Business Law Section

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654
(312) 988-5588
Fax: (312)988-5578
www.ababusinesslaw.org
businesslaw@abanet.org

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Via e-mail to:rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: File No. S7-10-09
Release Nos. 33-9086; 34-61161; IC-29069
<u>Facilitating Shareholder Director Nominations</u>

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "we") of the Section of Business Law (the "Section") of the American Bar Association ("ABA") in response to the opportunity afforded by the Commission (in the above-cited Release)(the "Additional Comment Release") for interested parties to comment on certain identified additional data and analyses set forth in the public comment file with respect to the Commission's earlier rulemaking proposals regarding proxy access set forth in Release Nos. 33-9046; 34-60089; IC- 28765 (the "Proposing Release"). As such, this letter supplements our letter to the Commission, dated August 31, 2009, commenting on the Proposing Release (the "Initial Comment Letter") and our letter to the Commission, dated September 15, 2009, relating the discussion in the Initial Comment Letter to the questions posed by the Commission in the Proposing Release.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section, nor does it necessarily reflect the views of all members of the Committee.

Part I. Comments with Regard to the Corporate Library Study

A. Introduction

In our Initial Comment Letter, we recommended that the Commission amend Rule 14a-8(i)(8) explicitly to permit shareholder proposals relating to proxy access, but not adopt a mandatory "default" rule for proxy access, such as proposed Rule 14a-11. By doing so, we endorsed what commentators often call an "opt-in" regime that would provide proxy access only where shareholders of a company, either by adoption of a shareholder-proposed bylaw or ratification of a board-adopted bylaw, affirmatively chose to include this process in their company's governance regime.[1]

However, we recognized that the Commission instead might choose to adopt a mandatory, "default" proxy access rule applicable to all public companies. In that event, we urged the Commission to allow shareholders, by either adoption of a bylaw or ratification of a board-adopted bylaw, to vary the terms of the proxy access regime applicable to their company by making access nominations easier or harder than the Commission's default rule, or by eliminating proxy access in its entirety. The latter structure for private ordering would permit shareholder choice to "opt-out" of a Commission default rule. We also stated our belief that a prescriptive default rule mandating proxy access that did not permit private ordering under an opt-out paradigm would not be able successfully to resolve all the workability issues that would arise in application of a one-size-fits-all rule to the 10,000 or so public companies that would be subject to the rule.

Accordingly, we urged the Commission to make shareholder choice a requisite under the two available paradigms for Commission facilitation of proxy access through its rulemaking authority. In doing so, we were mindful that shareholder choice means just that. Under either paradigm—opt-in or opt-out—we were careful to specify that shareholder action in the form of either bylaw adoption or

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[1] We also recommended that a shareholder-proposed bylaw under an amended Rule 14a-8(i)(8) be required to be consistent with the purpose of proxy access and advanced our understanding of that purpose as being "to facilitate through use of the company's proxy materials the ability of long-term shareholders who have a meaningful stake in the company and no control purpose to seek election of a limited number of independent persons they nominate as directors in a manner that has no control effect". Purpose is fundamental to the content of newly created proxy access right and should serve as the basis for its interpretation and implementation.

bylaw ratification was a prerequisite. We advocated only a very limited ability of boards to act without shareholder approval in cases where some corrective action was needed to implement proxy access at a forthcoming shareholders' meeting, and even in those cases we were careful to specify that such limited, corrective board action would require shareholder ratification for application at subsequent shareholder meetings.[2]

B. The Corporate Library Study Arguments against Shareholder Choice

One of the documents referred to in the Additional Comment Release is entitled "The Limits of Private Ordering: Restrictions on Shareholders' Ability to Initiate Governance Change and Distortions of the Shareholder Voting Process, prepared by Beth Young, Senior Research Associate, The Corporate Library, for the Council of Institutional Investors and the Shareowner Education Network (the "Corporate Library Study"). The Corporate Library Study advances four basic arguments against permitting any shareholder choice under a Commission proxy access rule.[3]

First, it takes the position, along with other parties advocating against shareholder choice, that shareholder choice (or any other form of private ordering) in the context of a prescriptive proxy access rule would be "a departure from the mandatory approach seen in all other areas of U.S. securities regulations". This argument is sometimes couched broadly, as in the Corporate Library Study, and sometimes more narrowly in terms of Commission disclosure rules. In all of its forms, however, it reduces to the simple observation that shareholders are nowhere else permitted to vary the application of a Commission rule regulating companies under the Securities Exchange Act of 1934 (the "1934 Act").

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[2] We also recommended that if the Commission chooses the opt-out paradigm, it defer doing so for a one or several year transitional period during which companies would be encouraged to seek shareholder approval for opting-in to proxy access by the pendency of the Commission's default rule and the ability of shareholders to submit proxy access proposals under an amended Rule 14a-8(i)(8).

[3] We note that the Corporate Library Study does not address the limited, "asymmetrical" shareholder choice provisions of proposed Rule 14a-11. Given the nature of its arguments against shareholder choice, logic of the Study would lead to deletion of even these limited rights to make proxy access easier to use.

Second, the Corporate Library Study argues against shareholder choice by noting that not all companies permit shareholders to amend bylaws by a simple majority vote: a small number do not permit shareholders to amend bylaws and some others require a supermajority vote of outstanding shares. Based on this observation, the Study reaches two conclusions:

- Shareholder opt-in or opt-out is not feasible for some 3-4% of the sampled public companies that do not permit shareholders to amend bylaws.
- "A supermajority vote threshold is not the same as a prohibition, to be sure. But the way a supermajority vote threshold is calculated makes it a significant barrier to shareholder action."

Third, the Corporate Library Study points to the fact that a relatively small number of public companies have multiple classes of stock with disparate voting rights. In many of these capital structures, a high vote class of stock might have the voting power to adopt a proxy access bylaw not favored by holders of a majority of the low vote shares, even though the latter might represent an arithmetic majority of the outstanding shares. The Study concludes: "Such arrangements distort the relationship between voting power and economic exposure and allow holders of what may be a very small number of shares to determine voting outcomes."

Finally, the Corporate Library Study cites the recent amendments to the Delaware General Corporation Law expressly enabling proxy access bylaws and draws the conclusion that "A lack of clarity regarding the validity of binding proxy access shareholder [bylaw] proposals in states other than Delaware further calls into question the feasibility of shareholder-initiated opt-in efforts in the nearly 40% of companies incorporated outside of Delaware".

C. The Corporate Library Study's Critique of Shareholder Choice is Faulty and Unpersuasive

1. Proposed Rule 14a-11 is not comparable to other Commission rules under the 1934 Act

To characterize the Commission's proposed proxy access rule as being like all other Commission rules regulating public companies under the 1934 Act, or (as other opponents of shareholder choice have argued) as being essentially about disclosure, is both incorrect and unpersuasive.

We agree that Commission rules under the 1934 Act affecting public companies generally apply to registrants across the board, and companies do not have the ability to opt-in or opt-out of the Commission's 1934 Act rules (other than by voluntarily registering when not required to do so or voluntarily deregistering under very limited circumstances). However, Commission regulation of public companies under the 1934 Act deals with disclosure, filing requirements and specific events such as tender offers and proxy contests, except for a limited number of Commission rules under the Sarbanes-Oxley Act of 2002, which result from specific, mandatory Congressionally imposed requirements and which are not comparable to the Commission's ordinary rulemaking for public companies under the 1934 Act. While it is true that SRO rules regulating corporate governance are technically 1934 Act rules and approved by the Commission, they too present a special case and the Commission's authority to implement SRO rules, as well as to approve SRO rules, is constrained. Moreover, companies can effectively opt-in or opt-out of SRO rules by board listing and delisting decisions. The Commission-originated rules (in contrast to the Congressionally imposed rules under Sarbanes-Oxley) and SRO initiated governance rules) can be followed by virtually all public companies without any impact on their corporate voting, capital structures or board arrangements. Thus, traditional Commission rulemaking neither poses a compliance issue or problem for individual companies, nor does it interfere with the ability of companies to deal with future changes in circumstances affecting corporate structure and corporate governance issues. However, when fundamental company structures and board and shareholder arrangements[4] are affected by

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[4] As proposed, Rule 14a-11 would, for example, permit shareholder nominations of directors that altered carefully balanced board composition arrangements which were negotiated as part of a merger or capital infusion and were intended to limit shareholder ability to designate more than a specified number of directors. While dissidents might be able to accomplish the same result through a traditional proxy contest, proxy access is intended to facilitate election of shareholder-nominated directors and thereby would fundamentally alter the expectations of the parties under previously negotiated director allocation structures. Another example of the proposed rule's potential impact on previously negotiated governance structures could occur where an unregistered class of stock with general voting rights, such as a class of preferred stock issued in a PIPES transaction, became empowered under a prescriptive proxy access rule to use the company's proxy materials to impose directors on registered classes of stock. These issues, and

mandatory prescriptive rulemaking, a different regime needs to be established. That is precisely the situation presented in connection with the creation of a prescriptive proxy access right.

To our knowledge, proposed Rule 14a-11, which is a discretionary Commission rule not mandated by specific legislation, would be unprecedented in terms of its potential effect on the capital and voting arrangements and contractual provisions of the some 10,000 individual companies to which it would apply, and on the ability of such companies to deal with future changes in circumstances. Moreover, as discussed in more detail below and in our Initial Comment Letter, proposed Rule 14a-11 has significant workability issues. This is simply not the case for traditional Commission disclosure and filing rules under the 1934 Act, further indicating the substantive difference between the two types of rules and the consequences of their adoption.

In short, contrary to assertions of some opponents of shareholder choice, proposed Rule 14a-11 does not deal with disclosure (except to the extent it mandates filing of a Schedule 14N), but rather with creation of a substantive entitlement to utilize company resources for proxy access that does not now exist under federal or state law (except for that of North Dakota). The disclosure aspects of the proposed regime are contained in separate proposed Rules 14a-18 and 14a-19, in proposed Schedule 14N and in other proposed rule amendments under Sections 13(d) and 14(a) of the 1934 Act. Indeed, the Proposing Release includes an independent disclosure Rule 14a-19 that is intended to be applicable to proxy access regimes established by state law or company bylaw independently from the Commission's proposed Rule 14a-11, thus recognizing that the latter rule is not about disclosure, but rather about eligibility for proxy access. [5]

Moreover, if the Commission believed that its proxy access regime was merely about disclosure, why would its rule proposals permit shareholders to vary the

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the workability challenges they create, are discussed in greater detail in our Initial Comment Letter.

[5] Nor is Rule 14a-8 precedent for proposed Rule 14a-11. As we noted in our letter to the Commission, dated January 4, 2004, with respect to the Commission's 2003 proxy access rule proposal, we do not believe Rule 14a-8 is precedent for a prescriptive proxy access rule for a number of reasons, including that there are 13 specific reasons for exclusion of shareholder proposals under Rule 14a-8 and that Rule 14a-8, then and as currently in effect, is neither designed for, nor intended to be used in connection with, an election contest.

terms of proxy access by making access easier, but not more restrictive? If the notion of shareholders having the ability to alter other disclosure rules does not exist anywhere else in the proxy rules (or any other Commission disclosure rules), why is this concept included in proposed Rule 14a-11 if the rule truly is only about disclosure?

The simple fact is that proposed Rule 14a-11 is not about disclosure at all, but instead is about the circumstances under which shareholders would have the ability to utilize the company's proxy materials to propose nominees for director in opposition to board candidates. By virtue of the proposed rule, a substantive right would be created that would entitle shareholders to use what is clearly a company document for their own purposes. That right simply does not exist under any state law, other than that of North Dakota.[6]

2. *Variations on voting requirements for shareholder amendment of bylaws are not a persuasive reason to dispense with shareholder choice in its entirety.*

The argument against shareholder choice in all circumstances, based on the fact that some companies require greater than majority shareholder votes to amend bylaws and a far smaller number of others do not permit shareholders to amend bylaws, suffers from several logical fallacies.

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[6] Perhaps those asserting that proposed Rule 14a-11 is nothing more than a disclosure rule are attempting to deal with the implications of *The Business Roundtable v. SEC*, 905 Fed.2d 406 (D.C. Cir. 1990), where the court stated: " that proxy regulation bears almost exclusively on disclosure stems as a matter of necessity from the nature of proxies".

First, that some 35-40% of companies included in three major stock indices[7] have supermajority voting requirements for bylaw amendments has no logical connection to the merits of shareholder choice. It is analogous to saying that we should not have Presidential elections because the Electoral College may not mirror the popular vote or that we should not elect legislators because some legislative districts are gerrymandered. Because some voting systems may be viewed as imperfect does not mean we should discard the voting systems we have. If simple majority shareholder democracy were agreed to be the ideal governance model (which is not the case) and if such shareholder democracy were undermined because some companies require supermajority votes for bylaw amendments (which is far from clear), then an appropriate remedy would be to advocate reform of the bylaw amendment rules for those companies that require a supermajority vote. It is a *non sequitur* to conclude that because some companies are perceived by some observers to have imperfect bylaw amendment processes, no company should be able to grant shareholders the right to adopt or amend proxy access bylaws.

Moreover, supermajority voting requirements reflect a governance regime approved or accepted by shareholders of companies with those regimes.[8] While it

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[7] The Corporate Library Study reports that 39.1% of Russell 3000 index companies, 36.1 % of Russell 1000 index companies and 35.4% of S&P 500 index companies require supermajority votes for shareholder amendments of bylaws. The Corporate Library sometimes inflates these percentages by combining companies with supermajority voting provisions and those with classes of stock with disparate voting rights to produce higher percentages of companies where shareholder choice is "impeded" by corporate voting structures. As we discuss below, disparate voting structures are simply not comparable to supermajority voting requirements, and combining the two distorts the statistics. The Corporate Library Study is also ambiguous on whether it classifies a voting requirement based on a majority of outstanding shares as a supermajority voting requirement. We believe that basing voting requirements on outstanding shares, rather than shares voting or shares present, is customary and appropriate for amendment of a company's constituent documents and cannot fairly be characterized as a supermajority voting requirement.

[8] We do not believe that supermajority voting requirements for bylaw amendments are inherently contrary to good corporate governance or otherwise unfair or inappropriate. Supermajority voting may not accord with some conceptions of shareholder democracy, but it nonetheless does serve valid purposes that are compatible with good corporate governance models and most often reflect careful consideration of the pros and cons of that voting requirement. Many democratic political models require supermajority votes for some purposes. It may be harder to defend a governance regime that does not permit shareholder amendment of bylaws under any

may not be consistent with what some consider to be the best governance regime, it is the regime that investors accepted when they acquired shares of companies with supermajority voting requirements. Converting the theoretical objections by some corporate governance activists to supermajority voting requirements for bylaw amendments into a principal reason to bar the operation of shareholder democracy in shaping proxy access for all public companies would constitute a classic example of a tyranny of the minority.

Conceding for the sake of argument that achieving a supermajority vote for a bylaw amendment is more difficult than achieving a simple majority,[9] the degree of difficulty cuts two ways:

- In an opt-out regime based on a prescriptive Commission default rule, where shareholder choice in the form of a bylaw amendment is required to vary the proxy access process, any perceived or actual difficulty of opting-out reinforces the likelihood that the Commission default rule will apply. Supporters of a Commission default rule should take some comfort, and not be critical, of the fact that perhaps as many as 35-40% of listed companies require a supermajority voting standard for shareholders to adopt an opt-out bylaw.

- On the other hand, in an opt-in regime where shareholders must adopt or ratify a proxy access bylaw in order to implement a proxy access regime, a supermajority vote requirement can fairly be characterized by proponents of a

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circumstances, but these are rare. Moreover, as with supermajority voting requirements, the appropriate response to the fact that a relatively small number of companies that do not permit shareholder amendment of bylaws is not to deprive shareholders of all other companies of their right to exercise shareholder choice; it is to effect change in the governance structure of the perceived aberrant companies.

[9] Whether in any particular case a supermajority is more difficult to achieve than a simple majority depends on the supermajority required (e.g., 66 2/3%, 75%, 80%), whether the supermajority is of the shares voting, the shares represented at a meeting or the shares outstanding, the composition of the shareholder body (e.g., the presence or absence of a large cohesive block of shares favoring or opposing the proposal or a very high proportion of institutional investors that vote in accordance with proxy advisory firms' recommendations) and the degree of support for the proposal among shareholders (e.g., board declassification and separation of the CEO and the board chair typically draw far higher shareholder support than environmental proposals). Many shareholder votes, particularly on uncontested matters supported by management, routinely achieve supermajority support sufficient for bylaw amendment.

> proxy access regime as making opt-in, in some instances, more difficult to achieve than would be the case under a majority voting standard. But to the extent the argument has validity,[10] it does so only in the context of an opt-in proxy access regime and then only in the circumstances of a minority of companies.

Moreover, the Corporate Library Study fails to acknowledge that shareholder ratification of board-adopted access bylaws would rarely (if ever) require supermajority approval.[11] Indeed, we believe that in both opt-out and opt-in regimes the far more prevalent pattern would be for boards to adopt bylaws and seek shareholder ratification requiring only a majority vote. The reasons include the natural desire of boards to assure workability and to avoid shareholder-proposed regimes that might, for example, affect control or eliminate meaningful limits on eligibility to utilize the proxy access process. Likewise, the Corporate Library Study largely ignores that management support of a shareholder-proposed proxy access bylaw often would result in adoption of the bylaw by the requisite supermajority.[12]

Nor does the Corporate Library Study acknowledge that the almost certain ability of shareholders to use an amended Rule 14a-8 to propose proxy access bylaw amendments and the increasing success of director "vote no" campaigns will create significant leverage on behalf of shareholders that can and, we are confident, would be used by shareholders in either an opt-in or opt-out regime.

In sum, the likely prevalence of shareholder ratification, as opposed to shareholder adoption, of proxy access bylaws and the threat of shareholder access proposals counter-balance to a significant degree, and quite probably eliminate for all practical purposes, the asserted impediments of supermajority voting requirements at what remains a minority of public companies.

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[10] The criticism ignores that shareholders of companies with supermajority voting requirements made a choice when they acquired stock in the particular company.

[11] Although the Corporate Library Study mentions the possibility of shareholder ratification, rather than shareholder adoption, of access bylaws, it does not focus on the very different voting standard or on the likely prevalence of ratification as opposed to direct adoption.

[12] According to the Corporate Library Study, during the period 2004-2009, 85% of board sponsored proposals to declassify the board achieved the requisite supermajority vote at companies with supermajority voting provisions for charter amendments.

3. Disparate voting rights at a small minority of companies are likewise not a persuasive reason for precluding shareholder choice at all public companies.

The Corporate Library Study also points to the existence of separate classes of voting stock with disparate voting rights as a "distortion" in the voting system at a relatively small minority of public companies and, therefore, as a reason not to incorporate any shareholder choice in a Commission-prescribed proxy access regime.[13] This argument ignores a number of critical points:

- The existence of a high vote/low vote dual class of common stock structure at less than 10% of the companies surveyed is hardly an excuse to deny the shareholders of the over 90% of other companies a right to exercise shareholder democracy in choosing a proxy access regime for their companies. This approach of disadvantaging shareholders of the vast majority of public companies because of perceived governance imperfections at a small minority of companies is, in our view, unsupportable.

- Nor do we agree with the premise of the Corporate Library Study that high vote/low vote structures are inherently bad. All investors in companies with this voting structure made a conscious decision to acquire the stock, notwithstanding the voting structure. Presumably they did so because they believed the economic potential of the company outweighed any negative aspects of its voting structure. Many, in fact, may have purchased low vote shares because they believed in the stability of governance inherent in the voting system and took the view that it benefited the company's economic performance.

- We also observe that if the higher vote shares have sufficient voting power to "thwart" the will of the holders of a majority of the lower voting shares in the context of opt-in or opt-out regimes, the holders of the higher vote shares would have sufficient voting power to elect all of the directors, thereby turning a proxy

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[13] According to the Corporate Library Study, 7.5% of Russell 3000 companies, 8.8% of Russell 1000 companies and 7.1% of S&P 500 companies have multiple classes of stock with disparate voting rights, although it is not clear from the Study whether all of these companies have two classes of common stock, one high vote and the other low vote, or whether the classification also includes other capital structures where the higher vote class has a commensurately greater economic value, as would be the case with certain preferred stock capital structures.

access rule that denies shareholder choice into a meaningless, pyrrhic victory. Little purpose would be served by a Commission-imposed proxy access regime in these circumstances.

4. *There is no substantial question about the legality of proxy access bylaws under state law.*

The fact that Delaware has adopted a statutory provision specifically authorizing proxy access bylaws does not, in our view, carry any negative implication that such bylaws are of dubious legality in other jurisdictions. Delaware and all other states have a general statutory provision that enables companies to adopt bylaws relating to the conduct of shareholder meetings, the creation and validity of proxies, and the conduct of shareholder voting. The statutory provisions governing bylaws are universally broad, enabling grants of plenary power to adopt bylaws not in conflict with specific statutory requirements or the company's charter. We are aware of no state that by statute limits a company's right to adopt a proxy access bylaw.[14]

Moreover, the legislative history of the Delaware statutory provision dealing with proxy access bylaws is bereft of any suggestion that the Delaware Legislature or Bar believed the provision was necessary to clarify that a Delaware company had full authority under the general enabling statutory provision to adopt a proxy access bylaw. As a consequence, we think it is clear that there are no negative implications in the adoption by Delaware of a statutory provision regarding proxy access bylaws. Rather, we think it is clear that the amendment was, first, confirmatory of existing powers under the general enabling statute and, second, intended to provide a non-exclusive list of conditions and limitations that could be included in proxy access bylaws.[15]

We therefore conclude that rather than affording a reason why shareholder choice might not be available in states other than Delaware, as the Corporate Library Study suggests, the Delaware enabling statute is better viewed as confirming the availability of shareholder choice on proxy access under state law.

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[14] North Dakota has a statutory provision mandating proxy access.

[15] We believe the same can be said of the recent amendment of the Model Business Corporation Act specifically enabling adoption of a proxy access bylaw.

D. The Corporate Library Study Ignores the Arguments Supporting Shareholder Choice under any Proxy Access Regime

The rationale for shareholder choice begins with the observation that the fundamental basis for creating a proxy access regime is to provide shareholders with a more effective process for participating in the process by which directors are nominated and elected. At its heart, proxy access is justified by its proponents because it enhances shareholder choice in the selection and election of directors. It would be anomalous, to say the least, for the Commission to enact a prescriptive regime intended to facilitate shareholder choice in director elections, while at the same time denying shareholders the right to vary that regime to make it easier or harder to utilize the proxy access mechanism.[16]

The desirability of shareholder choice is also based on the universal enabling premise of state corporation law statutes—that within very broad parameters shareholders of a company have the right and ability to choose the particulars of their companies' governance systems. The corollary to the shareholder right to choose is that potential investors who do not approve of that governance system (or any other aspect of the company's business or management) are not compelled to invest in that entity.[17] Shareholder choice is far more compatible with the enabling philosophy of corporate laws than a one-size-fits-all prescriptive rule.

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[16] Professor Joseph Grundfest has published an article that makes a forceful case that shareholder choice is required to be part of the Commission's access rules to achieve compliance with the Administrative Procedure Act. See Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, available at http://ssrn.com/abstract=1491670 (the "Grundfest Article"). We also believe it is quite instructive that both Professor Grundfest and Professor Lucian Bebchuck, two of the leading academic commentators on the current Commission proposals for proxy access, agree on the desirability of permitting shareholder choice. See Lucian A. Bebchuck & Scott Hirst, *Private Ordering and the Proxy Access Debate*, available at http://papers.ssrn.com/abstract+1513408 (the Bebchuck & Hirst Article), particularly at Section III. Professor Grundfest's and Professor Bebchuck's fundamental disagreement is confined to the desirability_of an opt-in paradigm (Professor Grundfest's choice) or opt-out paradigm (Professor Bebchuck's choice)

[17] Underlying the entire debate on shareholder choice is the highly questionable view that investors have a quasi-legal right to have each and every company in which they may invest conform to a prescribed governance template. In our view, assuming a corporation is compliant with all applicable state legal obligations, not only does such a right not exist, but it would in fact be injurious to shareholders because it undermines the dynamic ability of corporations to fashion the governance systems which their shareholders and boards have determined to be in the best

A closely related argument in favor of shareholder choice is that matters of internal corporate governance have historically been reserved to the states and have not been the province of federal regulation. Accepting for present purposes that the Commission has statutory authority to adopt a prescriptive proxy access regime, we believe that permitting shareholder choice under that regime squares best with our federal system and our long-standing tradition of according priority to the states in matters of internal corporate governance.

In addition, as the comment letters in response to the Commission's Proposing Release indicate, there is a wide divergence of views among investors regarding the terms and conditions of proxy access provisions, as well as whether proxy access is the optimum approach.[18] For example, investors commenting on proposed Rule 14a-11 favored ownership thresholds ranging from 1% to 10% or higher, minimum holding periods ranging from six months to as long as two years, and a variety of prioritization rules for situations where the number of nominees exceed the rule's limit. Moreover, shareholders of a particular company might prefer a reimbursement regime as a more effective way to promote shareholder director nominations than proxy access, or they might consider majority voting for directors, which would be negated if director election contests were promoted

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interests of the company and its shareholders and to change those systems as circumstances dictate. Standardization comes at the price of experimentation, innovation and adaptation. Efforts to standardize corporate governance risk calcification and stagnation, depriving companies of the ability to implement the governance structures that may be necessary for them to compete effectively in an increasingly global marketplace. None of the opponents of shareholder choice appear to have paid any meaningful attention to the drawbacks that standardized governance models may present. Indeed some of the opponents base their opposition on what they see as the bother of having to read corporate governance documents to determine the governance system in place at each corporation in which they invest. We cannot conceive of a more fallacious reason to oppose shareholder choice than eliminating shareholder democracy for the convenience of parties wishing to make it easier to launch proxy contests under the aegis of proxy access. Why not eliminate compliance with the proxy rules in their entirety so that proxy contests through proxy access become yet cheaper and less burdensome?

[18] See, e.g., The Altman Group, *Special Report on Proxy Access: A Study of 500+ Letter Submitted to the SEC on "Facilitating Shareholder Director Nominations"*, November 30, 2009; Latham & Watkins LLP and Georgeson & Co., *Corporate Governance Commentary—Proxy Access Analysis No. 4 and Appendix Thereto*, November 3, 2009, available at http://www.lw.com/upload/pubContent/_pdf/pub2866_1.pdf and http://www.georgeson.com/usa/download/reports/CorpGovCommentary_110309.pdf.

under proxy access, as a preferable model for shareholder democracy and director accountability. These considerations all strongly point toward allowing shareholder choice.

Finally, and to many most important, is that all relevant constituencies seem to agree that proxy access must be workable in practice and suitable in the context of the various circumstances presented across the spectrum of the estimated 10,000 or so companies that may be subject to the Commission's proxy access rule. For the Commission to achieve workability and suitability in a one-size-fits-all prescriptive proxy access rule will be challenging.[19] Moreover, as circumstances and corporate

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[19] For example, to be workable a proxy access rule would have to deal with a multitude of non-standard capital and board structures, such as: more than one class of common stock with disparate voting rights based on votes per share; convertible preferred stocks that bear voting rights based on the number of convertible preferred shares held or on the voting rights of the underlying common shares; classes of common and preferred shares that vote separately for different classes of directors; registered and unregistered classes of shares with common or disparate voting rights for directors; shares carrying contingent or conditional voting rights that depend on specified events occurring or not occurring and may be in force only some of the time; other board structures where different classes of stock elect different classes of directors; disparate voting rights of different classes of stock in terms of the number of votes per share or in terms of the underlying economic interest of shares of different classes of stock that vote as a single class for director; and debt or other non-stock interests in the company that carry voting rights for directors. These and all other capital and board structures that deviate from the simple model of a single class of common stock would need to be dealt with in a one-size-fits-all prescriptive rule in a variety of contexts under proxy access, including: inclusion or exclusion from the numerator and/or denominator of the fraction, expressed as a percentage, that is used for the ownership threshold; conversion from one class to another during the minimum holding period as a result of which the number of votes and/or share held and/or the percentage of economic interest in the company increase or decrease; whether the ownership threshold should be measured in terms of shares held, votes held or economic interest held; the effects on the computations of share issuances and repurchases during the minimum holding period (and the obvious gaming opportunities changes in outstanding voting securities could provide in determining eligibility for proxy access); and whether unregistered classes of stock that participate in director elections should or should not be included for the purposes of the necessary computations.

and shareholder structures differ among the vast number of covered companies, a prescriptive rule becomes increasingly more likely to raise workability and suitability issues. To expect that the workability and suitability of a one-size-fits all rule will be resolved by rule interpretation by the Commission staff (which would not be binding) or by the courts ignores the degree to which resolution of problems by these means are both cumbersome and impractical. Considering the narrow focus of much staff guidance and the fact that most court rulings are applicable only to the fact situation presented, neither of these methods of resolving workability would create a consistent and easily understood environment in which parties would have the ability to plan courses of action with a high degree of predictability. Any rule amendment by the Commission to address any such issues would be an even more cumbersome and impractical way to address ambiguity, workability, suitability and changed circumstances.

Shareholder choice, in contrast, particularly in combination with director action (as would be the case in a board-designed access bylaw ratified by a majority of shareholders), would afford a practical and time-tested process to achieve the workability and suitability that proxy access requires in the context of the thousands of companies and myriad of capital and board structures that would be subject to the Commission's regime.

Part II. Comments with Regard to the Division Analysis of Share Ownership Study

The Memorandum prepared by the Division of Risk, Strategy, and Financial Innovation regarding Share Ownership and Holding Period Patterns in 13F Data (Nov. 24, 2009) (the "Analysis") is, as stated therein, at best suggestive rather than definitive. We are concerned in particular with the impact of two limitations on the data itself, and more generally on the usefulness of the Analysis, in the Commission's rulemaking effort.

A. The Division's Share Ownership Analysis Has Limited Utility

There are two significant limitations on the validity and utility of the information reflected in the Analysis. First, we are concerned that the Analysis understates the concentration of institutional voting power, due to the fact that the Analysis is based on a review of reported investment discretion. In particular, it is our understanding that many pension funds and other institutional investors diversify the management and custody of their assets by utilizing more than one investment manager. Nevertheless, in order to fulfill their fiduciary duties with respect to the voting rights of securities held in their various portfolios and to avoid the possibility of effectively voting against themselves by entrusting voting decisions over different portfolios to the different managers that hold the shares, institutional investors typically retain voting control over their portfolios, often using a proxy voting service such as that provided by RiskMetrics Group, http://www.riskmetrics.com/proxy_voting, to coordinate and implement voting decisions across their portfolios.

In contrast, the Analysis is based on a study only of investment discretion held by the investment managers, not of voting power held by beneficial owners. As a result, the Analysis fails to identify ownership positions that may already in fact be aggregated and held by a single investor: an institutional investor using different managers or custodians and holding 1% of a company's stock in each of a Russell 1000 index portfolio, a technology portfolio and a growth stock portfolio would appear in the Analysis as holding three 1% positions, but not as one 3% position.

Second, as noted in the Analysis itself, the Analysis does not take into account the ability under the Proposing Release for different investors to aggregate their positions to satisfy whatever ownership thresholds may be applicable under a proxy access regime. The Analysis does provide some suggestion of the effect of this ability to aggregate. For example, as shown in Table 1A, not only would 51% of all covered public issuers have at least one shareholder able to satisfy a 5%/1-year stock ownership requirement, but 50% would also have two 3% or more shareholders who could combine to satisfy the standard, 50% would have three 2% shareholders who could combine to satisfy the standard, and 50% would have five 1% shareholders who could combine to satisfy the standard. As shown on Table 1B, among "megacap" companies, although 19% would have one or more shareholders who could satisfy a 5%/1-year stock ownership requirement, 81% would have two or more 3% shareholders who could combine to satisfy the standard, and 75% of the companies have four or more 2% shareholders, meaning that just 3 of the 4 or more largest shareholders at 75% of "megacap" companies could meet a 5%/1-year standard.

Nevertheless, even the type of extrapolation discussed in the preceding paragraph understates the ability of institutional investors to satisfy various stock ownership thresholds, particularly if those ownership thresholds are set at low levels, because of the absence of data on less-than-1% holdings. For example, if a 2%/1-year threshold were examined, the Analysis provides no guidance on the extent to which three or more less-than-1% holders could satisfy the standard.

In short, the utility of the Analysis, particularly as a basis for rulemaking, is highly questionable. The fact that the statistics are based on a standard that is not even proposed to be applied under the Commission's proposed rule, the limitations discussed above, as well as the limitations on the information discussed in the Analysis itself, all indicate that the Analysis at best sets a baseline in indicating the extent to which shareholders would be able to avail themselves of any proxy access rule.

B. The Share Ownership Analysis Does Not Measure the Impact of a Proxy Access Regime

More generally, we question the utility of the Analysis for policymaking decisions in the context of proxy access rulemaking. As discussed in our Initial Comment Letter, we believe that the stock ownership threshold applied under any proxy access regime is of critical importance. The fact that ownership and voting power structures vary widely from company-to-company powerfully indicates that a uniform ownership threshold is not appropriate.[20]

Moreover, we strongly disagree with commenters who have suggested that the ownership standards under an access regime do not raise significant policy concerns because access nominees will only be elected if they garner sufficient votes to win. This line of argument ignores entirely the costs that will be imposed on companies as a result of access election contests, which costs would be incurred regardless of whether an access nominee is ultimately elected. As we stated in our Initial Comment Letter, it is important to bear in mind that by its nature the effect of proxy access would be to relieve certain shareholders of the costs they would be unwilling to incur were they to run a traditional short-slate election contest, and to

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[20] We note that the Analysis examined only companies with single-class stock structures, again highlighting the limitation on potentially drawing conclusions from the Analysis that would be applied to both single- and multiple-class stock structures.

shift those costs to the company, so that they are effectively borne by all shareholders. We also disagree with the Commission's statement in the Proposing Release that boards generally would be cautious in expending resources to defeat shareholder nominees under an access regime, as a board's fiduciary duties in an access contest will be the same as in a traditional proxy contest. As stated in part III.A.1 of the Report on Effects of Proposed Commission Rule 14a-11 on Efficiency, Competitiveness and Capital Formation, in Support of Comments by Business Roundtable prepared by NERA Economic Consulting:

> [M]anagement and the incumbent board cannot assume the success of their chosen candidate and therefore will be compelled by their fiduciary responsibilities to expend great resources ensuring the [access] candidate's defeat. (Ironically, precisely because [access] board candidates may be of the lowest quality, due to the proponent's low search efforts to identify a nominee, management and the incumbent board may feel compelled to devote extra efforts to assure the candidate's defeat.)

The costs that will be borne by companies and their shareholders through access contests include not only the costs of additional soliciting efforts in opposition to access nominees, but also economic harm that may arise to a business as a result of the distraction and diversion of its board and management's attention to the election contest and away from routine business operations. Companies that are subject to election contests may also have greater difficulty competing for business and securing financing due to uncertainty the election contest may introduce with respect to the company's business strategy and the perception of instability resulting from the election contest. Also, the prospect of an election contest may discourage qualified director candidates from being willing to stand for election, to the detriment of the company and its shareholders. We therefore believe that, in considering proxy access, it is incumbent on the Commission to consider the costs that will be borne by companies, and effectively by all shareholders, as a result of access election contests, and we are concerned about the absence of any studies that address these costs.

The costs that will be borne by companies under an access regime are inextricably tied to the ownership standards that shareholders must satisfy to avail themselves of that regime. First, the lower the threshold, the more frequent access election contests will be, increasing as well the frequency of election contest costs being incurred by companies. Second, lower ownership standards also increase the likelihood of unsuccessful access election contests. The Commission must seriously question whether there is any benefit to establishing a proxy access regime that would enable a single shareholder or small group of shareholders, to nominate an access candidate when that shareholder or shareholder group is unable to obtain the support of one or more significant shareholders by the time it notifies the company of its access nominee. Establishing ownership standards that are too low also increases the likelihood of special interest nominees, such as a candidate of a group with a narrow social interest, who may (just as with the shareholder proposal process under Rule 14a-8) use the access regime, particularly at megacap or broadly held companies, in order to draw attention to a particular concern of the group, without regard to the group's ability to garner enough votes to actually elect its director candidate.[21]

For the foregoing reasons, we do not believe that the Analysis can be used in isolation in setting the ownership standards that must be satisfied under a proxy access regime. We are concerned in particular with any suggestion implicit in the Analysis that the thresholds should be set at a level where a single shareholder, or even a small group of shareholders, will be guaranteed the ability to utilize an access regime at a significant percentage of public companies. Instead, we believe that demonstrating the support of shareholders with beneficial ownership of a significant percentage of a company's stock should be a minimum standard under any Commission-mandated proxy access regime.

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The creation of a proxy access right by the Commission would represent the implementation of a unique process involving a highly complex subject matter. The Commission should assure that any mandated proxy access regime should be

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[21] An unduly low ownership threshold for single investors and for groups would also add to the costs of proxy access because it would facilitate misuse of the rule for control-related purposes. As we noted in our Initial Comment Letter, proposed Rule 14a-11 contained a number of provisions that could be used alone or in combination to affect control (contrary to the purpose of the rule), including that the limit on the total number of access nominees would be capped at 25% of the board, that one shareholder or shareholder group could submit nominations for all available access slots, that access nominees, once elected, would not be considered access directors if renominated by the board, and there is no requirement that the access nominee be independent from the nominating shareholder. An unduly low ownership would exacerbate these concerns.

both realistic and workable. We believe as well that the content and implementation of any new proxy access right further the goals sought to be achieved by proxy access and reflect the rights and interests of shareholders, a principle the Commission has consistently recognized and which, in the final analysis, is the rationale for the proxy access. These basic considerations lead us to the firm conclusion that shareholder choice is necessarily an integral part of any proxy access regime. We are hopeful that our comments will be of assistance to the Commission and its staff in considering these very profound issues.

The Committee appreciates the opportunity to comment on the Proposing Release and the Additional Comment Release. Members of the Committee are available to discuss our comments should the Commission or the staff so desire.

Very truly yours,

/s/ Jeffrey W. Rubin

Jeffrey W. Rubin, Chair of the
Committee on Federal Regulation of
Securities

Drafting Committee:

Stanley Keller, Co-Chair
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Charles M. Nathan, Co-Chair
Frederick H. Alexander
Robert Messineo
James C. Morphy
Ronald O. Mueller
Jeffrey W. Rubin

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