments; *see also* comment letters from ABA; Agilent Technologies, Inc. (December 19, 2003) (''Agilent''); McKinnell, BRT; Chamber; Richard Hall (December 22, 2003) (''Hall''); ICI; Intel; NYC Bar; Software & Information Industry Association (December 22, 2003) (''SIIA''); Sullivan; Valero; and Wells Fargo.

[163] This representation would be required in the nominating shareholder's notice to the company on Schedule 14N, pursuant to proposed Exchange Act Rule 14a–18(d). Instruction 2 to proposed Exchange Act Rule 14a–11(d) clarifies that if a nominee, nominating shareholder or any member of a nominating group has an agreement with the company or an affiliate of the company regarding the nomination of a candidate for election, any nominee or nominees from such shareholder or group shall not be counted in calculating the number of shareholder nominees for purposes of proposed Rule 14a–11(d).

[164] *See* proposed Rule 14a–18(d).

[165] The nominating shareholder and each member of the nominating shareholder group would be subject to liability pursuant to a proposed amendment to Rule 14a–9 with respect to the representation and disclosure included in the company's proxy materials.

[166] *See* 2003 Summary of Comments; *see also* comment letters from McKinnell, BRT; CalPERS; CII; CIR; and Wells Fargo.

[167] *See* 2003 Summary of Comments; *see also* comment letters from McKinnell, BRT and Wells Fargo.

[168] *See* proposed Instruction 1 to Rule 14a–18(d).

[169] *See, e.g.,* comment letter on 2007 Proposals from Mulcahy, BRT.

[170] *See* comment letters on 2007 Proposals from Keith F. Higgins, Committee Chair, American Bar Association, Section of Business Law (October 2, 2007) (''ABA 2007''); and Mulcahy, BRT. *See also* 2003 Summary of Comments and comment letters from ABA; ASCS; McKinnell, BRT; Blackwell Sanders; Sullivan; and Valero.

[171] *See* 2003 Summary of Comments; *see also* comment letters from BellTel Retirees Inc. (January 12, 2004); AFL–CIO; Association for Investment Management and Research (December 22, 2003); Association of US West Retirees (January 13, 2004); CalPERS; CalSTRS; CII; CIR; Corporate Library; Domini Social Investments LLC (December 22, 2003); Duberstein; State Board of Administration of Florida (December 19, 2003); Mark S. Gardiner (December 22, 2003); Hermes Pensions Management Limited (December 22, 2003); Alan G. Hevesi, Comptroller, State of New York (December 19, 2003) (''Hevesi''); Institutional Shareholder Services (December 18, 2003); Lawndale Capital Management, LLC (December 22, 2003) (''Lawndale''); LongView; LSV Asset Management (December 22, 2003); James McRitchie, Editor, Corporate Governance (November 16, 2003, December 22, 2003, and March 29, 2004) (''McRitchie 2003''); State Retirement and Pension System of Maryland (December 16, 2003); STRS Ohio; Ohio Public Employees Retirement System (December 22, 2003); Relational Investors LLC

Continued

fairness and wisdom of the limitations.[172] These commenters did not believe that it was fair to subject shareholder nominees for director to a different standard than board nominees [173] and felt that the requirements would inhibit significant holders from seeking seats on boards,[174] thus excluding particularly desirable director candidates from being nominated under the rule.[175] While some commenters supported the proposed limitations (*e.g.,* to address the special interest concern),[176] others noted that any nominees that were included in the company's proxy materials would still have to be elected by the shareholders and, if elected, would be subject to State law fiduciary duties.[177]

After further consideration and review of the comments on the 2003 Proposal, we have determined not to propose limitations on the relationships between a nominating shareholder or group and their director nominee or nominees. We agree with those commenters that opposed the proposed limitations and believe that such limitations may not be appropriate or necessary. Rather, we believe that Rule 14a–11, as proposed, should facilitate exercises of state law rights and afford a shareholder or group meeting the proposed standards the ability to propose a nominee for director that, in the nominating shareholder's view, better represents the interests of shareholders than those put forward by the nominating committee or board. We note that once a nominee is elected to the board of directors, that director will be subject to state law fiduciary duties and owe the same duty to the corporation as any other director on the board.

c. Nominating Shareholder or Group Will Not Be Deemed Affiliates of the Company

It is our view that the mere use of proposed Rule 14a–11, by itself, should not be deemed to establish a relationship between the nominating shareholder or group and the company that would result in that holder or group being deemed an ''affiliate'' of the company for purposes of the federal securities laws. Accordingly, proposed Rule 14a–11(a) would include an instruction making clear that a nominating shareholder will not be deemed an ''affiliate'' of the company under the Securities Act of 1933 [178] or the Exchange Act solely as a result of nominating a director or soliciting for the election of such a director nominee or against a company nominee pursuant to Rule 14a–11.[179] In addition, where a shareholder nominee is elected, and the nominating shareholder or group does not have an agreement or relationship with that director, other than relating to the nomination, the nominating shareholder or group would not be deemed an affiliate solely by virtue of having nominated that director under the proposed rules.[180]

Request for Comment

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

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

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

D.4. How should any independence standards be applied? Should the nominee and the nominating shareholder or group have the full burden of determining the effect of the nominee's election on the company's compliance with any independence requirements, even though those consequences may depend on the outcome of any election and may relate to the outcome of the election with regard to nominees other than shareholder nominees? Should the rules specify that the nominating shareholder or group may rely on information disclosed in the company's Commission filings in making this determination? How should the independence standards be applied when the entity is not a corporation—for example, a limited partnership?

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

D.6. As proposed, a nominating shareholder or group would be required to represent that the shareholder nominee satisfies generally applicable objective standards of a national securities exchange or national securities association that are applicable to directors of the company generally and not any particular definition of independence applicable to members of the audit committee of the company's board of directors. Should the proposal clarify that the nominee must meet the applicable objective standards of the company's primary listing exchange?

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

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

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

(December 21, 2003) (''Relational''); Kurt Schacht, J.D., CFA, Wyser-Pratte & Co. (November 13, 2003); San Diego City Employees' Retirement System (December 17, 2003); Social Investment Forum Ltd. (December 22, 2003); and Tannahill.

[172] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CII; Hevesi; Lawndale; and Relational.

[173] *See id.*

[174] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CII; Lawndale; McRitchie 2003; and Relational.

[175] *See* 2003 Summary of Comments; *see also* comment letter from Richard Moore, North Carolina Treasurer; Sean Harrigan, President, CalPERS; and Alan G. Hevesi, New York State Comptroller, on behalf of National Coalition for Corporate Reform (December 18, 2003) (''NCCR'').

[176] *See* 2003 Summary of Comments; *see also* comment letters from ABA; ASCS; Blackwell Sanders; Hall; and Sullivan.

[177] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS and NCCR.

[178] 15 U.S.C. 77a *et seq.*

[179] This safe harbor is set forth in Instruction 1 to proposed Rule 14a–11(a). The safe harbor is intended to operate such that the determination of whether a shareholder or group is an ''affiliate'' of the company would continue to be made based upon all of the facts and circumstances regarding the relationship of the shareholder or group to the company, but a shareholder or group will not be deemed an affiliate ''solely'' by virtue of having nominated that director.

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

the nominating shareholder or group be able to select the standard?

D.10. Should we apply the ''interested person'' standard of Section 2(a)(19) of the Investment Company Act with respect to the representation that a shareholder nominee be independent from a company that is a registered investment company? Should the ''interested person'' standard also apply to shareholder nominees for election to the board of directors of a business development company? Should we instead apply a different independence standard to registered investment companies or business development companies, such as the definition of independence in Exchange Act Rule 10A–3? [181]

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

D.12. Should the Commission include a similar safe harbor provision for nominating shareholders that submit a nominee for inclusion in a company's proxy materials pursuant to an applicable state law provision or a company's governing documents rather than using proposed Rule 14a–11? Why or why not?

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

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

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

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

5. Maximum Number of Shareholder Nominees To Be Included in Company Proxy Materials

We do not intend for proposed Rule 14a–11 to be available for any shareholder or group that is seeking to change the control of the issuer or to gain more than a limited number of seats on the board. The existing procedures regarding contested elections of directors are intended to continue to fulfill that purpose.[182] We also note that by allowing shareholder nominees to be included in a company's proxy materials, the cost of the solicitation is essentially shifted from the individual shareholder or group to the company and thus, all of the shareholders. We do not believe that an election contest conducted by a shareholder to change the control of the issuer or to gain more than a limited number of seats should be funded out of corporate assets. Further, extensive changes in board membership, or the possibility of such changes as a result of additional nominees being included in the proxy statement, have the potential to be disruptive to the board, while also potentially being confusing to shareholders. Amending our rules to provide for the inclusion of shareholder nominees for directors in a company's proxy materials is a significant change. Given the novelty of such a change, we believe it is appropriate to take an incremental approach as a first step and reassess at a later time to determine whether additional changes would be appropriate.

As proposed, a company would be required to include no more than one shareholder nominee or the number of nominees that represents 25 percent of the company's board of directors, whichever is greater.[183] Where a company has a director (or directors) currently serving on its board of directors who was elected as a shareholder nominee pursuant to Rule 14a–11, and the term of that director extends past the date of the meeting of shareholders for which the company is soliciting proxies for the election of directors, the company would not be required to include in its proxy materials more shareholder nominees than could result in the total number of directors serving on the board that were elected as shareholder nominees being greater than one shareholder nominee or 25 percent of the company's board of directors, whichever is greater.[184] We believe this limitation is appropriate to reduce the possibility of a nominating shareholder or group using the proposed new rule as a means to effect a change in control of a company or to gain more than a limited number of seats on the board by repeatedly nominating additional candidates for director. We note that in the 2003 Proposal, the Commission proposed to require companies to include a set number of nominees, rather than a percentage of the board, as proposed today.[185] We believe that using a percentage in the rule will promote ease of use and alleviate any concerns that a company may increase its board size in an effort

[181] 17 CFR 240.10A–3.

[182] *See, e.g.,* Exchange Act Rule 14a–12(c).

[183] *See* proposed Rule 14a–11(d)(1). According to information from RiskMetrics, based on a sample of 1,431 public companies, in 2007, the median board size was 9, with boards ranging in size from 4 to 23 members. Approximately 40% of the boards in the sample had 8 or fewer directors, approximately 60% had between 9 and 19 directors, and less than 1% had 20 or more directors.

[184] *See* proposed Rule 14a–11(d)(2). Depending on board size, 25% of the board may not result in a whole number. In those instances, the maximum number of shareholder nominees for director that a registrant will be required to include in its proxy materials will be the closest whole number below 25%. *See* Instruction 1 to paragraph (d).

[185] Comments on the 2003 Proposal provided a range of views regarding the appropriate number of shareholder nominees. Commenters that supported the use of a percentage, or combination of a set number and a percentage, to determine the number of shareholder nominees suggested percentages ranging from 20% to 35%. *See* 2003 Summary of Comments.

to reduce the effect of a shareholder nominee elected to the board.

Proposed Rule 14a–11(d)(3) would address situations where more than one shareholder or group would be eligible to have its nominees included in the company's form of proxy and disclosed in its proxy statement pursuant to the proposed rule. In those situations, the company would be required to include in its proxy statement and form of proxy the nominee or nominees of the first nominating shareholder or group from which it receives timely notice of intent to nominate a director pursuant to the rule, up to and including the total number of shareholder nominees required to be included by the company.[186] Where the first nominating shareholder or group from which the company receives timely notice does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the next nominating shareholder or group from which the company receives timely notice of intent to nominate a director pursuant to the rule would be included in the company's proxy materials, up to and including the total number of shareholder nominees required to be included by the company.

Although in 2003 we proposed a standard under which the largest shareholder or group would have their nominee or nominees included in the company proxy materials and the limited number of shareholders that commented did not generally object to such a standard,[187] after further consideration we believe that such a standard might be difficult for companies to administer because it would lack certainty. By using a first-in standard, a company would be able to begin preparing its materials and coordinating with the nominating shareholder or group immediately upon receiving an eligible nomination rather than waiting to see whether another nomination from a larger nominating shareholder or group is submitted before the notice deadline. This approach also may be fairer to the shareholder whose notice is received first and may provide certainty to the shareholder because it eliminates the possibility that the shareholder's nominee will be excluded as a result of a larger shareholder subsequently submitting a nominee.

Request for Comment

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

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

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

E.4. Should the proposed rule address situations where the governing documents provide a range for the number of directors on the board rather than a fixed number of board seats? If so, what changes to the rule would be necessary?

E.5. The proposal contemplates taking into account incumbent directors who were nominated pursuant to proposed Rule 14a–11 for purposes of determining the maximum number of shareholder nominees. Is that appropriate? Should there be a different means to account for such incumbent directors?

E.6. Should the procedure address situations in which, due to a staggered board, fewer director positions are up for election than the maximum permitted number of shareholder nominees? If so, how? Should the maximum number be based on the number of directors to be elected rather than to the overall board size?

E.7. Should any limitation on shareholder nominees take into account incumbent directors who were nominated outside of the Rule 14a–11 process, such as pursuant to an applicable state law provision, a company's governing documents, or a proxy contest? If so, should such directors be counted as ''shareholder nominees'' for purposes of determining the 25%?

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

E.9. Should Rule 14a–11 provide an exception for controlled companies or companies with a contractual obligation that permits a certain shareholder or group of shareholders to appoint a set number of directors? Should a nominating shareholder or group only be permitted to submit nominees for director based upon the number of director seats the nominating shareholder is entitled to vote on? For example, if a board consists of 10 directors and the company is contractually obligated to permit a certain shareholder or shareholders to appoint five directors to the board, should shareholders entitled to vote on the remaining five director slots be limited to submitting nominees based on a board size of five rather than 10, meaning that a nominating shareholder may submit one nominee for inclusion in the company's proxy materials?

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

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

E.12. Under the proposal, where the first nominating shareholder or group to deliver timely notice to the company does not nominate the maximum number of directors allowed under the rule, the nominee or nominees of the next nominating shareholder or group to deliver timely notice of intent to nominate a director pursuant to the rule would be included in the company's proxy materials, up to and including the

[186] This requirement is set forth in proposed Rule 14a–11(d)(3).

[187] *See* 2003 Summary of Comments.

total number of shareholder nominees required to be included by the company. Should the rule specify how to determine which of a second nominating shareholder's or group's nominees are to be selected where there are more nominees than available spots under the rule? Should Rule 14a–11 provide that only one nominating shareholder or group may have their nominee or nominees included in the company proxy materials, regardless of whether they nominate the maximum number allowed under the rule?

E.13. Would the ''first-in'' approach result in an undue advantage to the first shareholder or group to submit a nomination? Would such an approach result in a race to be the first in?

6. Notice and Disclosure Requirements

To submit a nominee for inclusion in the company's proxy statement and form of proxy, proposed Rule 14a–11 would require that the nominating shareholder or group provide a notice on Schedule 14N to the company of its intent to require that the company include that shareholder's or group's nominee or nominees in the company's proxy materials.[188] The shareholder notice on Schedule 14N would also be required to be filed with the Commission.

The notice would be required to be provided to the company and filed by the date specified by the company's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting. We are proposing 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting as the standard where a company does not have an advance notice provision because we believe that 120 days would provide adequate time for companies to take the steps necessary to include or, where appropriate, to exclude a shareholder nominee for director that is submitted pursuant to Rule 14a–11. If the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, however, then the nominating shareholder must provide notice a reasonable time before the company mails its proxy materials. The company would be required to disclose the date by which the shareholder must submit the required notice in a Form 8–K filed pursuant to proposed Item 5.07 within four business days after the company determines the anticipated meeting date.[189]

The notice would be filed with the Commission on proposed new Exchange Act Schedule 14N on the date the notice is sent to the company.[190] The new Schedule 14N would require:[191]

- The name and address of the nominating shareholder or each member of the nominating shareholder group;
- Information regarding the amount and percentage of securities beneficially owned and entitled to vote at the meeting;
- A written statement from the ''record'' holder of the shares beneficially owned by the nominating shareholder or each member of the nominating shareholder group (usually a broker or bank) verifying that, as of the date of the shareholder notice on Schedule 14N, the shareholder continuously held the securities for at least one year;[192]
- A written statement of the nominating shareholder's or group's intent to continue to own the requisite shares through the shareholder meeting at which directors are elected. Additionally, the nominating shareholder or group would provide a written statement regarding the nominating shareholder's or group's intent with respect to continued ownership after the election;[193] and
- A certification that to the best of the nominating shareholder's or group's knowledge and belief, the securities are not held for the purpose of, or with the effect of, changing the control of the issuer or gaining more than a limited number of seats on the board of directors.[194]

We believe that these disclosures would assist shareholders in making an informed voting decision with regard to any nominee or nominees put forth by the nominating shareholder or group, in that the disclosures would enable shareholders to gauge the nominating shareholder's or group's interest in the company, longevity of ownership, and intent with regard to continued ownership in the company. These disclosures also would be important to the company in determining whether the nominating shareholder or group is eligible to rely on Rule 14a–11 to include a nominee or nominees in the company's proxy materials.

The shareholder notice on Schedule 14N also would include representations concerning the nominating shareholder's or group's eligibility to use Rule 14a–11, as well as disclosure about the nominating shareholder or group and the nominee for director. The disclosure provided by the nominating shareholder or group would be similar to the disclosure currently required in a contested election and would be included by the company in its proxy materials. This disclosure would be required pursuant to proposed new Exchange Act Rule 14a–18. Specifically, the shareholder notice on Schedule 14N would be required to include:

- A representation that the nominating shareholder or group is eligible to submit a nominee under Rule 14a–11;[195]
- A representation that, to the knowledge of the nominating shareholder or group, the candidate's

[188] *See* proposed Rule 14a–11(c), Rule 14a–18 and Rule 14n–1.

[189] *See* proposed Instruction 2 to Rule 14a–11(a) and proposed Rule 14a–18. This would be similar to the requirement currently included in Rule 14a–5(f), which specifies that, where the date of the next annual meeting is advanced or delayed by more than 30 calendar days from the date of the annual meeting to which the proxy statement relates, the company must disclose the new meeting date in the company's earliest possible quarterly report on Form 10–Q. Although registered investment companies generally are not required to file Form 8–K, we are proposing to require them to file a Form 8–K disclosing the date by which the shareholder notice must be provided if the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year. *See* proposed Exchange Act Rules 13a–11(b)(2) and 15d–11(b)(2).

[190] In this regard, we propose to amend Rule 13(a)(4) of Regulation S–T to provide that a Schedule 14N will be deemed to be filed on the same business day if it is filed on or before 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect. This will allow nominating shareholders additional time to file the notice on Schedule 14N and transmit the notice to the company.

[191] In the 2003 Proposal, the Commission proposed to rely on disclosure obtained in a Schedule 13G. The Schedule 13G filing requirement is triggered when a shareholder or group owns more than 5% of the company's securities. In the current proposal, we are proposing ownership thresholds for many companies that are different from the more than 5% threshold proposed in 2003. We nevertheless believe uniform disclosure for all companies, regardless of size, would be appropriate. Therefore, we are proposing a new filing requirement on Schedule 14N, to require certain disclosures regarding the nominating shareholder and nominee that would not otherwise be required to be filed.

[192] This requirement would be applicable only where the nominating shareholder is not the registered holder of the shares and where the shareholder has not filed a Schedule 13D, Schedule 13G, Form 3, Form 4, and/or Form 5, or amendments to those documents. *See* Item 5(a) to proposed Schedule 14N.

[193] *See* proposed Rule 14a–18(f), proposed Item 5(b) of Schedule 14N, proposed Item 7(e) of Schedule 14A, and proposed Item 22(b)(18) of Schedule 14A.

[194] *See* Item 8 of proposed Schedule 14N.

[195] The eligibility standards for nominating shareholders are set forth in proposed Rule 14a–11(b). Pursuant to Rule 14a–18(b), the nominating shareholder would be required to include a representation in the notice that the nominating shareholder or group satisfies the conditions in Rule 14a–11(b).

nomination or initial service on the board, if elected, would not violate controlling state law, federal law, or applicable listing standards (other than a standard relating to independence);[196]

- A representation that, to the knowledge of the nominating shareholder or group, the nominee meets the objective criteria for independence from the company that are set forth in applicable rules of a national securities exchange or national securities association[197] or, in the case of a registered investment company or business development company, that the nominee to the board is not an ''interested person'' of the company as defined in Section 2(a)(19) of the Investment Company Act;[198]
- A representation that neither the nominee nor the nominating shareholder (or any member of the nominating shareholder group, if applicable) has an agreement with the company regarding the nomination of the nominee;[199]
- A statement from the nominee that the nominee consents to be named in the company's proxy statement and to serve on the board if elected, for inclusion in the company's proxy statement;[200]
- A statement that the nominating shareholder or each member of the nominating shareholder group intends to continue to own the requisite amount of securities through the date of the meeting;[201]
- Disclosure about the nominee complying with the requirements of Item 4(b), Item 5(b), and Items 7(a), (b) and (c) and, for investment companies, Item 22(b) of Exchange Act Schedule 14A, for inclusion in the company's proxy statement;[202]
- Disclosure about the nominating shareholder or members of a nominating shareholder group consistent with the disclosure currently required pursuant to Item 4(b) and Item 5(b) of Schedule 14A in a contested election;[203]
- Disclosure about whether the nominating shareholder or member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K. Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A;[204]
- The following disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company:
- Any direct or indirect material interest in any contract or agreement between the nominating shareholder or group or the nominee and the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);
- Any material pending or threatened litigation in which the nominating shareholder or group or nominee is a party or a material participant and that involves the company, any of its officers or directors, or any affiliate of the company; and
- Any other material relationship between the nominating shareholder or group or the nominee and the company or any affiliate of the company not otherwise disclosed;[205]
- Disclosure of any Web site address on which the nominating shareholder or group may publish soliciting materials;[206] and
- If desired to be included in the company's proxy statement, any statement in support of the shareholder nominee or nominees, which may not exceed 500 words.[207]

We note that the disclosure requirements we have proposed here are substantially similar to the requirements the Commission proposed in the 2003 Proposal. In both cases, the requirements focus on obtaining disclosure similar to what would be obtained in an election contest. In the 2003 Proposal, because the Commission proposed a 5% ownership threshold, nominating shareholders or groups would have been required to file a Schedule 13G, so the Commission also proposed to require certain disclosures and representations from the nominating shareholder and nominee on Schedule 13G rather than create a new schedule. Under the tiered ownership threshold we are proposing, a nominating shareholder or group may hold less than 5% of the company's securities and would not be required to file a Schedule 13G. Accordingly, because we believe that uniform disclosure regardless of company size would be appropriate, we are proposing a new Schedule 14N that would require the same disclosures and representations from the nominating shareholder and nominee regardless of the percentage of the company's securities held by the nominating shareholder or group.

[196] Proposed Rule 14a–11(a)(2) requires that the nomination and initial board service not violate these standards. This representation would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(a).

[197] The representation is not required if the company is not subject to the rules of a national securities exchange or national securities association.

[198] This representation would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(c). The criteria for independence would be those generally applicable to directors, and not particular independence requirements, such as the requirements for audit committee members. *See* the Instruction to Rule 14a–18(c).

[199] This representation would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(d).

[200] This statement would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(e).

[201] *See* proposed Rule 14a–18(f).

[202] This information would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(g). This information would identify the nominee, describe certain legal proceedings, if any, related to the nominee, and describe certain of the nominee's transactions and relationships with the company. *See* Items 7(a), (b), and (c) of Schedule 14A. This information also would include biographical information and disclosure about certain interests of the nominee. *See* Item 5(b) of Schedule 14A. With respect to a nominee for director of a registered investment company or business development company, the disclosure would include certain basic information about the nominee and any arrangement or understanding between the nominee and any other person pursuant to which he was selected as a nominee; information about the positions, interests, and transactions and relationships of the nominee and his immediate family members with the company and persons related to the company; information about the amount of equity securities of funds in a fund complex owned by the nominee; and information describing certain legal proceedings related to the nominee, including legal proceedings in which the nominee is a party adverse to, or has a material interest adverse to, the company or any of its affiliated persons. *See* paragraph (b) of Item 22 of Schedule 14A.

[203] This information would be submitted in the nominating shareholder's notice pursuant to proposed Rule 14a–18(h).

[204] *See* proposed Rule 14a–18(i). Similar information is required for a nominee in response to Items 4(b) and 5(b) of Schedule 14A. We believe that it is appropriate to require similar disclosure of information from the nominating shareholder or group.

[205] *See* proposed Rule 14a–18(j).

[206] This information would be included in the nominating shareholder's notice pursuant to proposed Rule 14a–18(k).

[207] *See* proposed Rule 14a–18(*l*). The 500 words would be counted in the same manner as words are counted under Rule 14a–8. Any statements that are, in effect, arguments in support of the nomination would constitute part of the supporting statement. Accordingly, any ''title'' or ''heading'' that meets this test would be counted toward the 500-word limitation. Inclusion of a Web site address in the supporting statement would not violate the 500-word limitation; rather, the Web site address would be counted as one word for purposes of the 500-word limitation. We note that in the 2003 Proposal the Commission proposed that a company would be required to include a nominating shareholder's or group's supporting statement in the company's proxy materials in instances where the company made a statement opposing the nominating shareholder's nominee or nominees and/or supporting company nominees. Most commenters thought that a nominating shareholder's or group's supporting statement should be included in company proxy materials irrespective of whether the company includes its own supporting statement or statement in opposition to a shareholder nominee. *See* 2003 Summary of Comments.

The Schedule 14N would be filed with the Commission in the following manner: [208]

- The filing would include a cover page in the form set forth in proposed Schedule 14N with the appropriate box on the cover page marked to specify that the filing relates to a Rule 14a–11 nomination; [209]
- The filing would be made under the subject company's Exchange Act file number (or in the case of a registered investment company, under the subject company's Investment Company Act file number); and
- The filing would be made on the date the notice is first transmitted to the company.

In order to file the Schedule 14N on EDGAR, a nominating shareholder or group and any nominee that does not already have EDGAR filing codes, and to which the Commission has not previously assigned a user identification number, which we call a ''Central Index Key (CIK)'' code, would need to obtain the codes by filing electronically a Form ID [210] at *https://www/filermanagement.edgarfiling.sec.gov*. The applicant also would be required to submit a notarized authenticating document. If the authenticating document is prepared before the applicant makes the Form ID filing, the authenticating document may be uploaded as a Portable Document Format (PDF) attachment to the electronic filing. An applicant also may submit the authenticating document by faxing it to the Commission within two business days before or after electronically filing the Form ID.[211]

The Schedule 14N would be required to be amended promptly for any material change in the facts set forth in the originally-filed Schedule 14N. In this regard, we would view withdrawal of a nominating shareholder or group, or of a director nominee, and the reasons for any such withdrawal, as a material change. For example, such a withdrawal could be material because it may result in a group no longer meeting the required ownership threshold under Rule 14a–11. The nominating shareholder or group also would be required to file a final amendment to the Schedule disclosing within 10 days of the final results of the election being announced by the company the nominating shareholder's or group's intention with regard to continued ownership of their shares. The nominating shareholder would previously have disclosed their intent with regard to continued ownership of the company's securities in its original notice on Schedule 14N. Filing of the amendment to the Schedule 14N would provide shareholders with information as to whether the outcome of the election may have altered the intent of the shareholder and what further plans with regard to the company the nominating shareholder may have.

The Schedule 14N, as filed with the Commission, as well as any amendments to the Schedule 14N, would be subject to the liability provisions of Exchange Act Rule 14a–9 pursuant to proposed new paragraph (c) to the rule.[212]

In a traditional proxy contest, shareholders would receive the disclosure required by Items 4(b), 5(b), and Item 7 (or Item 22, as applicable) of Schedule 14A as discussed above. The proposed Schedule 14N disclosure requirements are somewhat more expansive in that they also would include the disclosures concerning ownership amount, length of ownership, intent to continue holding the shares through the date of the meeting, and a certification that the nominating shareholder or group is not seeking to change the control of the issuer or to gain more than a limited number of seats on the board of directors. In addition, the proposed disclosure requirements would include representations concerning the nominating shareholder's or group's eligibility to rely on Rule 14a–11 to include a nominee or nominees in the company's proxy statement, as well as representations concerning the nominee's eligibility, and disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company. Today's proposed disclosure requirements are not as extensive, however, as those in the Shareholder Proposals Proposing Release that were not adopted. In that instance, a shareholder that was relying on a company bylaw to include a nominee for director in a company's proxy materials would have had to provide the following disclosures in addition to what we are proposing today:

- A description of the following items that occurred during the 12 months prior to the formation of any plans or proposals, or during the pendency of any proposal or nomination:
- Any material transaction of the shareholder with the company or any of its affiliates, and
- Any discussion regarding the proposal between the shareholder and a proxy advisory firm;
- Any holdings of more than 5% of the securities of any competitor of the company (*i.e.,* any enterprise with the same SIC code); and
- Any meetings or contacts, including direct or indirect communication by the shareholder, with the management or directors of the company that occurred during the 12-month period prior to the formation of any plans or proposals, or during the pendency of the proposal.[213]

Based on the comments we received on the Shareholder Proposals Proposing Release, we believe that requiring such extensive disclosure may be impractical and may serve as a deterrent to shareholders' exercise of their right to nominate directors. We believe that the disclosure we propose today would provide transparency and facilitate shareholders' ability to make an informed voting decision on a shareholder director nominee or nominees without being unnecessarily burdensome on nominating shareholders or groups. We believe that the proposed disclosure would be particularly important because the nominating shareholder or group would not be bound by the same fiduciary duties applicable to the members of a board's nominating committee in selecting director nominees.

Request for Comment

F.1. Are the proposed content requirements of the shareholder notice on Schedule 14N appropriate? Are there matters included in the notice that should be eliminated (*e.g.,* should the

[208] The requirement to file a Schedule 14N with the Commission is set forth in proposed Rule 14n–1 and proposed Rule 14a–18.

[209] The Schedule 14N also would be used for disclosure concerning the inclusion of shareholder nominees in company proxy materials when made pursuant to an applicable state law provision or a company's governing documents, as set out in proposed Rule 14a–19.

[210] 17 CFR 239.63; 249.446; and 274.402.

[211] The authenticating document would need to be manually signed by the applicant over the applicant's typed signature, include the information contained in the Form ID, and confirm the authenticity of the Form ID. If the authenticating document is filed after electronically filing the Form ID, it would need to include the accession number assigned to the electronically filed Form ID as a result of its filing. *See* 17 CFR 232.10(b)(2).

[212] For further discussion, *see* Section III.E.

[213] These disclosures would have applied to either a shareholder proponent of a proposal to amend a company's bylaws to establish procedures for inclusion in the company's proxy materials of shareholder nominees for director or to a nominating shareholder under such an adopted bylaw. A shareholder proponent of a bylaw proposal would also have been required to disclose background information about the proposing shareholder including qualifications and background relevant to the plans or proposals, and any interests or relationships of such shareholder proponent that are not shared generally by the other shareholders of the company and that could have influenced the decision by such proponent to submit a proposal.

nominating shareholder be required to provide disclosure of its intention with regard to continued ownership of the shares after the election, as is proposed)?

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

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

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

F.5. What should be the consequence of a nominating shareholder or group including materially false information or a materially false representation in the nominating shareholder's or group's notice on Schedule 14N to the company, whether before inclusion of a nominee in the company's proxy materials, after inclusion of a nominee in the company's proxy materials but before the election, or after a nominee has been included in the company's proxy materials and elected? Should it make a difference whether the false information or representation was provided knowingly? Should it make a difference whether the false information or representation was material?

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

F.7. The proposed instructions to Rule 14a–11 address how to provide disclosure where the nominating shareholder is a ''general or limited partnership, syndicate or other group.'' Is this sufficiently broad to address any nominating shareholders that may use the rule?

F.8. Should a company's advance notice provision govern the timing of the submission of shareholder nominations for directors? If not, should the Commission adopt a specific deadline instead? Should the Commission make no reference to advance notice provisions as they may apply to proxy solicitations and adopt a generally applicable federal standard? Would such an approach better enable consistent exercise by shareholders of their voting and nominating rights across public companies? If the Commission were to establish a federal standard, would 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting be appropriate? Should it be longer (*e.g.,* 150 or 180 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting), or shorter (*e.g.,* 90 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting)?

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

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

F.11. The proposed notice requirements address both regularly scheduled annual meetings and circumstances where a company may not have held an annual meeting in the prior year or has moved the date of the meeting more than 30 days from the prior year. Under these circumstances, what is the appropriate date by which a nominating shareholder must submit the notice to the company? Should the Commission adopt a specific deadline for non-regularly scheduled meetings, or rely on a ''reasonable time'' standard? If a ''reasonable time'' standard is adopted, should the company be required to file the Form 8–K announcing the deadline any minimum number of days in advance of the deadline? If so, how many days notice should the company provide and why? What deadline should apply when a company holds a special meeting in lieu of an annual meeting?

F.12. As proposed, an instruction to Form 8–K would specify that a company would be required to file a report pursuant to Item 5.07 within four business days of determining the anticipated meeting date if the company did not hold an annual meeting the previous year or if the annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting. Is such an instruction necessary? Should the company be required to file the Item 5.07 Form 8–K in less than four business days (*e.g.,* two business days) or more than four business days (*e.g.,* seven business days, 10 business days)?

F.13. Should a registered investment company be required to disclose on Form 8–K the date by which a shareholder or shareholder group must submit the notice to the company of its intent to require its nominees on the company's proxy card? Should this date also be required to be disclosed on the company's Web site, if it has one? Should registered investment companies instead be permitted to provide this disclosure in a different manner?

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

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

nominating shareholder first identifies a nominee for director, or some other time? Should it be filed later?

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

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

F.18. In situations where a nominating shareholder or group beneficially owns more than 5% of the company's securities, should we permit a combined Schedule 13G/Schedule 14N filing? Should we permit a combined Schedule 13D/Schedule 14N filing? Why or why not?

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

F.20. Should the notice be required to include a description of the following items that occurred during the 12 months prior to the formation of any plans or proposals with respect to the nomination, or during the pendency of any nomination: (i) Any material transaction of the shareholder with the company or any of its affiliates, and (ii) any discussion regarding the nomination between the shareholder and a proxy advisory firm?

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

F.22. Should the nominating shareholder or group and/or nominee be required to disclose any meetings or contacts, including direct or indirect communication by the shareholder, with the management or directors of the company that occurred during the 12-month period prior to the formation of any plans or proposals with respect to a nomination?

7. Requirements for a Company That Receives a Notice From a Nominating Shareholder or Group

a. Inclusion of a Shareholder Director Nominee

Upon receipt of a shareholder's or group's notice of its intent to require the company to include in its proxy materials a shareholder nominee or nominees pursuant to Rule 14a–11, the company would determine whether any of the events permitting exclusion of the shareholder nominee or nominees has occurred.[214] If not, the company would notify in writing the nominating shareholder or group no later than 30 calendar days before the company files its definitive proxy statement and form of proxy with the Commission that it will include the nominee or nominees. The company would be required to provide this notice in a manner that provides evidence of timely receipt by the nominating shareholder or group.

The company would then include disclosure regarding the shareholder nominee or nominees and the nominating shareholder or group in the company's proxy statement[215] and include the name of the nominee on the company's form of proxy that is included with the proxy statement.[216] With regard to the company's form of proxy, the company could identify any shareholder nominees as such and recommend how shareholders should vote for, against, or withhold votes on those nominees and management nominees on the form of proxy.[217] The company would otherwise be required to present the nominees in an impartial manner in accordance with Rule 14a–4. Under the current rules, a company may provide shareholders with the option to vote for or withhold authority to vote for the company's nominees as a group, provided that shareholders also are given a means to withhold authority for specific nominees in the group. In our view, this option would not be appropriate where the company's form of proxy includes shareholder nominees, as grouping the company's nominees may make it easier to vote for all of the company's nominees than to vote for the shareholder nominees in addition to some of the company nominees. Accordingly, when a shareholder nominee is included, the proposed rules would not permit a company to provide shareholders the option of voting for or withholding authority to vote for the company nominees as a group, but would instead require that each nominee be voted on separately.[218]

A company also would be required to include in its proxy statement, if desired by the nominating shareholder or group, a statement by the nominating shareholder or group in support of the shareholder nominee or nominees. In this regard, we believe that not only should a company be able to include a statement in support of the company nominees in its proxy statement, provided that it complies with Rule 14a–9, we also are of the view that a nominating shareholder or group should be afforded a similar opportunity. Accordingly, we are proposing to require a company to include a nominating shareholder's or group's statement of support for the shareholder nominee or nominees, so long as the statement of support does not exceed 500 words.[219] This statement must be provided to the company in the shareholder notice on Schedule 14N.[220]

In addition, both the company and the nominating shareholder or group would be able to solicit in favor of their nominees outside the proxy statement (for example, on a designated website), provided that such solicitations were made within the parameters of the

[214] *See* proposed Rule 14a–11(f).

[215] Under the proposed rules, inclusion of a shareholder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the proposed rules make clear that inclusion of a shareholder nominee would not be deemed a solicitation in opposition. *See* proposed revisions to Rule 14a–6(a)(4) and Note 3 to that rule.

[216] These requirements are set forth in proposed Rule 14a–11(a), proposed Rule 14a–18(g)–(*l*) and proposed amendments to Rule 14a–4(b)(2). In addition, we are proposing to add paragraph (e) to Item 7 of Schedule 14A (and, for registered investment companies and business development companies, paragraph (18) to Item 22(b) of Schedule 14A) to state that the registrant must include the disclosure required from the nominating shareholder under proposed Rule 14a–11(a).

[217] This would be similar to the current practice with regard to shareholder proposals submitted pursuant to Rule 14a–8 where companies identify the shareholder proposals and provide a recommendation to shareholders as to how they should vote on those proposals.

[218] *See* proposed Rule 14a–4(b)(2)(iv). We anticipate that companies would continue to be able to solicit discretionary authority to vote a shareholder's shares for the company nominees, as well as to cumulate votes for the company nominees in accordance with applicable state law, where such state law provides for cumulative voting.

[219] *See* proposed Rule 14a–11(a). In counting the 500 words, any statements that are, in effect, arguments in support of the proposal would be viewed as part of the supporting statement. Accordingly, any ''title'' or ''heading'' that meets this test would be counted toward the 500-word limitation. Inclusion of a website address in the supporting statement would not violate the 500-word limitation; rather, the website address would be counted as one word for purposes of the 500-word limitation.

[220] *See* proposed Rule 14a–18(*l*).

applicable proxy rules. Any written soliciting materials published, sent or given by the nominating shareholder or group outside the company's proxy statement would be required to be filed with the Commission in accordance with proposed Rule 14a–2(b)(7) or (b)(8) on the date of first use.

b. Excluding a Shareholder Director Nomination That Does Not Comply With the Requirements of Rule 14a–11

A company may determine that it is not required under proposed Rule 14a–11 to include a nominee from a nominating shareholder or group in its proxy materials if it determines any of the following:

- Proposed Rule 14a–11 is not applicable to the company;
- The nominating shareholder or group has not complied with the requirements of Rule 14a–11;
- The nominee does not meet the requirements of Rule 14a–11;
- Any representation required to be included in the notice to the company is false or misleading in any material respect; or
- The company has received more nominees than it is required to include by proposed Rule 14a–11 and the nominating shareholder or group is not entitled to have its nominee included under the criteria proposed in Rule 14a–11(d)(3).[221]

The nominating shareholder or group would need to be notified of the company's determination not to include the shareholder nominee in sufficient time to consider the validity of any determination to exclude the nominee.[222] In this regard, we note the time-sensitive nature of Rule 14a–11 and the interpretive issues that may arise in applying the new rule. Accordingly, the rules that we are proposing, which set out the process by which a company would determine whether to include a shareholder nominee and notify the nominating shareholder or group, include a proposed procedure by which companies would send a notice to the Commission where the company intends not to include a shareholder nominee in its proxy materials, and could seek staff advice—through a no-action request—with respect to that determination.[223] This procedure is modeled after the staff no-action process used in connection with shareholder proposals under Rule 14a–8.

In addition, we have proposed a process by which a nominating shareholder or group may remedy certain eligibility or procedural deficiencies in a nomination.[224] The various time deadlines set out in the proposed process were determined by considering the appropriate balance between companies' needs in meeting printing and filing deadlines for their shareholder meetings with shareholders' need for adequate time to satisfy the requirements of the rule. In doing so, we considered the timing requirements and deadlines in Rule 14a–8 when crafting the requirements and deadlines for Rule 14a–11; however, due to the potential complexity of the nomination process, we determined that it would be appropriate to provide additional time for the process. For example, once a nominating shareholder submits a nominee pursuant to Rule 14a–11, the company must consider the nominee submitted and make a determination as to whether to include the nominee or submit a no-action request pursuant to Rule 14a–11(f). A nominating shareholder will be afforded time to respond to the no-action request, and the staff will need time to process the request. In addition, a company may need time after receipt of the no-action response from the staff to finalize the proxy materials.

The following process would apply when a company receives a shareholder nomination under Rule 14a–11:

- Upon receipt of a shareholder's or shareholder group's notice of intent to nominate a director or directors, the company would determine whether any of the eligibility requirements have not been satisfied by the nominating shareholder or group or nominee or nominees and whether the company will seek to exclude the shareholder nominee or nominees;[225]
- If the company determines that the eligibility requirements have not been satisfied by the nominating shareholder or group or nominee or nominees and it seeks to exclude the shareholder nominee or nominees, the company would notify in writing the nominating shareholder or group of this determination, at the business address, facsimile number and/or e-mail address provided in the nominating shareholder's or group's notice to the company. This notice must be postmarked or transmitted electronically no later than 14 calendar days after it receives the shareholder notice of intent to nominate. The company should provide this notice in a manner that provides evidence of receipt by the nominating shareholder or group;[226]
- The company's notice to the nominating shareholder or group that it has determined that the company may exclude a shareholder nominee or nominees would be required to include an explanation of the company's basis for determining that it may exclude the nominee or nominees;[227]
- The nominating shareholder or group would have 14 calendar days after receipt of the written notice of deficiency to respond to that notice and correct any eligibility or procedural deficiencies identified in that notice. The nominating shareholder's or group's response must be postmarked, or transmitted electronically, no later than 14 calendar days from the date the shareholder received the company's notice. As with the company's notice, the nominating shareholder or group should provide the response in a manner that provides evidence of its receipt by the company;[228]
- Neither the composition of a nominating shareholder group nor a shareholder nominee could be changed as a means to correct a deficiency identified in the company's notice to the nominating shareholder or group—those matters would be required to remain as they were described in the notice to the company (we believe that to allow otherwise could serve to undermine the purpose of the notice deadline provided for in the rule); however, where a nominating shareholder or group inadvertently submits a number of nominees that exceeds the maximum number required to be included by the company, the nominating shareholder or group may specify which nominee or

[221] *See* proposed Rule 14a–11(a).

[222] *See* proposed Rule 14a–11(f).

[223] *See* proposed Rule 14a–11(f)(7)–(14). As is the case with regard to the Rule 14a–8 staff no-action process, we encourage companies and shareholders to attempt to resolve disputes independently. To the extent that a company and nominating shareholder or group are able to resolve an issue at any point during the staff no-action process, the company would withdraw its request for a no-action position from the staff.

[224] *See* proposed Rule 14a–11(f)(3)–(6).

[225] *See* proposed Rule 14a–11(f)(1)–(3). *See also* proposed Rule 14a–11(a) detailing circumstances permitting exclusion of shareholder nominee or nominees. Where a company receives more than one nominee from an eligible nominating shareholder or group and some of those nominees are eligible to be placed in the company's proxy materials, the company's determination that one or more of the nominating shareholder's or group's nominees are not eligible will not affect the company's obligation to place the eligible nominee or nominees in its proxy materials.

[226] *See* proposed Rule 14a–11(f)(3).

[227] *See* proposed Rule 14a–11(f)(4).

[228] *See* proposed Rule 14a–11(f)(5). We believe it is necessary to impose a time limit for a nominating shareholder's response to a notice of deficiency due to the potential time-sensitive nature of the nomination process and a company's preparation of its proxy materials for filing.

nominees are not to be included in the company's proxy materials;[229]

• If, upon review of the nominating shareholder's response, the company determines that the company still may exclude a shareholder nominee or nominees, after providing the requisite notice of and time for the nominating shareholder or group to remedy any eligibility or procedural deficiencies in the nomination, the company would be required to provide notice of the basis for its determination to the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The Commission staff could permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy if the company demonstrates good cause for missing the deadline;[230]

• The company's notice to the Commission would include: (a) Identification of the nominating shareholder or each member of the nominating shareholder group, as applicable; (b) the name of the nominee or nominees; (c) an explanation of the company's basis for determining that it may exclude the nominee or nominees; and (d) a supporting opinion of counsel when the company's basis for excluding a nominee or nominees relies on a matter of state law;[231]

• Unless otherwise provided in Rule 14a–11 (*e.g.,* the nominating shareholder's or group's obligation to demonstrate that it responded to a company's notice of deficiency, where applicable, within 14 calendar days after receipt of the notice of deficiency), the burden would be on the company to demonstrate that it may exclude a nominee or nominees;[232]

• The company would be required to file its notice of its intent to exclude with the Commission and simultaneously provide a copy to the nominating shareholder or each member of the nominating shareholder group;[233]

• The nominating shareholder or group could submit a response to the company's notice to the Commission. This response would be postmarked or transmitted electronically no later than 14 calendar days after the nominating shareholder's or group's receipt of the company's notice to the Commission. The nominating shareholder or group would be required to provide a copy of its response to the Commission simultaneously to the company;[234]

• The Commission staff would, at its discretion, provide an informal statement of its views (a no-action letter) to the company and the nominating shareholder or group;[235]

• The company would provide the nominating shareholder or group with notice, no later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission, of whether it will include or exclude the shareholder nominee or nominees;[236]

• All materials submitted to the Commission in relation to Rule 14a–11(f) would be publicly available upon submission;[237] and

• The company or any nominating shareholder or group could request that the staff seek the Commission's views with respect to a determination of the staff under Rule 14a–11(f). The staff, upon such a request or on its own motion, would generally present questions to the Commission that involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.[238]

The process generally would operate as follows:

Due date	Action required
Date set by company's advance notice provision or, in the absence of such a provision, 120 days before the anniversary of the date that the company mailed the prior year's proxy materials.	Nominating shareholder or group must provide and file notice on Schedule 14N.
Within 14 calendar days after the company's receipt of the nominating shareholder's or group's notice on Schedule 14N.	Company must notify the nominating shareholder or group of any determination not to include the nominee or nominees.
Within 14 calendar days after the nominating shareholder's or group's receipt of the company's deficiency notice.	Nominating shareholder must respond to the company's deficiency notice.
No later than 80 calendar days before the company files its definitive proxy statement and form of proxy with the Commission.	Company must provide notice of its intent to exclude the nominating shareholder's or group's nominee or nominees and the basis for its determination to the Commission.
Within 14 calendar days of the nominating shareholder's or group's receipt of the company's notice to the Commission.	Nominating shareholder or group could submit a response to the company's notice to the Commission staff.
As soon as practicable	Commission staff would, at its discretion, provide an informal statement of its views to the company and the nominating shareholder or group.
No later than 30 calendar days before the company files its definitive proxy statement and form of proxy with the Commission.	Company must provide the nominating shareholder or group with notice of whether it will include or exclude the shareholder's nominee or nominees.

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[229] *See* proposed Rule 14a–11(f)(6).

[230] *See* proposed Rule 14a–11(f)(7). This would be similar to the procedures the company must follow if it intends to exclude a shareholder proposal under Rule 14a–8. *See* Rule 14a–8(j). Given the similarities in the processes, we are proposing an 80-day deadline for Rule 14a–11(f).

[231] *See* proposed Rule 14a–11(f)(8).

[232] *See* proposed Rule 14a–11(f)(9).

[233] *See* proposed Rule 14a–11(f)(10).

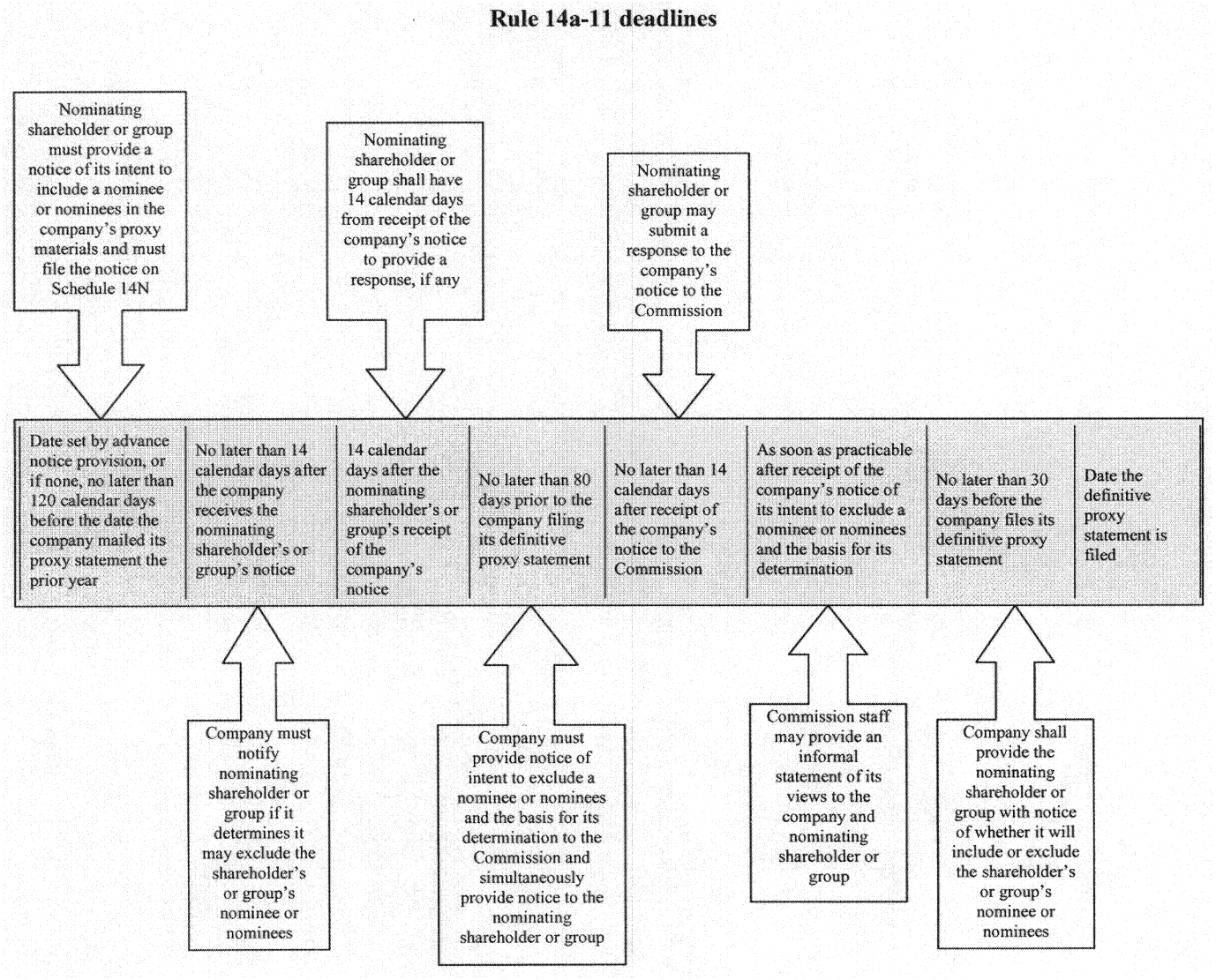
[234] *See* proposed Rule 14a–11(f)(11). A nominating shareholder group may, but is not required to, respond to a company's notice to the staff.

[235] *See* proposed Rule 14a–11(f)(12). The staff's no-action responses to submissions made pursuant to proposed Rule 14a–11(f) would reflect only informal views. The staff determinations reached in these no-action letters would not, and cannot, adjudicate the merits of a company's position with respect to exclusion of a shareholder nominee under Rule 14a–11. Accordingly, a discretionary staff determination would not preclude an interested person from pursuing a judicial determination regarding the application of Rule 14a–11.

[236] *See* proposed Rule 14a–11(f)(13).

[237] *See* proposed Rule 82a, which would state that materials filed with the Commission pursuant to proposed Rule 14a–11(f), written communications related thereto received from any person, and each related no-action letter or other written communication issued by the staff of the Commission, shall be made available to any person upon request for inspection or copying. This rule would be similar to Rule 82, which applies to no-action requests related to shareholder proposals.

[238] *See* Commission Rules of Informal and Other Procedures Rule 202.1(d).



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Request for Comment

G.1. Under proposed Rule 14a–11(a) a company would not be required to include a shareholder nominee where: (1) Applicable state law or the company's governing documents prohibit the company's shareholders from nominating a candidate for director; (2) the nominee's candidacy or, if elected, board membership, would violate controlling state law, federal law or rules of a national securities exchange or national securities association; (3) the nominating shareholder or group does not meet the rule's eligibility requirements; (4) the nominating shareholder's or group's notice is deficient, (5) any representation in the nominating shareholder's or group's notice is false in any material respect, or (6) the nominee is not required to be included in the company's proxy materials due to the proposed limitation on the number of nominees required to be included. Proposed Rule 14a–11(f)(1) provides that the company shall determine whether any of these events have occurred. Will companies be able to make this determination? Why or why not?

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

G.3. As proposed, inclusion of a shareholder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the proposed rules make clear that inclusion of a shareholder nominee would not be deemed a ''solicitation in opposition.'' Is this appropriate or should the inclusion of a nominee instead be viewed as a solicitation in opposition that would require a company to file its proxy statement in preliminary form? Should we view inclusion of a shareholder nominee as a solicitation in opposition for other purposes (*e.g.,* expanded disclosure obligations)?

G.4. Under the proposal, companies would not be able to provide shareholders the option of voting for the company's slate of nominees as a whole. Should we allow companies to provide

that option to shareholders? Are any other revisions to the form of proxy appropriate? Would a single ballot or ''universal ballot'' that includes both company nominees and shareholder nominees be confusing? Would a universal ballot result in logistical difficulties? If so, please specify.

G.5. Is it appropriate to require that the company include in its proxy statement a supporting statement by the nominating shareholder or group? If so, should this requirement be limited to instances where the company wishes to make a statement opposing the nominating shareholder's nominee or nominees or supporting company nominees? Is it appropriate to limit the nominating shareholder's or group's supporting statement to 500 words? If not, what limit, if any, is more appropriate (*e.g.,* 250, 750, or 1,000 words)? Should the limit be 500 words per nominee, or some other number (*e.g.,* 250, 750, or 1,000 words)? Should the company's supporting statement be similarly limited? Why or why not?

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

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

G.8. Is the 80-day requirement for submission of the company's notice to the Commission sufficient? If not, should the requirement be increased (*e.g.,* 90 days, 100 days, 120 days, or more) or decreased (*e.g.,* 75 days, 60 days, or less)? Is the proposed provision under which the staff could permit the company to make its submission later than 80 days before filing its definitive proxy statement where the company demonstrates good cause appropriate? If not, why not? Should the rule more explicitly discuss the effect of such a late filing?

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

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

G.11. Would the timing requirements overall allow a company to comply with the requirements of e-proxy?

G.12. Do the proposed timing requirements, in the aggregate, allow sufficient time for the informal staff review process? How far in advance of filing definitive proxy materials do companies typically begin printing those materials? If the proposed timing requirements do not allow sufficient time for the informal staff review process, please tell us specifically which timing requirements pose a problem and suggest a specific alternative time that would be sufficient.

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

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

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

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

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

G.18. In the absence of a staff review process, what would be the potential litigation cost associated with the resolution of disputes concerning company determinations? Would shareholder meetings be delayed due to such litigation or threat of litigation?

G.19. Are there certain types of company determinations that should or should not be subject to the staff review process (*e.g.,* whether a nominating shareholder or group meets the required ownership threshold)? Please provide specific examples in your response.

G.20. How should we address the situation where a nominating shareholder qualifies, provides its notice, and submits all of the nominees a company is required to include, then becomes ineligible under the rule? Under what circumstances should a second shareholder or group be able to nominate directors? If the second nominating shareholder or group provided a notice before the first shareholder became ineligible? Should it matter whether a company had notified the second nominating shareholder or group that it intended to exclude their nominee or nominees?

8. Application of the Other Proxy Rules to Solicitations by the Nominating Shareholder or Group

As proposed, Rule 14a–11 would permit shareholders to aggregate their securities with other shareholders in order to meet the applicable minimum ownership threshold to nominate a director. Accordingly, we anticipate that shareholders would, in many instances,

engage in communications with other shareholders in an effort to form a nominating shareholder group that would be deemed solicitations under the proxy rules. In 2003 we proposed an exemption from certain of the proxy rules to enable shareholders to communicate for the limited purpose of forming a nominating shareholder group without filing and disseminating a proxy statement. To qualify for the exemption, shareholders would have had two options. The communications would either have been made to a limited number of shareholders or, in the alternative, to an unlimited number of shareholders, provided that the communication was limited in content and filed with the Commission. Some commenters supported adoption of limited exemptions,[239] while others stated that the exemptions were unnecessary or duplicative of existing exemptions from the proxy rules. In particular, commenters expressed concerns about the exemption for solicitations not involving more than 30 persons in connection with the formation of a nominating security holder group.[240] These commenters believed the 30-person exemption might be used for undeclared control purposes and believed that there was no reason to replace the 10-person exemption set forth in Exchange Act Rule 14a–2(b)(2), which permits limited testing of the waters before application of the notice and filing requirements of the proxy rules.[241]

After considering further the need for an exemption, and in particular the comments received on the 2003 Proposal, we are proposing an exemption from the proxy rules for communications made in connection with using proposed Rule 14a–11 [242] that are limited in content and filed with the Commission.[243] We believe this limited exemption will facilitate shareholders' use of proposed Rule 14a–11 and remove concerns shareholders seeking to use the rule may have regarding certain communications with other shareholders regarding their intent to submit a nomination pursuant to the rule. The exemption would not apply to oral communications because such communications could not easily satisfy the filing requirement, which we believe is important in determining compliance with the content restriction in the proposed exemption. As proposed, Exchange Act Rules 14a–3 to 14a–6 (other than paragraphs 14a–6(g) and 14a–6(p)), 14a–8, 14a–10, and 14a–12 to 14a–15 would not apply to any solicitation by or on behalf of any shareholder in connection with the formation of a nominating shareholder group, provided that:

- Each written communication includes no more than:
- A statement of the shareholder's intent to form a nominating shareholder group in order to nominate a director under the proposed rule;
- Identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;
- The percentage of securities that the shareholder beneficially owns or the aggregate percentage owned by any group to which the shareholder belongs; and
- The means by which shareholders may contact the soliciting party; [244] and
- Any written soliciting material published, sent or given to shareholders in accordance with the terms of this provision is filed with the Commission by the nominating shareholder, under the company's Exchange Act file number (or in the case of a registered investment company, under the company's Investment Company Act file number), no later than the date the material is first published, sent or given to shareholders. The soliciting material would be required to include a cover page in the form set forth in Schedule 14A, with the appropriate box on the cover page marked.[245]

In this regard, we note that shareholders also would have the option to structure their solicitations, whether written or oral, to comply with an existing exemption from the proxy rules, including the exemption for solicitations of no more than 10 shareholders,[246] and the exemption for certain communications that take place in an electronic shareholder forum.[247]

Both the nominating shareholder or group and the company may wish to solicit in favor of their nominees for director by various means, including orally, by U.S. mail, electronic mail, and Web site postings. While the company ultimately would file a proxy statement and therefore could rely on the existing proxy rules to solicit outside the proxy statement,[248] shareholders could be limited in their soliciting activities under the current proxy rules. Accordingly, we are proposing a new exemption to the proxy rules providing that solicitations by or on behalf of a nominating shareholder or group in support of a nominee included in the company's proxy statement and form of proxy in accordance with the proposed rule, would not be subject to Exchange Act Rules 14a–3 to 14a–6 (other than paragraphs 14a–6(g) and 14a–6(p)), 14a–8, 14a–10, and 14a–12 to 14a–15, provided that:

- The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization; [249]
- Each written communication includes:
- The identity of the nominating shareholder or group and a description of his or her direct or indirect interests, by security holdings or otherwise;
- A prominent legend in clear, plain language advising shareholders that a shareholder nominee is or will be included in the company's proxy statement and to read the company's proxy statement when it becomes available because it includes important information. The legend also must explain to shareholders that they can find the proxy statement, other soliciting material and any other relevant documents, at no charge on the Commission's Web site; and
- Any soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the nominating shareholder or group with the Commission, under the company's Exchange Act file number,

[239] *See* 2003 Summary of Comments; *see also* comment letters from CalPERS; CIR; ICI; and Clauss & Wolf.

[240] *See* 2003 Summary of Comments; *see also* comment letters from ABA; NYC Bar; and Sullivan.

[241] *Id.*

[242] The proposed exemption would not apply to solicitations made when seeking to have a nominee included in a company's proxy materials pursuant to a procedure specified in the company's governing documents. In this instance, companies and/or shareholders would have determined the parameters of the shareholder's or group's access to the company's proxy materials. Given the range of possible criteria companies and/or shareholders could establish for nominations, we are not proposing to extend the exemption to those circumstances. A shareholder would need to determine whether one of the existing exemptions applies to their solicitation conducted in connection with a nomination made pursuant to a company's governing documents. The proposed exemption also would not apply to nominations made pursuant to applicable state law provisions, again because state law could establish any number of possible criteria for nominations.

[243] *See* proposed Rule 14a–2(b)(7)(i).

[244] *See id.*

[245] *See* proposed Rule 14a–2(b)(7)(ii). We note that written communications include electronic communications, such as e-mails and Web site postings.

[246] Exchange Act Rule 14a–2(b)(2).

[247] Exchange Act Rule 14a–2(b)(6).

[248] *See* Exchange Act Rule 14a–12.

[249] *See* proposed Rule 14a–2(b)(8)(i).

no later than the date the material is first published, sent or given to shareholders.[250] Three copies of the material would at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the company is listed and registered. The soliciting material would be required to include a cover page in the form set forth in Schedule 14A, with the appropriate box on the cover page marked.[251]

Request for Comment

H.1. Should the Commission provide a new exemption for soliciting activities undertaken by shareholders seeking to form a nominating shareholder group pursuant to Rule 14a–11? If so, is the proposed exemption appropriate? If not, why not? What specific changes to the exemption would be appropriate? Should the rule require that a shareholder meet any of the requirements of Rule 14a–11 to rely on the exemption (*e.g.,* have held the securities they seek to aggregate for the required holding period)? Is it appropriate to require filing with the Commission on the date of first use, as proposed?

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

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

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

H.5. Is the requirement that the nominating shareholder or group provide a description of his or her direct or indirect interests, by security holdings or otherwise, sufficiently clear? Do we need to provide additional guidance as to what interests would be required to be disclosed?

H.6. Should all written soliciting materials be filed with the Commission on the date of first use? If not, how much later should they be filed (*e.g.,* two business days after first use; four business days after first use, some other date)? Should the materials be filed before the date of first use?

H.7. Should we provide a similar exemption for soliciting activities undertaken by shareholders seeking to form a nominating shareholder group other than in connection with Rule 14a–11 (*e.g.,* in connection with a nomination under applicable state law provisions or a company's governing documents)?

H.8. Should solicitations by or on behalf of a nominating shareholder or group in support of a nominee included in the company's proxy statement and form of proxy pursuant to Rule 14a–11 be exempt? Why or why not?

H.9. Should the exemption be conditioned on the soliciting materials including a legend about the shareholder's nominee being included in company proxy materials and a statement about where shareholders can find the proxy statement, soliciting material, and other relevant documents, as proposed? Should any other conditions be included in the exemption?

H.10. Should a nominating shareholder or group be required to file any soliciting material published, sent or given to shareholders in accordance with the exemption no later than the date the material is first published, sent or given to shareholders, as proposed?

H.11. Should solicitations by the nominating shareholder or group be limited or prohibited? If so, why?

H.12. Should we provide a similar exemption for soliciting activities undertaken by a nominating shareholder or group in support of their nominee or nominees, where those nominees are included in a company's proxy materials pursuant to applicable state law provisions or a company's governing documents?

C. Amendments to Exchange Act Rule 14a–8(i)(8)

1. Background

Currently, Rule 14a–8(i)(8) allows a company to exclude from its proxy statement a shareholder proposal that relates to a nomination or an election for membership on the company's board of directors or a procedure for such nomination or election. As noted, the Commission amended this provision in 2007 to expressly permit the exclusion of a proposal that would result in an immediate election contest or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings. The Commission adopted this proposal in December 2007 to provide certainty to companies and shareholders in light of the *AFSCME* decision.[252] In the adopting release, the Commission noted the many disclosures that are required for election contests that would not have been provided for in Rule 14a–8.[253] In this regard, several Commission rules, including Exchange Act Rule 14a–12, regulate contested proxy solicitations to assure that investors receive disclosure to enable them to make informed voting decisions in elections. The requirements to provide these disclosures to shareholders from whom proxy authority is sought are grounded in Rule 14a–3, which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information in Schedule 14A. Items 4(b) and 5(b) of Schedule 14A require numerous specified disclosures if the solicitation is subject to Rule 14a–12(c), and Item 7 of Schedule 14A also requires important specified disclosures for any director nominee. Finally, all of these disclosures are covered by the prohibition on the making of a solicitation containing false or misleading statements or omissions that is found in Rule 14a–9.

The Commission's action in 2007 provided certainty to shareholders and companies regarding the application of Rule 14a–8(i)(8) in the wake of the *AFSCME* decision that had caused confusion about what disclosure and liability rules might apply to any resulting election contest. As noted in

[250] For a registered investment company, the filing would be made under the subject company's Investment Company Act file number.

[251] *See* proposed Rule 14a–2(b)(8)(iii).

[252] *See* Election of Directors Adopting Release. *See also* footnotes 88 and 89, above.

[253] *See* Election of Directors Adopting Release.

Section II., at that time, the Commission did not take any action with respect to the alternative proposal published in 2007.[254] Since that time, we have continued to consider whether the proxy process can be improved and we have concluded that the proxy rules, including Rule 14a–8(i)(8), can be amended to further facilitate shareholders' rights to nominate directors and promote fair corporate suffrage, while still providing appropriate disclosure and liability protections.

2. Proposed Amendment to Rule 14a–8(i)(8)

We are proposing an amendment to Rule 14a–8(i)(8), the election exclusion, to enable shareholders, under certain circumstances, to require companies to include in company proxy materials proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11.[255] The proposal would have to meet the procedural requirements of Rule 14a–8 and not be subject to one of the substantive exclusions other than the election exclusion (*e.g.,* the proposal could be excluded if the shareholder proponent did not meet the ownership threshold under Rule 14a–8).[256]

As proposed, except as provided below in the codification of staff positions, revised Rule 14a–8(i)(8) would not restrict the types of amendments that a shareholder could propose to a company's governing documents to address the company's provisions regarding nomination procedures or disclosures related to shareholder nominations, although any such proposals that conflict with proposed Rule 14a–11 or state law could be excluded.[257] We recognize that the proposed amendments to Rule 14a–8(i)(8) could result in shareholders proposing amendments that would establish procedures for nominating directors and disclosures related to such nominations that require a different ownership threshold, holding period, or other qualifications or representations than those proposed in Rule 14a–11. The amendments proposed by shareholders through Rule 14a–8 would be permitted unless they would conflict with Rule 14a–11 (*i.e.,* proposals that would preclude nominations by shareholders who would qualify under proposed Rule 14a–11 to have their nominee for director included in the company's proxy materials) or applicable state law. We considered whether this would create confusion or lack of certainty for companies and their shareholders, but believe that this possibility is outweighed by the importance of facilitating shareholders' ability to exercise their rights to determine their own additional shareholder nomination proxy disclosure and related procedures.

3. Disclosure Requirements

We are not proposing any new disclosure requirements for a shareholder that submits a proposal that would amend, or that requests an amendment to, a company's governing documents to address the company's nomination procedures or procedures for inclusion of shareholder nominees in company proxy materials or disclosures related to those shareholder provisions.[258] New disclosures would not be required from a shareholder simply submitting such a proposal to amend, or requesting an amendment to, a company's governing documents because the Commission believes that a shareholder may simply want to amend the company's procedures for nominating directors, but may not intend to nominate any particular individual.[259]

As noted, the proposed amendments to Rule 14a–8(i)(8) could result in shareholders proposing amendments that would establish procedures for nominating directors and disclosures related to such nominations that require a different ownership threshold, holding period, or other qualifications or representations than those proposed in Rule 14a–11. In addition, a state could set forth in its corporate code [260] or a company may choose to amend its governing documents, to provide for nomination or disclosure rights in addition to those provided pursuant to Rule 14a–11 (*e.g.*, a company could choose to provide a right for shareholders to have their nominees disclosed in the company's proxy materials regardless of ownership—in that instance, the company's provision would apply for certain shareholders who would not otherwise have their nominees included in the company's proxy materials pursuant to Rule 14a–11). Accordingly, we are proposing amendments to our proxy rules to address the disclosure requirements when a nomination is made pursuant to such a provision.[261] We believe the proposed additional disclosure requirements are necessary to provide shareholders with full and fair disclosure of information that is material when a choice among directors to be elected is presented.

Proposed Rule 14a–19 would apply to a shareholder nomination for director for inclusion in the company's proxy materials made pursuant to procedures

[254] Under the alternative proposal, Rule 14a–8(i)(8) would have been amended with certain conditions to permit a qualifying shareholder who makes full disclosure in connection with a bylaw proposal relating to director nominations procedures to have that proposal included in a company's proxy materials.

[255] A proposal would continue to be subject to exclusion under Rule 14a–8(i)(2) if its implementation would cause the company to violate any state, federal, or foreign law to which it is subject, or under Rule 14a–8(i)(3), if the proposal or supporting statement was contrary to any of the Commission's proxy rules. As proposed to be amended, Rule 14a–8(i)(8) would allow shareholders to propose additional means, other than Rule 14a–11, for disclosure of shareholder nominees in company proxy materials. Therefore, a shareholder proposal that seeks to provide an additional means for including shareholder nominees in the company's proxy materials pursuant to the company's governing documents would not be deemed to conflict with Rule 14a–11 simply because it would establish different eligibility thresholds or require more extensive disclosures about a nominee or nominating shareholder than would be required under Rule 14a–11. A shareholder proposal would conflict with Rule 14a–11, however, to the extent that the proposal would purport to prevent a shareholder or shareholder group that met the requirements of proposed Rule 14a–11 from having their nominee for director included in the company's proxy materials. A shareholder proposal would also be subject to exclusion under Rule 14a–8(i)(2) or Rule 14a–8(i)(3) to the extent that it would affirmatively excuse nominating shareholders or their nominees from compliance with the liability provisions of Rule 14a–9(c) or the proposed Rule 14a–19 disclosure requirements applicable to shareholder nominations submitted pursuant to an applicable state law provision or a company's governing documents.

[256] Currently, Rule 14a–8 requires that a shareholder proponent have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for a period of one year prior to submitting the proposal. *See* Rule 14a–8(b). These requirements would remain the same. The proposal may be subject to exclusion if the procedural requirements of the rule are not met or it falls within one of the other substantive bases for exclusion included in Rule 14a–8.

[257] In this regard, the proposed revision to Rule 14a–8(i)(8) would not make a distinction between binding and non-binding proposals.

[258] Shareholders submitting a proposal to amend a company's governing documents to address nomination procedures for inclusion of shareholder nominees in company proxy materials or disclosures related those shareholder nomination provisions would be subject to the rule's current requirements. *See* footnote 256, above.

[259] This approach is different from the disclosure requirements the Commission proposed in the Shareholder Proposals Release in 2007; however, it is consistent with the overall requirements relating to the submission of shareholder proposals—generally, shareholder proponents are not required to provide any type of disclosure along with their proposal.

[260] *See* discussion of North Dakota Publicly Traded Corporations Act, N.D. Cent. Code § 10–35 et al., in footnote 70, above.

[261] *See* proposed Rule 14a–19.

established pursuant to state law or by a company's governing documents. The proposed rule would require a nominating shareholder or group to include in its shareholder notice on Schedule 14N (which also would be filed with the Commission on the date provided to the company) disclosures about the nominating shareholder or group and their nominee that are similar to what would be required in an election contest.[262]

Specifically, the shareholder notice on Schedule 14N would be required to include:

- A statement from the nominee that the nominee consents to be named in the company's proxy statement and to serve on the board if elected, for inclusion in the company's proxy statement;[263]
- Disclosure about the nominee complying with the requirements of Item 4(b), Item 5(b), and Items 7(a), (b) and (c) and, for investment companies, Item 22(b) of Exchange Act Schedule 14A, for inclusion in the company's proxy statement;[264]
- Disclosure about the nominating shareholder or members of a nominating shareholder group consistent with the disclosure currently required pursuant to Item 4(b) and Item 5(b) of Schedule 14A;[265]
- Disclosure about whether the nominating shareholder or member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K. Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A;[266]
- The following disclosure regarding the nature and extent of the relationships between the nominating shareholder or group and nominee and the company or any affiliate of the company:
- Any material direct or indirect interest in any contract or agreement between the nominating shareholder or group or the nominee and the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);
- Any material pending or threatened litigation in which the nominating shareholder or group or nominee is a party or a material participant, and that involves the company, any of its officers or directors, or any affiliate of the company; and
- Any other material relationship between the nominating shareholder or group or the nominee and the company or any affiliate of the company not otherwise disclosed;[267] and
- Disclosure of any Web site address on which the nominating shareholder or group may publish soliciting materials.[268]

These disclosures would then be included in the company's proxy materials pursuant to proposed new Item 7(f) of Schedule 14A. Proposed Item 22(b)(19) of Schedule 14A would require investment companies to include in their proxy materials disclosures from the nominating shareholder or shareholder group with regard to the nominee and nominating shareholder or shareholder group that are similar to those required for reporting companies (other than registered investment companies).

In addition, the nominating shareholder or group would be required to identify the shareholder or group making the nomination and the amount of their ownership in the company on Schedule 14N. The filing would be required to include, among other disclosures:

- The name and address of the nominating shareholder or each member of the nominating shareholder group; and
- Information regarding the aggregate number and percentage of the securities entitled to be voted, including the amount beneficially owned and the number of shares over which the nominating shareholder or each member of the nominating shareholder group has or shares voting or disposition power.

We believe that these disclosures would assist shareholders in making an informed voting decision with regard to any nominee or nominees put forth by the nominating shareholder or group, in that the disclosures would enable shareholders to gauge the nominating shareholder's or group's interest in the company. Depending on the requirements of the state law provisions or the company's governing documents, these disclosures also may be important to the company in determining whether the nominating shareholder or group meets any ownership threshold, where applicable. The nominating shareholder or group would be liable for any false or misleading statements in these disclosures pursuant to proposed new paragraph (c) of Rule 14a–9.[269]

The disclosure requirements we are proposing differ from the approach proposed in the alternative proposal in 2007.[270] In that release, the Commission proposed requiring significant new disclosures from shareholder proponents of bylaw proposals to be made on Schedule 13G. Commenters expressed concern that the proposed disclosure requirements were too onerous and should not be required to submit a shareholder proposal.[271] Upon further consideration, we believe that it is appropriate to allow the submission of proposals to amend, or that request an amendment to, a company's governing documents to address the company's nomination procedures or disclosures related to shareholder nominations without requiring extensive disclosure regarding the shareholder proponent. As noted above, we acknowledge that some shareholders may simply desire to amend or establish the company's procedure for nominating directors, but may not contemplate nominating any particular

[262] *See* proposed Rule 14a–19.

[263] *See* proposed Rule 14a–19(a).

[264] *See* proposed Rule 14a–19(b). This information would identify the nominee, describe certain legal proceedings, if any, related to the nominee, and describe certain of the nominee's transactions and relationships with the company. *See* Items 7(a), (b), and (c) of Schedule 14A. This information also would include biographical information and information concerning interests of the nominee. *See* Item 5(b) of Schedule 14A. With respect to a nominee for director of an investment company, the disclosure would include certain basic information about the nominee and any arrangement or understanding between the nominee and any other person pursuant to which he was selected as a nominee; information about the positions, interests, and transactions and relationships of the nominee and his immediate family members with the company and persons related to the company; information about the amount of equity securities of funds in a fund complex owned by the nominee; and information describing certain legal proceedings related to the nominee, including legal proceedings in which the nominee is a party adverse to, or has a material interest adverse to, the company or any of its affiliated persons. *See* paragraph (b) of Item 22 of Schedule 14A.

[265] *See* proposed Rule 14a–19(c).

[266] *See* proposed Rule 14a–19(d).

[267] *See* proposed Rule 14a–19(e).

[268] *See* proposed Rule 14a–19(f).

[269] *See* proposed Rule 14a–9(c).

[270] *See* Shareholder Proposals Proposing Release.

[271] *See*, *e.g.*, comment letters from American Federation of Labor and Congress of Industrial Organizations (August 2, 2007) (''AFL–CIO 2007''); Amalgamated Bank LongView Funds (October 2, 2007); Australian Council of Super-Investors (October 2, 2007); Robert Balopole, CFA, President, Balopole Investment Management Corp.; CalPERS 2007; California State Teachers' Retirement System (November 16, 2007) (''CalSTERS 2007''); Council of Institutional Investors (September 18, 2007) (''CII''); Public Employees' Retirement Association of Colorado (October 1, 2007) (''CO Retirement''); McRitchie 2007; F&C Management Limited (October 1, 2007); State Board of Administration of Florida (October 3, 2007); ICGN Shareholder Rights Committee (October 2, 2007); State Universities Retirement System of Illinois (October 1, 2007); Investment Management Association (October 2, 2007); KLD Research & Analytics, Inc. (October 2, 2007); Brett McDonnell (September 27, 2007); Treasurer, State of North Carolina (October 2, 2007); Ohio Public Employees Retirement System (October 2, 2007); SEIU; International Brotherhood of Teamsters (August 30, 2007); UK Local Authority Pension Fund Forum (October 2, 2007); and United Church Foundation (September 27, 2007).

individual. In addition, we do not require additional disclosure from proponents of other types of shareholder proposals submitted under Rule 14a–8. We are soliciting comment, however, on whether additional disclosure from a shareholder submitting a bylaw proposal would be appropriate.

4. Codification of Prior Staff Interpretations

Although we are proposing to amend Rule 14a–8(i)(8), we continue to believe that under certain circumstances companies should have the right to exclude proposals related to particular elections and nominations for director from company proxy materials where those proposals could result in an election contest between company and shareholder nominees without the important protections provided by the disclosure and liability provisions otherwise provided for in the proxy rules. Rule 14a–8(i)(8) should not, however, be read so broadly such that the provision could be used to permit the exclusion of proposals regarding the qualifications of directors, shareholder voting procedures, board nomination procedures and other election matters of importance to shareholders that would not directly result in an election contest between management and shareholder nominees, and that do not present significant conflicts with the Commission's other proxy rules. Therefore, we propose to amend Rule 14a–8(i)(8) to codify certain prior staff interpretations with respect to the type of proposals that would continue to be excludable.[272]

A company would be permitted to exclude a proposal under Rule 14a–8(i)(8) if it:

- Would disqualify a nominee who is standing for election;[273]
- Would remove a director from office before his or her term expired;[274]
- Questions the competence, business judgment, or character of one or more nominees or directors;[275]
- Nominates a specific individual for election to the board of directors,[276] other than pursuant to Rule 14a–11, an applicable state law provision, or a company's governing documents; or
- Otherwise could affect the outcome of the upcoming election of directors.

With regard to the language ''otherwise could affect the outcome of the upcoming election of directors,'' we are seeking to address the fact that the proposed new language of the exclusion specifically addresses the particular types of proposals that we have traditionally seen in this area and that we believe are clearly excludable under the policy underlying the rule. With the broader proposed language, we are seeking to address new proposals that may be developed over time that are comparable to the four specified categories and would undermine the purpose of the exclusion. This broader language is generally consistent with the language of the other bases for exclusion in Rule 14a–8.[277]

Request for Comment

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

I.2. Should the Commission amend Rule 14a–8(i)(8) to allow proposals that would amend, or that request an amendment to, a company's governing documents to provide for or prohibit inclusion of shareholder nominees for director in company proxy materials? Should such an amendment operate separately from proposed Rule 14a–11? Should such an amendment be adopted regardless of whether proposed Rule 14a–11 is adopted? If so, under what circumstances should such proposals be permitted? For example, should shareholder proposals be included where they propose or request amendments to provisions in the company's governing documents to address the inclusion of shareholder nominees for director in the company's proxy materials so long as such amendments are not prohibited under state law? Should such proposals instead be included only if the law of the company's state of incorporation explicitly authorizes a company to have a provision in its governing documents that permits the inclusion of shareholder nominees in the company's proxy materials? Should such proposals instead be limited under Rule 14a–8 to instances when a company already has a provision in its governing documents that addresses the inclusion of shareholder nominees in the company's proxy materials?

I.3. Should companies be required to include non-binding proposals regarding procedures to include shareholder nominees for director in company proxy materials, as proposed? Should the requirements instead be limited to binding proposals?

I.4. Should proposed Rule 14a–8(i)(8) operate independently, even if proposed Rule 14a–11 were not adopted or not in effect? Why or why not? Are there changes or additions to Rule 14a–8(i)(8) as proposed that can or should be made so that it would be better suited or able to operate independently? Please give specific recommendations.

I.5. Is it sufficiently clear that shareholders would have the ability under proposed Rule 14a–8(i)(8) to propose nomination procedures that are different from proposed Rule 14a–11 provided that such procedures would serve as additional methods of accessing the proxy and would not preclude a shareholder or group or shareholders who satisfied the Rule 14a–11 requirements from using the Rule 14a–11 method? If not, what clarification should be made?

I.6. As proposed, a shareholder proposal under Rule 14a–8(i)(8) would supplement proposed Rule 14a–11, not replace it. Should shareholders instead be permitted under Rule 14a–8(i)(8) to propose governing document amendments that would conflict with proposed Rule 14a–11? Please explain how and why. Are there different

[272] In limited circumstances, the staff may permit proponents to make minor revisions to a proposal to cure a deficiency under Rule 14a–8. Under existing staff interpretations, the staff may permit revisions to proposals that would disqualify board nominees from standing for election at the upcoming meeting or that would remove a director from office before his or her term expires. In contrast, where the proposal or supporting statement questions the competence or business judgment of one or more directors that will stand for reelection at the upcoming meeting, the staff will generally not permit the proponent to revise the proposal to cure such a deficiency. The proposed codification of existing staff interpretations under Rule 14a–8(i)(8) is not intended to alter the staff's historical approach (*see* Staff Legal Bulletin No. 14 (July 13, 2001)) to permitting revisions to cure deficiencies under Rule 14a–8(i)(8).

[273] *See, e.g., Dollar Tree Stores, Inc.* (March 7, 2008) and *Waddell and Reed Financial, Inc.* (February 23, 2001).

[274] *See, e.g., TVI Corporation* (April 2, 2008) and *First Energy Corp.* (March 17, 2003).

[275] *See, e.g., Exxon Mobil Corporation* (March 20, 2002) and *AT&T Corp.* (February 12, 2001).

[276] *See, e.g., N–Viro International Corporation* (March 8, 2007) and *Dow Jones & Company, Inc.* (January 31, 1996).

[277] *See, e.g.,* Rule 14a–8(i)(7) addressing proposals that ''deal[] with a matter relating to the company's ordinary business operations,'' and Rule 14a–8(i)(10) addressing proposals that have been ''substantially implemented'' already by the company.

limitations on such proposals that we should consider? If so, what are they?

I.7. What would be the costs to companies if Rule 14a–8(i)(8) were amended as proposed?

I.8. Rule 14a–8 currently requires that a shareholder proponent have held continuously at least $2,000 in market value or 1% of the company's securities entitled to be voted on the proposal at the meeting for at least one year as of the date of submission of the proposal. Are these thresholds appropriate? Should the minimum ownership threshold be higher than $2,000 in market value of the company's securities entitled to be voted on the proposal? Should the minimum ownership threshold be periodically adjusted for inflation? Should these eligibility determinations be made on the date of submission of the proposal, as proposed? If not, what date should be used?

I.9. Are there alternative thresholds that would be more appropriate for purposes of submitting a proposal under Rule 14a–8(i)(8) (*e.g.*, 1%, 2%, 3%, 4%, or 5% of the company's securities)? If so, please explain.

I.10. We are not proposing any requirements to disclose information about a shareholder proponent who submits a proposal that seeks to establish a procedure for nominating one or more directors. Should the rule require disclosure about a shareholder proponent who submits a proposal that relates to procedures for nominating directors but does not nominate a director? If so, what disclosures would be appropriate? The disclosures required in a contested election? Disclosure about the proponent's motives and interactions with the company leading up to the proposal? With respect to requiring disclosure from shareholder proponents, should our rules make a distinction between a proposal relating to a procedure for nominating directors and other proposals on other unrelated subjects?

I.11. Should disclosure consistent with that required in an election contest as defined in Rule 14a–12 be required for shareholder nominations pursuant to applicable state law provisions or a company's governing documents, as proposed? Why or why not? What additional disclosures should be required, if any? Which of the proposed disclosure requirements, if any, should be deleted or revised?

I.12. As proposed, the disclosures required for a nomination pursuant to an applicable state law provision or a company's governing documents do not include all of the disclosures that would be required for a Rule 14a–11 nomination. Would any of the additional disclosures required under Rule 14a–11 be appropriate with regard to a nomination under an applicable state law provision or a company's governing documents? If so, which ones in particular? Should a nominating shareholder or group submitting a nomination pursuant to an applicable state law provision or a company's governing documents be required to provide a statement regarding the nominating shareholder's or group's intent to continue to hold the securities through the date of the meeting? Should the rules require a statement regarding the nominating shareholder's or group's intent with respect to continued ownership of the shares after the election?

I.13. Should Rule 14a–8(i)(8) be amended to codify the prior staff interpretations of the election exclusion, as proposed? Why or why not? Does the proposed new language best describe the category of proposals that companies should be permitted to exclude? Are there other examples or categories or proposals that should be included in the revised rule (that do not restrict the ability of shareholders to propose nomination procedures)?

I.14. Is the proposed new language of Rule 14a–8(i)(8) sufficiently clear? In particular, would the proposed language ''or otherwise could affect the outcome of the upcoming election of directors,'' achieve its goal? Would there be unintended consequences of revising the language as proposed?

D. Other Rule Changes

1. Beneficial Ownership Reporting Requirements

The proposed rules would enable shareholders to engage in limited solicitations to form nominating shareholder groups and engage in solicitations in support of their nominees without disseminating a proxy statement. Although the minimum amount of securities a shareholder or group of shareholders must beneficially hold to be eligible to submit a nomination pursuant to proposed Rule 14a–11 is 1% for large accelerated filers, 3% for accelerated filers, and 5% for non-accelerated filers, the Commission anticipates that some shareholders or groups of shareholders may beneficially own in the aggregate more than 5% of the company's securities that are eligible to vote for the election of directors. Therefore, nominating shareholders will need to consider whether they have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b)(1) that is required to file beneficial ownership reports.[278] Any person who is directly or indirectly the beneficial owner of more than 5% of a class of equity securities registered under Exchange Act Section 12 must report that ownership by filing an Exchange Act Schedule 13D with the Commission.[279] There are exceptions to this requirement, however, that permit such a person to report that ownership on Schedule 13G rather than Schedule 13D.[280] One exception permits filings on Schedule 13G for a specified list of qualified institutional investors who have acquired the securities in the ordinary course of their business and with neither the purpose nor the effect of changing or influencing control of the company. A second exception applies to persons who are not specified in the first exception. These beneficial owners of more than 5% of a subject class of securities may file on Schedule 13G if they acquired the securities with neither the purpose nor the effect of changing or influencing control of the company and they are not directly or indirectly the beneficial owner of 20% or more of the subject class of securities.

Central to Schedule 13G eligibility is that the shareholder be a passive investor that has acquired the securities without the purpose, or the effect, of changing or influencing control of the company. In addition, shareholders who are filing as qualified institutional investors must have acquired the securities in the ordinary course of their business. We believe that the formation of a shareholder group solely for the purpose of nominating one or more directors pursuant to proposed Rule 14a–11, the nomination of one or more directors pursuant to proposed Rule 14a–11, soliciting activities in connection with such a nomination (including soliciting in opposition to a company's nominees), or the election of such a nominee as a director under proposed Rule 14a–11, should not result in a nominating shareholder or nominating shareholder group losing its eligibility to file on Schedule 13G. In such circumstances, a nominating shareholder or nominating shareholder group could report on Schedule 13G, rather than Schedule 13D. Accordingly, we are proposing to revise the requirement that the first and second

[278] Nominating shareholders that have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b) would need to reassess whether group status and the obligation of the group to file beneficial ownership reports continue after the election of directors.

[279] *See* Exchange Act Rule 13d–1.

[280] *See, e.g.,* Exchange Act Rules 13d–1(b) and 13d–1(c).

categories of persons who may report their ownership on Schedule 13G have acquired the securities without the purpose or effect of changing or influencing control of the registrant to provide an exception for activities solely in connection with a nomination under Rule 14a–11.[281] Any activity other than those provided for under Rule 14a–11 would make these instructions inapplicable. These rule changes would not apply to nominating shareholders or groups that submit a nomination pursuant to an applicable state law provision or a company's governing documents because in those instances the applicable provisions may not limit the number of board seats for which a shareholder or group could nominate candidates or include a requirement that the nominating shareholder or group lack intent to change the control of the issuer or to gain more than a limited number of seats on the board (as is the case under proposed Rule 14a–11). Accordingly, we do not believe it would be appropriate to make any determination as to whether a nominating shareholder or group under an applicable state law provision or a company's governing documents would be eligible to file on Schedule 13G.

Request for Comment

J.1. The proposal would provide that a shareholder or shareholder group[282] would not, solely by virtue of nominating one or more directors under proposed Rule 14a–11, soliciting on behalf of that nominee or nominees, or having that nominee or nominees elected, lose their eligibility to file as a passive or qualified institutional investor. This provision would then permit those shareholders or groups to report their ownership on Schedule 13G, rather than Schedule 13D. Is this approach appropriate? Should other conditions be required to be satisfied? If so, what other conditions? For example, should a nominating shareholder or group cease to qualify as a passive or qualified institutional investor where the nominee is the nominating shareholder or a member of the group, a member of the immediate family of the nominating shareholder or any member of the group, an employee of the nominating shareholder or any member of the group, or is in any way controlled by the nominating shareholder or any member of the group?

J.2. Should nominating shareholders or groups be required to comply with the additional Schedule 13D filing and disclosure requirements under the Exchange Act beneficial ownership reporting standards?

J.3. Should we provide a similar provision for nominating shareholders or groups submitting a nomination pursuant to an applicable state law provision or a company's governing documents? Why or why not?

2. Exchange Act Section 16

Exchange Act Section 16[283] applies to every person who is the beneficial owner of more than 10% of any class of equity security registered under Exchange Act Section 12 (''10% owners''), and each officer and director (collectively with 10% owners, ''insiders'') of the issuer of such security. Generally:

- Section 16(a) requires an insider to file an initial report with the Commission disclosing his or her beneficial ownership of all equity securities of the issuer upon becoming an insider. To keep this information current, Section 16(a) also requires insiders to report changes in such holdings, in most cases within two business days following the transaction.[284]
- Section 16(b) provides the issuer (or shareholders suing on behalf of the issuer) a private right of action to recover from an insider any profit realized by the insider from any purchase and sale (or sale and purchase) of any equity security of the issuer within any period of less than six months.[285]
- Section 16(c) makes it unlawful for an insider to sell any equity security of the issuer if the insider: (1) Does not own the security sold; or (2) owns the security, but does not deliver it against the sale within specified time periods.[286]

In 2003 the Commission proposed that a group formed solely for the purpose of nominating a director pursuant to proposed Rule 14a–11, soliciting in connection with the election of that nominee, or having that nominee elected as a director should not be viewed as being aggregated together for purposes of the 10% ownership determination under Section 16.[287] We are not proposing such an exclusion today and instead believe it would be appropriate to apply the existing analysis of whether a group has formed[288] and whether Section 16 applies.[289] In this regard, because the ownership thresholds for proposed Rule 14a–11 are significantly lower than 10%, and are generally lower than what was proposed in 2003, we do not believe that the lack of an exclusion would have a deterrent effect on the formation of groups, and therefore an exclusion may be unnecessary under the current proposal. Rather, a group formed for the purpose of nominating a director pursuant to proposed Rule 14a–11, soliciting in connection with the election of that nominee, or having that nominee elected as a director, would be analyzed the same way as any other group for purposes of determining whether group members are 10% owners subject to Section 16.

Some shareholders, particularly institutions and other entities, may be concerned that successful use of proposed Rule 14a–11 to include a director nominee in company proxy materials may result in the nominating person also being deemed a director under the ''deputization'' theory developed by courts in Section 16(b) short-swing profit recovery cases.[290] Under this theory it is possible for a person to be deemed a director subject to Section 16, even though the issuer has not formally elected or otherwise named that person a director. We have not proposed standards for establishing the independence of the nominee from the nominating shareholder, or members of the nominating shareholder group.

[281] This exception would only be available for purposes of the nomination. After the election of directors, a nominating shareholder or group would need to reassess its eligibility to continue to report on Schedule 13G as a passive or qualified institutional investor. For example, if a nominating shareholder is the nominee, and is successful in being elected to the board of a company, the shareholder would most likely be ineligible to continue filing on Schedule 13G because of its ability as a director to directly or indirectly influence the management and policies of the company.

[282] A group may file on Schedule 13G so long as each member qualifies to do so individually.

[283] 15 U.S.C. 78p.

[284] Exchange Act Section 16(a) [15 U.S.C. 78p(a)].

[285] Exchange Act Section 16(b) [15 U.S.C. 78p(b)].

[286] Exchange Act Section 16(c) [15 U.S.C. 78p(c)].

[287] Commenters on the 2003 Proposal generally supported the proposed exception. *See* 2003 Summary of Comments; *see also* comment letters from CalPERS, CIR; ICI; NYC Bar; and NYS Bar.

[288] *See* Exchange Act Rule 13d–5(b) [17 CFR 240.13d–5(b)].

[289] *See* Exchange Act Rule 16a–1(a)(1) [17 CFR 240.16a–1(a)(1)].

[290] *See Feder* v. *Martin Marietta,* 406 F.2d 260 (2d Cir.), cert. denied, 396 U.S. 1036 (1970); *Blau* v. *Lehman,* 368 U.S. 403 (1962); and *Rattner* v. *Lehman,* 193 F.2d 564 (2d Cir. 1952). The judicial decisions in which this theory was applied do not establish precise standards for determining when ''deputization'' may exist. However, the express purpose of Section 16(b) is to prevent the unfair use of information by insiders through their relationships to the issuer. Accordingly, one factor that courts may consider in determining if Section 16(b) liability applies is whether, by virtue of the ''deputization'' relationship, the ''deputizing'' entity's transactions in issuer securities may benefit from the deputized director's access to inside information.

Request for Comment

K.1. Would it be a disincentive to using proposed Rule 14a–11 if shareholders forming a group to nominate a director could become subject to Section 16 once the group's ownership exceeds 10% of the company's equity securities? Why or why not?

K.2. Are there any specific reasons why shareholders forming a group solely to nominate a director pursuant to proposed Rule 14a–11 should not be subject to Section 16 once the group's ownership exceeds 10% of the company's equity securities? If so, should the Commission adopt an exclusion from Section 16? Why, or why not?

K.3. If we should amend Rule 16a–1(a)(1), the rule that defines who is a 10% owner for Exchange Act Section 16 purposes, to exclude a Rule 14a–11 nominating shareholder group from the definition, how should such an exclusion be structured? For example, these groups could remain subject to the general condition of the rule that they not have the purpose or effect of changing or influencing control of the issuer, but a note to Rule 16a–1(a)(1) could provide an exception for members of nominating shareholder groups formed solely for the purpose of using proposed Rule 14a–11.[291] Should these conditions or other conditions apply?

K.4. Should the Commission consider providing an exclusion to the existing Rule 13d–5 definition of ''group'' that applies to both the Section 13(d) beneficial ownership reporting requirements and the Section 16 reporting requirements?

K.5. If the Commission adopts any such exclusion, should it be based on additional or different conditions? For example, should the Commission provide an exclusion from the definition of ''group'' in Rule 13d–5(b) for shareholders that agree to act together solely for the purpose of holding their securities in accordance with proposed Rule 14a–11(b)(2)?

K.6. Are there reasons that members of nominating shareholder groups formed under proposed Rule 14a–11 should be treated differently than shareholder groups permitted to form and formed to nominate directors under an applicable state law provision, or under provisions in a company's governing documents? If so, why? What distinctions ought to be drawn between groups formed under proposed Rule 14a–11 and an applicable state law provision or a company's governing documents in terms of Rule 13d–5(b) and Rule 16a–1(a)(1)?

K.7. Should there be a prohibition on any affiliation between nominees and nominating shareholders or groups? If so, what limitations would be appropriate? Would any such prohibitions or limitations make it less likely that in Section 16(b) cases courts would find nominating shareholders to be ''deputized'' directors in circumstances where liability should not apply? Would the lack of any such prohibitions or limitations increase the likelihood that courts would find nominating shareholders to be ''deputized'' directors?

E. Application of the Liability Provisions in the Federal Securities Laws to Statements Made by a Nominating Shareholder or Nominating Shareholder Group

It is our intent that a nominating shareholder or group relying on Rule 14a–11, an applicable state law provision, or a company's governing documents to include a nominee in company proxy materials be liable for any materially false or misleading statements in information provided by the nominating shareholder or group to the company (in its shareholder notice on Schedule 14N) that is then included in the company's proxy materials. To this end we have amended Rule 14a–9 to add a new paragraph (c), to specifically address these situations. Proposed new paragraph (c) states that ''no nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the federal proxy rules, an applicable state law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in registrant proxy materials, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.''

In addition, proposed new Rule 14a–11(e) contains express language providing that the company would not be responsible for information that is provided by the nominating shareholder or group under Rule 14a–11 and then repeated by the company in its proxy statement, except where the company knows or has reason to know that the information is false or misleading. A similar provision is included in proposed Rule 14a–19 with regard to information that is provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable state law provision or the company's governing documents.[292]

Also, as proposed, any information that is provided to the company in the notice from the nominating shareholder or group under Rule 14a–11 (and, as required, filed with the Commission by the nominating shareholder or group) and then included in the company's proxy materials would not be incorporated by reference into any filing under the Securities Act, the Exchange Act, or the Investment Company Act unless the company determines to incorporate that information by reference specifically into that filing.[293] A similar provision would apply to information that is provided by the nominating shareholder or group in connection with a nomination made pursuant to an applicable state law provision or the company's governing documents.[294]

To the extent the company does incorporate that information by reference or otherwise adopt the information as its own, however, we would consider the company's disclosure of that information as the company's own statement for purposes of the antifraud and civil liability provisions of the Securities Act, the Exchange Act, or the Investment Company Act, as applicable.

Request for Comment

L.1. Is an amendment to Rule 14a–9 the appropriate means to assign liability for materially false or misleading information provided by the nominating shareholder or group to the company that is included in the company's proxy materials? If not, what would be a more appropriate means? Should we characterize the disclosure provided to the company by the nominating shareholder or group and included in the company's proxy materials as soliciting material of the nominating

[291] Rule 16a–1(a)(1) also contains a general condition that the securities be held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business, but this condition would not be applicable to nominating shareholder groups under the exclusion contemplated by this comment request.

[292] *See* Note to proposed Rule 14a–19.

[293] *See* the Instruction to proposed Item 7(e) of Schedule 14A; Instruction to proposed Item 22(b)(18) of Schedule 14A.

[294] *See* the Instruction to proposed Item 7(f) of Schedule 14A; Instruction to proposed Item 22(b)(19) of Schedule 14A.

shareholder or group, as we proposed in 2003? Why or why not? Is it appropriate for proposed Rule 14a–9(c) to apply to nominations made pursuant to Rule 14a–11, an applicable state law provision, and a company's governing documents?

L.2. Does the language of proposed new paragraph (c) of Rule 14a–9 make clear that the nominating shareholder or group would be liable for any information included in its Schedule 14N or notice to the company that is included in the company's proxy materials? If not, what specific changes should be made to the proposed rule text?

L.3. Does the proposal make clear the company's responsibilities when it includes such information in its proxy materials? Should the proposal include language otherwise addressing a company's responsibility for repeating statements that it knows or has reason to know are not accurate? Are there situations where a company should be responsible for repeating statements of the nominating shareholder or group? Should the proposal treat disclosure provided in connection with a nomination pursuant to Rule 14a–11, an applicable state law provision, or a company's governing documents differently?

L.4. Should information provided by nominating shareholders or groups be deemed incorporated by reference into Securities Act, Exchange Act, or Investment Company Act filings? Why or why not?

L.5. Should information, if incorporated by reference into Securities Act or Exchange Act filings, still be treated as the responsibility of the nominee rather than the company? As proposed, are we creating a disincentive to incorporation by reference?

F. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- The proposed amendments that are the subject of this release;
- Additional or different changes; or
- Other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of companies, investors and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. Paperwork Reduction Act

A. Background

The proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[295] We are submitting the proposal to the Office of Management and Budget for review in accordance with the PRA.[296] The titles for the collections of information are:

(1) ''Form ID'' (OMB Control No. 3235–0328);

(2) ''Proxy Statements—Regulation 14A (Commission Rules 14a–1 through 14a–19 and Schedule 14A)'' (OMB Control No. 3235–0059);

(3) ''Information Statements—Regulation 14C (Commission Rules 14c–1 through 14c–7 and Schedule 14C)'' [297] (OMB Control No. 3235–0057);

(4) ''Schedule 14N'';

(5) ''Securities Ownership—Regulation 13D and 13G (Commission Rules 13d–1 through 13d–7 and Schedules 13D and 13G)'' (OMB Control No. 3235–0145);

(6) ''Form 8–K'' (OMB Control No. 3235–0060); and

(7) ''Rule 20a–1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations'' (OMB Control No. 3235–0158).

These regulations, rules and forms were adopted pursuant to the Exchange Act and the Investment Company Act and set forth the disclosure requirements for securities ownership reports filed by investors, proxy and information statements,[298] and current reports filed by companies to ensure that investors are informed and can make informed voting or investing decisions. The hours and costs associated with preparing, filing, and sending these schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

B. Summary of Proposed Amendments

The Commission's proposals would provide shareholders with two ways to more fully exercise their rights to nominate directors. First, we are proposing a new rule—Rule 14a–11—that would, under certain circumstances, require companies to include in their proxy materials shareholder nominees for director submitted by long-term shareholders or groups of shareholders with significant holdings. Under the rule, a company would not be required to include a shareholder nominee or nominees for director in the company proxy materials where the nominating shareholder or group is seeking to change the control of the issuer or to obtain more than a limited number of seats on the board. Proposed Rule 14a–11 would not apply where state law or a company's governing documents prohibit shareholders from nominating directors.

For purposes of the PRA, we estimate the total annual incremental paperwork burden resulting from proposed Rule 14a–11 and the related rule changes for reporting companies (other than registered investment companies), and registered investment companies to be approximately 17,149 hours of internal company or shareholder time and a cost of approximately $2,796,320 for the services of outside professionals.[299] For purposes of the PRA, we estimate the total annual incremental paperwork burden to nominating shareholders and groups from proposed Schedule 14N to be approximately 28,565 hours of shareholder personnel time, and $3,808,600 for services of outside professionals. As discussed further, below, these total costs include all additional disclosure burdens associated with the proposed rules including burdens related to the notice and disclosure requirements.

Second, under the proposed amendment to Rule 14a–8(i)(8), the ''election exclusion,'' a company would

[295] 44 U.S.C. 3501 *et seq.*

[296] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[297] Exchange Act Schedule 14C requires disclosure of some items of Exchange Act Schedule 14A. Therefore, while we are not proposing to amend the text of Schedule 14C, the proposed amendments to Schedule 14A also must be reflected in the PRA burdens for Schedule 14C.

[298] The proxy rules apply only to domestic companies with securities registered under Section 12 of the Exchange Act and to investment companies registered under the Investment Company Act. The number of annual reports by reporting companies may differ from the number of proxy and information statements filed with the Commission in any given year. This is because some companies are subject to reporting requirements by virtue of Section 15(d) of the Exchange Act, and therefore are not covered by the proxy rules. Also, some companies are subject to the proxy rules only because they have a class of debt registered under Section 12. These companies generally are not required to hold annual meetings for the election of directors. In addition, companies that are not listed on a national securities exchange may not hold annual meetings and therefore would not be required to file a proxy or information statement.

[299] For convenience, the estimated PRA hour burdens have been rounded to the nearest whole number. We estimate an hourly cost of $400 per hour for the service of outside professionals based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing proxy statements and related disclosures with the Commission.

not be permitted to exclude a shareholder proposal that would amend, or that requests an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11.

For purposes of the PRA, we estimate the total annual incremental paperwork burden resulting from the proposed amendment to Rule 14a–8(i)(8) and the related rule changes for reporting companies (other than registered investment companies), registered investment companies, and shareholders to be approximately 7,692 hours of internal company or shareholder time and a cost of approximately $1,025,500 for the services of outside professionals.

In connection with proposed Rule 14a–11 and the proposed amendment to Rule 14a–8(i)(8), we also are proposing new rules that would require a notice to be filed with the Commission on proposed new Schedule 14N, and provided to the company, when a shareholder seeks to submit a nomination to a company pursuant to Rule 14a–11 or pursuant to an applicable state law provision or the company's governing documents. The Schedule 14N would include disclosure similar to the disclosure currently required in a proxy contest. The nominating shareholder or group would provide the disclosure specified in Rule 14a–18 or Rule 14a–19, as applicable, in the Schedule 14N. The company would be required to include the disclosure provided by the nominating shareholder in its proxy materials.

We also are proposing a new exemption from the proxy rules for communications by nominating shareholders or groups that are soliciting in favor of a shareholder nominee for director included pursuant to Rule 14a–11. This exemption would require inclusion in the written soliciting materials of a legend advising shareholders to look at the company's proxy statement when it becomes available and advising shareholders how to find the company's proxy statement. The burden hours resulting from the proposed exemption are included in the above totals related to proposed Rule 14a–11.

Compliance with the proposed disclosure requirements would be mandatory. There would be no mandatory retention period for the information disclosed, and responses to the disclosure requirements would not be kept confidential.

C. Paperwork Reduction Act Burden Estimates

The proposed amendments would, if adopted, require additional disclosure on Schedules 14A and 14C and new Schedule 14N, as well as Form 8–K. Schedule 14A prescribes the information that a company and/or a soliciting shareholder must include in its proxy statement to provide shareholders with material information relating to voting decisions. Schedule 14C prescribes the information that a company that is registered under Exchange Act Section 12 must include in its information statement in advance of a shareholders' meeting when it is not soliciting proxies from its shareholders, including when it takes corporate action by written authorization or consent of shareholders. When filed in connection with Rule 14a–11, Schedule 14N would require disclosure about the amount and percentage of securities entitled to be voted on the election of directors by the nominating shareholder or group, the length of ownership of such securities, and the nominating shareholder's or group's intent to continue to hold the securities through the date of the meeting. Schedule 14N would also require a certification that the nominating shareholder or group is not seeking to change the control of the company or to gain more than a limited number of seats on the board, as well as disclosure similar to the disclosure currently required for a contested election and certain representations required for use of Rule 14a–11, including that the nominee meets the generally applicable objective criteria for ''independence'' in any applicable national securities exchange or national securities association rules. When filed in connection with a nomination pursuant to an applicable state law provision or the company's governing documents, the Schedule 14N would include similar but more limited disclosures and representations. Exchange Act Rule 14a–8 requires the company to include a shareholder proposal in its Schedule 14A or 14C unless the shareholder has not complied with the procedural requirements in Rule 14a–8 or the proposal falls within one of the 13 substantive bases for exclusion in Rule 14a–8. Investment Company Act Rule 20a–1 requires registered investment companies to comply with Exchange Act Regulation 14A or 14C, as applicable.[300]

[300] The annual responses to Investment Company Act Rule 20a–1 reflect the number of proxy and information statements that are filed by registered investment companies.

1. Proposed Rule 14a–11

Proposed Rule 14a–11 would require any subject company to include disclosure about a nominating shareholder's or group's nominee or nominees for election as director in the company's proxy materials when the conditions of the rule are met. The proposed rule would apply unless state law or a company's governing documents prohibit shareholders from nominating a candidate or candidates for election as director. A nominating shareholder or group would be required to file proposed Schedule 14N to disclose information about the nominating shareholder or group and the nominee or nominees, and the company would be required to include certain information regarding the nominating shareholder or group and nominee or nominees in the company's proxy statement unless the company determines that it is not required to include the nominee or nominees in its proxy materials.[301] Nominating shareholders also would be afforded the opportunity to include in the company's proxy statement a statement of support for its nominee or nominees of a length not to exceed 500 words. The nominee or nominees also would be included on the company's form of proxy in accordance with Exchange Act Rule 14a–4.

Under the proposed rule, shareholders or groups beneficially owning at least 1%, 3%, or 5% of a company's securities entitled to be voted on the election of directors, for large accelerated, accelerated, and non-accelerated filers, respectively, would be eligible to submit a nominee for election as director to be included in the company's proxy materials subject to certain limitations on the overall number of shareholder nominees for director.

We estimate that 4,163 reporting companies (other than registered investment companies) are likely to have at least one shareholder that could meet the above thresholds.[302] For

[301] The burdens associated with Schedule 14N and the disclosure requirements of Rule 14a–18 and Rule 14a–19 are discussed in Section IV.C.3. below.

[302] We estimate that 1,385 large accelerated filers have at least one shareholder that meets the 1% threshold; 1,584 accelerated filers have at least one shareholder meeting the 3% threshold; and 1,194 non-accelerated filers have at least one shareholder meeting the 5% threshold. *See* Section II.B.3., above.

Shareholders would be permitted to aggregate holdings for purposes of meeting the eligibility thresholds in Rule 14a–11 and therefore the Commission anticipates that some groups of shareholders may beneficially own in the aggregate more than 5% of the company's securities that are

Continued

purposes of this analysis, we estimate that 5% of companies with shareholders eligible to submit nominees pursuant to Rule 14a–11 will receive nominees from shareholders for inclusion in their proxy materials, which would result in 208 companies with shareholders meeting the applicable eligibility threshold receiving nominees annually.[303] We further estimate that 61 registered investment companies will receive nominees from shareholders pursuant to Rule 14a–11 annually.[304] For purposes of the PRA, we estimate that the incremental disclosure burden will be 95 hours per nominee for each reporting company (other than registered investment companies) and registered investment company to comply with the requirements of Rule 14a–11 and Items 7(e) and (f) and 22(b)(18) and (19) of Schedule 14A.[305] As discussed, we estimate for PRA purposes that each company that receives nominees pursuant to Rule 14a–11 will receive two nominees from shareholders or groups. Thus, for reporting companies (other than registered investment companies) we estimate 13,015 total company burden hours which corresponds to 9,761 hours of company time, and a cost of approximately $1,301,500 for the services of outside professionals. In the case of registered investment companies, we estimate the total annual incremental paperwork burden to prepare the disclosure that would be required under this portion of the proposed rules to be approximately 3,805 burden hours, which corresponds to 2,854 hours of company time and a cost of approximately $380,500 for the services of outside professionals. In each case, this estimate includes:

- If the company determines that it will include a shareholder nominee, the company's preparation of a written notice to the nominating shareholder or group (five burden hours per notice);
- The company's inclusion in its proxy statement and form of proxy of the name of, and other related disclosures concerning, a person or persons nominated by a shareholder or shareholder group (five burden hours per nominee);[306]
- The company's preparation of its own statement regarding the shareholder nominee or nominees (20 burden hours per nominee); and
- If a company determines that it may exclude a shareholder nominee submitted pursuant to the proposed rule, the company's preparation of a written notice to the nominating shareholder or group followed by written notice of the basis for its determination to exclude the nominee to the Commission staff (65 burden hours per notice).

For purposes of this analysis, we assume that approximately 187 (or 90% of) reporting companies (other than registered investment companies) and 55 (or 90% of) registered investment companies that have a shareholder or group and receives a shareholder nominee for director would be required to include the nominee in its proxy materials. In the other 10% of cases we assume that the company would be able to exclude the shareholder nominee (after providing notice of its reasons to the Commission). If a company determines to include a shareholder nominee, it must provide written notice to the nominating shareholder or group. We estimate the burden associated with preparing this notice to be five hours. For reporting companies (other than registered investment companies), this would result in 935 aggregate burden hours (187 companies × 5 hours/company), which corresponds to 701 burden hours of company time (187 companies × 5 hours/company × .75) and $93,500 in services of outside professionals (187 companies × 5 hours/company × .25 x $400). For registered investment companies, this would result in 275 aggregate burden hours (55 companies × 5 hours/company), which corresponds to 206 burden hours of company time (55 companies × 5 hours/company × .75), and $27,500 for services of outside professionals (55 companies × 5 hours/company × .25 × $400).

We estimate the annual disclosure burden for companies to include nominees on their form of proxy and proxy materials to be 5 burden hours per nominee, for a total of 1,870 aggregate burden hours (187 responses × 5 hours/response × 2 nominees) for reporting companies (other than registered investment companies), and 550 aggregate burden hours (55 responses × 5 hours/response × 2 nominees) for registered investment companies. For reporting companies (other than registered investment companies), this corresponds to 1,403 burden hours of company time, and $187,000 for services of outside professionals.[307] For registered investment companies, this corresponds to 413 hours of company time, and $55,000 for services of outside professionals.[308]

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eligible to vote for the election of directors. In these circumstances, nominating shareholders will need to consider whether they have formed a group under Exchange Act Section 13(d)(3) and Rule 13d–5(b)(1) that is required to file beneficial ownership reports. To the extent nominating shareholder groups exceed the 5% threshold and file a Schedule 13G this would result in an increased number of Schedule 13G filings. We estimate that 25% of the nominees will be from shareholders who individually meet the eligibility thresholds (52), and 75% will be from shareholder groups (156). Were each of these groups to exceed 5%, we estimate that an additional 156 Schedule 13G filings will be made annually as a result of the proposed rule. The total burden associated with this increase in the number of filings is 1935 burden hours (156 additional Schedule 13Gs × 12.4 hours/schedule). This burden corresponds to 484 hours of shareholder time (156 additional Schedule 13Gs × 12.4 hours/Schedule × .25) and $580,320 for services of outside professionals (156 additional Schedule 13Gs × 12.4 hours/Schedule × .75 x $400).

[303] In this regard, we note that in 2008 there were at least 32 contested elections. *See* RiskMetrics Group, 2008 Postseason Report Summary, Weathering the Storm: Investors Respond to the Global Credit Crisis, October 2008. In addition, approximately 118 Rule 14a–8 shareholder proposals related to board issues were submitted to shareholders for a vote in the 2008–2009 proxy season. *See* RiskMetrics 2009 Proxy Season Scorecard, May 15, 2009. We believe these two numbers, or 150 shareholders in total, provide some indication of the number of shareholders that may be interested in using Rule 14a–11. Based upon this information, we believe it is reasonable to use 208 (based on 5% of the companies that have at least one shareholder that meets the ownership threshold) as the estimate for the number of companies that may receive nominees.

[304] We estimate that approximately 1,225 registered investment companies will hold a shareholder meeting in a given year, based on the number of responses to Rule 20a–1, and that 5% of such companies will receive nominees from shareholders for inclusion in their proxy materials. We believe that using the 5% estimate for registered investment companies is reasonable because we estimate that shareholders of registered closed-end and open-end investment companies will on balance submit nominees at the same rate as other companies.

[305] The actual burden hours will depend on the number of shareholder nominees submitted to a company for inclusion in its proxy materials. For purposes of the PRA, in the case of reporting companies (other than registered investment companies) we assume each shareholder or group would submit two nominees. As discussed in footnote 183 above, the median board size based on a 2007 sample of public companies was nine. Approximately 60% of the boards sampled had between nine and 19 directors. In the case of registered investment companies, we estimate that the median board size is eight. *See* Investment Company Institute and Independent Directors Council, *Overview of Fund Governance Practices 1994–2006,* at 6–7 (November 2007), *available at:http://www.ici.org/issues/dir/1rpt_07_fund_gov_practices.pdf* (noting that the median number of independent directors per fund complex in 2006 was six and that independent directors held 75% or more of board seats in 88% of fund complexes). Thus, although some shareholders or groups could nominate fewer than two nominees and others would be permitted to nominate more than two nominees, depending on the size of the board, we assume for purposes of the PRA that each shareholder or group would submit two nominees.

[306] The requirement is in proposed amended Rule 14a–4.

[307] The calculations for these numbers are: 1,870 burden hours × .75 = 1,402 burden hours of company time and 1,870 burden hours × .25 × $400 = $187,000 for services of outside professionals.

[308] The calculations for these numbers are: 550 burden hours × .75 = 413 hours of company time

We estimate that 187 reporting companies (other than registered investment companies) and 55 registered investment companies would include a statement with regard to the shareholder nominees.[309] We anticipate that the burden to include a statement would include time spent to research the nominee's background, preparation of the statement, and company time for review of the statement by, among others, the nominating committee and legal counsel. We estimate that this burden would be approximately 20 hours per nominee. For reporting companies (other than registered investment companies), this would result in 7,480 aggregate burden hours (187 statements × 20 hours/statement × 2 nominees). This corresponds to 5,610 hours of company time (187 statements × 20 hours/statement × 2 nominees × .75) and $748,000 for services of outside professionals (187 statements × 20 hours/statement × 2 nominees × .25 × $400) for reporting companies (other than registered investment companies). For registered investment companies, this would result in 2,200 aggregate burden hours (55 statements × 20 hours/statement × 2 nominees). This corresponds to 1,650 hours of company time (55 statements × 20 hours/statement × 2 nominees × .75) and $220,000 for services of outside professionals (55 statements × 20 hours/statement × 2 nominees × .25 × $400).

Further, for purposes of this analysis, we assume that approximately 42 (or 20% of) reporting companies (other than registered investment companies) and 12 (or 20% of) registered investment companies who receive a shareholder nominee for director for inclusion in their proxy materials would make a determination that they are not required to include a nominee in their proxy materials because the nominee is ineligible under proposed Rule 14a–11 and would file a notice of intent to exclude that nominee.[310] We estimate that the burden hours associated with preparing and submitting the company's notification to the nominating shareholder or group and the Commission regarding its intent to exclude a shareholder nominee, and its reasons for doing so, would be 65 hours per notification.[311] In the case of reporting companies (other than registered investment companies), we estimate that this would result in an aggregate burden of 2,730 (42 notices × 65 hours/notice), corresponding to 2,048 hours of company time (42 notices × 65 hours/notice × .75) and $273,000 for the services of outside professionals (42 responses × 65 hours/notice × .25 × $400). In the case of registered investment companies, we estimate that this would result in 780 aggregate burden hours (12 notices × 65 hours/notice), which would correspond to 585 hours of company time (12 notices × 65 hours/notice × .75) and $78,000 for the services of outside professionals (12 notices × 65 hours/notice × .25 × $400). These burdens would be added to the PRA burdens of Schedules 14A and 14C or, in the case of registered investment companies, Rule 20a–1.

We also estimate that the annual incremental burden for the nominating shareholder's or group's participation in the Rule 14a–11 exclusion process would average 30 hours per nomination.[312] For nominating shareholders or groups of reporting companies (other than registered investment companies), this would result in 1,260 total burden hours (42 responses × 30 hours/response). This would correspond to 945 hours of shareholder time (42 responses × 30 hours/response × .75) and $126,000 for services of outside professionals (42 responses × 30 hours/response × .25 × $400). For nominating shareholders or groups of registered investment companies, this would result in 360 total burden hours (12 responses × 30 hours/response). This would correspond to 270 hours of shareholder time (12 responses × 30 hours/response × .75) and $36,000 for services of outside professionals (12 responses × 30 hours/response × .25 × $400). This burden would be added to the PRA burden of Schedule 14N.

We also are proposing a new exemption from the proxy rules for communications by nominating shareholders or groups that are soliciting in favor of a shareholder nominee for director. Although nominating shareholders or groups would not be required to engage in written solicitations, the exemption would require inclusion in any written soliciting materials of a legend advising shareholders to look at the company's proxy statement when it becomes available and advising shareholders how to find the company's proxy statement. For purposes of this analysis, we assume that 50% of nominating shareholders or groups would solicit in favor of their nominee or nominees outside the company's proxy statement. In the case of reporting companies (other than registered investment companies), this would result in an aggregate burden of 104 hours (104 solicitations × 1 hour/solicitation), which corresponds to 78 hours of shareholder time (104 solicitations × 1 hour/solicitation × .75) and $10,400 for services of outside professionals (104 solicitations × 1 hour/solicitation × .25 × $400). These burden hours would be added to the PRA burden of Schedule 14A.[313]

2. Proposed Amendment to Rule 14a–8(i)(8)

Our proposed amendment to Rule 14a–8(i)(8), the election exclusion, would enable shareholders to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11. As proposed, revised Rule 14a–8(i)(8) would not restrict the types of amendments that a shareholder could propose to a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, although any

and 550 burden hours × .25 × $400 = $55,000 for services of outside professionals.

[309] We estimate that each company that includes a shareholder nominee in its proxy materials would include such a statement.

[310] We assume that 21 of these nominees (or 50% of those sought to be excluded by companies) would ultimately be excludable under the rule.

[311] This estimate is based on data provided by the American Society of Corporate Secretaries in its comment letter on the 2003 Proposal. In its letter, the ASCS provided data from a survey of its own, as well as the Business Roundtable's, members indicating that the average burden associated with preparing and submitting a no-action request to the staff in connection with a shareholder proposal was approximately 30 hours and associated costs of $13,896. Although the letter did not specify as much, assuming these costs correspond to legal fees, which we estimate at an hourly cost of $400, we estimate that this cost is equivalent to approximately 35 hours ($13,896/$400). For purposes of the PRA, we assume that submitting the notice and reasons for excluding a shareholder nominee to the staff will be comparable to preparing a no-action request to exclude a proposal under Rule 14a–8. Thus, we estimate that the burden to submit the notice and reasons for excluding a shareholder nominee would be approximately 65 hours.

[312] As noted in footnote 311, above, we estimate that the average burden to a company associated with preparing and submitting a no-action request to the staff is approximately 65 burden hours. We believe that the average burden for a shareholder proponent to respond to a company's no-action request is likely to be less than a company's burden; therefore, we estimate 30 burden hours for a nominating shareholder to respond to a company's notice of intent to exclude to the Commission.

[313] In the case of registered investment companies, this would result in an aggregate burden of 31 hours (31 solicitations × 1 hour/solicitation), which corresponds to 23 hours of shareholder time (31 solicitations × 1 hour/solicitation × .75) and $3,100 for services of outside professionals (31 solicitations × 1 hour/solicitation × .25 × $400). These burden hours would be added to the PRA burden of Rule 20a–1.

such proposals that conflict with proposed Rule 14a–11 or state law could be excluded. The proposal would have to meet the procedural requirements of Rule 14a–8 and not be subject to one of the substantive exclusions other than the election exclusion (*e.g.,* the proposal could be excluded if the shareholder proponent did not meet the ownership threshold under Rule 14a–8).

Historically, shareholders have made relatively few proposals relating to shareholder access to company proxy materials. The staff received 368 no-action requests from companies seeking to exclude shareholder proposals during the 2006–2007 proxy season. Of these requests, only three (or approximately one percent) related to proposals for bylaw amendments providing for shareholder nominees to appear in the company's proxy materials. During the 2007–2008 proxy season, the staff received 432 no-action requests to exclude shareholder proposals pursuant to Rule 14a–8. Of these no-action requests, 6 (or approximately two percent) related to proposals for bylaw amendments providing for shareholder nominees to appear in the company's proxy materials. Because our proposed amendment to Rule 14a–8(i)(8) would narrow the scope of the exclusion and prohibit companies from excluding certain proposals that are excludable under the current Rule 14a–8(i)(8), we anticipate an increase in the number of shareholder proposals to amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations.

While the number of no-action requests the staff has received in the past is a useful starting point, other data also is helpful to gauge shareholder interest in nominating directors and predict the anticipated impact on the number of proposals submitted pursuant to Rule 14a–8 to amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations that otherwise would be excludable under current Rule 14a–8(i)(8). For example, based on publicly available information, from 2001 to 2005, there were an average of 14 contested elections per year.[314] In 2008, it is estimated that there were at least 32 contested elections.[315] We anticipate that as a result of the proposed amendment to Rule 14a–8(i)(8), shareholders will submit at least as many shareholder proposals to amend a company's governing documents to address the company's nomination procedures or disclosures related to director nominations as there are contested elections. We anticipate that if shareholders are willing to put forth the expense and effort to wage a contest to put forth their own nominees in 32 instances, there will be at least that many proposals submitted to companies pursuant to Rule 14a–8 because companies will no longer be permitted under the rule to exclude proposals that currently are excludable under Rule 14a–8(i)(8). We also anticipate that some shareholders that have submitted proposals in the past with regard to other board issues will submit proposals to address a company's nomination procedures or disclosures related to director nominations. According to information from RiskMetrics, approximately 118 Rule 14a–8 shareholder proposals regarding board issues were or will be submitted to shareholders for a vote in the 2008–2009 proxy season.[316] We estimate that approximately half of these shareholders would submit a proposal regarding nomination procedures or disclosures, resulting in 59 proposals.

In the case of reporting companies (other than registered investment companies), we anticipate that the amendments to Rule 14a–8 will result in an increase of 38 proposals annually from 2008, and a total of 97 proposals regarding nomination procedures or disclosures related to director nominations to companies per year.[317] We estimate the annual incremental burden for the shareholder to prepare the proposal to be 10 burden hours per proposal, for a total of 380 burden hours (38 proposals × 10 hours/proposal). This would correspond to 285 hours of shareholder time (38 proposals × 10 hours/proposal × .75) and $38,000 for the services of outside professionals (38 proposals × 10 hours/proposal × .25 × $400).

We estimate that 90% of companies that receive a shareholder proposal to amend, or request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations will seek to exclude the proposal from their proxy materials (so companies would seek to exclude 87 such proposals per proxy season). We estimate that the annual incremental burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 65 hours per proposal, for a total of 5,655 burden hours (87 proposals × 65 hours/proposal) for reporting companies (other than registered investment companies). This would correspond to 4,241 hours of company time (87 proposals × 65 hours/proposal × .75) and $565,500 for the services of outside professionals (87 proposals × 65 hours/proposal × .25 × $400).

We also estimate that the annual incremental burden for the proponent's participation in the Rule 14a–8 no-action process would average 30 hours per proposal, for a total of 2,610 burden hours (87 proposals × 30 hours/proposal).[318] This would correspond to 1,958 hours of shareholder time (87 proposals × 30 hours/proposal × .75) and $261,000 for services of outside professionals (87 proposals × 30 hours/proposal × .25 × $400). These burdens would be added to the PRA burden of Schedules 14A and 14C.

In the case of registered investment companies, we anticipate that the amendments to Rule 14a–8 will result in an increase of 9 proposals annually, and a total of 18 proposals regarding

[314] *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise,* 93 Va. L. Rev. 675 (2007) (''Bebchuk 2007 Article'') (citing data from proxy solicitation firm Georgeson Shareholder).

[315] *See* RiskMetrics Group, 2008 Postseason Report Summary, Weathering the Storm: Investors Respond to the Global Credit Crisis, October 2008.

[316] *See* footnote 303, above.

[317] The increase is calculated by adding the number of proxy contests in 2008 (32) plus the number of no-action requests received in 2008 regarding proposals seeking to amend a company's bylaws to provide for shareholder director nominations (6). We have not included the estimated 59 proposals in this increase because we believe they will be submitted in lieu of other types of proposals (a shareholder is limited to submitting one shareholder proposal to each company). We recognize that a company that receives a shareholder proposal has no obligation to submit a no-action request to the staff under Rule 14a–8 unless it intends to exclude the proposal from its proxy materials. Based on historical data, companies generally seek no-action relief from the staff on approximately 60% of the proposals received. However, we anticipate that because the proposals that would be submitted pursuant to amended Rule 14a–8 could affect the composition of the company's board of directors, nearly all companies receiving such proposals would submit a written statement of its reasons for excluding the proposal to the staff. Thus, we estimate that 90% of the estimated 97 companies receiving proposals to amend, or request an amendment to, a company's governing documents to address nomination procedures or disclosures related to director nominations would submit a written statement of its reasons for excluding the proposal to the staff.

[318] As noted above, in footnote 311, we estimate that the average burden to a company associated with preparing and submitting a no-action request to the staff was approximately 65 burden hours. We believe that the average burden for a shareholder proponent to respond to a company's no-action request is likely to be less than a company's burden; therefore, we estimate 30 burden hours for a shareholder proponent to respond to a company's notice of intent to exclude to the Commission. In this regard, we also estimate that the average burden for a shareholder proponent to submit a shareholder proposal would be 10 hours.

nomination procedures or disclosures related to director nominations to companies per year.[319] We estimate the annual incremental burden for the shareholder proponent to prepare the proposal to be 10 hours per proposal, for a total of 90 burden hours (9 proposals × 10 hours/proposal). This would correspond to 68 hours of shareholder time (9 proposals × 10 hours/proposal × .75) and $9,000 for the services of outside professionals (9 proposals × 10 hours/proposal × .25 × $400).

Similar to reporting companies other than investment companies, we assume that 90% of registered investment companies that receive a shareholder proposal to amend, or request an amendment to, the company's governing documents regarding nomination procedures or disclosures related to shareholder nominations will seek to exclude the proposal from their proxy materials (so registered investment companies would seek to exclude 16 such proposals per proxy season). Also similar to reporting companies other than investment companies, we assume that the annual incremental burden for the company's submission of a notice of its intent to exclude the proposal and its reasons for doing so would average 65 hours per proposal, for a total of 1,040 burden hours for registered investment companies (16 proposals × 65 hours/proposal). This would correspond to 780 hours of company time (16 proposals × 65 hours/proposal × .75) and $104,000 for the services of outside professionals (16 proposals × 65 hours/proposal × .25 × $400). We also estimate that the annual incremental burden for the proponent's participation in the Rule 14a–8 no-action process would average 30 hours per proposal, for a total of 480 burden hours (16 proposals × 30 hours/proposal). This would correspond to 360 hours of shareholder time (16 proposals × 30 hours/proposal × .75) and $48,000 for the services of outside professionals (16 proposals × 30 hours/proposal × .25 × $400). These burdens would be added to the PRA burden of Rule 20a–1.

[319] The increase is calculated by adding the average number of registered investment company proxy contests in calendar years 2006, 2007, and 2008 (8) plus the average number of no-action letters issued by the staff regarding proposals seeking to amend a registered investment company's bylaws to provide for shareholder director nominations received in calendar years 2006, 2007, and 2008 rounded to the nearest whole number greater than zero (1). In addition, we estimate that investment companies currently receive as many proposals regarding nomination procedures or disclosures as there are contested elections and no-action letters issued by the staff, resulting in a total of 18 proposals regarding nomination procedures or disclosures related to director nominations to companies per year.

3. Proposed Schedule 14N and Proposed Exchange Act Rules 14a–18 and 14a–19

Proposed Rule 14n–1 would establish a new filing requirement for the nominating shareholder or group, under which the nominating shareholder or group would be required to file notice of its intent to include a shareholder nominee or nominees for director pursuant to proposed Rule 14a–11, applicable state law provisions, or a company's governing documents, as well as disclosure about the nominating shareholder or group and nominee or nominees on proposed new Schedule 14N. New Schedule 14N was modeled after Schedule 13G, but with more extensive disclosure requirements than Schedule 13G. The Schedule 14N would require, among other items, disclosure about the amount and percentage of securities owned by the nominating shareholder or group, the length of ownership of such securities, and the nominating shareholder's or group's intent to continue to hold the securities through the date of the meeting.

In addition, the Schedule 14N would include disclosure required pursuant to proposed Rule 14a–18 or Rule 14a–19, as applicable. Proposed Rule 14a–18 would prescribe the disclosure required to be included in the nominating shareholder's notice to the company, on Schedule 14N, of its intent to require that the company include that shareholder's nominee in the company's proxy materials pursuant to proposed Rule 14a–11. Proposed Rule 14a–19 would prescribe the disclosure required to be included in the nominating shareholder's notice to the company, on Schedule 14N, of its intent to require the company to include a nominee pursuant to applicable state law provisions or a company's governing documents. With regard to the latter, we are seeking to assure that nominating shareholders or groups who submit a shareholder nomination for inclusion in company proxy materials pursuant to applicable state law provisions or the company's governing documents also provide disclosure similar to the disclosure required in a contested election to give shareholders the information needed to make an informed voting decision.

Both rules would require disclosures regarding the nature and extent of the relationships between the nominating shareholder and nominee and the company or any affiliate of the company. Pursuant to proposed Items 7(e)–(f) of Schedule 14A or, in the case of a registered investment company, Items 22(b)(18)–(19) of Schedule 14A, the company would be required to include the information set forth in Schedule 14N in its proxy materials. A nominating shareholder filing a Schedule 14N to provide disclosure required by proposed Rule 14a–19 when submitting a nominee for inclusion in company proxy materials pursuant to applicable state law provisions or the company's governing documents would not be required to provide the representations required for nominating shareholders using proposed Rule 14a–11.

We estimate that compliance with the proposed Schedule 14N requirements would result in a burden greater than Schedule 13G[320] but less than a Schedule 14A.[321] Therefore, we estimate that compliance with proposed Schedule 14N will result in 47 hours per response for nominees submitted pursuant to Rule 14a–11.[322] We also note that the burden associated with filing a Schedule 14N in connection with a nomination made pursuant to an applicable state law provision or the company's governing documents may be slightly less than a nomination made pursuant to Rule 14a–11 because certain disclosures, representations and certifications would not be required (including disclosure about intent to continue to own the company's securities, the representations that would be required to rely on Rule 14a–11, a supporting statement from the nominating shareholder or group, and the certification concerning lack of intent to change control or to gain more than a limited number of seats on the board that would be required for a nomination pursuant to Rule 14a–11). Therefore, we estimate that compliance with proposed Schedule 14N when a shareholder or group submits a nominee or nominees to a company pursuant to an applicable state law provision or the company's governing documents will result in 40 hours per response.

[320] We currently estimate the burden per response for preparing a Schedule 13G filing to be 12.4 hours.

[321] We currently estimate the burden per response for preparing a Schedule 14A filing to be 101.50 hours and a Schedule 14C to be 102.62 hours.

[322] We estimate that the burden of preparing the information in Schedule 14N for a nominating shareholder or group would be ⅓ of the disclosures typically required by a Schedule 14A filing, which would result in approximately 34 burden hours. For purposes of this analysis, we estimate that the 34 burden hours will be added to the 12.4 hours associated with filing a Schedule 13G, resulting in a total of approximately 47 burden hours. We estimate that 75% of the burden of preparation of Schedule 14N will be borne internally by the nominating shareholder or group, and that 25% will be carried by outside professionals. We believe the nominating shareholder or group would work with their nominee to prepare the disclosure and then have it reviewed by outside professionals.

For purposes of the PRA, we estimate the total annual incremental paperwork burden for nominating shareholders or groups to prepare the disclosure that would be required under this portion of the proposed rules to be approximately 28,565 hours of shareholder time, and $3,808,600 for the services of outside professionals.[323] This estimate includes the nominating shareholder's or group's preparation and filing of the notice and required disclosure and, as applicable, representations and certifications on Schedule 14N.

We do not expect that every shareholder that meets the eligibility threshold to submit a nominee for inclusion in a company's proxy materials pursuant to proposed Rule 14a–11, an applicable state law provision, or a company's governing documents will do so. As discussed above, we estimate that 208 reporting companies (other than registered investment companies) and 61 registered investment companies will receive notices of intent to submit nominees pursuant to proposed Rule 14a–11. We anticipate that some companies will receive nominees from more than one shareholder or group, though, as discussed above, for purposes of PRA estimates, we assume each company with an eligible shareholder would receive two nominees from only one shareholder or group.

We estimate that compliance with the requirements of Schedule 14N submitted pursuant to Rule 14a–11 will require 19,552 burden hours (208 notices × 47 hours/notice × 2 nominees/shareholder) in aggregate each year for nominating shareholders or groups of reporting companies (other than registered investment companies), which corresponds to 14,664 hours of shareholder time (208 notices × 47 hours/notice × 2 nominees/shareholder × .75) and costs of $1,955,200 (208 notices × 47 hours/notice × 2 nominees/shareholder .25 × $400) for the services of outside professionals. In the case of registered investment companies, we estimate that a nominating shareholder's or group's compliance with the requirements of Schedule 14N will require 5,734 burden hours (61 responses × 47 hours/response × 2 nominees) in aggregate each year, which corresponds to 4,301 hours of shareholder time (61 responses × 47 hours/response × 2 nominees × .75) and costs of $573,400 for the services of outside professionals (61 responses × 47 hours/response × 2 nominees × .25 × $400). Therefore, we estimate a total of 25,286 burden hours for all reporting companies, including investment companies, broken down into 18,965 hours of shareholder time and $2,528,600 for services of outside professionals.

We assume that all nominating shareholders or groups will prepare a statement of support for the nominee or nominees, and we estimate the disclosure burden for the nominating shareholder or group to prepare a statement of support for its nominee or nominees to be approximately 10 burden hours per nominee. This results in an aggregate burden of 4,160 (208 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 3,120 hours of shareholder time (208 statements × 10 hours/statement × 2 nominees/shareholder × .75) and $416,000 for services of outside professionals (208 statements × 10 hours/statement × 2 nominees/shareholder × .25 × $400) for shareholders of reporting companies (other than registered investment companies). For registered investment companies, this would result in an aggregate burden of 1,220 (61 statements × 10 hours/statement × 2 nominees/shareholder), which corresponds to 915 hours of shareholder time (61 statements × 10 hours/statement × 2 nominees/shareholder × .75) and $122,000 for services of outside professionals (61 statements × 10 hours/statement × 2 nominees/shareholder × .25 × $400). Therefore, we estimate a total of 5,380 burden hours for all reporting companies, including investment companies, broken down into 4,035 hours of shareholder time and $538,000 for services of outside professionals.

When a nominating shareholder or group submits a nominee or nominees to a company pursuant to an applicable state law provision or the company's governing documents, the nominating shareholder or group will be required to file a Schedule 14N to provide disclosure about the nominating shareholder or group and the nominee or nominees as provided in proposed Rule 14a–19. As discussed, a company will be required to include certain disclosures about the nominating shareholder or group and the nominee or nominees in its proxy statement. As noted above, we estimate that the burden associated with filing a Schedule 14N in connection with a nomination made pursuant to an applicable state law provision or a company's governing documents is 40 hours. We also estimate that approximately 49 nominating shareholders or groups of reporting companies (other than registered investment companies) would submit a nomination pursuant to an applicable state law provision or a company's governing documents.[324] Thus, we estimate compliance with the requirements of Schedule 14N for nominating shareholders or groups submitting nominations pursuant to an applicable state law provision or the company's governing documents would result in 3,920 aggregate burden hours (49 notices × 40 hours/notice × 2 nominees/shareholder) each year for nominating shareholders or groups of reporting companies (other than registered investment companies), broken down into 2,940 hours of shareholder time (49 notices × 40 hours/notice × 2 nominees/shareholder × .75) and costs of $392,000 for the services of outside professionals (49 notices × 40 hours/notice × 2 nominees/shareholder × .25 × $400). In the case of registered investment companies, we estimate that approximately 9 nominating shareholders or groups would submit a nomination pursuant to an applicable state law provision or a company's governing documents.[325] We estimate that a nominating shareholder's or group's compliance with the requirements of Schedule 14N would result in 720 aggregate burden hours (9 notices × 40 hours/notice × 2 nominees/shareholder) each year, which corresponds to 540 hours of shareholder time (9 notices × 40 hours/notice × 2 nominees/shareholder × .75) and costs of $72,000 for the services of outside professionals (9 notices × 40 hours/notice × 2 nominees/shareholder × .25 × $400). Therefore, we estimate that the total burden hours would be 4,640 for all reporting companies, including investment companies, broken down into 3,480 hours of shareholder time

[323] This figure represents the aggregate burden hours attributed to proposed Schedule 14N and is the sum of the burden associated with Schedules 14N submitted pursuant to Rule 14a–11, applicable state law provisions, and a company's governing documents.

[324] In this regard, we estimated that approximately 97 shareholder proponents would submit proposals regarding nomination procedures or disclosures related to shareholder nominations. For purposes of this analysis, we assume that approximately half (49) of those shareholders would be eligible to submit a nomination pursuant to applicable state law provisions or a company's governing documents.

[325] In this regard, we estimated that approximately 18 shareholder proponents would submit proposals to registered investment companies regarding nomination procedures or disclosures related to shareholder nominations. We estimate that approximately half (9) of those shareholders would be eligible to submit a nomination pursuant to applicable state law provisions or a company's governing documents.

and $464,000 for services of outside professionals.

We assume that all nominating shareholders or groups that submit a nominee or nominees pursuant to an applicable state law provision or a company's governing documents would prepare a statement of support for the nominee or nominees,[326] and we estimate the disclosure burden for the nominating shareholder or group to prepare a statement of support for its nominee or nominees to be approximately 10 burden hours per nominee. This results in an aggregate burden of 980 hours (49 statements × 10 hours/statement × 2 nominees/shareholder) for shareholders of reporting companies (other than registered investment companies), which corresponds to 735 hours of shareholder time (49 statements × 10 hours/statement × 2 nominees/shareholder × .75) and $98,000 for services of outside professionals (49 statements × 10 hours/statement × 2 nominees/shareholder × .25 × $400). For registered investment companies, this results in an aggregate burden of 180 hours (9 statements × 10 hours/statement × 2 nominees/shareholder), which would correspond to 135 hours of shareholder time (9 statements × 10 hours/statement × 2 nominees/shareholder × .75) and $18,000 for services of outside professionals (9 statements × 10 hours/statement × 2 nominees/shareholder × .25 × $400). This results in a total of 1,160 burden hours, broken down into 870 hours of shareholder time and $116,000 for the services of outside professionals.

4. Proposed Amendments to Exchange Act Form 8–K

Under proposed Rule 14a–11, a nominating shareholder or group would have to provide a notice to the company, on Schedule 14N, of its intent to require that the company include the nominating shareholder's or group's nominee in the company's proxy materials by the date specified by the company's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the date that the company mailed its proxy materials for the prior year's annual meeting.[327] If the company did not hold an annual meeting during the prior year, or if the date of the meeting has changed more than 30 days from the prior year, then the nominating shareholder or group would be required to provide notice a reasonable time before the company mails its proxy materials, as specified by the company in a Form 8–K filed pursuant to proposed Item 5.07. We also are proposing to require a registered investment company that is a series company to file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting and the total number of the company's shares that are entitled to vote for the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.

For purposes of the PRA, we estimate that approximately 4% of reporting companies (other than registered investment companies) would be required to file an Exchange Act Form 8–K because the company did not hold an annual meeting during the prior year, or the date of the meeting has changed by more than 30 days from the prior year.[328] Based on our estimate that there are approximately 11,000 reporting companies (other than registered investment companies), this corresponds to 440 companies that would be required to file a Form 8–K. In accordance with our current estimate of the burden of preparing a Form 8–K, we estimate 5 burden hours to prepare, review and file the Form 8–K, for a total burden of 2,200 hours (440 filings × 5 hours/filing). This total burden corresponds to 1,650 hours of company time (440 filings × 5 hours/filing × .75) and $220,000 for services of outside professionals (440 filings × 5 hours/filing × .25 x $400).

In the case of registered investment companies, we estimate that, similar to reporting companies other than registered investment companies, 4% of registered closed-end management investment companies subject to Rule 14a–11 that are traded on an exchange would be required to file an Exchange Act Form 8–K because the company did not hold an annual meeting during the prior year or the date of the meeting has changed by more than 30 days from the prior year.[329] We estimate that approximately 650 of the 1,225 registered investment companies responding to Investment Company Act Rule 20a–1 are closed-end funds that are traded on an exchange, resulting in 26 closed-end funds that would be required to file Form 8–K for these purposes (650 registered closed-end management investment companies × .04).[330] However, we estimate that few, if any, registered open-end management investment companies regularly hold annual meetings. Therefore, we estimate that 575 registered investment companies are not closed-end investment companies and would be required to file Form 8–K. This results in a total of 601 registered investment companies required to file Form 8–K (26 closed-end management investment companies + 575 other registered investment companies) and 3,005 burden hours (601 filings × 5 hours/filing). This total burden corresponds to 2,254 hours of company time (601 filings × 5 hours/filing × .75) and $300,500 for services of outside professionals (601 filings × 5 hours/filing × .25 × $400).[331] Adding the totals for reporting companies (other than registered investment companies) and registered investment companies results in a total burden of 5,205, which corresponds to 3,904 hours of company time and $520,500 for services of outside professionals. This includes the requirement for a registered investment company that is a series company to file a Form 8–K disclosing the company's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting and the total number of the company's shares that are entitled to vote for the election of directors at the annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of

[326] We are assuming for PRA purposes that any applicable state law provision or company's governing documents would allow for inclusion of such a statement by the nominating shareholder or group.

[327] The proposed amendment to Rule 14a–8(i)(8) is not expected to impact Form 8–K, so the burden estimates solely reflect the burden changes resulting from proposed Rule 14a–11.

[328] Based on information obtained in 2003 from the Investor Responsibility Research Center, 3.7% of companies (other than registered investment companies) filed Form 8–Ks because they did not hold an annual meeting during the prior year or the date of the meeting has changed by more than 30 days from the prior year. *See also* footnote 195 in the 2003 Proposal.

[329] We believe that the percentage for registered closed-end investment companies would be similar to other reporting companies because such investment companies are traded on an exchange and are required to hold annual meetings of shareholders.

[330] We estimate that 1,225 registered investment companies hold annual meetings each year based on the number of responses to Rule 20a–1. Based on data provided by Lipper, the Commission estimates that approximately 650 registered closed-end management investment companies are traded on an exchange.

[331] Consistent with the current estimates for Form 8–K, we estimate that 75% of the burden of preparation of Form 8–K is carried by the company and that 25% of the burden of preparation of Form 8–K is carried by outside professionals at an average cost of $400 per hour. The burden includes disclosure of the date by which a nominating shareholder or group must submit the notice required by proposed Rule 14a–11(c) as well as disclosure of net assets, outstanding shares, and voting.

shareholders) as of the end of the most recent calendar quarter.

5. Form ID Filings [332]

Under proposed Rule 14a–11(c), a shareholder who submits a nominee or nominees for inclusion in the company's proxy statement must provide notice on Schedule 14N to the company of its intent to require that the company include the nominee or nominees in the company's proxy materials and file the Schedule 14N with the Commission. We anticipate that some shareholders that submit a nominee or nominees for inclusion in a company's proxy materials will not previously have filed an electronic submission with the Commission and will file a Form ID. Form ID is the application form for access codes to permit filing on EDGAR. The proposed rules are not changing the form itself, but we anticipate that the number of Form ID filings may increase due to shareholders filing Schedule 14N when submitting a nominee or nominees to a company for inclusion in its proxy materials pursuant to proposed Rule 14a–11. We estimate that 90% of the shareholders who submit a nominee or nominees for inclusion in the company's proxy materials will not have filed previously an electronic submission with the Commission and would be required to file a Form ID.[333] As noted above, we estimate that approximately 208 reporting companies (other than registered investment companies) and 61 registered investment companies will receive shareholder nominations submitted pursuant to proposed Rule 14a–11. This corresponds to 242 additional Form ID filings. In addition, as noted above, we estimate that approximately 49 reporting companies (other than registered investment companies) and 9 registered investment companies will receive shareholder nominations submitted pursuant to an applicable state law provision or a company's governing documents. This corresponds to an additional 52 Form ID filings. As a result, the additional annual burden would be 44 hours (294 filings x .15 hours/filing).[334] For purposes of the PRA, we estimate that the additional burden cost resulting from the proposed amendments will be zero because we estimate that 100 percent of the burden will be borne internally by the nominating shareholder.

D. Revisions to PRA Reporting and Cost Burden Estimates

Table 1 below illustrates the incremental annual compliance burden of the collection of information in hours and in cost for proxy and information statements and current reports under the Exchange Act. The burden was calculated by multiplying the estimated number of responses by the estimated average number of hours each entity spends completing the form. We estimate that 75% of the burden of preparation of the proxy and information statement and current reports is carried by the company internally, while 25% of the burden of preparation is carried by outside professionals at an average cost of $400 per hour. We estimate that 75 percent of the burden of preparation of Schedule 14N and Schedule 14A (with regard to the legend required for additional soliciting materials) will be carried by the nominating shareholder or group internally and that 25 percent of the burden of preparation will be carried by outside professionals retained by the nominating shareholder or group. We estimate that 25 percent of the burden of preparation of Schedule 13G (for nominating shareholder groups that exceed 5%) will be carried by the nominating shareholder or group internally and that 75 percent of the burden of preparation will be carried by outside professionals retained by the nominating shareholder or group. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried internally by the company and the nominating shareholder or group is reflected in hours.

TABLE 1—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES *

	Current annual responses (A)	Proposed annual responses (B)	Current burden hours (C)	Increase in burden hours (D)	Proposed burden hours (E)=C+D	Current professional costs (F)	Increase in professional costs (G)	Proposed professional costs =F+G
Sch 14A	7,300	7,300	555,683	14,692	570,375	$63,709,987	$1,958,760	$65,668,747
Sch 14C	680	680	52,337	1,632	53,969	5,951,639	217,640	6,169,279
Sch 14N	0	269	0	28,565	28,565	0	3,808,600	3,808,600
Form 8–K	108,424	109,465	406,590	3,904	410,494	54,212,000	520,500	54,732,500
Form ID	65,700	65,994	9,855	44	9,899	0	0	0
Sch 13G	12,500	12,546	25,577	484	26,061	42,694,200	580,320	43,274,520
Rule 20a–1	1,225	1,225	130,095	4,085	134,180	18,375,000	544,600	18,919,600
Total				53,406			7,630,420	

* The incremental burden estimate for Rule 20a–1 includes the disclosure that would be required on Schedule 14A and 14C, discussed above, with respect to funds.

E. Solicitation of Comment

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

[332] The proposed amendment to Rule 14a–8(i)(8) is not expected to affect Form ID filings, so the burden estimates solely reflect the burden changes resulting from proposed Rule 14a–11.

[333] We estimate that 326 nominating shareholders or groups will submit nominations pursuant to Rule 14a–11, applicable state law provisions or a company's governing documents. As noted earlier, approximately 32 proxy contests were conducted in 2008. Of the 326 nominating shareholders or groups, we believe that 32 will have obtained EDGAR filer codes previously; therefore we estimate approximately 294 will need to file a Form ID. This results in an estimate of 90%.

[334] We currently estimate the burden associated with Form ID is 0.15 hours per response.

We request comment and supporting empirical data for purposes of the PRA on:

- How likely it would be for shareholders or groups to be able to meet the requirements under proposed Rule 14a–11;
- In how many instances qualifying shareholders or groups would use Rule 14a–11 to include disclosure concerning a nominee or nominees in a company's proxy materials;
- How many nominees qualifying shareholders or group might offer; and
- Whether there would be an increase in the number of shareholder proposals submitted pursuant to Rule 14a–8 that companies receive as a result of the proposed amendments.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–10–09. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–10–09, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Cost-Benefit Analysis

A. Background

The Commission is proposing new rules that would, under certain circumstances, require companies to include in their proxy materials shareholder nominees for election as director, as well as other disclosure regarding those nominees and the nominating shareholder or group. In addition, the new rules would require companies to include in their proxy statements, under certain circumstances, shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures, or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11. The proposed rules are intended to remove certain impediments that the federal proxy process currently impose on shareholders' ability to exercise their state law right to nominate directors, and thereby reduce the costs to shareholders of exercising their rights. Below, we describe the additional disclosures shareholders would receive if the proposed rules are adopted and the direct and indirect economic effects of such new disclosures. Our discussion of the economic effects takes into account the incentives and actions of parties who would be able under the rulemaking to affect its scope and influence. These parties include shareholders, the board, and state legislatures.

Proposed Rule 14a–11 would require companies, where applicable, to include disclosures of shareholder nominations for director and disclosure about the nominating shareholder or group and the nominee or nominees in company proxy materials if, among other things, the nominating shareholder or group meets the requisite ownership threshold and has held the shares for at least one year prior to the date the shareholder provides notice on Schedule 14N of its intent to require the company to include a nominee or nominees in the company's proxy materials pursuant to Rule 14a–11. The nominating shareholder or group also would be required to represent that he or she intends to hold the shares through the date of the meeting. A nominating shareholder that includes a nominee or nominees in a company's proxy materials pursuant to Rule 14a–11 would be required to provide to the company, in its notice on Schedule 14N, disclosure similar to the disclosure required in a proxy contest.[335] Pursuant to proposed Item 7(e) of Schedule 14A (and, in the case of registered investment companies and business development companies, proposed Item 22(b)(18) of Schedule 14A), the company would be required to include the information in its proxy materials, where applicable. In addition, the proposed rules would enable shareholders to engage in limited solicitations to form nominating shareholder groups and engage in solicitations in support of their nominee or nominees without disseminating a proxy statement.[336]

The Commission also is proposing an amendment to Rule 14a–8 to narrow the exclusion in paragraph (i)(8), which addresses director elections. Under the proposed amendment, the company would not be permitted to rely on Rule 14a–8(i)(8) to omit from its proxy statement a shareholder proposal that would amend, or that requests an amendment to, a company's governing documents regarding nomination procedures, or disclosures related to shareholder nominations, although any such proposals that conflict with proposed Rule 14a–11 or state law could still be excluded from the company's proxy materials. The current procedural requirements for submitting a proposal pursuant to Rule 14a–8 would remain the same.

No additional disclosures would be required from any shareholder that submits such a proposal; however, a nominating shareholder that includes a nominee or nominees in a company's proxy materials pursuant to an applicable state law provision or the company's governing documents would be required to provide to the company, in its notice on Schedule 14N, disclosure similar to the disclosure required in a proxy contest.[337] Pursuant to proposed Item 7(f) of Schedule 14A (and, in the case of registered investment companies and business development companies, proposed Item 22(b)(19) of Schedule 14A), the company would be required to include the information in its proxy materials. We believe this information will provide shareholders with information that is useful to an informed voting decision.

The direct effect of proposed Rule 14a–11 and the related disclosure requirements would be to reduce shareholders' cost of nominating directors, which can otherwise be prohibitive since, to be successful, shareholders generally must conduct their own proxy contest. The amendments would do so without eliminating the traditional method of conducting a proxy contest. Therefore, were these amendments to become effective, the first-order economic effect would be that shareholders seeking to nominate directors may choose to move away from soliciting their own proxies for their nominees and instead require the company to include their nominee or nominees in the company proxy materials. The second-order economic effect would be that, due to the lowered

[335] *See* proposed Rule 14a–18.

[336] *See* proposed Rule 14a–2(b)(7)–(8).

[337] *See* proposed Rule 14a–19 and Rule 14n–1.

cost of effectively nominating directors, where applicable, there may be an increase in shareholder nominees for director.

The amendment to Rule 14a–8(i)(8) would narrow the exclusion and no longer permit a company to exclude shareholder proposals that would amend, or request an amendment to, a company's governing documents regarding nomination procedures, or disclosures related to shareholder nominations could result in additional shareholders being able to submit nominees for inclusion in a company's proxy materials, if approved by shareholders. Using Rule 14a–8 in this way could result in a two-year process to gain access to a company's proxy materials. The two-year process could result in different economic effects to those discussed above for proposed Rule 14a–11, depending on the proponent's success (*e.g.,* the inclusion of the proposal in the company's proxy materials and adoption of a binding bylaw proposal by appropriate shareholder vote), and the likelihood that the proponent would initiate the two-year process. The likelihood that the proponent would initiate the two-year process could be limited by the costs of the procedure arising from the additional time (including opportunity costs of holding securities where the shareholder may consider the company's board composition to be sub-optimal) and the risk of failure.[338]

The extent of the economic effect of proposed Rule 14a–11 and the related disclosure requirements may be affected by several factors. These factors include future possible actions by boards and states. They also include limits on the number of shareholder director nominees that must be disclosed in the company's proxy materials. Another relevant factor is how the requirement that a shareholder that intends to rely on proposed Rule 14a–11 may not be holding the securities it owns in the company ''for the purpose of or with the effect of changing control'' of the company would be applied in practice.

In the case of the proposed amendments to Rule 14a–8, future actions of boards may affect applicability of the rule. If Rule 14a–8(i)(8) is amended as proposed, a company would not be permitted to exclude a shareholder proposal that would amend, or that requests an amendment to, a company's governing documents to address shareholder nomination procedures or disclosures related to shareholder director nominations. It is reasonable to expect that at least some shareholders will submit this type of proposal—shareholder groups may be most likely to attempt to take this action when they perceive that the board does not currently represent their interests. Even if these proposals are no longer excludable pursuant to Rule 14a–8(i)(8), companies may submit a no-action request to exclude these shareholder proposals from the proxy statement pursuant to other procedural or substantive bases for exclusion. In contrast, we believe that applicability of proposed Rule 14a–11 is not likely to be affected by future actions of companies, because it is our understanding that under existing state laws companies generally may not prohibit shareholders from nominating directors.[339]

Future actions of the states also could affect the applicability of the proposed amendments. Proposed Rule 14a–11, for instance, would not apply to companies incorporated in states that prohibit nominations of directors by shareholders or permit companies to prohibit such nominations and where the company's governing documents do so. Additionally, the proposed rule requires that the nominee's board candidacy and membership be consistent with state law. Under Rule 14a–8, shareholder proposals must be proper subjects for action by shareholders under state law. States may have incentives to affect the director nomination process, and these incentives may lead them to consider changes that could affect the availability of proposed Rule 14a–11 or Rule 14a–8. To the extent that states change their laws, for example, to prohibit the nomination of directors by shareholders, proposed Rule 14a–11 and Rule 14a–8 would apply less broadly.

The application of the term ''changing control'' affects the shareholders that may rely on the proposed amendments to require disclosure of their board nominees. The certification by the nominating shareholder or group on Schedule 14N that it does not hold the securities it owns in the company with the purpose or effect of changing control of the company will limit the shareholders that can use the procedure in proposed Rule 14a–11. Whether this requirement applies to a nominating shareholder or group will depend, however, on the facts and circumstances of each nominating shareholder or group. It is certainly not the Commission's intent that this requirement would restrict shareholders from using the new rule merely because it is nominating directors pursuant to the new rule. Nevertheless, other factors in addition to the nomination may support a finding of control.

The economic effects of the proposed rulemaking also are affected by the requirement that shareholders cannot nominate more than a maximum of one director or 25% of the existing board. In addition to this direct requirement, the cap on shareholder nominees may have additional, indirect implications for the economic effects of proposed Rule 14a–11. First, the number of shareholder nominees that can be included in the company's proxy materials overall is limited. If one shareholder or group nominates the maximum allowable number of candidates, any other shareholder's or group's nominees are not required to be disclosed in the same proxy statement. Second, if the maximum allowable number of existing shareholder nominees is currently in place on the board, additional shareholder nominees are not required to be disclosed in the proxy statement. Third, boards seeking to limit the effect of shareholder nominated directors under the proposed rule may, in some instances, choose to expand the board size to dilute, to an extent, those directors.[340]

Below we consider the benefits and costs of these economic effects of the proposed amendments.

B. Benefits

We anticipate that the proposals, where applicable, would result in (1) a reduction in the cost to shareholders of soliciting votes in support of a nominated candidate for election to the board of directors; (2) improved disclosure of shareholder nominated director candidates; (3) potential improved board performance; and (4) enhanced ability for shareholders and companies to adopt their preferred shareholder nomination procedures.

[338] In this regard, we note that we are proposing new rules that would require a shareholder submitting a nominee or nominees pursuant to an applicable state law provision or a company's governing documents to provide disclosure similar to what is required currently in a proxy contest.

[339] We are not aware of any state laws that do so, but we seek comments on whether states currently have any prohibitions on shareholders' right to nominate directors, and whether, to the extent such a right is not explicitly allowed, shareholders are presumed to have nomination rights.

[340] As an example, a board of eight with two new shareholder-nominated directors, may expand to up to 11, diluting the influence of the shareholder-nominated directors without expanding the number of director slots for which they must place shareholder-nominated directors in the proxy statement because the proposed 25% limits in proposed Rule 14a–11 would include a provision allowing companies to round down the number of directors.

1. Reduction in Costs Related to Shareholder Nominations

Generally, a shareholder who attempts to nominate directors must conduct a proxy contest in which the shareholder is responsible for collecting information, preparing proxy materials with required disclosures concerning the director nomination, and mailing the proxy materials to each shareholder solicited. A shareholder conducting a proxy contest incurs large costs involved with preparing a proxy statement and soliciting on behalf of his or her nominee.[341] The costs can make it prohibitively expensive for shareholders to exercise their state law rights to nominate and elect directors. In addition, collective action concerns may discourage any one shareholder or group from assuming such costs for the benefit of other shareholders.[342]

Proposed new Rule 14a–11 would reduce both the direct and indirect costs of the proxy solicitation process. In particular, proposed new Rule 14a–11 would allow shareholders to avoid the direct costs of conducting a proxy contest and would mitigate collective action and free rider concerns that otherwise may deter many shareholders from engaging in a traditional proxy contest. In regard to the latter, the proposed rule changes would likely ameliorate the need for collective action among shareholders, because qualifying shareholders will have direct access to a company's proxy materials to more effectively nominate directors. To the extent that shareholders substitute use of Rule 14a–11 for engaging in traditional election contests, the proposal could also help companies avoid potential disruptions and the diversion of resources resulting from traditional proxy contests that might take place in the absence of the proposed amendments. Because the level of this benefit is affected by the extent to which shareholders make such substitutions, it is also checked by the extent that use of proposed Rule 14a–11 is not a perfect substitute for traditional election contests. For example, the proposed rule restricts the number of shareholder director nominees that a company would be required to include in its proxy materials and the proposed rule would be available only to shareholders that do not hold the securities in the company with the purpose of, or with the effect of, changing control of the company. These elements of the proposed rule impose restrictions that are not present in a traditional proxy contest. Proxy contests also would still be available where shareholders have a control intent.

According to a study of proxy contests conducted during 2003, 2004, and 2005, the average cost to a soliciting shareholder of a proxy contest is $368,000.[343] The costs included those associated with proxy advisors and solicitors, processing fees, legal fees, public relations, advertising, and printing and mailing.[344] Approximately 95% of the cost was unrelated to printing and postage.[345] The cost of printing and postage averaged approximately $18,000.[346] Based on this information, we estimate that a shareholder using proposed Rule 14a–11 to submit a nominee or nominees for director to be included in a company's proxy statement will save at least $18,000 on average and may save more as a result of being able to use the company's proxy materials to solicit other shareholders. The nominating shareholder or group may or may not engage in public relations and advertising, or engage proxy solicitors, therefore, the extent of any cost savings may be greater.

The benefits of this reduction in costs also may be enhanced to the extent that companies' governing documents are modified to allow inclusion of additional shareholder nominees for director in company proxy materials. The instances of such changes in provisions in governing documents may increase as a result of the proposed amendment to Rule 14a–8(i)(8) to preclude companies from excluding proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11.

2. Improved Disclosure of Shareholder Nominated Director Candidates

The proposed new disclosure requirements in Rules 14a–11, 14a–18, and 14n–1 would require additional information to be provided on Schedule 14N, including certifications by shareholders who submit a nominee under proposed Rule 14a–11 about the nominee's independence, and disclosure of the information similar to that currently required in a proxy contest regarding the nominating shareholder and nominee. Proposed Rules 14a–19 and 14n–1 would require similar disclosures when a shareholder uses an applicable state law provision or company's governing documents to include shareholder nominees for director in the company's proxy materials. The information provided by such certifications and disclosures would help provide transparency to shareholders in voting on shareholder nominees for director and therefore may lead to better informed voting decisions. The information also will provide consistent and comparable information about shareholder nominated candidates across companies. With respect to Rule 14a–8(i)(8), companies have been permitted to exclude proposals to establish procedures to include shareholder nominees in company proxy materials. The Commission was concerned that allowing such proposals would result in contested elections without the disclosure that otherwise would be required in a traditional proxy contest.[347] The proposed disclosure requirements are designed to address that concern.

3. Potential Improved Board Performance and Company Performance

Both proposed Rule 14a–11 and the amendments to Rule 14a–8(i)(8) may result in improved company performance, arising from improvements in board performance. First, both proposals, by increasing the chances of a shareholder-nominated director to be elected to the board, may increase the potential for incumbent directors to face closer scrutiny from outsiders. Faced with this new prospect, incumbent directors may work more diligently to signal their value to the company through efforts to improve the performance of the board and, relatedly, the company. [348] Company performance

[341] As noted in footnote 303, above, in 2008 there were at least 32 contested elections.

[342] *See, e.g.,* Lynn A. Stout, *The Mythical Benefit of Shareholder Control,* 93 Va. L. Rev. 789, 789 (2007) (''In a public company with widely dispersed share ownership, it is difficult and expensive for shareholders to overcome obstacles to collective action and wage a proxy battle to oust an incumbent board.''), *available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978775.*

[343] *See* comment letter from Automatic Data Processing, Inc. (April 20, 2006) on File No. S7–10–05.

[344] *See id.*

[345] *See id.*

[346] *See id.*

[347] *See* Shareholder Proposal Proposing Release (proposing amendments to Rule 14a–8 to ''make clear that director nominations made pursuant to [bylaw amendments concerning shareholder nominations of directors] would be subject to the disclosure requirements currently applicable to proxy contests'' and noting that such disclosure is of ''great importance'' to an informed voting decision by shareholders).

[348] The academic literature indicates the benefit to shareholders of having an independent, active and committed board of directors. *See, e.g.,* Fitch Ratings, ''Evaluating Corporate Governance'' (December 12, 2007), *available at: http://www.fitchratings.com/corporate/reports/*

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may improve to the extent some directors are replaced by other directors whose actions are better aligned with the interests of shareholders.[349] Even where incumbents are not replaced, the requirements of the rule can lead to greater accountability on the part of incumbent directors. The level of board accountability will depend on the extent to which directors see a close link between their performance and the prospect of removal.[350]

Similarly, the inclusion in company proxy materials of shareholder nominees for director under proposed Rule 14a–11, or the possibility of shareholder nominees being included in company proxy materials pursuant to shareholder-initiated amendments to a company's governing documents permitted by the proposed amendments to Rule 14a–8, may enhance the quality of the shareholders' voice and result in a board whose interests are better aligned with shareholders' interests.[351]

Second, the possibility of shareholder nominated candidates being submitted for inclusion in a company's proxy materials, as well as the possibility of the shareholder nominee's election, may lead to enhanced board performance. If the proposed rules are adopted, the responsiveness of boards may increase in an effort to alleviate concerns expressed by shareholders on certain matters and thereby avoid shareholders submitting nominees pursuant to the new rules. The board may feel a need to be more attentive to the company's operations as a result of this enhanced accountability to shareholders. In addition, having a shareholder-nominated director elected to and serving on the board may increase the transparency in boards' decision-making process, which would make it easier for shareholders to monitor the board. This increased monitoring could enhance board performance and ultimately lead to improved corporate performance.[352]

Third, increasing shareholders' access to company proxy materials for the inclusion of shareholder nominees for director may result in a larger pool of qualified director nominees to choose from. To the extent that a company does not include shareholder nominees for director in its proxy materials, thereby reducing the pool of qualified nominees, an opportunity cost may be incurred by the company and thus the shareholders. Therefore, proposed Rule 14a–11 may reduce the opportunity costs to companies and shareholders.

4. Enhanced Ability for Shareholders and Companies To Adopt Procedures

The proposed amendment to Rule 14a–8(i)(8) also may facilitate shareholders and companies working together to tailor companies' governing documents to suit the specific interests of the company and its shareholders. The proposed amendment would allow shareholders to use Rule 14a–8 to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, as long as the proposal does not conflict with Rule 14a–11. This may provide shareholders a more effective voice than simply being able to recommend candidates to the nominating committee or being able to nominate candidates in person at a shareholder meeting.

The overall benefit of allowing shareholders to include director nominees in a company's proxy materials may depend on the extent to which shareholders choose to exercise their rights and on shareholders' perception of the merits of the nominees that are advanced by nominating shareholders.

C. Costs

We anticipate that the amendments, where applicable, may result in costs related to (1) potential adverse effects on company and board performance; (2) potential complexity of the proxy process; and (3) preparing the required disclosures, printing and mailing, and costs of additional solicitations.

1. Costs Related to Potential Adverse Effects on Company and Board Performance

The proposals would impose some direct costs on the companies that would be subject to the new rules. These costs would arise from potential changes to corporate behavior and potential lower board quality.

Most, if not all, companies have director nomination procedures. The proposed changes may lead some companies to incur costs associated with re-examining those procedures, especially if the company is subject to, or thinks it likely will be subject to, shareholder nominated director candidates. Companies accustomed to uncontested director elections may incur costs of adjusting their practices.[353] Further, the possibility of contested director elections may adversely influence corporate behavior. To the extent that incumbent board members may feel a greater need to respond to shareholders' various concerns, the board may incur costs in attempting to institute policies and procedures they believe will address shareholder concerns. It is possible that the time a board spends on shareholder relations could reduce the time that it would otherwise spend on strategic and long-term thinking and overseeing management, which may negatively

report_frame.cfm?rpt_id=363502. Moreover, empirical evidence has indicated that the ability of significant shareholders to hold corporate managers accountable for activity that does not benefit investors may reduce agency costs and increase shareholder value. *See, e.g.,* Brad M. Barber, ''Monitoring the Monitor: Evaluating CalPERS' Activism'' (November 2006), *available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890321*. *See also* Deutsche Bank, Global Equity Research, ''Beyond the Numbers: Corporate Governance in Europe,'' (March 5, 2005).

[349] *See, e.g.,* Chris Cernich, et al., ''Effectiveness of Hybrid Boards,'' IRRC Institute for Corporate Responsibility (May 2009) *available at: http://www.irrcinstitute.org/pdf/IRRC_05_09_EffectiveHybridBoards.pdf* (finding that in a study of 120 ''hybrid'' boards—boards formed when activist shareholders, through actual or threatened proxy contests, were able to elect dissident directors but not gain control of the entire board—such boards increased shareholder value at ongoing companies by 19.1% (16.6 percentage points more than peers) from the contest period through the board's one-year anniversary).

[350] The current proposal, by facilitating a reduction in the cost of nominating ''outside'' directors, would create a new threat of removal to incumbent directors, which can bring about increased accountability that would benefit investors. Economists have put forth theory and evidence on the link between incentives that are associated with accountability and performance. *See, e.g.,* Benjamin E. Hermalin and Michael S. Weisbach, ''Endogenously Chosen Board of Directors and Their Monitoring of the Board'' 88 American Economic Review 96 (1998), *available at: http://129.3.20.41/eps/mic/papers/9602/9602001.ps.gz.* Milton Harris and Artur Raviv ''Control of Corporate Decisions: Shareholders vs. Management'' (May 29, 1998), *available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965559.*

[351] Published research has reported that when chief executive officers are more involved in the nomination of independent directors, stock price reactions to independent director appointments are significantly lower, and companies appoint fewer independent directors. *See* Anil Shivdasani & David Yermack, ''CEO Involvement in the Selection of New Board Members: An Empirical Analysis,'' 54 J. Finance 1829 (1999). This evidence is consistent with the idea that limiting total management control of the nomination process improves accountability.

[352] One benefit of corporate transparency is that it reduces information differences between the entities (*e.g.,* the board of directors and the shareholders), and hence lowers the cost of trading the firm's securities and the firm's cost of capital. *See, e.g.,* Diamond, Douglas W. and Robert E. Verrecchia, ''Disclosure, Liquidity, and the Cost of Capital,'' Journal of Finance, September 1991, 46 (4), 1325–1359. For empirical evidence, *see, e.g.,* Christian Leuz and Robert E. Verrecchia, ''The Economic Consequences of Increased Disclosure,'' Journal of Accounting Research, 2000, 38 (supplement), 91–124.

[353] *See, e.g.,* comment letter on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from the U.S. Chamber of Commerce (October 2, 2007) (''Chamber 2007'').

affect shareholder value.[354] These costs are limited by the extent to which the additional communication results in better decision-making by the board, as well as shareholders' understanding that the board's time and other resources are in scarce supply and take these considerations into account in deciding to nominate directors.

In addition, the rule proposals could, in some cases, result in lower quality boards.[355] If a shareholder nominee is elected and disruptions or polarization in boardroom dynamics occur as a result, the disruptions may delay or impair the board's decision-making process.[356] In companies in which boards are already well-functioning, dissent can be counterproductive and could delay the board's decision-making process. Such a delay or impairment in the decision-making process could constitute an indirect economic cost to shareholder value.

Companies may expend more resources on efforts to defeat the election of shareholder nominees for director. Commenters have drawn attention to the potential to turn every director election into an election contest.[357] This may be the case, for instance, if company directors determine to spend company resources to defeat shareholder nominees they believe are not in the best interests of the company (or for other reasons).[358] Such a reaction could discourage qualified board members from running. This potential would be limited by shareholders' understanding that board dynamics can be important, and that changing them may not always be beneficial. It also would be limited to the extent that company directors do not seek to substitute their judgment for the judgment of the shareholders when the question is who should comprise the board of directors.[359] We also have assumed that boards generally would be cautious in expending resources to defeat shareholder nominees insofar as incumbent board members generally are interested in the outcome of elections and in the corporation's policy in connection with opposing shareholder nominees. Nevertheless, to the extent that company directors make large expenditures to defeat shareholder nominees, those expenditures would represent a cost to shareholders. An additional cost could arise from the potential placement of directors who have insufficient experience or capabilities to serve effectively, as some commenters have suggested.[360] But to the extent that shareholders understand that experience and competence are important director qualifications, any associated costs may be limited.

Finally, the proposals could introduce a cost to shareholders to the extent that the nomination procedure is used by shareholders to promote an agenda that conflicts with other shareholders' interests. For example, it would be possible for an investor to try to maximize his private gains through board decisions at the expense of other shareholders.[361] This cost, however, is limited to the extent these nominees would be required to make certain disclosures designed to elicit their interests and relationships, and must ultimately be elected by the shareholders.[362]

2. Costs Related to Potential Complexity of Proxy Process

Under the proposed amendments, the process of determining which shareholder director nominee will be on the form of proxy and the limitations on the number of shareholder-nominated directors to appear in the company's proxy materials and eventually serve on the board may create a degree of complexity. If several shareholders or groups desire (and qualify) to nominate the maximum number of directors they are allowed to place in the company's proxy materials, only the first shareholder or group to submit a Schedule 14N will succeed. Additionally, under proposed Rule 14a–11, if the maximum allowable number of shareholder nominees is currently serving on the board, a company would not be required to include additional shareholder nominees in the company's proxy materials.

Under the proposed amendments to Rule 14a–8, shareholders would need to wait for two proxy seasons to utilize the particular procedures and disclosures adopted through a shareholder proposal under Rule 14a–8—the first season to establish a shareholder director nomination procedure and the second season to nominate and elect directors.

These sources of complexity and any uncertainty that may arise in implementing the proposed amendments could result in costs to companies, to shareholders seeking to nominate directors, and to shareholder director nominees. For example, both

[354] *See, e.g.,* Stout, footnote 342, above, at 792 (''Perhaps the most obvious [economic function of board governance] is promoting more efficient and informed business decisionmaking. It is difficult and expensive to arrange for thousands of dispersed shareholders to express their often-differing views on the best way to run the firm.''); *see generally* Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment,* 199 Harv. L. Rev. 1, 25–27 (2006) (discussing how concern for accountability may undermine decision making discretion and authority). *But see* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power,* 118 Harv. L. Rev. 833, 883 (2005) (''[M]ere recognition that back-seat driving might sometimes be counter-productive is hardly sufficient to mandate general deference to management. Such mandated deference would follow only if one assumes that shareholders are so irrational or undisciplined that they cannot be trusted to decide for themselves whether deference would best serve their interests.''). *See also,* comment letter on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from ABA 2007.

[355] *See, e.g.,* comment letter on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from Chamber 2007; Stephen M. Bainbridge, ''A Comment on the SEC Shareholder Access Proposal'' (November 14, 2003) at 17, *available at: http://ssrn.com/abstract=470121* (''The likely effects of electing a shareholder representative therefore will not be better governance. It will be an increase in affectional conflict. * * * It will be a reduction in the trust-based relationships that causes horizontal monitoring within the board to provide effective constraints on agency costs.'').

[356] *See, e.g.,* comment letter on the 2007 Proposals (SEC File Nos. S7–16–07 and S7–17–07) from the Society of Corporate Secretaries & Governance Professionals (October 5, 2007).

[357] *See* 2003 Summary of Comments and comment letters from ASCS and McKinnell, BRT.

[358] *See* 2003 Summary of Comments; *see also* comment letters from ABA; Charlotte M. Bahin, ACB; The Allstate Corporation (December 23, 2003) (''Allstate''); Ashland; Richard H. Ayers (November 18, 2003) (''Ayers''); Callaway Golf Company (December 22, 2003) (''Callaway''); Caterpillar, Inc. (December 17, 2003) (''Caterpillar''); Cigna Corporation (January 2, 2004) (''Cigna''); ConocoPhillips (October 3, 2003) (''ConocoPhillips''); Cummins, Inc. (November 23, 2003) (''Cummins''); Debevoise & Plimpton (December 17, 2003); Exelon Corporation (December 22, 2003) (''Exelon''); FirstEnergy Corp. (December 10, 2003) (''FirstEnergy''); Ganske, Kelley & Profusek; General Mills (December 19, 2003); Roger L. Howe (November 26, 2003); Reed Hundt (December 16, 2003); International Paper (December 22, 2003); Letter Type D (representing 8 individuals or entities); Letter Type H (representing 7 individuals or entities); Letter Type N (representing 38 individuals or entities); Letter Type Q (representing 4 individuals or entities); McDATA Corporation (December 22, 2003) (''McDATA''); Pfizer, Inc. (December 11, 2003) (''Pfizer''); MDU Resources (December 22, 2003) (''MDU''); Malcolm S. Morris (November 6, 2003); National Association of Corporate Directors (March 26, 2004) (''NACD''); Office Depot, Inc. (December 22, 2003); Kerr-McGee Corporation (December 22, 2003); Progress Energy (December 22, 2003); Tribune Company (December 18, 2003); and Wachtell.

[359] *Cf. Blasius Indus.* v. *Atlas Corp.,* 564 A.2d 651, 663 (Del. Ch. 1988) (stating that ''[although the] premise [that the board knows better than do the shareholders what is in the corporation's best interest] is no doubt true for any number of matters, it is irrelevant (except insofar as the shareholders wish to be guided by the board's recommendation) when the question is who should comprise the board of directors.'').

[360] *See, e.g.,* comment letter from Exelon Corporation (December 22, 2003) on the 2003 Proposal.

[361] *See, e.g,* Stout, footnote 342 above, at 794 (''[B]y making it easier for large shareholders in public firms to threaten directors, a more effective shareholder franchise might increase the risk of intershareholder ''rent-seeking'' in public companies.'').

[362] *See, e.g.,* Bebchuk, note 354 above, at 883 (arguing that proposals by special interest shareholders are generally unlikely to be adopted by the majority).

companies and shareholders could incur costs to seek legal advice in connection with shareholder nominations submitted pursuant to Rule 14a–11, the inclusion of shareholder nominees in company proxy materials, and the process for submission of a notice of intent to exclude a nominee or nominees included in the rule.[363] A company that receives a shareholder nomination for director has no obligation to make a submission under Rule 14a–11 unless it intends to exclude the nominee from its proxy materials. Companies and shareholders also could incur costs to seek legal advice in connection with shareholder proposals submitted pursuant to Rule 14a–8 and the notice of intent to exclude process related to it. A company that receives a shareholder proposal has no obligation to make a submission under Rule 14a–8 unless it intends to exclude the proposal from its proxy materials. To the extent disputes on whether to include particular nominees or proposals are not resolved internally, companies and/or shareholders might seek recourse in courts, which would increase costs.

The proposed amendments to Rule 14a–8 would no longer permit companies to exclude from their proxy materials proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11. Expanding the types of proposals permitted under Rule 14a–8 may increase the number of shareholder proposals submitted to companies. This would likely result in increased costs to the company related to reviewing and processing such proposals to determine matters such as shareholder eligibility, and whether there is a basis for excluding the proposal under Rule 14a–8. In this regard, in a comment letter submitted in connection with the 2003 Proposal, a commenter submitted information from a survey conducted about the costs associated with including a shareholder proposal in the company's proxy materials, estimating that preparation and submission of a notice of intent to exclude the proposal to the SEC regarding a shareholder proposal would average 65 hours per proposal.[364] For purposes of PRA, we estimate that shareholders will submit approximately 97 proposals regarding nomination procedures or disclosures related to director nominations to companies per year. Assuming that 90% of companies prepare and submit a notice of intent to exclude these proposals, the resulting costs to companies would result in approximately 4,241 hours and $565,500 for the services of outside professionals. Alternatively, such costs could decrease to the extent that proposed Rule 14a–8 provides a clearer indication of which proposals are excludable.

3. Costs Related to Preparing Disclosure, Printing and Mailing and Costs of Additional Solicitations

The proposals may impose additional direct costs on companies and shareholders subject to the new rules, related to the preparation of required disclosure, printing and mailing costs and costs of additional solicitations that may be undertaken as a result of including one or more shareholder nominees for director in the company proxy materials.

For purposes of the PRA analysis, we estimate that the disclosure burden of the proposed amendments to reporting companies (other than registered investment companies) is 15,652 hours of personnel time and $2,087,000 for services of outside professionals. We also estimate for purposes of the PRA analysis that the disclosure burden to shareholders of the proposed amendments will be 31,865 hours of shareholder time and $4,758,420 for services of outside professionals. For registered investment companies, we estimate for purposes of the PRA analysis that the burden of the proposed amendments will be 5,888 hours of company time and $785,000 for the services of outside professionals.

Companies would incur additional printing and mailing costs to include shareholder nominees in the company's proxy materials pursuant to Rule 14a–11, an applicable state law provision, or a company's governing documents as a result of the proposed amendment to Rule 14a–8(i)(8).[365] These incremental printing and mailing costs could include the expense of adding the name and background information of shareholder nominees for director in their proxy materials as well as the increased weight of a company's proxy materials. The printing and mailing costs would increase as the number of shareholder nominees to be included in the company proxy materials increases. As noted above, this may result in a decrease in costs to shareholders that would have to conduct proxy contests in the absence of proposed Rule 14a–11, but may increase the costs for companies. The increased costs for companies may not be as much as would otherwise result if that shareholder engaged in a proxy contest.[366]

Companies also would incur printing and mailing costs with respect to the inclusion of a shareholder proposal related to changes to the company's governing documents regarding inclusion of shareholder nominees in company proxy materials. We have two sources of information estimating such costs. According to the information provided by one commenter, the average cost to a company to print and mail one shareholder proposal in its proxy materials is $15,324 and 34 hours.[367] The responses to a questionnaire that the Commission made available in 1997 relating to 1998 amendments to Rule 14a–8, however, suggest such costs to the companies responding averaged $50,000.[368] As noted above, we believe

[363] For example, the comment letter from ASCS on the 2003 Proposal estimated based on survey results that the cost of outside counsel in connection with opposing a shareholder nominee and supporting the company's nominees for directors would be 59.4 hours and $44,460.

[364] *See* 2003 Summary of Comments; *see also* letter from McKinnell, BRT (providing information from surveys conducted of BRT and ASCS members). *See also* footnote 311, above.

[365] We note that these increased costs may be less for companies using notice and access. *See Internet Availability of Proxy Materials,* Release No. 34–55146 (January 22, 2007) (''Internet Proxy Availability Release'').

[366] One commenter on the 2003 Proposal estimated that a Rule 14a–11 contest would cost a company approximately one-third what a full proxy contest costs. *See* comment letter from Bainbridge. Based on this assumption, this commenter estimated, relying on data from a late 1980s survey, that the costs of such a contest to a public company would be $500,000. This commenter also cited data estimating companies' annual expenditures on Rule 14a–8 shareholder proposals to be $90 million. While this commenter noted that it is unlikely that there will be as many Rule 14a–11 election contests as Rule 14a–8 shareholder proposals, the commenter asserted that incumbent boards are likely to spend considerably more on opposing each Rule 14a–11 contest than on opposing a Rule 14a–8 shareholder proposal. This commenter estimated that $100 million may be an appropriate estimate for the lower boundary of the range within which Rule 14a–11's direct costs will fall. By contrast, another commenter estimated that under current rules the total cost of proxy contests for companies would exceed $15 million. *See* comment letter from McKinnell, BRT in connection with the 2003 Proposal (estimate was based on data provided in response to a 2003 survey of members of the Business Roundtable and the American Society of Corporate Secretaries).

[367] *See* ASCS letter. We also note that these increased costs may be less for companies using notice and access. *See* Internet Proxy Availability Release.

[368] In the adopting release for the amendments to Rule 14a–8 in 1998, we noted that responses to a questionnaire we made available in February 1997 suggested the average cost spent on printing costs (plus any directly related costs, such as additional postage and tabulation expenses) to include

that the proposed amendment to Rule 14a–8(i)(8) could result in an additional 38 shareholder proposals submitted annually.[369] Based on this information, for purposes of our analysis, we assume printing and mailing costs of one shareholder proposal in a company's proxy materials could be in the range of approximately $15,000 to $50,000. Assuming each of these proposals were included in company proxy materials, it could result in a total cost of approximately $570,000 to $1,900,000 for the affected companies.

The proposed rules also would present direct costs due to disclosure requirements. For example, companies that determine that they may exclude a shareholder nominee are required to provide a notice to the nominating shareholder or group regarding any eligibility or procedural deficiencies in the nomination and provide to the Commission notice of the basis for its determination.[370] Nominating shareholders or groups and the nominees also would be required to disclose information about themselves, which may be costly.[371] Most of this disclosure will be provided by the nominating shareholder or group in the notice to the company, which would be filed on new Schedule 14N. The Schedule 14N also would include information regarding the length of ownership, certifications, and other information.

We also anticipate the possibility of increased direct costs associated with additional solicitations by both companies and shareholders. Companies may increase solicitations to vote against shareholder proposals or to vote for their slate of directors. Shareholders may increase solicitations to vote for shareholder proposals, to withhold votes for a company's nominees for director, or to vote for the shareholder nominee or nominees. In addition, companies may face additional costs for solicitations if shareholders or groups submit nominees for inclusion in company proxy materials pursuant to Rule 14a–11, an applicable state law, or a company's governing documents.

D. Small Business Issuers

Based on our staff's review of Rule 14a–8 shareholder proposals, it seems that smaller companies tend to receive relatively fewer shareholder proposals. Therefore, we assume that the proposed amendment to the rule would not substantially increase the number of shareholder proposals to smaller companies and likely would have little impact on small entities. With respect to proposed Rule 14a–11, there is some indication that proxy contests may occur disproportionately at smaller companies.[372] Accordingly, we assume that proposed Rule 14a–11 is likely to have a greater effect than the proposed amendments to Rule 14a–8 on smaller companies.[373]

E. Request for Comment

We have identified certain costs and benefits imposed by these proposals. In addition to the requests for comment throughout the release on the potential impact of the proposed rules, we specifically request comment on all aspects of this cost-benefit analysis, including identification of any additional costs and benefits. We encourage commenters to identify and supply relevant data concerning the costs and benefits of the proposed amendments. We also solicit comment on how the use of electronic proxy materials[374] may reduce the costs for companies that would be required to include shareholder nominees or shareholder proposals, as well as for shareholders that otherwise would be required to conduct a proxy contest.

We also request comment on the following specific concerns:

- We solicit quantitative data to assist our assessment of the benefits and costs of enhanced shareholder access to company proxy materials. Will proposed Exchange Act Rule 14a–11 reduce shareholders' cost of nominating directors?
- We solicit quantitative data on how often shareholders meeting the proposed Rule 14a–11 thresholds would invoke the rule to propose nominees.
- We solicit quantitative data on the potential increases, if any, of shareholder proposals under Exchange Act Rule 14a–8(i)(8) as a result of these proposed rules.
- We solicit quantitative data on the incremental cost of mailing and printing company proxies that may be longer due to the inclusion of shareholder nominees. How does this compare with the cost of a stand-alone printing of the additional material, such as would be borne by a shareholder engaged in a proxy contest under the current rules?
- We solicit quantitative data on the time and cost spent by shareholders nominating directors through a proxy contest under the current rules.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[375] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[376] and Section 2(c) of the Investment Company Act[377] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The proposed rules are intended to remove impediments to the exercise of shareholders' rights to nominate and elect directors and provide shareholders with information about nominating shareholders and their nominees for director. The proposed rules, if adopted, would establish a process for inclusion of shareholder nominees for director in company proxy materials pursuant to Rule 14a–11 and disclosure regarding the nominating shareholder and nominees submitted pursuant to Rule 14a–11. The proposed rules also would provide an avenue for shareholders to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder

shareholder proposals in company proxy materials was approximately $50,000. The responses received may have accounted for the printing of more than one proposal.

[369] We estimated that approximately 97 proposals would be submitted regarding nomination procedures or disclosures related to nomination procedures, however, our estimate assumed that 59 proposals that otherwise would have been submitted on other governance topics would instead relate to nomination procedures or disclosures related to nomination procedures. Assuming the 59 proposals would already be accounted for in companies' costs, we estimate that 38 additional proposals would be submitted to companies annually.

[370] For purposes of the PRA analysis, we estimate these disclosure requirements would result in 2,633 burden hours of company time, and $351,000 for services of outside professionals.

[371] For purposes of the PRA analysis, we estimate the Schedule 14N disclosure requirements for shareholders submitting nominees pursuant to Rule 14a–11 or a company's governing documents would result in a total of 28,565 hours of shareholder time and $3,808,600 for services of outside professionals.

[372] *See, e.g.,* Bebchuk 2007 Article.

[373] For further discussion on the impact of the proposed amendments on smaller reporting companies, *see* discussion of Initial Regulatory Flexibility Act below.

[374] *See* Internet Proxy Availability Release.

[375] 15 U.S.C. 78w(a)(2).

[376] 15 U.S.C. 78c(f).

[377] 15 U.S.C. 80a–2(c).

nominations. In addition, the proposed rules would require disclosure of information regarding nominating shareholders or groups and any nominees submitted pursuant to an applicable state law provision or a company's governing documents, which would provide shareholders a better informed basis for deciding how to vote for nominees for election to the board of directors. Enabling shareholders to submit shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations should better reflect shareholders' preferences regarding shareholder director nomination procedures and disclosure. We expect the proposed rules to promote the efficiency of the exercise of shareholders' rights to nominate and elect directors.

We expect proposed Rule 14a–11 would increase efficiency because a shareholder will not have to engage in a formal proxy contest if the shareholder only wants to nominate a small number of directors and is not seeking control of a company's board. We also note that the proposal would increase efficiency because all or most nominees will be included on one proxy card with clear disclosure for shareholders to evaluate when deciding whether and how to grant authority to vote their shares by proxy, rather than having to evaluate more than one set of proxy materials sent by a company and an insurgent shareholder.

If a company is required to include shareholder nominees in its proxy materials, competition for board seats could increase, which might encourage or discourage qualified candidates from running. To the extent that this would discourage less-qualified candidates from running, or alternatively, would increase the quality of board members due to increased competition, investors may be more or less willing to invest in companies that receive shareholder nominees pursuant to the proposed rules. The proposed rules should improve and streamline information flow between investors and with the company, which we believe would give more direct effect to shareholder preferences regarding shareholder nominations for director.

Shareholders and the company's relationship with shareholders may benefit from the board devoting additional time to considering shareholder concerns; however, one possible adverse impact on efficiency, competition, and capital formation is that boards may devote less time to fulfilling their other responsibilities as a result. However, we believe that investors may be able to evaluate a company's board of directors more effectively and make more informed investment decisions as a result of the proposed rules. We also believe that these developments may have some positive impact on the efficiency of markets and capital formation because it may help to increase investor confidence during this time of uncertainty in our markets.

We request comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their view, if possible.

VII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms under the Exchange Act and the Investment Company Act that would, under certain limited circumstances, require companies to include in their proxy materials shareholder nominees for election as director. It also relates to the proposed revisions to the rules and forms that would prohibit companies from excluding shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations. The proposals are intended to improve the ability of shareholders to receive consistent and comparable disclosure regarding, and participate meaningfully in, the nomination and election of directors.

A. Reasons for, and Objectives of, the Proposed Action

Today's proposals include features from the proposals on this topic in 2003 and 2007, and reflect much of what we learned through the public comment that the Commission has received concerning this topic over the past six years. The proposals are intended to remove impediments to shareholders' ability to participate meaningfully in the nomination and election of directors, to promote the exercise of shareholders' rights to nominate and elect directors, to open up communication between a company and its shareholders, and to provide shareholders with better information to make an informed voting decision by requiring disclosure about a nominating shareholder or group, as well as nominees for director submitted by a nominating shareholder or group. In particular, the proposed rules would create a process for long-term shareholders, or groups of long-term shareholders, with significant holdings to have their nominees for director included in company proxy materials. In addition, the proposed amendment to Rule 14a–8(i)(8) would narrow the exclusion and would not permit companies to exclude shareholder proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11, when certain conditions are met.

The rule proposals are intended to achieve the stated objectives without unduly burdening companies. We seek to limit the cost and burden on companies by limiting proposed Rule 14a–11 to nominations by shareholders who have maintained a significant continuous beneficial ownership in the company for at least one year at the time the notice of nomination is submitted. These limitations would lower the cost to companies while still improving disclosure in the company's proxy materials and thereby improve shareholders' ability to participate meaningfully in the nomination and election of directors. This increased participation may improve corporate governance by increasing director accountability and responsiveness and aligning the interests of the board and shareholders, thereby giving investors greater confidence that the board is serving the interests of shareholders. This may, in turn, enhance the value of shareholders' investments.

B. Legal Basis

We are proposing amendments to the forms and rules under the authority set forth in Sections 3(b), 13, 14, 15, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, and Sections 10, 20(a) and 38 of the Investment Company Act of 1940, as amended.

C. Small Entities Subject to the Proposed Rules

The Regulatory Flexibility Act defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [378] The Commission's rules define ''small business'' and ''small organization'' for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[379] A

[378] 5 U.S.C. 601(6).

[379] Exchange Act Rule 0–10 [17 CFR 240.0–10].

''small business'' and ''small organization,'' when used with reference to an issuer other than an investment company, generally means an issuer with total assets of $5 million as a company with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,229 issuers that may be considered small entities.[380]

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[381] We estimate that approximately 178 registered investment companies and 34 business development companies meet this definition. The proposed rules may affect each of the approximately 212 issuers that may be considered small entities, to the extent companies and shareholders take advantage of the proposed rules.

We request comment on the number of small entities that would be impacted by our proposals, including any empirical data.

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposals would, under certain circumstances, require all companies subject to the federal proxy rules, including small entities, to permit certain shareholders to submit nominees for inclusion in the company's proxy materials. A company would be required to include shareholder nominees for director in its proxy materials unless state law or a company's governing documents prohibits shareholders from nominating directors. Nominating shareholders, including nominating shareholders that are small entities, would be required to provide disclosure in proposed Schedule 14N about the nominating shareholders and the nominee, and companies would be required to include the disclosure provided by the nominating shareholder or group in the company's proxy materials.

The proposals also would permit shareholders to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, provided the proposal does not conflict with proposed Rule 14a–11. A nominating shareholder or group, including a nominating shareholder or group that is a small entity, using an applicable state law provision or a provision in the company's governing documents to submit a nomination for director would be required to provide disclosure in proposed Schedule 14N about the nominating shareholder or group and the nominee. Companies also would be required to include disclosure about the nominating shareholder or group and the nominee in the company's proxy materials when a shareholder submits a nomination for director pursuant to an applicable state law provision or a company's governing documents.

Based on our staff's review of Rule 14a–8 shareholder proposals, it seems that smaller companies tend to receive relatively fewer shareholder proposals. Therefore, we assume that the proposed amendment to the rule would not substantially increase the number of shareholder proposals to smaller companies and likely would have little impact on small entities. With respect to proposed Rule 14a–11, there is some indication that proxy contests may occur disproportionately at smaller companies.[382] Accordingly, we assume that proposed Rule 14a–11 is likely to have a greater effect than the proposed amendments to Rule 14a–8 on smaller companies.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or duplicate the proposed rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- the clarification, consolidation or simplification of the rule's compliance and reporting requirements for small entities;
- the use of performance rather than design standards; and
- an exemption for small entities from coverage under the proposals.

The Commission has considered a variety of reforms to achieve its regulatory objectives while minimizing the impact on small entities. As one possible approach, we considered requiring companies to include shareholder nominees for director in a company's proxy materials upon the occurrence of certain events so that the rule would apply only in situations where there was a demonstrated failure in the proxy process related to director nominations and elections in 2003. We have not taken this approach in the current proposal because we believe that it is important to remove impediments to shareholders' exercise of their right to nominate directors at all companies subject to the proxy rules rather than only at those companies where specified events have occurred. Alternatively, we considered changes to Rule 14a–8(i)(8) that would enable shareholders to have their proposals for bylaw amendments regarding the procedures for nominating directors included in the company's proxy materials provided the shareholder submitting the proposal made certain disclosures and beneficially owned more than 5% of the company's shares in 2007. We did not take this approach because we seek to provide shareholders with a more immediate and direct means of effecting change in the boards of directors of the companies in which they invest. For these reasons, as well as the reasons discussed throughout the release, we believe that today's proposals may better achieve the Commission's objectives.

We have sought comment on whether the proposed tiered approach—under which shareholders or shareholder groups at larger companies would have to satisfy a lower ownership threshold than shareholders or shareholder groups at smaller companies in order to rely on Rule 14a–11—is appropriate and workable. The effect of the tiered approach may make it less likely that shareholders at smaller companies will nominate directors under Rule 14a–11. We are not proposing different disclosure standards based on the size of the issuer. We believe the proposed uniform disclosure will be helpful to voting decisions on shareholder nominated directors at issuers of all sizes. However, we seek comment on whether the disclosure can be tiered based on the size of the company and still provide useful information to shareholders. We also have included requests for comment regarding the appropriate ownership threshold for non-accelerated filers. As noted, based on our staff's review of Rule 14a–8 shareholder proposals, it seems that smaller companies tend to receive

[380] The estimated number of reporting small entities is based on 2008 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database.

[381] Rule 0–10 under the Investment Company Act [17 CFR 270.0–10] contains the applicable definition.

[382] *See, e.g.,* Bebchuk 2007 Article.

relatively fewer shareholder proposals. Therefore, we assume that the proposed rule would not substantially increase the number of shareholder proposals to smaller companies and likely would have little impact on small entities. With respect to proposed Rule 14a–11, there is some indication that proxy contests may occur disproportionately at smaller companies.[383] Accordingly, we assume that proposed Rule 14a–11 is likely to have a greater effect than the proposed amendments to Rule 14a–8 on smaller companies.

We considered the use of performance standards rather than design standards in the proposed rules. The proposal contains both performance standards and design standards. We are proposing design standards to the extent that we believe compliance with particular requirements are necessary. However, to the extent possible, we are proposing rules that impose performance standards. For example, under Rule 14a–11, shareholder nominees can provide a 500 word statement of support concerning their nominee or nominees for director, but we do not specify the content. Similarly, shareholders can propose any nomination procedures or disclosures related to shareholder nominations under the proposed amendment to Rule 14a–8(i)(8), provided they do not conflict with Rule 14a–11. By allowing shareholders to submit proposals that would amend, or that request an amendment to, a company's governing documents regarding nomination procedures or disclosures related to shareholder nominations, we seek to provide shareholders and companies with a measure of flexibility to tailor the means through which they can comply with the standards.

We request comment on whether separate requirements for small entities would be appropriate. The purpose of the proposed rules is to remove impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors and thereby enable shareholders to participate meaningfully in the nomination and election of directors at the companies in which they invest. Exempting small entities would not appear to be consistent with these goals. An exemption or separate requirements for small entities may not address the impediments to the exercise of shareholders' rights to nominate and elect directors to company boards of directors that may affect small entities as much as they would affect large companies. The establishment of any differing compliance or reporting requirements or timetables or any exemptions for smaller reporting companies may not be in keeping with the objective of the proposed rules.

G. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How our rules could achieve their objective while lowering any burden on smaller entities;
- The number of small entities that may be affected by the proposals;
- The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
- How to quantify the impact of the proposed rules.

We solicit comments as to whether the proposed changes could have an effect that we have not considered. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[384] a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a ''major rule'' for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

IX. Statutory Basis and Text of Proposed Amendments

The amendments are proposed pursuant to Sections 3(b), 13, 14, 15, 23(a) and 36 of the Securities Exchange Act of 1934, as amended, and Sections 10, 20(a) and 38 of the Investment Company Act of 1940, as amended.

List of Subjects

17 CFR Part 200

Freedom of information, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 232, 240, and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart D—Information and Requests

1. The authority citation for part 200, subpart D, continues to read, in part, as follows:

Authority: 5 U.S.C. 552, as amended, 15 U.S.C. 77f(d), 77s, 77ggg(a), 77sss, 78m(F)(3), 78w, 80a–37, 80a–44(a), 80a–44(b), 80b–10(a), and 80b–11.

* * * * *

2. Add § 200.82a to read as follows:

§ 200.82a Public availability of materials filed pursuant to § 240.14a–11(f) and related materials.

Materials filed with the Commission pursuant to Rule 14a–11(f) under the Securities Exchange Act of 1934 (17 CFR 240.14a–11(f)), written communications related thereto received from any person, and each related no-action letter or other written communication issued by the staff of the Commission, shall be made available to any person upon request for inspection or copying.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

3. The authority citation for part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

4. Amend § 232.13 by revising paragraph (a)(4) introductory text (the note remains unchanged) to read as follows:

[383] *See id.*

[384] Public Law 104–121, Title II, 110 Stat. 857 (1996).

§ 232.13 Date of filing; adjustment of filing date.

(a) * * *

(4) Notwithstanding paragraph (a)(2) of this section, a Form 3, 4 or 5 (§§ 249.103, 249.104, and 249.105 of this chapter) or a Schedule 14N (§ 240.14n–101 of this chapter) submitted by direct transmission on or before 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, shall be deemed filed on the same business day.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201, *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

6. Amend § 240.13a–11 by revising paragraph (b) to read as follows:

§ 240.13a–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.13a–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter;

(2) Disclosure pursuant to Instruction 2 to § 240.14a–11(a) of the date by which a shareholder or shareholder group must submit the notice required pursuant to § 240.14a–11(c); or

(3) Disclosure pursuant to Instruction 3 to § 240.14a–11(b) of information concerning net assets, outstanding shares, and voting.

* * * * *

7. Amend § 240.13d–1 by revising paragraphs (b)(1)(i) and (c)(1) and adding Instruction 1 to paragraph (b)(1) and Instruction 1 to paragraph (c)(1) to read as follows:

§ 240.13d–1 Filing of Schedules 13D and 13G.

* * * * *

(b)(1) * * *

(i) Such person has acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d–3(b), other than activities solely in connection with a nomination under § 240.14a–11; and

* * * * *

Instruction 1 to paragraph (b)(1). For purposes of paragraph (b)(1)(i) of this section, the exception for activities solely in connection with a nomination under § 240.14a–11 will not be available after the election of a director nominated pursuant to § 240.14a–11.

* * * * *

(c) * * *

(1) Has not acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to § 240.13d–3(b), other than activities solely in connection with a nomination under § 240.14a–11;

* * * * *

Instruction 1 to paragraph (c)(1). For purposes of paragraph (c)(1) of this section, the exception for activities solely in connection with a nomination under § 240.14a–11 will not be available after the election of a director nominated pursuant to § 240.14a–11.

* * * * *

8. Amend § 240.14a–2 by:

a. Revising paragraph (b) introductory text; and

b. Adding paragraphs (b)(7) and (b)(8).

The revision and additions read as follows:

§ 240.14a–2 Solicitations to which § 240.14a–3 to § 240.14a–15 apply.

* * * * *

(b) Sections 240.14a–3 to 240.14a–6 (other than paragraphs 14a–6(g) and 14a–6(p)), § 240.14a–8, § 240.14a–10, and §§ 240.14a–12 to 240.14a–15 do not apply to the following:

* * * * *

(7) Any solicitation by or on behalf of any shareholder in connection with the formation of a nominating shareholder group pursuant to § 240.14a–11, provided that:

(i) Each written communication includes no more than:

(A) A statement of each soliciting shareholder's intent to form a nominating shareholder group in order to nominate a director under § 240.14a–11;

(B) Identification of, and a brief statement regarding, the potential nominee or nominees or, where no nominee or nominees have been identified, the characteristics of the nominee or nominees that the shareholder intends to nominate, if any;

(C) The percentage of securities that each soliciting shareholder beneficially owns or the aggregate percentage owned by any group to which the shareholder belongs; and

(D) The means by which shareholders may contact the soliciting party.

(ii) Any soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the shareholder with the Commission, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940, under the registrant's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14A (§ 240.14a–101) and the appropriate box on the cover page must be marked.

(8) Any written solicitation by or on behalf of a nominating shareholder or nominating shareholder group in support of a nominee placed on the registrant's form of proxy in accordance with § 240.14a–11 or against the registrant's nominee or nominees, provided that:

(i) The soliciting party does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization;

(ii) Each written communication includes:

(A) The identity of each nominating shareholder and a description of his or her direct or indirect interests, by security holdings or otherwise;

(B) A prominent legend in clear, plain language advising shareholders that a shareholder nominee is or may be included in the registrant's proxy statement and to read the registrant's proxy statement when it becomes available because it includes important information (or, if the registrant's proxy statement is publicly available, advising shareholders of that fact and

encouraging shareholders to read the registrant's proxy statement because it includes important information). The legend also must explain to shareholders that they can find the registrant's proxy statement, and any other relevant documents, at no charge on the Commission's Web site; and

(iii) Any soliciting material published, sent or given to shareholders in accordance with this paragraph must be filed by the nominating shareholder with the Commission, under the registrant's Exchange Act file number, or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940, under the registrant's Investment Company Act file number, no later than the date the material is first published, sent or given to shareholders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14A (§ 240.14a–101) and the appropriate box on the cover page must be marked.

9. Amend § 240.14a–4 by:

a. Revising the first sentence of paragraph (b)(2) introductory text; and

b. Adding a sentence to the end of the undesignated paragraph following paragraph (b)(2)(iv).

The revision and addition read as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(b) * * *

(2) A form of proxy that provides for the election of directors shall set forth the names of persons nominated for election as directors, including any person whose nomination by a shareholder or shareholder group satisfies the requirements of § 240.14a–11, an applicable state law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials. * * *

* * * * *

(iv) * * *

* * * Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with § 240.14a–11, an applicable state law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

* * * * *

10. Amend § 240.14a–6 by:

a. Redesignating paragraphs (a)(4), (a)(5) and (a)(6) as paragraphs (a)(5), (a)(6) and (a)(7) respectively;

b. Adding new paragraph (a)(4);

c. Adding a sentence at the end of Note 3; and

d. Adding paragraph (p).

The revisions and additions read as follows:

§ 240.14a–6 Filing requirements.

(a) * * *

(4) A shareholder nominee for director included pursuant to § 240.14a–11, an applicable state law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

* * * * *

Note 3. * * * The inclusion of a shareholder nominee in the registrant's proxy materials pursuant to § 240.14a–11, an applicable state law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials does not constitute a ''solicitation in opposition,'' even if the registrant opposes the shareholder nominee and solicits against the shareholder nominee and in favor of a registrant nominee.

* * * * *

(p) *Solicitations subject to § 240.14a–11.* Any soliciting material that is published, sent or given to shareholders in connection with § 240.14a–2(b)(7) or (b)(8) must be filed with the Commission as specified in that section.

11. Amend § 240.14a–8 by revising paragraph (i)(8) as follows:

§ 240.14a–8 Shareholder proposals.

* * * * *

(i) * * *

(8) *Director elections:* If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Nominates a specific individual for election to the board of directors, other than pursuant to § 240.14a–11, an applicable state law provision, or the company's governing documents; or

(v) Otherwise could affect the outcome of the upcoming election of directors.

* * * * *

12. Amend § 240.14a–9 by adding a paragraph (c) and removing the authority citation following the section to read as follows:

§ 240.14a–9 False or misleading statements.

* * * * *

(c) No nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the federal proxy rules, an applicable state law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in registrant proxy materials, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

* * * * *

13. Add § 240.14a–11 to read as follows:

§ 240.14a–11 Shareholder nominations.

(a) *Applicability.* In connection with an annual meeting of shareholders (or a special meeting in lieu of the annual meeting) at which directors are elected, a registrant (other than a registrant subject to the proxy rules solely because it has a class of debt registered under Exchange Act § 12) will be required to include in its proxy statement and form of proxy the name of a person or persons nominated by a shareholder or group of shareholders for election to the board of directors and include in its proxy statement the disclosure about such nominee or nominees and the nominating shareholder or members of a nominating shareholder group that is specified in § 240.14a–18(e)–(*l*), provided that:

(1) Applicable state law or the registrant's governing documents do not prohibit the registrant's shareholders from nominating a candidate or candidates for election as a director;

(2) The nominee's candidacy or, if elected, board membership would not violate controlling state law, the registrant's governing documents, federal law, or rules of a national securities exchange or national securities association applicable to the registrant (other than rules of a national securities exchange or national securities association regarding director independence);

(3) The nominating shareholder or members of the nominating shareholder group have satisfied the eligibility

requirements in paragraph (b) of this section;

(4) All information required to be included in the notice to the registrant required pursuant to paragraph (c) of this section is so included;

(5) No representation or certification required to be included in the notice to the registrant required pursuant to paragraph (c) of this section is false or misleading in any material respect; and

(6) The provisions of paragraph (d) of this section limiting the number of nominees required to be included would not necessitate exclusion of the nominee.

Instruction 1 to paragraph (a). A nominating shareholder will not be deemed an ''affiliate'' of the registrant under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) or the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) solely as a result of nominating a candidate for director or soliciting for the election of such a director nominee or against a registrant's nominee pursuant to this section. Where a shareholder nominee is elected, and the nominating shareholder or nominating shareholder group does not have an agreement or relationship with that director, otherwise than relating to the director's nomination pursuant to § 240.14a–11, solicitation for the election of the shareholder director nominee or against a registrant's nominee, or the election of the shareholder director nominee, the nominating shareholder or nominating shareholder group will not be deemed an affiliate solely by virtue of having nominated that director.

Instruction 2 to paragraph (a). If the registrant did not hold an annual meeting the previous year, or if the date of the current year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's annual meeting, the registrant must disclose pursuant to Item 5.07 of Form 8–K (§ 249.308 of this chapter) the date by which a shareholder or shareholder group must submit the notice required pursuant to paragraph (c) of this section, which date shall be a reasonable time prior to the date the registrant mails its proxy materials for the meeting.

(b) *Nominating shareholder eligibility.* A shareholder or group of shareholders nominating a person or persons must satisfy the following requirements:

(1) The shareholder individually, or the shareholder group in the aggregate, must beneficially own, as of the date the shareholder or group of shareholders provides notice to the registrant on Schedule 14N of their intent to include a nominee or nominees in the registrant's proxy materials pursuant to § 240.14a–11:

(i) For large accelerated filers as defined in § 240.12b–2, and investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) with net assets of $700 million or more, at least 1% of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting);

(ii) For accelerated filers as defined in § 240.12b–2, and investment companies registered under the Investment Company Act of 1940 with net assets of $75 million or more but less than $700 million, at least 3% of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting); and

(iii) For non-accelerated filers as defined in § 240.12b–2, and investment companies registered under the Investment Company Act of 1940 with net assets of less than $75 million, at least 5% of the registrant's securities that are entitled to be voted on the election of directors at the annual meeting of shareholders (or a special meeting in lieu of the annual meeting); and

(2) The shareholder or each member of the shareholder group must have held the securities that are used for purposes of determining the applicable ownership threshold required by paragraph (b)(1) of this section continuously for at least one year as of the date it provides notice to the registrant on Schedule 14N and intend to continue to hold those securities through the date of the subject election of directors.

Instruction 1 to paragraph (b). In the case of a registrant other than an investment company registered under the Investment Company Act of 1940, for purposes of (b)(1) of this section, in determining the securities that are entitled to be voted on the election of directors, the nominating shareholder or nominating shareholder group may rely on information set forth in the registrant's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to this Act, unless the nominating shareholder or nominating shareholder group knows or has reason to know that the information contained therein is inaccurate. In the case of a registrant that is an investment company registered under the Investment Company Act of 1940, for purposes of paragraph (b)(1) of this section, in determining the securities that are entitled to be voted on the election of directors, the nominating shareholder or nominating shareholder group may rely on information set forth in the following documents, unless the nominating shareholder or nominating shareholder group knows or has reason to know that the information contained therein is inaccurate:

a. In the case of a registrant that is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (§ 270.18f–2(a) of this chapter), the Form 8–K described in Instruction 3 to paragraph (b); or

b. In the case of other investment companies, the registrant's most recent annual or semi-annual report filed with the Commission on Form N–CSR (17 CFR 249.331; 17 CFR 274.128).

Instruction 2 to paragraph (b). For purposes of paragraph (b)(1) of this section, the amount of net assets of an investment company registered under the Investment Company Act of 1940 shall be the amount of net assets of the company as of the end of the company's second fiscal quarter in the fiscal year immediately preceding the fiscal year of the meeting, as disclosed in the registrant's Form N–CSR filed with the Commission, except that, for a series company (as defined in § 270.18f–2(a) of this chapter), the amount of net assets shall be the amount disclosed in the Form 8–K described in Instruction 3 to paragraph (b).

Instruction 3 to paragraph (b). If the registrant is an investment company that is a series company (as defined in § 270.18f–2(a) of this chapter), the registrant must disclose pursuant to Item 5.07 of Form 8–K (§ 249.308 of this chapter):

a. The registrant's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting; and

b. The total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at an annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) as of the end of the most recent calendar quarter.

(c) *Shareholder notice.* To have a nominee included in the registrant's proxy statement and form of proxy, the nominating shareholder must provide notice to the registrant on Schedule 14N as specified by § 240.14n–1 of its intent to require that the registrant include that shareholder's nominee on the registrant's form of proxy and include

the disclosures required pursuant to § 240.14a–18. This notice must be filed with the Commission on the date provided to the registrant.

(d) *Number of shareholder nominees.* (1) The registrant will not be required to include in its proxy statement and form of proxy more than one shareholder nominee or the number of nominees that represents 25 percent of the registrant's board of directors, whichever is greater;

(2) Where the registrant has one or more directors currently serving on its board of directors who were elected as a shareholder nominee pursuant to this section, and the term of that director or directors extends past the date of the meeting of shareholders for which it is soliciting proxies, the registrant will not be required to include in the proxy statement or form of proxy more shareholder nominees than could result in the total number of directors who were elected as shareholder nominees pursuant to § 240.14a–11 and serving on the board being more than one shareholder nominee or 25 percent of the registrant's board of directors, whichever is greater; and

(3) In the event that more than one shareholder or group of shareholders is otherwise permitted to nominate a person or persons to a registrant's board of directors pursuant to § 240.14a–11, the registrant shall include in the proxy statement and form of proxy the nominee or nominees of the first nominating shareholder or nominating shareholder group from which the registrant receives timely notice as specified in paragraph (c) of this section, up to and including the total number required to be included by the registrant pursuant to this paragraph. Where the first nominating shareholder or nominating shareholder group to deliver timely notice as specified in paragraph (c) of this section does not nominate the maximum number of directors required to be included by the registrant, the nominee or nominees of the next nominating shareholder or nominating shareholder group from which the registrant receives timely notice as specified in paragraph (c) of this section would be included in the registrant's proxy materials, up to and including the total number required to be included by the registrant.

Instruction 1 to paragraph (d). Depending on board size, 25% of the board may not result in a whole number. In those instances, the maximum number of shareholder nominees for director that a registrant will be required to include in its proxy materials will be the closest whole number below 25%.

Instruction 2 to paragraph (d). If a nominee, a nominating shareholder, or any member of a nominating shareholder group has any agreement with the registrant or any affiliate of the registrant regarding the nomination of a candidate for election as a member of the registrant's board of directors, any such nominee or any nominee of such nominating shareholder or nominating shareholder group shall not be included in calculating the number of nominees required under this section.

(e) *False or misleading statements.* The registrant is not responsible for any information in the notice from the nominating shareholder or nominating shareholder group submitted as required by paragraph (c) of this section or otherwise provided by the nominating shareholder or nominating shareholder group, except where the registrant knows or has reason to know that the information is false or misleading.

(f) *Determinations regarding eligibility.* (1) Upon the registrant's receipt of a notice described in paragraph (c) of this section, the registrant shall determine whether any of the events permitting exclusion of a shareholder nominee has occurred;

(2) If the registrant determines that it will include a shareholder nominee, it must notify in writing the nominating shareholder or nominating shareholder group no later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The registrant is responsible for providing this notice in a manner that evidences its timely receipt by the nominating shareholder or each member of the nominating shareholder group;

(3) If the registrant determines that it may exclude a shareholder nominee, the registrant must notify in writing the nominating shareholder or nominating shareholder group of this determination. This notice must be postmarked or transmitted electronically no later than 14 calendar days after the registrant receives the notice required by paragraph (c) of this section. The registrant is responsible for providing this notice in a manner that evidences its timely receipt by the nominating shareholder or each member of the nominating shareholder group;

(4) The registrant's notice to the nominating shareholder or nominating shareholder group under paragraph (f)(3) of this section that it has determined that it may exclude a shareholder nominee must include an explanation of the registrant's basis for determining that it may exclude the nominee;

(5) The nominating shareholder or nominating shareholder group shall have 14 calendar days after receipt of the registrant's notice under paragraph (f)(3) of this section to respond to the registrant's notice and correct any eligibility or procedural deficiencies identified in that notice, as required by paragraph (f)(4) of this section. The nominating shareholder's or nominating shareholder group's response must be postmarked, or transmitted electronically, within the timeframe identified in the preceding sentence. The nominating shareholder or nominating shareholder group is responsible for providing the response in a manner that evidences its timely receipt;

(6) Neither the composition of the nominating shareholder group nor the shareholder nominee may be changed as a means to correct a deficiency identified in the registrant's notice to the nominating shareholder or nominating shareholder group under paragraph (f)(3) of this section—those matters must remain as they were described in the notice to the registrant submitted pursuant to paragraph (c) of this section; however, where a nominating shareholder or nominating shareholder group inadvertently submits a number of nominees that exceeds the maximum number required to be included by the registrant, the nominating shareholder or nominating shareholder group may specify which nominee or nominees are not to be included in the registrant's proxy materials;

(7) If the registrant determines that it may exclude a shareholder nominee, after providing the requisite notice of and time for the nominating shareholder or nominating shareholder group to remedy any eligibility or procedural deficiencies in the nomination, the registrant must provide notice of the basis for its determination to the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The Commission may permit the registrant to make its submission later than 80 days before the registrant files its definitive proxy statement and form of proxy if the registrant demonstrates good cause for missing the deadline;

(8) The registrant's notice to the Commission shall include:

(i) Identification of the nominating shareholder or each member of the nominating shareholder group, as applicable;

(ii) The name of the nominee;

(iii) An explanation of the registrant's basis for determining that the registrant may exclude the nominee; and

(iv) A supporting opinion of counsel when the registrant's basis for excluding a nominee relies on a matter of state law;

(9) Unless otherwise indicated in this section, the burden is on the registrant to demonstrate that it may exclude a nominee;

(10) The registrant must file its notice with the Commission and simultaneously provide a copy to the nominating shareholder or each member of the nominating shareholder group;

(11) The nominating shareholder or nominating shareholder group may submit a response to the registrant's notice to the Commission. This response must be postmarked or transmitted electronically to the Commission no later than 14 calendar days after the nominating shareholder's or nominating shareholder group's receipt of the registrant's notice to the Commission. The nominating shareholder or nominating shareholder group must provide a copy of its response to the Commission simultaneously to the registrant;

(12) The Commission staff may provide an informal statement of its views to the registrant and the nominating shareholder or nominating shareholder group;

(13) The registrant shall provide the nominating shareholder or nominating shareholder group with notice, no later than 30 calendar days before it files its definitive proxy statement and form of proxy with the Commission, of whether it will include or exclude the shareholder nominee; and

(14) The exclusion of a shareholder nominee by a registrant where that exclusion is not permissible under § 240.14a–11(a) shall be a violation of this section.

14. Amend § 240.14a–12 by removing the heading ''Instructions to § 240.14a–12''; by removing the numbers 1. and 2. of instructions 1 and 2 to § 240.14a–12 and adding in their places the phrases ''Instruction 1. to § 240.14a–12.'' and ''Instruction 2. to § 240.14a–12.'', respectively; and adding Instruction 3 to read as follows:

§ 240.14a–12 Solicitation before furnishing a proxy statement.

* * * * *

Instruction 3. to § 240.14a–12. Solicitations by a nominating shareholder or nominating shareholder group that are made in connection with a § 240.14a–11 nomination will not be deemed a solicitation in opposition subject to § 240.14a–12(c).

15. Add § 240.14a–18 to read as follows:

§ 240.14a–18 Disclosure regarding nominating shareholders and nominees submitted for inclusion in a registrant's proxy materials pursuant to § 240.14a–11.

To have a nominee included in a registrant's proxy materials pursuant to § 240.14a–11, the nominating shareholder or nominating shareholder group must provide notice to the registrant of its intent to do so on a Schedule 14N and file that notice with the Commission on the date first sent to the registrant. This notice on Schedule 14N shall be sent to the registrant by the date specified by the registrant's advance notice bylaw provision or, where no such provision is in place, no later than 120 calendar days before the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder or nominating shareholder group must provide and file its notice a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8–K (§ 249.308 of this chapter) filed pursuant to Item 5.07 of Form 8–K. This notice must include:

(a) A representation that, to the knowledge of the nominating shareholder or nominating shareholder group, the nominee's candidacy or, if elected, board membership would not violate controlling state law, Federal law or rules of a national securities exchange or national securities association applicable to the registrant (other than rules of a national securities exchange or national securities association regarding director independence);

(b) A representation that the nominating shareholder or nominating shareholder group satisfies the conditions in § 240.14a–11(b);

(c) In the case of a registrant other than an investment company, a representation that the nominee meets the objective criteria for ''independence'' of the national securities exchange or national securities association rules applicable to the registrant, if any, or, in the case of a registrant that is an investment company, a representation that the nominee is not an ''interested person'' of the registrant as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19));

Instruction to paragraph (c). For this purpose, the nominee would be required to meet the definition of ''independence'' that generally is applicable to directors of the registrant and not any particular definition of independence applicable to members of the audit committee of the registrant's board of directors. To the extent a national securities exchange or national securities association rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), the nominee would not be required to represent that the nominee meets the subjective determination of independence as part of the shareholder nomination process.

(d) A representation that neither the nominee nor the nominating shareholder nor, where there is a nominating shareholder group, any member of the nominating shareholder group, has an agreement with the registrant regarding the nomination of the nominee;

Instruction to paragraph (d). For purposes of paragraph (d), negotiations between the nominee, the nominating shareholder or nominating shareholder group and the nominating committee or board of the registrant to have the nominee included on the registrant's proxy card as a management nominee, where those negotiations are unsuccessful, or negotiations that are limited to whether the registrant is required to include the shareholder nominee on the registrant's proxy card in accordance with § 240.14a–11, will not represent a direct or indirect agreement with the registrant.

(e) A statement from the nominee that the nominee consents to be named in the registrant's proxy statement and form of proxy and, if elected, to serve on the registrant's board of directors;

(f) A statement that the nominating shareholder or nominating shareholder group intends to continue to own the requisite shares through the date of the meeting of shareholders. Additionally, the nominating shareholder or nominating shareholder group must provide a statement regarding the nominating shareholder's or nominating shareholder group's intent with respect to continued ownership after the election.

(g) Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b) and (c) and, for investment

companies, Item 22(b) of Schedule 14A (§ 240.14a–101), as applicable;

(h) Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A, as applicable;

(i) Disclosure about whether the nominating shareholder or each member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K (§ 229.10 of this chapter). Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A;

Instruction 1 to paragraphs (h) and (i). Where the nominating shareholder is a general or limited partnership, syndicate or other group, the information called for in paragraphs (h) and (i) of this section must be given with respect to:

a. Each partner of the general partnership;

b. Each partner who is, or functions as, a general partner of the limited partnership;

c. Each member of the syndicate or group; and

d. Each person controlling the partner or member.

Instruction 2 to paragraphs (h) and (i). If the nominating shareholder is a corporation or if a person referred to in a., b., c. or d. of Instruction 1 to paragraphs (h) and (i) is a corporation, the information called for in paragraphs (h) and (i) of this section must be given with respect to:

a. Each executive officer and director of the corporation;

b. Each person controlling the corporation; and

c. Each executive officer and director of any corporation or other person ultimately in control of the corporation.

(j) The following information regarding the nature and extent of the relationships between the nominating shareholder or nominating shareholder group and nominee and the registrant or any affiliate of the registrant:

(1) Any direct or indirect material interest in any contract or agreement between the nominating shareholder or nominating shareholder group or the nominee and the registrant or any affiliate of the registrant (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any material pending or threatened litigation in which the nominating shareholder or nominating shareholder group or nominee is a party or a material participant, involving the registrant, any of its officers or directors, or any affiliate of the registrant; and

(3) Any other material relationship between the nominating shareholder or nominating shareholder group or the nominee and the registrant or any affiliate of the registrant not otherwise disclosed;

Note to paragraph (j)(3). Any other material relationship of the nominating shareholder or nominating shareholder group with the registrant or any affiliate of the registrant may include, but is not limited to, whether the nominating shareholder or nominating shareholder group currently has, or has had in the past, an employment relationship with the registrant or any affiliate of the registrant (including consulting arrangements).

(k) The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any; and

(*l*) Any statement in support of the shareholder nominee or nominees, which may not exceed 500 words, if the nominating shareholder or nominating shareholder group elects to have such statement included in the registrant's proxy materials.

16. Add § 240.14a–19 to read as follows:

§ 240.14a–19 Disclosure regarding nominating shareholders and nominees submitted for inclusion in a registrant's proxy materials pursuant to applicable state law or a registrant's governing documents.

To have a nominee included in a registrant's proxy materials pursuant to a procedure set forth under applicable state law or the registrant's governing documents addressing the inclusion of shareholder director nominees in the registrant's proxy materials, the nominating shareholder or nominating shareholder group must provide notice to the registrant of its intent to do so on a Schedule 14N and file that notice with the Commission on the date first sent to the registrant. This notice shall be sent to the registrant by the date specified by the registrant's advance notice provision or, where no such provision is in place, no later than 120 calendar days before the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual meeting during the prior year, or if the date of the meeting has changed by more than 30 calendar days from the prior year, then the nominating shareholder or nominating shareholder group must provide notice a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8–K (§ 249.308 of this chapter) filed pursuant to Item 5.07 of Form 8–K. This notice must include:

(a) A statement from the nominee that the nominee consents to be named in the registrant's proxy statement and form of proxy and, if elected, to serve on the registrant's board of directors;

(b) Disclosure about the nominee as would be provided in response to the disclosure requirements of Items 4(b), 5(b), 7(a), (b) and (c) and, for investment companies, Item 22(b) of Schedule 14A (§ 240.14a–101), as applicable;

(c) Disclosure about the nominating shareholder or each member of a nominating shareholder group as would be required in response to the disclosure requirements of Items 4(b) and 5(b) of Schedule 14A (§ 240.14a–101), as applicable;

(d) Disclosure about whether the nominating shareholder or member of a nominating shareholder group has been involved in any legal proceeding during the past five years, as specified in Item 401(f) of Regulation S–K (§ 229.10 of this chapter). Disclosure pursuant to this section need not be provided if provided in response to Items 4(b) and 5(b) of Schedule 14A (§ 240.14a–101);

Instruction 1 to paragraphs (c) and (d). Where the nominating shareholder is a general or limited partnership, syndicate or other group, the information called for in paragraphs (c) and (d) of this section must be given with respect to:

a. Each partner of the general partnership;

b. Each partner who is, or functions as, a general partner of the limited partnership;

c. Each member of the syndicate or group; and

d. Each person controlling the partner or member.

Instruction 2 to paragraphs (c) and (d). If the nominating shareholder is a corporation or if a person referred to in a., b., c. or d. of Instruction 1 to paragraphs (c) and (d) is a corporation, the information called for in paragraphs (c) and (d) of this section must be given with respect to:

a. Each executive officer and director of the corporation;

b. Each person controlling the corporation; and

c. Each executive officer and director of any corporation or other person ultimately in control of the corporation.

(e) The following information regarding the nature and extent of the relationships between the nominating shareholder or nominating shareholder group and nominee and the registrant or any affiliate of the registrant:

(1) Any direct or indirect material interest in any contract or agreement

between the nominating shareholder or nominating shareholder group or the nominee and the registrant or any affiliate of the registrant (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any material pending or threatened litigation in which the nominating shareholder or nominating shareholder group or nominee is a party or a material participant, involving the registrant, any of its officers or directors, or any affiliate of the registrant; and

(3) Any other material relationship between the nominating shareholder or nominating shareholder group or the nominee and the registrant or any affiliate of the registrant not otherwise disclosed; and

Instruction to paragraph (e)(3). Any other material relationship of the nominating shareholder or nominating shareholder group with the registrant or any affiliate of the registrant may include, but is not limited to, whether the nominating shareholder or nominating shareholder group currently has, or has had in the past, an employment relationship with the registrant or any affiliate of the registrant (including consulting arrangements).

(f) The Web site address on which the nominating shareholder or nominating shareholder group may publish soliciting materials, if any.

Note to § 240.14a–19. The registrant is not responsible for any information in the notice from the nominating shareholder or nominating shareholder group or otherwise provided by the nominating shareholder or nominating shareholder group, except where the registrant knows or has reason to know that the information is false or misleading.

17. Amend § 240.14a–101 by:

a. Adding on the cover page one box before the box ''Soliciting Material under § 240.14a–12'';

b. Revising Item 7 as follows:

i. Redesignating paragraph (e) as paragraph (g); and

ii. Adding new paragraph (e) and paragraph (f); and

c. Adding paragraphs (18) and (19) to Item 22(b).

The additions and revisions read as follows:

§ 240.14a–101—Schedule 14A. Information required in proxy statement.

SCHEDULE 14A INFORMATION

* * * * *

[ ] Soliciting Material under § 240.14a–11

* * * * *

Item 7. * * *

* * * * *

(e) If a shareholder nominee or nominees are submitted to the registrant and the registrant is not permitted to exclude the nominee or nominees pursuant to the provisions of § 240.14a–11, the registrant must include the disclosure required from the nominating shareholder or nominating shareholder group under § 240.14a–18(e)–(*l*) with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to Item 7(e). The information disclosed pursuant to paragraph (e) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Company Act of 1940, except to the extent that the registrant specifically incorporates that information by reference.

(f) If a shareholder nominee or nominees are submitted to the registrant for inclusion in the registrant's proxy materials pursuant to a procedure set forth under applicable state law or the registrant's governing documents providing for the inclusion of shareholder director nominees in the registrant's proxy materials, the registrant must include the disclosure required from the nominating shareholder or nominating shareholder group under § 240.14a–19(a) through (f) with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to Item 7(f). The information disclosed pursuant to paragraph (f) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Company Act of 1940, except to the extent that the registrant specifically incorporates that information by reference.

* * * * *

Item 22. Information required in investment company proxy statement.

* * * * *

(b) * * *

(18) If a shareholder nominee or nominees are submitted to the Fund and the Fund is not permitted to exclude the nominee or nominees pursuant to the provisions of § 240.14a–11, the Fund must include the disclosure required from the nominating shareholder or nominating shareholder group under § 240.14a–18(e) through (*l*) with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to paragraph (b)(18). The information disclosed pursuant to paragraph (b)(18) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Company Act of 1940, except to the extent that the Fund specifically incorporates that information by reference.

(19) If a shareholder nominee or nominees are submitted to the Fund for inclusion in the Fund's proxy materials pursuant to a procedure set forth under applicable state law or the Fund's governing documents providing for the inclusion of shareholder director nominees in the Fund's proxy materials, the Fund must include the disclosure required from the nominating shareholder or nominating shareholder group under § 240.14a–19(a) through (f) with regard to the nominee or nominees and the nominating shareholder or nominating shareholder group.

Instruction to paragraph (b)(19). The information disclosed pursuant to paragraph (b)(19) of this Item will not be deemed incorporated by reference into any filing under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Investment Company Act of 1940, except to the extent that the Fund specifically incorporates that information by reference.

* * * * *

18. Amend Part 240 by adding an undesignated center heading and §§ 240.14n–1 through 240.14n–3 and § 240.14n–101 to read as follows:

Regulation 14N: Filings Required by Certain Nominating Shareholders

§ 240.14n–1 Filing of Schedule 14N.

(a) A shareholder or group of shareholders that submits a nominee or nominees in accordance with § 240.14a–11 or a procedure set forth under applicable state law or a registrant's governing documents providing for the inclusion of shareholder director nominees in the registrant's proxy materials shall file with the Commission a statement containing the information required by Schedule 14N (§ 240.14n–101) and simultaneously provide the notice on Schedule 14N to the registrant.

(b)(1) Whenever two or more persons are required to file a statement containing the information required by Schedule 14N (§ 240.14n–101), only one statement need be filed. The statement must identify all such persons, contain the required information with regard to each such person, indicate that the statement is filed on behalf of all such persons, and include, as an exhibit,

their agreement in writing that the statement is filed on behalf of each of them. Each person on whose behalf the statement is filed is responsible for the timely filing of that statement and any amendments thereto, and for the completeness and accuracy of the information concerning such person contained therein; such person is not responsible for the completeness or accuracy of the information concerning the other persons making the filing, unless such person knows or has reason to know that the information is inaccurate.

(2) If the group's members elect to make their own filings, each filing should identify all members of the group but the information provided concerning the other persons making the filing need only reflect information which the filing person knows or has reason to know.

§ 240.14n–2 Filing of amendments to Schedule 14N.

(a) If any material change occurs in the facts set forth in the Schedule 14N (§ 240.14n–101) required by § 240.14n–1(a), the person or persons who were required to file the statement shall promptly file or cause to be filed with the Commission an amendment disclosing that change.

(b) An amendment shall be filed within 10 calendar days of the final results of the election being announced by the registrant stating the nominating shareholder's or the nominating shareholder group's intention with regard to continued ownership of their shares.

§ 240.14n–3 Dissemination.

One copy of Schedule 14N (§ 240.14n–101) filed pursuant to §§ 240.14n–1 and 240.14n–2 shall be sent to the issuer of the security at its principal executive office by registered or certified mail. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered.

§ 240.14n–101 Schedule 14N—Information to be included in statements filed pursuant to § 240.14n–1 and amendments thereto filed pursuant to § 240.14n–2.

Securities and Exchange Commission, Washington, DC 20549

Schedule 14N

Under the Securities Exchange Act of 1934

(Amendment No._)*

_____

(Name of Issuer)

_____

(Title of Class of Securities)

_____

(CUSIP Number)

_____

[ ] Notice of Submission of a Nominee or Nominees in Accordance with § 240.14a–11

[ ] Notice of Submission of a Nominee or Nominees in Accordance with Procedures Set Forth Under Applicable State Law or the Registrant's Governing Documents

*The remainder of this cover page shall be filled out for a reporting person's initial filing on this form, and for any subsequent amendment containing information which would alter the disclosures provided in a prior cover page.

The information required in the remainder of this cover page shall not be deemed to be ''filed'' for the purpose of Section 18 of the Securities Exchange Act of 1934 (''Act'') or otherwise subject to the liabilities of that section of the Act but shall be subject to all other provisions of the Act.

(1) Names of reporting persons

(2) Amount of securities beneficially owned and entitled to be voted on the election of directors held by each reporting person:

(3) Percent of securities entitled to be voted on the election of directors represented by amount in Row (2):

Instructions for Cover Page:

(1) *Names of Reporting Persons*—Furnish the full legal name of each person for whom the report is filed—*i.e.,* each person required to sign the schedule itself—including each member of a group. Do not include the name of a person required to be identified in the report but who is not a reporting person.

(2) and (3) *Amount Held by Each Reporting Person*—Rows (2) and (3) are to be completed in accordance with the provisions of Item 3 of Schedule 14N. All percentages are to be rounded off to the nearest tenth (one place after decimal point).

Notes: Attach as many copies of the second part of the cover page as are needed, one reporting person per page.

Filing persons may, in order to avoid unnecessary duplication, answer items on Schedule 14N by appropriate cross references to an item or items on the cover page(s). This approach may only be used where the cover page item or items provide all the disclosure required by the schedule item. Moreover, such a use of a cover page item will result in the item becoming a part of the schedule and accordingly being considered as ''filed'' for purposes of section 18 of the Act or otherwise subject to the liabilities of that section of the Act.

Special Instructions for Complying With Schedule 14N

Under Sections 14 and 23 of the Securities Exchange Act of 1934 and the rules and regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this schedule. The information will be used for the primary purpose of determining and disclosing the holdings and interests of a nominating shareholder or nominating shareholder group. This statement will be made a matter of public record. Therefore, any information given will be available for inspection by any member of the public.

Because of the public nature of the information, the Commission can use it for a variety of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statutes or provisions. Failure to disclose the information requested by this schedule may result in civil or criminal action against the persons involved for violation of the Federal securities laws and rules promulgated thereunder.

Instructions

The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be prepared so as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

Item 1(a). Name of Registrant

Item 1(b). Address of Registrant's Principal Executive Offices

Item 2(a). Name of Person Filing

Item 2(b). Address or Principal Business Office or, if None, Residence

Item 2(c). Title of Class of Securities

Item 2(d). CUSIP No.

Item 3. Ownership

Provide the following information regarding the aggregate number and percentage of the securities of the registrant identified in Item 1.

(a) Amount of securities beneficially owned and entitled to be voted on the election of directors at the meeting:.

(b) Percent of securities entitled to be voted on the election of directors at the meeting:__.

Item 4. Notice of Dissolution of Group

Notice of dissolution of a nominating shareholder group or the termination of a shareholder nomination shall state the date of the dissolution or termination.

Item 5. Statement of Ownership From a Nominating Shareholder or Each Member of a Nominating Shareholder Group Submitting This Notice Pursuant to § 240.14a–11

(a) If the nominating shareholder, or each member of the nominating shareholder group, is the registered holder of the shares, please so state. Otherwise, attach to Schedule 14N a written statement from the ''record'' holder of the nominating shareholder's shares (usually a broker or bank) verifying that, at the time of submitting the shareholder notice to the registrant on Schedule 14N, the nominating shareholder continuously held the securities being used to satisfy the applicable ownership threshold for a period of at least one year. In the alternative, if the nominating shareholder has filed a Schedule 13D, Schedule 13G, Form 3, Form 4, and/or Form 5, or amendments to those documents, so state and attach a copy or incorporate that filing by reference.

(b) Provide a written statement that the nominating shareholder, or each member of the nominating shareholder group, intends to continue to own the requisite shares through the date of the meeting of shareholders. Additionally, at the time this Schedule is filed, the nominating shareholder or each member of the nominating shareholder group must provide a written statement regarding the nominating shareholder's or nominating shareholder group member's intent with respect to continued ownership after the election.

Item 6. Representations and Disclosure Required by § 240.14a–18

If a nominating shareholder or nominating shareholder group is submitting this notice in connection with the inclusion of a shareholder nominee or nominees for director in the company's proxy materials pursuant to § 2 40.14a–11, provide the information required by § 240.14a–18.

Item 7. Disclosure Required by § 240.14a–19

If a nominating shareholder or nominating shareholder group is submitting this notice in connection with the inclusion of a shareholder nominee or nominees for director in the company's proxy materials pursuant to a procedure set forth under applicable state law or the registrant's governing documents, provide the information required by § 240.14a–19.

Item 8. Certification for Nominating Shareholder Notices Submitted Under § 240.14a–11

The following certification shall be provided by the filing person, or in the case of a group, each filing person whose securities are being aggregated for purposes of meeting the ownership threshold set out in § 240.14a–11(b):

By signing below I certify that, to the best of my knowledge and belief, the securities referred to above are not held for the purpose of or with the effect of changing control of the issuer of the securities or to gain more than a limited number of seats on the board.

Signature

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

Dated: _____

Signature: _____

Name/Title: _____

The original statement shall be signed by each person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative other than an executive officer or general partner of the filing person, evidence of the representative's authority to sign on behalf of such person shall be filed with the statement, *provided, however,* that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath his signature.

Attention: Intentional misstatements or omissions of fact constitute Federal criminal violations (see 18 U.S.C. 1001).

19. Amend § 240.15d–11 by revising paragraph (b) to read as follows:

§ 240.15d–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.15d–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such an investment company is required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter;

(2) Disclosure pursuant to Instruction 2 to § 240.14a–11(a) of the date by which a nominating shareholder or nominating shareholder group must submit the notice required pursuant to § 240.14a–11(c); or

(3) Disclosure pursuant to Instruction 3 to § 240.14a–11(b) of information concerning net assets, outstanding shares, and voting.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

20. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.,* 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

21. Amend Form 8–K (referenced in § 249.308) by:

a. Adding a sentence at the end of General Instruction B.1;

b. Removing the heading ''Section 5.06'' and adding in its place ''Item 5.06''; and

c. Adding Item 5.07.

The additions read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

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GENERAL INSTRUCTIONS

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B. Events to be Reported and Time for Filing Reports

1. * * * A report pursuant to Item 5.07 is to be filed within four business days after the registrant determines the anticipated meeting date.

* * * * *

Item 5.07 Shareholder Nominations Pursuant to Exchange Act Rule 14a–11

(a) If the registrant did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice required pursuant to § 240.14a–11(c), which date shall be a reasonable time before the registrant mails its proxy materials for the meeting.

(b) If the registrant is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (17 CFR 270.18f–2), then the

registrant is required to disclose in connection with the election of directors at an annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders):

(1) The registrant's net assets as of June 30 of the calendar year immediately preceding the calendar year of the meeting; and

(2) The total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) at such meeting of shareholders as of the end of the most recent calendar quarter.

* * * * *

Dated: June 10, 2009.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–14090 Filed 6–17–09; 8:45 am]

BILLING CODE 8010–01–P