

# PROXY ACCESS FOR ALL SHAREHOLDERS

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## I. INTRODUCTION

United States economic turmoil has raised questions about the failure of boards of directors to oversee management, focus on shareholder interests, and accept accountability for poor decisions.<sup>1</sup> One solution that the Securities and Exchange Commission (“SEC”) has embraced is a more open process of nominating directors.<sup>2</sup> This approach, known as shareholder “proxy access” has been debated for decades, but with each swell of interest, proponents have agreed that proxy access should only be available to large shareholders.<sup>3</sup>

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<sup>1</sup> See, e.g., Mary L. Schapiro, SEC Chairwoman, Address to Transatlantic Corporate Governance Dialogue – 2009 Conference (Sept. 17, 2009), available at <http://www.sec.gov/news/speech/2009/spch091709mls.htm> (suggesting that boards of directors have failed to question the decisions of management to accept risk and have failed to understand the risks taken).

<sup>2</sup> Facilitating Shareholder Director Nominations (Final Rule), Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Release No. 29,384, 75 Fed. Reg. 56668 (Sept. 16, 2010) [*hereinafter* Facilitating Shareholder Director Nominations (Final Rule)]; Facilitating Shareholder Director Nominations (Proposed Rule), Securities Act Release No. 9046, Exchange Act Release No. 60,089, Investment Company Act Release No. 28,765, 96 SEC Docket 9, at 7 (proposed June 10, 2009) [*hereinafter* Facilitating Shareholder Director Nominations (Proposed Rule)]. A more open process is also supported by Congress as evident by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), which was signed into law by President Obama on July 21, 2010. Section 971(b) of the Act states: “[t]he Commission may issue rules permitting the use by a shareholder of proxy solicitation materials supplied by an issuer of securities for the purpose of nominating individuals to membership on the board of directors of the issuer.”

<sup>3</sup> Security Holder Director Nominations, Exchange Act Release No. 34-48,626, Investment Company Act Release No. 26,206, 81 SEC Docket 770 (Oct. 14, 2003). Of recent SEC proposals, the most generous would have limited proxy access to shareholders that own at least one percent of a corporation’s total shares issued, depending on the size of the corporation. Facilitating Shareholder Director Nominations (Proposed Rule), at 43. The current standard of proxy access is that no shareholder of any size has access to a corporation’s proxy statement. No Commission proposal or recommendation in support of proxy access has ever supported proxy access for all shareholders. See Facilitating Shareholder Director Nominations (Final Rule); Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,914, Investment Company Act Release No. 28,075, 92 SEC Docket 256 (Dec. 6, 2007); Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,161, Investment Company Act Release No. 27,914, 91 SEC Docket 575 (July 27, 2007); Regulation of Communications Among Shareholders, Exchange Act Release No. 31,326, Investment Company Act Release No. 19,031, 52 SEC Docket 2028 (Oct. 16, 1992); Exchange Act Release No. 13901, Investment Company Act Release No. 9914, 12 SEC Docket 1656 (Aug. 29, 1977); Re-Examination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Exchange Act Release No. 13482, Investment Company Act Release No. 9740, 12 SEC Docket 267 (Apr. 28, 1977); Securities Act Release No. 2887, Exchange Act Release No. 3347, Investment Company Act Release No. 417, 1942 WL 34864 (Dec. 18, 1942). The Commission has considered some aspect of shareholder access to the corporation’s proxy statement in 1942, 1977, 1992, 2003, 2007, and 2009. Facilitating Shareholder Director Nominations (Proposed Rule) at 8 n.27, 21 n.73.

Proxy access refers to the right of a shareholder, as partial owner of a public corporation, to propose a nominee for the board of directors that the corporation must include in its proxy statement.<sup>4</sup> Public corporations submit proxy statements to their shareholders to solicit votes on matters that require shareholder approval, such as the election of directors, because it is not practical for all shareholders to attend a corporation's shareholder meeting.<sup>5</sup> Currently, a corporation is not required to include a shareholder's nominee for the board, or any other shareholder proposal, in the corporation's proxy statement. The fact that larger shareholders could soon be permitted to include director nominees in a proxy statement prepared by the corporation at the corporation's expense and effort is a seminal event that exemplifies the increasing power of shareholders in general.<sup>6</sup>

Despite this proposed shift in shareholder power, director accountability to shareholders is best achieved by proxy access for *all* shareholders, a solution that would allow all shareholders, regardless of the size of their interests, to nominate directors to be included in the corporation's proxy statement.<sup>7</sup> Every shareholder should be permitted to nominate directors that appear in the corporation's proxy statement, regardless of how many shares the shareholder owns, because every shareholder confers authority on the board of directors to manage the corporation.<sup>8</sup> The SEC's most recent proxy access rule is well-intentioned but irrationally distinguishes between large and small shareholders and would better accomplish proxy access goals by offering the same proxy access to all shareholders. Other than to appease proxy access opponents, there is no sensible reason for distinguishing between large and small shareholders with respect to proxy access, nor is there a reasonable way to determine at what percentage ownership a shareholder should be granted proxy access.

Proxy access is not a new idea. When SEC Chairwoman Mary Schapiro formally recommended the preliminary version of the SEC's new shareholder proxy access rule on

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<sup>4</sup> See Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 479 (2008).

<sup>5</sup> *Id.*

<sup>6</sup> See *id.* at 484.

<sup>7</sup> The SEC's new proxy access rule distinguishes between shareholders based on ownership size and other factors beyond the scope of this essay such as how long a shareholder has held shares. Facilitating Shareholder Director Nominations (Final Rule) at 24. See *infra* note 33.

<sup>8</sup> Proxy access for all shareholders is an unconventional approach. The SEC's most recent proposal of proxy access for shareholders large enough to control at least one percent of a corporation with \$700 million in net assets resulted in over 500 comment letters spanning two comment periods, the majority of which expressed opposition, a Congressional response, and a lawsuit by the Business Roundtable and the U.S. Chamber of Commerce. See Comments on Proposed Rule: Facilitating Shareholder Director Nominations, <http://www.sec.gov/comments/s7-10-09/s71009.shtml#33-9086>; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Brief for Petitioners, Business Roundtable v. SEC, No. 10-1305 (D.C. Cir. Sept. 29, 2010). The proxy access rule as passed allows proxy access for shareholders owning at least three percent of the voting power of a corporation for three years. Facilitating Shareholder Director Nominations (Final Rule) at 24-25.

May 20, 2009, she quoted language from a 1977 SEC Release that cites the same need for proxy access as exists today:<sup>9</sup>

Recent disclosures concerning a wide variety of questionable and illegal corporate practices, accomplished in certain instances with the knowledge and participation of top corporate management, have served to focus public attention on the subject of corporate accountability. A number of proposals designed to achieve a new “corporate governance” have been suggested, including . . . providing mechanisms to assure a higher level of management accountability to shareholders through revisions of the Commission’s proxy rules.<sup>10</sup>

Over three decades later, questionable corporate practices continue with the knowledge and participation of top corporate management, and the SEC continues to look to proxy access as a way to improve management accountability.<sup>11</sup> And with good reason, because despite the fact that corporate decisions are ultimately the responsibility of the board of directors, it is the shareholders who have the statutory power to hold the members of the board accountable in one significant way: by voting them out.<sup>12</sup>

When a corporation makes bad decisions that are neither illegal nor negligent, it is the shareholders who are responsible for holding the decision-makers accountable.<sup>13</sup> Lawmakers, as tempted as they may be to ensure bad decisions do not repeat, are charged

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<sup>9</sup> Re-Examination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Securities Act Release No. 9740, Exchange Act Release No. 13,482, Investment Company Act Release No. 9740, 12 SEC Docket, 267 (Apr. 28, 1977). The corporate scandals alluded to were evidenced by more than 350 public disclosures in a two-year period regarding bribes, kickbacks, illegal political contributions, and improper accounting practices. *Id.* at 2 n.1.

<sup>10</sup> Mary Schapiro, SEC Chairwoman, Statement at SEC Open Meeting on Facilitating Shareholder Director Nominations (May 20, 2009), available at <http://www.sec.gov/news/speech/2009/spch052009mls.htm>.

<sup>11</sup> Facilitating Shareholder Director Nominations (Final Rule) at 7-8. Perhaps the two most controversial categories of presumably good-faith decisions made by boards of directors in recent times are: (1) exorbitant executive compensation for poor performance (*see, e.g.*, Robert Daines, Vinay B. Nair, & Lewis Kornhauser, *The Good, the Bad and the Lucky: CEO Pay and Skill* (NYU Pollack Ctr. for Law & Bus., Working Paper No. 04-035, 2005), available at <http://hdl.handle.net/2451/25977> (discussing high pay for poor performance at Disney, AT&T, Exxon and Verizon among other corporations)), and (2) imprudent investments in asset-backed securities and credit-default swaps (*see, e.g.*, Louise Story & Ben White, *The Road to Lehman’s Failure was Littered with Lost Chances*, N.Y. TIMES, Oct. 6, 2008 (discussing the collapse of Lehman Brothers following investments in mortgage-backed securities); Mary Williams Walsh, *Inquiry Asks Why AIG Paid Banks*, N.Y. TIMES, Mar. 26, 2009 (discussing the bailout of American International Group following investments in credit-default swaps)).

<sup>12</sup> *See, e.g.*, MODEL BUS. CORP. ACT § 8.08 (2007) (“The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.”); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 959 (Del. 1985) (“[T]he powers of corporate democracy are at [the shareholders’] disposal to turn the board out.”).

<sup>13</sup> Because the Business Judgment Rule prevents courts from second-guessing such director decisions, only the shareholders are in a position to effect change. *See In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996) (“That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through ‘stupid’ to ‘egregious’ or ‘irrational’, provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a *good faith* effort to advance corporate interests.”).

with facilitating a legal system that compels director liability for illegal or negligent acts, not director accountability for poor outcomes of good faith decisions. Because it would be unfair and impractical to hold directors personally liable for poor business decisions, lawmakers instead provide tools for shareholders to use to impose director accountability.<sup>14</sup> One accountability tool is proxy access.<sup>15</sup>

This essay first discusses the regulation of proxy access and the SEC's new proxy access rule, which requires a corporation to include certain large shareholders' nominees for the board in the corporation's proxy statement. It next discusses why proxy access should be afforded to all shareholders, not just large shareholders, and concludes by explaining why opposition to proxy access is misguided.

## II. NEW SEC REGULATION OF PROXY ACCESS

The SEC regulates the solicitation of proxies using rules promulgated under Section 14 of the Securities Exchange Act of 1934.<sup>16</sup> Proxies can be solicited for many reasons, including the election of directors, by anyone willing to follow the requirements of Regulation 14A, which requires a specific presentation of information to shareholders.<sup>17</sup> Typically, the board of directors solicits proxies on behalf of the corporation and at the corporation's expense, but other parties may do so as well if they are willing to bear the cost.<sup>18</sup> The corporation's proxy statement is a solicitation of votes, not a ballot, and pending

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<sup>14</sup> See David Rosenberg, *Supplying the Adverb: The Future of Corporate Risk-Taking and the Business Judgment Rule*, 6 BERKELEY BUS. L.J. 216, 225 (2009); *In re Caremark*, 698 A.2d at 967 ("To employ a different rule—one that permitted an 'objective' evaluation of the decision—would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests.").

<sup>15</sup> A competing, yet effective tool cited by opponents of proxy access proposals is the notion that shareholders can "vote with their feet" and sell their shares in any corporation they do not feel is managed effectively. See, e.g., Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. DAVIS L. REV. 605, 631-32, n.141 (2007) (citing Carol Goforth, *Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late*, 43 AM. U.L. REV. 379, 406 (1994)).

<sup>16</sup> See 17 C.F.R. §§ 240.14a-1-240.14b-2 (2010).

<sup>17</sup> See 17 C.F.R. §§ 240.14a-3, 4, 5, 101 (2010). Rule 14a-8 provides the process by which shareholders can submit proposals to be included in the corporation's proxy statement and pending enforcement of the new proxy access rule, allows a corporation to exclude proposals that relate "to a nomination or an election for membership on the corporation's board of directors." 17 C.F.R. § 240.14a-8 (2010). The new version of Rule 14a-8 offers more specific examples of the types of nomination/election proposals that may be excluded. Facilitating Shareholder Director Nominations (Final Rule) at 227-28. Importantly, the new version of Rule 14a-8 would no longer allow a corporation to exclude from proxy materials proposals that seek to establish a procedure under a corporation's governing documents for the inclusion of one or more shareholder director nominees in the corporation's proxy materials. *Id.* at 84, n.223; see *infra* note 36.

<sup>18</sup> See generally Gregory S. Meyer, Proxy Statement (Schedule 14A) (May 11, 2010), available at [http://www.sec.gov/Archives/edgar/data/1085734/000101968710001755/meyer\\_def.htm](http://www.sec.gov/Archives/edgar/data/1085734/000101968710001755/meyer_def.htm) (soliciting votes of shareholders of Blockbuster Inc. on behalf of Gregory S. Meyer). The cost of a proxy fight can be millions of dollars depending on legal costs and the number of shareholders solicited. See, e.g., Ian Fried, *Costs Mount in HP Proxy Fight*, CNET NEWS, Mar. 13, 2002, available at <http://news.cnet.com/2100-1001-859261.html> (suggesting that corporations can spend \$5-10 per voter solicited by telephone and \$2.5-3 million total in mailing costs).

enforcement of the new proxy access rule, there is no mechanism by which any shareholder can cause a corporation to solicit votes for the shareholder's nominees for director.<sup>19</sup>

On June 10, 2009, the SEC proposed a new proxy access rule for larger shareholders that was finalized on August 25, 2010.<sup>20</sup> To qualify for proxy access, a shareholder or group of shareholders must own at least three percent of a public corporation's voting power.<sup>21</sup> Additionally, and among other requirements, the shareholder or group of shareholders must have held the shares for at least three years with no intent to effect a change of control of the corporation.<sup>22</sup> The new rule allows these "significant, long-term holders" to include no more than one nominee or the number of nominees that represents 25% of the corporation's board, whichever is greater, in the corporation's proxy statement, thereby avoiding the prohibitive cost of preparing and sending proxy materials on their own behalf.<sup>23</sup>

On September 29, 2010, the Business Roundtable and U.S. Chamber of Commerce sued the SEC in the United States Court of Appeals for the District of Columbia Circuit and petitioned the SEC to stay the effect of its newly adopted proxy access rule pending the outcome of the lawsuit.<sup>24</sup> The SEC granted the stay on October 4, 2010, to avoid any regulatory uncertainty while the rule is being challenged.<sup>25</sup> The Business Roundtable and U.S. Chamber of Commerce allege, among other claims, that the SEC did not properly consider certain costs of the new rule, that the rule is arbitrary and capricious in violation of

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<sup>19</sup> This distinction between a ballot and a proxy statement may make sense given the logic of the proxy rules, but the complicated and expensive process of proxy solicitation has effectively caused the proxy statement to become a ballot that offers a limited choice between the corporation's slate of directors or withholding one's votes. *See* Facilitating Shareholder Director Nominations (Proposed Rule) at 15-16 (explaining that dissatisfied shareholders seeking redress from the proxy rules have three choices under the proxy rules: (1) launch a proxy fight, (2) submit non-election related proposals via Rule 14a-8, or (3) withhold their votes against one or more directors). *See supra* text accompanying note 17.

<sup>20</sup> Facilitating Shareholder Director Nominations (Final Rule) at 7.

<sup>21</sup> *Id.* at 75. When the financial reform bill was being negotiated, Senator Christopher Dodd proposed mandating a minimum ownership requirement of five percent, but ultimately, discretion was left to the SEC to determine the rules by which proxy access would be granted. Victoria McGrane, *US Sen Dodd Pushes Scaled-Back Proxy Access Rule*, WALL ST. J., June 16, 2010, available at [http://online.wsj.com/article/BT-CO-20100616-714740.html?mod=WSJ\\_latestheadlines](http://online.wsj.com/article/BT-CO-20100616-714740.html?mod=WSJ_latestheadlines).

<sup>22</sup> Facilitating Shareholder Director Nominations (Final Rule) at 114.

<sup>23</sup> *Id.* at 107, 138-39.

<sup>24</sup> Brief for Petitioners, *supra* note 8; In the Matter of the Motion of Business Roundtable and the Chamber of Commerce of the United States of America for Stay of Effect of Commission's Facilitating Shareholder Director Nominations Rules, Securities Act Release No. 9149, Exchange Act. Release No. 63,031, Investment Company Act Release No. 29,456, File No. S7-10-09 (Oct. 4, 2010).

<sup>25</sup> *See supra* note 24. For an analysis of how the stay may have provided a research opportunity to determine how financial markets view proxy access, *see* Bo Becker, Daniel Bergstresser, & Guhan Subramanian, *Does Shareholder Access Improve Firm Value? Evidence from the Business Roundtable Challenge*, (Harv. Bus. School, Working Paper No. 11-052, 2010).

the Administrative Procedures Act, and that the rule violates the First Amendment.<sup>26</sup> Given the opposition to proxy access, it is doubtful that any rule that grants some level of proxy access to shareholders, no matter how judiciously crafted, would have avoided a similar suit.

### III. PROXY ACCESS FOR ALL SHAREHOLDERS

This essay argues that proxy access for all shareholders would (1) avoid the arbitrary determination of what size shareholder deserves proxy access; (2) reinforce the state-granted power that all shareholders have to choose directors; (3) empower directors through legitimate director elections; (4) increase director accountability, making directors more responsive to all shareholder concerns; (5) reduce withhold campaigns; (6) diminish conflicts of interest between retail and institutional shareholders; and (7) help determine whether shareholders truly want empowerment.

The SEC touts the benefits of removing obstacles to the basic shareholder right to nominate and elect directors, and yet the new rule limits proxy access to a select group of shareholders holding a certain percentage of a corporation's shares.<sup>27</sup> This approach irrationally distinguishes between small shareholders and large shareholders regarding the right of shareholders to nominate directors. This distinction is reasonable with respect to director *elections* and occurs without being mandated by statute because the size of a shareholder's interest determines the shareholder's power to elect directors: bigger shareholders by definition have more votes. Greater ownership logically confers greater power to influence the corporation. But with respect to director *nominations*, the distinction between small shareholders and larger shareholders has no basis other than to appease proxy access opponents.<sup>28</sup>

The power of a shareholder to nominate a candidate for director is similar to the many other rights and powers shareholders possess, such as the right to receive an annual report or attend the annual meeting of shareholders.<sup>29</sup> These rights should not be limited to

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<sup>26</sup> Brief for Petitioners, *supra* note 8, at 2. The SEC responded to the alleged violations of law on January 19, 2011, and oral argument occurred on April 7, 2011. Brief of Respondent, SEC, No.10-1305 (D.C. Cir. Jan. 18, 2011).

<sup>27</sup> Facilitating Shareholder Director Nominations (Final Rule) at 35; Facilitating Shareholder Director Nominations (Proposed Rule) at 13.

<sup>28</sup> The SEC justifies an ownership threshold for proxy access on the grounds "that it is appropriate to take a measured approach that balances competing interests and seeks to ensure investor protection." Facilitating Shareholder Director Nominations (Final Rule) at 72, 80. No explanation is offered for why three percent is the ideal ownership threshold, other than the SEC's belief that higher thresholds would be too difficult to meet and lower thresholds might result in more frequent election contests, which the SEC fears would be costly to corporations. *Id.* at 83-84.

<sup>29</sup> Most state statutes do not specifically grant shareholders the power to *nominate* directors but rather grant shareholders the power to elect directors, which necessitates a nomination. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141 (2009); MODEL BUS. CORP. ACT §§ 8.02-8.04 (2007). All shareholders of a class or series have the same rights with respect to the election of directors because all shares of a class or series are equal. MODEL BUS. CORP. ACT § 6.01 ("Except to the extent varied as permitted by this section, all shares of a class or series must have terms, including preferences, rights and limitations, that are identical with those of other shares of the same class or series."). Generally, a corporation's constituent documents are silent regarding how directors will be nominated and do not limit valid nominations to those received from larger shareholders.

shareholders of a certain size without a compelling justification. No such justification exists with respect to proxy access because the benefits of proxy access for larger shareholders apply equally to all shareholders, and the detriments of proxy access argued by opponents are unfounded regardless of the size of shareholder for which proxy access is granted.

Proxy access for all shareholders would eliminate the need to determine the percentage of ownership a shareholder must possess to enjoy proxy access. The SEC's attempt to make this determination strengthens the power to choose directors for only a small percentage of shareholders.<sup>30</sup> Additionally, the distinction does not comport with the SEC's stated goal "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."<sup>31</sup> The proxy process cannot function as a replacement for a shareholder meeting if all but the largest shareholders are denied access. Corporations do not limit annual meeting attendance, participation, nomination procedures, etc. to larger shareholders.<sup>32</sup> A rational investor would not tolerate such a distinction.<sup>33</sup>

Proxy access for all shareholders would restore a principle of corporate law that has been unintentionally distorted by the proxy rules: shareholders as owners are vested with the power to choose directors to manage the corporation through a process of nomination and election.<sup>34</sup> State corporate law grants power to the shareholders to choose directors to

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<sup>30</sup> See Ian Salisbury, *Proxy-Access Change Could be Muted*, WALL ST. J., July 1, 2010 (explaining that the majority of large corporations do not have shareholders with a five percent stake, which was the upper ownership threshold of the original SEC proxy access proposal, and pension funds rarely achieve ownership near five percent, even when combined with other pension funds). See *infra* text accompanying note 86.

<sup>31</sup> Facilitating Shareholder Director Nominations (Proposed Rule) at 9; see also Facilitating Shareholder Director Nominations (Final Rule) at 9.

<sup>32</sup> Given that many SEC rules exist to ensure investors in a corporation's shares are treated equally, corporations resist distinguishing between holders of the same type of shares. See, e.g., 17 C.F.R. § 240.14d-10 (2010) (providing that in a tender offer the holders of the same type of shares must be treated equally, and the highest consideration paid to any one shareholder must be paid to all shareholders); 17 C.F.R. § 240.14d-11 (2010) (providing that in a tender offer the bidder must offer the same form and amount of consideration to shareholders in both the initial and subsequent offering period).

<sup>33</sup> Legislation of proxy access requires consideration of numerous potential stock ownership distinctions in addition to the question of minimum ownership. For example, should there be a minimum holding period to allow shareholders proxy access? Should directors elected via proxy access rules be required to own stock in the corporation? Should long-term shareholders with small holdings be treated the same as large shareholders? Should there be a limit on the number of nominees a shareholder can propose in the corporation's proxy statement? Should shareholders be permitted to use proxy access to effect a change of control? These considerations are of less importance than ownership distinctions because any limitations imposed would presumably apply to all shareholders as a procedural qualification, not as a substantive qualification that can only be satisfied by shareholders of a certain size. With respect to change-of-control issues, the SEC rightfully asserts 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 not be "funded out of corporate assets." Facilitating Shareholder Director Nominations (Proposed Rule) at 74-75; Facilitating Shareholder Director Nominations (Final Rule) at 139.

<sup>34</sup> See, e.g., MODEL BUS. CORP. ACT § 8.01(a) (2007) ("each corporation must have a board of directors"); *id.* § 8.03(c) ("Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter"); DEL. CODE ANN. tit. 8, § 211 (2009).

ensure proper management of the corporation.<sup>35</sup> This power to choose directors was effectively transferred from shareholders to a corporation's current management when Section 14(a) of the Exchange Act governing proxy solicitation was enacted without a mechanism to allow shareholders to include director nominees in the corporation's proxy statement.<sup>36</sup>

Section 14(a) of the Exchange Act was designed to ensure certain detailed information is provided to shareholders when soliciting their vote, not to impede shareholders' selection of directors.<sup>37</sup> Proxy access for all shareholders would remove what has become a barrier to the fundamental shareholder right to choose directors.<sup>38</sup> Given that general corporate law provides no distinction among shareholders based on the number of shares owned other than increased voting power, proxy access for all shareholders would ensure that every owner is able to nominate candidates for consideration by the shareholders.<sup>39</sup>

Proxy access for all shareholders would give shareholders a significant opportunity to influence board membership, which would bring more legitimacy to director elections. And, if directors are freely nominated and elected by the shareholders, then directors will be more empowered to ignore unhelpful shareholder proposals.<sup>40</sup> State corporate law provides

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<sup>35</sup> See Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2082 (2010).

<sup>36</sup> See Facilitating Shareholder Director Nominations (Proposed Rule) at 8 n.25 (citing H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 14 (1934)) for the idea that despite not foreseeing the likelihood of the proxy statement to wrest power from the shareholders, Congress wanted to prevent the frustration of the "free exercise of the voting rights of stockholders."

<sup>37</sup> EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES, § 15.15 (2005) (summarizing the purpose of the proxy rules).

<sup>38</sup> See *supra* text accompanying note 29. The power to choose directors includes both the power to nominate and the power to elect because one without the other would be ineffective. See Facilitating Shareholder Director Nominations (Final Rule) at 9-10.

<sup>39</sup> The SEC's new proxy access rule amends Exchange Act Rule 14a-8(i)(8) to enable shareholders to require corporations to include in the corporate proxy statement proposals to amend governing documents regarding nomination procedures or related disclosures that do not conflict with the new proxy access rule. Facilitating Shareholder Director Nominations (Final Rule) at 227. Similarly, such amendments could be permitted under a proxy-access-for-all-shareholders system if not in conflict with the notion that any shareholder should be permitted to nominate director candidates. One important goal of proxy access for all shareholders is to decrease the nominating power of current management relative to the shareholders. Because proxy access for all shareholders protects the fundamental right of shareholders to elect directors, there should be no mechanism by which shareholders could compel a corporation to opt out of proxy access requirements. See Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329, 352 (2010) (supporting an opt-out process with necessary safeguards); Facilitating Shareholder Director Nominations (Final Rule) at 17 ("Rights, including shareholder rights, are artifacts of law, and in the realm of corporate governance some rights cannot be bargained away but rather are imposed by statute").

<sup>40</sup> One such unhelpful shareholder proposal is say-on-pay, which requires that a corporation seek an advisory shareholder vote on compensation. Michael B. Dorff, *Confident Uncertainty, Excessive Compensation & the Obama Plan*, 85 IND. L.J. 491, 543-45 (2010). Opponents argue say-on-pay proposals are ineffective because shareholders vote against executive compensation programs for differing reasons, and there is no way for a board to discern which aspects of compensation are opposed by the shareholders or how to craft acceptable compensation. Kenneth R. Davis, *Taking Stock – Salary and Options Too: The Looting of Corporate America*, 69 MD. L. REV. 419, 423 (2010). Say-on-pay proposals generally come from shareholders, not directors, and received



that shareholders elect directors to manage a corporation because this is a more effective management system than vesting routine management in the shareholders themselves.<sup>41</sup> A corporation would be immobilized if decisions that are now made by the board of directors had to be made by the shareholders. But the current system of voting for directors is an exercise in inevitability in that the shareholders' choice is between the company-selected slate of directors and nobody.<sup>42</sup> Proxy access for all shareholders would create an open director nomination process resulting in directors with a mandate to manage the corporation and to combat inappropriate shareholder influence.<sup>43</sup>

Proxy access for all shareholders would cause directors to be more accountable to the shareholders, making a corporation more responsive to shareholder concerns.<sup>44</sup> Directors that do not have to compete for their board positions are being allowed to govern without an important incentive to further shareholder goals.<sup>45</sup> Proxy access for all shareholders would likely result in more director nominations by shareholders than will result under the new proxy access rule.<sup>46</sup>

As more shareholder-nominated directors win seats on boards, those directors are less likely than board-nominated directors to be seen as divisive.<sup>47</sup> Currently, proxy contests

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majority support at 22 corporations in 2009, which was twice as many as in 2008. RISKMETRICS GROUP, *A New Voice in Governance: Global Policymakers Shape the Road to Reform*, RISKMETRICS GROUP POSTSEASON REPORT, at 4 (Oct. 2009). If directors felt they were elected with a mandate following open and fierce nominations, they would have more power to ignore proposals such as advisory compensation votes. Unfortunately, such votes are now required by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

<sup>41</sup> Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 792 (2007). See *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N.H. 85 (N.H. 1880) (stating that the business of every corporation must be managed by the directors, not the shareholders); see also MODEL BUS. CORP. ACT § 8.01(b) (2007) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed by or under the direction of, its board of directors.").

<sup>42</sup> See Hayden & Bodie, *supra* note 35.

<sup>43</sup> See MARK A. SARGENT & DENNIS R. HONABACH, PROXY RULES HANDBOOK, §7.1 (2009) (explaining that some commentators argue that "overly intrusive shareholder access actually undercuts shareholder interests by lowering returns and forcing directors to adopt too short a time horizon for decision-making"). As the influence of proxy advisory firms such as RiskMetrics has grown, shareholder influence over the board of directors has also increased, and shareholders have sought to control executive compensation, disclosure of compensation, majority voting for directors, and removal of staggered boards. Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1006, 1036 (2010). At some point shareholder influence must give way to the trust that is implicit in a fiduciary relationship. For example, the board of directors sets its own compensation, which is a clear conflict of interest, but that does not mean fairness requires shareholder voting on specific levels of board compensation.

<sup>44</sup> For a recent example of this assertion, see *Facilitating Shareholder Director Nominations (Proposed Rule)* at 10 n.34 (citing Comment Letter from James McRitchie, Corporate Governance, SEC File No. S7-16-07 (Oct. 1, 2007); Comment Letter from Stephen Abrecht, Executive Director of SEIU Master Trust, SEC File No. S7-17-07 (Oct. 1, 2007)).

<sup>45</sup> See *Facilitating Shareholder Director Nominations (Proposed Rule)* at 11 n.36 (citing Comment Letter from William Apfel, et al., Walden Asset Management (Sept. 11, 2007)).

<sup>46</sup> Opponents of all forms of proxy access cite increased nominations as a likely negative effect of proxy access. See, e.g., Devin Leonard, *Bargains In the Boardroom?*, N.Y. TIMES, Apr. 4, 2010, at BU.

<sup>47</sup> See RISKMETRICS GROUP, *supra* note 40, at 10-11 (explaining that in the first three quarters of 2009, only 4 of 39 proxy contests were fought over board control, which suggests it is easier to persuade shareholders to vote for a few new directors rather than for an entirely new board).

are contentious, but if shareholder-nominated directors become more common, their presence on a board has less potential to be factious.<sup>48</sup>

Because proxy access for all shareholders will result in more nominations, shareholders will be less likely to engage in withhold campaigns.<sup>49</sup> Withhold campaigns are often supported by institutional or activist shareholders seeking to embarrass a board nominee in an uncontested election by encouraging other shareholders to withhold votes for the nominee.<sup>50</sup> In an uncontested election where directors are elected by a plurality, a withhold campaign cannot defeat a nominee because only one vote is required to ensure election.<sup>51</sup> A withhold campaign is considered successful if it results in a high percentage of votes withheld even though the director is still elected.<sup>52</sup> But if all shareholders had the benefit of proxy access, shareholders might feel pressure to directly effect corporate change by nominating their own candidate instead of attempting to indirectly effect change by encouraging a director to resign as a result of a successful withhold campaign.<sup>53</sup>

Finally, proxy access for all shareholders diminishes conflicting interests that exist between retail shareholders and institutional shareholders. For example, retail shareholders tend to hold smaller ownership stakes and may be more tolerant of risk-taking by a corporation than large institutional shareholders that are not as likely to be diversified across an industry.<sup>54</sup> All shareholders make investment decisions for a variety of reasons and seek representatives on the board of directors in their own best interests, which may be inapposite to other investors.<sup>55</sup> Proxy fights are waged by shareholders in pursuit of these

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<sup>48</sup> See *id.*

<sup>49</sup> See Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649, 660 (2009) (discussing the highly publicized withhold campaign against Disney CEO Michael Eisner in 2004); Kaja Whitehouse, *CEO Compensation Survey (A Special Report)--Stiffed Board: Shareholders Angry About Executive Pay Are Targeting the People Responsible: Directors*, WALL ST. J., Apr. 9, 2007, at R4 (discussing a withhold campaign against directors of Home Depot).

<sup>50</sup> Martin Lipton, *Shareholder Activism and the "Eclipse of the Public Corporation,"* Keynote Address at the 25th Annual Institute on Federal Securities (Feb. 7, 2007), available at <http://blogs.law.harvard.edu/corpgov/files/2007/02/20070210%20Lipton%20Address.pdf>.

<sup>51</sup> Even though more corporations are requiring majority voting to elect a member of the board of directors, many corporations only require a plurality, which effectively means that a withhold campaign against a specific director will fail to prevent the director from being elected. The success of a withhold campaign is therefore measured by how few votes the director actually received despite being elected. Elizabeth Amon, *Will Majority Rule Prevail in Electing Corporate Boards?*, CORP. COUNS. 73, (July 1, 2006), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005458428>.

<sup>52</sup> Robert S. Saunders, *Why Majority Voting in Director Elections Is a Bad Idea*, 1 VA. L. & BUS. REV. 107, 108 (2006).

<sup>53</sup> See John F. Olson, *Reflections on a Visit to Leo Strine's Peaceable Kingdom*, 33 J. CORP. L. 73, 77 (2007).

<sup>54</sup> Lee Harris, *Missing in Activism: Retail Investor Absence in Corporate Elections*, 2010 COLUM. BUS. L. REV. 104, 131-32 (2010).

<sup>55</sup> *Id.* at 130 (citing Iman Anabtawi, *Some Skepticism about Increasing Shareholder Power*, 53 UCLA L. REV. 561, 564-65 (2006)); see also Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 628-29 (2006).

interests, often with no regard for the governance goals of fellow shareholders.<sup>56</sup> Due to cost, retail shareholders are less likely to engage in a proxy fight to obtain representation on the board of directors, but proxy access for all shareholders would allow retail shareholders to increase their ability relative to institutional shareholders to solicit votes for representation.<sup>57</sup> Alternatively, the SEC's new rule that grants proxy access to only large shareholders confers more power on institutional shareholders in obtaining board representation at the expense of retail shareholders, a result that is counter to the SEC's stated goal of protecting all investors, irrespective of the size of their ownership interests.<sup>58</sup>

#### IV. ANCILLARY EFFECTS OF PROXY ACCESS FOR ALL SHAREHOLDERS

In addition to improving board accountability and aligning board and shareholder interests, proxy access for all shareholders may also have positive effects on how investors and policymakers conceive of ideal corporate management. For example, proxy access for all shareholders will help establish whether shareholders prefer board entrenchment, the idea that directors purposely adopt governance policies to thwart their removal from the board.<sup>59</sup> If proxy access for all shareholders emerges as the best way for shareholders to effect board turnover, and yet board turnover does not increase, this will suggest that shareholders are comfortable with board entrenchment. Proponents of proxy access argue that board entrenchment should be discouraged because it perverts the power of shareholders to elect directors.<sup>60</sup> Conversely, board entrenchment other than to avoid an acquisition may be neither bad nor good, but merely the result of shareholder voting. It may be that shareholders have a choice to support board entrenchment or to take steps to elect new directors.<sup>61</sup> Just because shareholders do not regularly replace current directors does not mean board turnover should be encouraged.<sup>62</sup>

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<sup>56</sup> See Comment Letter from a Bi-Partisan Group of Eighty Professors of Law, Business, Economics, or Finance in Favor of Facilitating Shareholder Director Nominations (Aug. 17, 2009), available at <http://www.sec.gov/comments/s7-10-09/s71009-282.pdf>.

<sup>57</sup> Harris, *supra* note 54, at 163-64.

<sup>58</sup> See U.S. Securities and Exchange Commission, The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, <http://www.sec.gov/about/whatwedo.shtml> (last visited Feb. 9, 2011). Under the heading "What we do" on the SEC's website, the Commission states that its mission is to "protect investors" and describes such investors as "first-time investors" who turn to the market to secure their futures, pay for homes, and send children to college, none of which descriptions apply to institutional investors.

<sup>59</sup> Marcel Kahan & Edward B. Rock, *Corporate Constitutionalism: Antitakeover Charter Provisions as Precommitment*, 152 U. PA. L. REV. 473, 492-96 (2003).

<sup>60</sup> Lucian A. Bebchuk, *Another View: Don't Gut Proxy Access*, N.Y. TIMES DEALBOOK (June 21, 2010), available at <http://dealbook.blogs.nytimes.com/2010/06/21/another-view-dont-gut-proxy-access/>.

<sup>61</sup> Sharon Hanes, *The Market for Takeover Defenses*, 101 NW. U. L. REV. 125, 147 (2007).

<sup>62</sup> See Brett H. McDonnell, *Professor Bainbridge and the Arrovian Moment: A Review of the New Corporate Governance in Theory and Practice*, 34 DEL. J. CORP. L. 139, 142-43 (2009) (discussing Stephen Bainbridge's director primacy theory).

Furthermore, proxy access for all shareholders will help establish whether shareholders want empowerment. If shareholders do not use their newfound power to nominate more directors, then arguably, shareholders do not need or want further voting empowerment.<sup>63</sup> Retail shareholders, for example, may not want more voting empowerment, as evidenced by the fact that they largely do not vote on shareholder proposals, including the election of directors.<sup>64</sup> Similarly, larger institutional shareholders may enjoy the power to effect corporate change by threatening to nominate candidates for the board, but may be less likely to actually follow through on an attempt to replace a director.<sup>65</sup>

## V. OPPOSITION TO PROXY ACCESS

Opponents of the new proxy access rule, including the U.S. Chamber of Commerce and the Business Roundtable, also undoubtedly oppose proxy access for all shareholders.<sup>66</sup> Opponents argue that allowing proxy access (1) will cost too much,<sup>67</sup> (2) will deter qualified individuals from serving as directors,<sup>68</sup> (3) will cause the election of unqualified or activist directors,<sup>69</sup> (4) is better left to the states,<sup>70</sup> and (5) will exceed the SEC's statutory power,<sup>71</sup> among other claims.<sup>72</sup>

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<sup>63</sup> See Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 395 (1983) (discussing rational shareholder apathy).

<sup>64</sup> Luis A. Aguilar, SEC Commissioner, Speech Regarding Increasing Accountability and Transparency (Feb. 6, 2009) (stating that following the implementation of e-proxy rules, "less than 5 percent of individual investors voted at meetings held by companies that used e-proxy in late 2007 and early 2008"), available at <http://www.sec.gov/news/speech/2009/spch020609laa.htm>.

<sup>65</sup> See Kahan & Rock, *supra* note 43, at 1006, 1036 (discussing how institutional funds effect change without removing directors). However, because proxy access is limited to shareholders with a high percentage ownership, the new rule could have no effect at all. See *supra* text accompanying note 30.

<sup>66</sup> See Stephen Davis & Jon Lukomnik, *Activists Flex Muscle, Get Proxy Access*, COMPLIANCE WEEK, July 13, 2010, <http://www.complianceweek.com/article/6025/activists-flex-muscle-get-proxy-access>.

<sup>67</sup> Comment Letter from Cravath, Swaine & Moore LLP, Davis Polk & Wardwell LLP, Latham & Watkins, LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, Sullivan & Cromwell LLP, and Wachtell, Lipton, Rosen & Katz, at 8 (Jan. 19, 2010), available at <http://www.sec.gov/comments/s7-10-09/s71009-619.pdf>.

<sup>68</sup> THE ALTMAN GROUP, PROXY ACCESS, A STUDY OF 500+ LETTERS SUBMITTED TO THE SEC ON "FACILITATING SHAREHOLDER DIRECTOR NOMINATIONS" (Nov. 30, 2009), available at <http://www.altmangroup.com/pdf/ProxyAccessAltmanGroupRpt.pdf>.

<sup>69</sup> Letter from the U.S. Chamber of Commerce to the members of the United States Senate, Multi-Industry Letter Regarding the So-Called "Corporate Governance" Provisions of the "Restoring American Financial Stability Act," (Apr. 13, 2010) available at <http://library.uschamber.com/issues/letters/2010/multi-industry-letter-regarding-so-called-corporate-governance-provisions-restor> (arguing that proxy access will "[u]nleash an onslaught of activists trying to manipulate the proxy process to force corporate decisions that adversely impact shareholders as a whole in order to further their parochial social or political agenda").

<sup>70</sup> See Stephen M. Bainbridge, *Gut Proxy Access*, PROFESSORBAINBRIDGE.COM: THE VOCATIONAL AND AVOCATIONAL JOURNAL OF A CORPORATE LAW PROFESSOR (June 21, 2010), <http://www.professorbainbridge.com/professorbainbridgecom/2010/06/gut-proxy-access.html>.

<sup>71</sup> See Stephen M. Bainbridge, *A Comment on the SEC Shareholder Access Proposal* (UCLA Sch. of Law, Law & Econ. Research Paper No. 03-22, 2003) (concluding that the SEC has the authority to adopt proxy access but corporate

Estimates of the cost of proxy access to a corporation are unreliable because most data regarding the expense of defending or engaging in a proxy contest measures cost in the context of a hostile acquisition where participants have an incentive to spend whatever is necessary to solicit votes.<sup>73</sup> Such proxy contests often include the cost of hiring a proxy solicitor. The cost to a corporation for simply including a nominee's name and qualifications description in proxy materials is significantly less than the cost of hiring a proxy solicitor to request votes on behalf of the individual nominated.<sup>74</sup> It essentially costs nothing for a corporation to include additional names on a proxy card, which could even be distributed electronically.<sup>75</sup>

Proxy access for all shareholders is unlikely to deter qualified individuals from serving on the board of directors. Qualified directors will continue to have the benefit of indemnification and insurance protections that a corporation provides, and compensation and prestige will continue to make directorships attractive at many corporations.<sup>76</sup>

The worry that activist shareholders will nominate unqualified directors is unwarranted, assuming other shareholders will not be so naïve as to elect unqualified directors.<sup>77</sup> Concerns that unqualified directors will be elected can be characterized as concerns that shareholders are potentially incompetent or irrational.<sup>78</sup> To ensure some level of competence, current management could suggest amendments to a corporation's bylaws to impose minimum qualifications for nominees.<sup>79</sup> And, even if a rogue director were to hijack a board, ill intentions would be tempered by fiduciary duties, statutory prohibitions, and the will of the other directors.

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implementation costs will outweigh the benefits), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=470121](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=470121). Whether the SEC has authority to implement proxy access is a legitimate practical concern that is of less importance in an essay about why proxy access for all shareholders is beneficial, not how it should be implemented, and of even less importance following the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which specifically grants authority to the SEC to pursue proxy access. *See supra* text accompanying note 2.

<sup>72</sup> For a complete list of all arguments discussed in comment letters to the SEC's most recent proposal, *see* THE ALTMAN GROUP, *supra* note 68, at Table 3.

<sup>73</sup> Lucian A. Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 *BUS. LAW.* 43, 45 (2003).

<sup>74</sup> *See* Fried, *supra* note 18.

<sup>75</sup> *See* 17 C.F.R. 240.14a-16 (2010). The SEC's e-proxy rules provide that a corporation that delivers notice of the availability of proxy materials to its shareholders does not need to deliver paper copies unless specifically requested by a shareholder.

<sup>76</sup> Carol J. Loomis, *Board Pay: Unchecked and Out of Hand*, *FORTUNE*, Jan. 15, 2010, *available at* [http://money.cnn.com/2010/01/04/news/companies/director\\_compensation.fortune/index.htm](http://money.cnn.com/2010/01/04/news/companies/director_compensation.fortune/index.htm) (reporting that the average annual compensation for a director at one of the 491 corporations selected by Fortune Magazine for review in 2008 was \$213,000).

<sup>77</sup> *See* Bi-Partisan Group of Eighty Professors, *supra* note 56.

<sup>78</sup> *See* Easterbrook & Fischel, *supra* note 63, at 397.

<sup>79</sup> *See, e.g.*, Andrew R. Brownstein & Igor Kirman, *Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 *BUS. LAW.* 23, 59 (2004).

Finally, proxy access for all shareholders will not impede the states' ability to continue to be a laboratory for limiting or expanding shareholder rights.<sup>80</sup> States' rights advocates should be championing a form of proxy access that would relieve states of federal restrictions that have been placed on the fundamental right to choose directors.<sup>81</sup> Opponents claim proxy access creates a right that does not exist.<sup>82</sup> On the contrary, proxy access for all shareholders removes impediments to the right to elect directors that exists in every state.<sup>83</sup> It is contradictory that states' rights advocates support a free market for investment but are opposed to a free market for director nominations.<sup>84</sup>

## VI. CONCLUSION

If the SEC's recent rule providing proxy access for large shareholders survives legal challenge, it will improve the power of large shareholders to hold the board accountable for oversight and management. After so many decades of proxy access debate, enactment of the new rule seems to have been inevitable given recent support for proxy access for large shareholders from the White House, the SEC, and certain key members of Congress.<sup>85</sup> However, the logic of how the new proxy access rule applies to different shareholders is inconsistent. If proxy access will benefit large shareholders, it would also benefit all shareholders regardless of size.<sup>86</sup>

In supporting the SEC commissioners' passing of the proxy access rule by a divided 3-2 vote on August 25, 2010, Chairwoman Schapiro stated that long-term significant shareholders deserve a means to nominate candidates to the boards of the corporations they own.<sup>87</sup> In recognition of the power of proxy access, she continued: "I have great faith in the collective wisdom of shareholders to determine which competing candidates will best fulfill

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<sup>80</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Delaware and North Dakota have amended their corporate codes to allow shareholders access to the corporate proxy statement under some circumstances, and the American Bar Association has adopted similar changes to the Model Business Corporation Act. See *Facilitating Shareholder Director Nominations (Proposed Rule)*, at 21 n.70 (citing DEL. CODE ANN. tit. 8, § 112 (2009) and N.D. Cent. Code § 10-35-08 (2009)).

<sup>81</sup> See *supra* text accompanying note 36.

<sup>82</sup> See Comment Letter from Corporate Secretaries and Governance Professionals, at 2 (Aug. 17, 2009), available at <http://www.sec.gov/comments/s7-10-09/s71009-472.pdf>.

<sup>83</sup> See *supra* text accompanying note 34.

<sup>84</sup> See, e.g., *The Federalist Society – Corporations Practice Group: Panel on the SEC and the Financial Services Crisis of 2008*, 28 REV. BANKING & FIN. L. 237, 257, 263 (2008).

<sup>85</sup> Victoria McGrane, *Group Targets Obama Adviser Jarrett on Proxy Access*, DOW JONES NEWSWIRES, June 18, 2010, available at <http://www.nasdaq.com/aspx/stock-market-news-story.aspx?storyid=201006171815dowjonesdjonline000786&title=group-targets-obama-adviser-jarrett-on-proxy-access>.

<sup>86</sup> Even large shareholders may not enjoy the benefits of proxy access at the largest U.S. corporations given the approximately \$3.5 billion investment needed to reach the 3% threshold at any of the 20 largest U.S. corporations by market cap. Stephen Grocer, *Proxy Access: The Biggest Businesses Get Their Way*, WALL ST. J., August 4, 2010, available at <http://blogs.wsj.com/deals/2010/08/04/proxy-access-the-biggest-businesses-get-their-way/>.

<sup>87</sup> Schapiro, *supra* note 10.

the responsibilities of serving as a director.”<sup>88</sup> Her statements summarize a guiding principle for proxy access: as owners, shareholders deserve the unencumbered right to nominate directors, and as significant as this power may be, it is moderated by the fact that no director competing for a position on the board can be elected without the collective support of the shareholders. All shareholders are owners of the corporation; all shareholders have the power to elect directors; and all shareholders deserve the means to nominate candidates to the boards of the corporations they own.

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<sup>88</sup> *Id.*