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I. INTRODUCTION

Although shareholder activism has progressed in recent years, the 2008 financial crisis confirms the need for further changes.[1] The legal structure underpinning contemporary American corporate governance has failed shareholders. "[T]here are still problems in exercising basic shareholder rights in many U.S. listed companies, because shareholders often have limited influence over the election of their board members" wrote the chief of the investment arm of Norway's central bank in a letter to S.E.C. Chairman Christopher Cox.[2]

Two prominent examples, Enron and Lehman Brothers, highlight the status quo's problems. The failure of Enron's board of directors to safeguard shareholders contributed to the company's collapse. In its 2002 report, the U.S. Senate Permanent Subcommittee on Investigations concluded that Enron's board allowed the company:

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1. *See* Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1784-85 (2006).

2. Comment Letter from Knut Kjer, CEO, Norges Bank Inv. Mgmt., et al., to Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n (Sept. 28, 2007), *available at* http://www.sec.gov/comments/s7-16-07/s71607-499.pdf (commenting on Shareholder Proposals in Release Nos. 34-56160 and 34-56161) [hereinafter Kjer Letter]; *see generally* Norges Bank, About NBIM *available at* http://www.norges-bank.no/templates/article____69632.aspx; *c.f.* Muhammad Cohen, *Campaign Outsider: Money Issue Needs a Champion*, ASIA TIMES, May 21, 2008, *available at* http://www.atimes.com/atimes/Global_Economy/JE21Dj09.html (arguing "in modern corporate practice, board of director electors are a sham, reminiscent of Soviet Union-style voting without a whiff of real democracy").

> [T]o engage in high risk accounting, inappropriate conflict of interest transactions, extensive undisclosed off-the-books activities, and excessive executive compensation. The board [also] witnessed numerous indications of questionable practices by Enron management over several years, but chose to ignore them to the detriment of Enron shareholders, employees and business associates.[3]

There was reason to be optimistic about governance changes in Enron's aftermath.[4] The current financial crisis, however, has revealed the extent to which corporate boards of directors continue to fail shareholders. Lehman Brothers' board of directors took a "leisurely approach to overseeing the risk decisions and standards" which led to the firm's September 2008 bankruptcy. Moreover, Lehman's board was "content with a governance structure that concentrated power effectively in the hands of the CEO" and "apparently [saw] no need for a change in its own governance, or that of top management either. It took a bet that its approach would work and it lost big time . . ."[5] These episodes illustrate the dangers of inattentive and enfeebled boards of directors.

A director owes a fiduciary duty to the company's shareholders to oversee corporate management.[6] Accordingly, shareholders should play the leading role in selecting a board charged with representing their interests. Shareholders elect the board of directors through a proxy card which allows investors to vote without actually attending the shareholder meeting.[7] In the rare situations where the current board members have not re-nominated themselves, the only nominees found on the proxy ballot are those chosen by the company's management.[8] If a shareholder wants to suggest a nominee for the board election, the shareholder must cover the expense of complying with complex SEC

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3. S. REP. NO. 107-70, at 3 (2002).

4. *See, e.g.*, Public Company Accounting Reform and Investor Protection (Sarbanes-Oxley) Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amendment in scattered sections of 15, 18 U.S.C.)

5. Finlay on Governance, *Question for Lehman Brothers Board: Why Are You Still There?* (June 10, 2008), http://www.finlayongovernance.com/?p=485. Members of the Board of Directors were paid fees ranging from $325,000 to $397,000. *Id.*

6. *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 679 (2007).

7. *See* Cohen, *supra* note 2.

8. *See id.*; *see also* Stephen Labaton, *S.E.C. to Propose Change in Election of Boards*, N.Y. Times, May 19, 2009, at B3 (stating that even with heavy opposition, the candidate normally wins).

regulations and mail separate ballots to shareholders.[9]

This process undermines shareholder democracy. In reality, the nomination process for the board of directors is controlled by management. The interests of a director who owes their position on the board to the corporation's executives are in conflict with the company's shareholders.[10] The situation is exacerbated when the company's chief executive officer is an influential board member or chairperson.[11] A nomination usually results in election since board elections are often uncontested.[12]

One prominent shareholder rights advocacy group, the American Federation of State, County & Municipal Employees (AFSCME), urged shareholders to press companies to adopt bylaws which would grant shareholders' board nominees direct access to the proxy ballot. Shareholders nominees would reach all of the company's shareholders without imposing on the shareholder the costs of a potentially expensive proxy battle.[13] AFSCME also challenged the interpretation of SEC Rule 14a-8(i)(8),[14] which states that a company may exclude a shareholder proposal in the company's proxy statement "[i]f the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election", in court.[15] The case, *American Federation of State, County & Municipal Employees v. American International Group* ("*AFSCME*"),[16] reached the Second Circuit Court of Appeals in 2006. The court held 14a-8(i)(8) did not preclude the adoption of AFSCME's proposed bylaws.[17]

As a result of *AFSCME*, the SEC attempted to clarify the interpretation of Rule 14a-8(i)(8) by proposing two alternative approaches to proxy access for shareholder nominations of directors in 2007.[18] The

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9. *See* Cohen, *supra* note 2.

10. *See id.*

11. *See id.*

12. *See id.*; *see also* Labaton, *supra* note 8.

13. Jeffrey N. Gordon, Symposium, *Proxy Contests in an Era of Increasing Shareholder Power Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 485 (2008).

14. *See id.*

15. 17 C.F.R. § 240.14a-8(i)(8) (2008).

16. *See* Am. Fed'n of State, County & Mun. Employees (AFSCME) v. Am. Int'l Group, Inc., 462 F.3d 121 (2d Cir. 2006).

17. *See infra* text accompanying n.35.

18. Shareholder Proposals, Exchange Act Release No. 56160, Investment

first was a procedure which allowed for qualified shareholders to access the company proxy material for nominating directors to the board through bylaw amendments.[19] The second procedure would close shareholder access to the company proxy material for nominating directors to the board through bylaw amendments.[20] In what some critics labeled a political move, the SEC voted to close proxy access for shareholder nominations of directors by adopting the Non-Access Proposal.[21] In May 2009, the SEC voted to propose rule amendments which "would provide shareholders with a meaningful ability to exercise their state law rights to nominate the directors of the companies that they own."[22] "If adopted, the proposal would open the door to the most significant change in decades to the role played by investors in governing publicly traded companies."[23]

Part II of this Article reviews the historical and recent interpretation of SEC Rule 14a-8(i)(8) and the Second Circuit Court of Appeals *AFSCME* decision. Part III evaluates the Access Proposal the SEC rejected in 2007. Part IV evaluates the 2007 SEC Non-Access Proposal, and the proposal's effect on shareholder rights. Part V discusses why neither of the SEC's 2007 adequately addresses the issue of shareholder rights, reviews the 2009 SEC proposal, and sets forth a workable solution.

Company Act Release No. 27914, 72 Fed. Reg. 43,466 (Aug. 3, 2007); Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,161, Investment Company Act Release No. 27914, 72 Fed. Reg. 43,488 (Aug. 3, 2007).

19. *See* Shareholder Proposals, 72 Fed. Reg. at 43,466.

20. *See* Shareholder Proposals Relating to the Election of Directors, 72 Fed. Reg. at 43,488.

21. *See* Ian Katz & Jesse Westbrook, *Bank of America, GM May Win SEC Vote on Board Picks (Update 2)*, BLOOMBERG.COM, Nov. 28, 2007, http://www.bloomberg.com/apps/news?pid=20601109&sid=aWBtkl5t47mY&refer=news.

22. Press Release, U.S. Sec. & Exch. Comm'n, SEC Votes to Propose Rule Amendments to Facilitate Rights of Shareholders to Nominate Directors (May 20, 2009), *available at* http://www.sec.gov/news/press/2009/2009-116.htm [hereinafter SEC Press Release].

23. Labaton, *supra* note 8.

II. SEC RULE 14A-8(I)(8)

Under the SEC's proxy rules for U.S. companies:

> If a shareholder seeking to submit a proposal meets certain eligibility and procedural requirements, the corporation is required to include the proposal in its proxy statement and identify the proposal in its form of proxy, unless the corporation can prove to the SEC that a given proposal may be excluded based on one of thirteen grounds enumerated in the regulations.[24]

"[T]he rule requires a company to include the text of a shareholder proposal in the proxy statement provided to shareholders by management and to give shareholders the opportunity to vote for the proposal on management's proxy card."[25] One of the thirteen grounds a company can use to exclude shareholder proposals concerning the election of directors under its Rule 14a-8(i)(8) is where the proposal "relates to *an election* for membership on the company's board of directors or analogous governing body."[26]

A. AFSCME v. AIG

AFSCME submitted a proposal ("Proposal") to include its board nominees in American International Group's (AIG) 2005 proxy statement.[27] The Proposal sought to amend the bylaws by requiring AIG to include in its proxy statement the name, along with certain disclosures and statements, of any person nominated for election to the board by a stockholder who beneficially owns 3% or more of AIG's outstanding stock.[28] In response, AIG filed a letter with SEC's Division of Corporate Finance (Division) stating the Proposal "relates to an election" and sought to exclude the Proposal from its proxy statement.[29] The

24. Am. Fed'n of State, County & Mun. Employees (AFSCME) v. Am. Int'l Group, Inc., 462 F.3d 121, 126 (2d Cir. 2006) (citing Rule 14a-8, 17 C.F.R. § 240.14a-8(i)(1)-(13) (2008)).

25. Brief of Harvard Law School Professors as Amici Curiae Supporting Appellants, AFSCME v. Am. Int'l Group, Inc., 462 F.3d 121 (2d Cir. 2006) (No. 05-2825).

26. *AFSCME*, 462 F.3d at 125 (emphasis added) (quoting Rule 14a-8(i)(8)).

27. *Id.* at 123.

28. *Id.* at 124.

29. Am. Fed'n of State, County & Mun. Employees (AFSCME) v. Am. Int'l Group, Inc., 462 F.3d 121, 124 (2d Cir. 2006).

Division, in a 'no-action' letter, stated that it would not recommend enforcement action against AIG for excluding the Proposal.[30] AFSCME then requested that the Commission itself review the Division's position.[31] The Commission resolved not to review the Division's no-action position under Rule 14a-8(i)(8).[32] AFSCME, dissatisfied with the Commission's decision, took the issue to federal district court. After the district court denied AFSCME's motion, AFSCME appealed to the Second Circuit Court of Appeals.[33]

The appellate court held that AIG could not rely on Rule 14a-8(i)(8) to exclude a shareholder proposal seeking to amend the company's bylaws to establish a procedure under which the company would be required to include shareholder nominees for director in the company's proxy materials at future meetings.[34] In a unanimous opinion written by Judge Richard C. Wesley, the Second Circuit held, referencing SEC Rule 14a-8(i)(8), "a shareholder proposal that seeks to amend the corporate bylaws to establish a procedure by which shareholder-nominated candidates may be included on the corporate ballot does not relate to an election within the meaning of the Rule and therefore cannot be excluded from corporate proxy materials under that regulation."[35] The holding was based on the Court's view of the initial interpretation of the SEC staff going back to 1976 when the present language of what is now Rule 14a-8(i)(8) was adopted.[36] That interpretation in the court's view limited the exclusion to shareholder proposals pertaining to a *specific* election contest and not to election procedures.[37]

The Court recognized that, commencing in 1990, the Division "began applying a different interpretation, although at first in an ad hoc and inconsistent manner."[38] The Court stated "[w]e believe that an

30. *Id. See also* Am. Int'l Group, Inc., SEC No-Action Letter, 2005 WL 372266 (Feb. 4, 2005).

31. Brief of Appellee-Respondent, AFSCME v. Am. Int'l Group, Inc., 462 F.3d 121 (2d Cir. 2006) (No. 05-2825).

32. *Id.*

33. *AFSCME*, 462 F.3d at 124 (referring to *AFSCME v. Am. Int'l Group, Inc.*, 361 F. Supp. 2d 344 (S.D.N.Y. 2005)).

34. Am. Fed'n of State, County & Mun. Employees (AFSCME) v. Am. Int'l Group, Inc., 462 F.3d 121, 123 (2d Cir. 2006).

35. *Id.*

36. *Id.* at 126-28.

37. *Id.*

38. *Id.* at 123.

agency's interpretation of an ambiguous regulation made at the time the regulation was implemented or revised should control unless that agency has offered sufficient reasons for its changed interpretation."[39] The Court concluded: "For the foregoing reasons, we reverse the judgment of the district court and remand the case for entry of judgment in favor AFSCME."[40]

"The effect of the *AFSCME* decision was to permit both the bylaw proposal and, had the bylaw been adopted, subsequent election contests conducted under it, to be included in the company's proxy materials, but without compliance with the disclosure requirements of Rule 14a-12 proxy solicitations."[41]

B. Historical Interpretation

When the SEC amended Rule 14a-8(i)(8) in 1976, the SEC stated that "with respect to corporate elections, Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature [i.e., 'corporate, political or other elections to office'], since other proxy rules, including Rule 14a-11, are applicable thereto."[42] After the 1976 amended Rule was adopted, the SEC stated it did not intend to "expand the scope of existing exclusions to cover proposals dealing with matters previously held not excludable by the Commission."[43]

The *AFSCME* Court interpreted the 1976 SEC statements to support the position that:

> [T]he election exclusion is limited to shareholder proposals used to oppose solicitations dealing with an identified board seat in an upcoming election and rejects the somewhat broader interpretation that the election exclusion applies to shareholder proposals that

39. *Id.*

40. Am. Fed'n of State, County & Mun. Employees (AFSCME) v. Am. Int'l Group, Inc., 462 F.3d 121, 131 (2d Cir. 2006).

41. Shareholder Proposals, Exchange Act Release No. 56160, Investment Company Act Release No. 27914, 72 Fed. Reg. 43,466, 43,469 (Aug. 3, 2007).

42. *AFSCME*, 462 F.3d at 126-27 (quoting Proposed Amendments to Rule 14a-8, 41 Fed. Reg. 29,982, 29,985 (proposed July 7, 1976) (codified at 17 C.F.R § 240.14a-8) (emphasis omitted)).

43. *Id.* at 127 (quoting Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52,994, 52,998 (Nov. 22, 1976) (codified at 17 C.F.R § 240.14a-8)).

> would institute procedures making such election contests more likely.[44]

In contrast, the SEC found its current interpretation of Rule 14a-8(i)(8) to be consistent with the 1976 statements.[45]

This is not the first time the SEC has addressed direct access to proxy statements.[46] In 1990, the Commission "not[ed] the difficulty experienced by shareholders in gaining a new voice in determining the composition of the board of directors" but still choose not to pursue a remedy for shareholder access.[47] A never adopted 2003 proposal sought to give shareholders with five percent ownership a voice in making director nominations.[48]

C. Recent Interpretation

The SEC, interpreting Rule 14a-8(i)(8), stated that:

> A proposal may be excluded pursuant to Rule 14a-8(i)(8) if it would result in an immediate election contest (e.g., by making a director nomination for a particular meeting) or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholder director nominees in the company's proxy materials for subsequent meetings.[49]

The SEC further stated that "a proposal would result in a contested election if it is a means either to campaign for or against a director nominee or to require a company to include shareholder-nominated candidates in the company's proxy materials."[50] AIG supported the

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44. *Id.* at 128.

45. *See Statement Concerning Bylaw Proposals to Establish Director Nomination Procedures: Testimony Before the S. Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. (Nov. 14, 2007) (statement of Christopher Cox, Chairman, Sec. & Exch. Comm'n) (transcript available at http://www.sec.gov/news/testimony/2007/ts111407cc.htm) [hereinafter Cox Statement].

46. *See* Gordon, *supra* note 13, at 483-84.

47. Cox Statement, *supra* note 45.

48. Gordon, *supra* note 13, at 481 (noting "the effect [of shareholder constrains] has been to rule out a low-cost mechanism for shareholder insurgent to reach fellow shareholders in a director election.").

49. Am. Fed'n of State, County & Mun. Employees (AFSCME) v. Am. Int'l Group, Inc., 462 F.3d 121, 127 (2d Cir. 2006).

50. *Id.* at 126.

SEC interpretation that the 1976 statements authorize the exclusion of proposals that would result in both an immediate election contest and election reform "being used for the purpose of electioneering or fostering election contests."[51]

The *AFSCME* Court, however, stated that the SEC began apply a different interpretation of Rule 14a-8(i)(8) in 1990.[52] In their Amicus Brief, several Harvard Law professors argued that "[t]here is no basis in the language of the Rule or otherwise for importing a requirement that a proposal not make a contested election more likely."[53] AFSCME argued the broad interpretation of the SEC to be inconsistent with "the legislative purposes of the proxy rules and shareholder proposals."[54]

III. ACCESS PROPOSAL

In the Access Proposal, Rule 14a-8 would be amended to require companies to include in their proxy materials shareholder proposals for bylaw amendment that would establish procedures for nominating candidates to the board of directors.[55] The Access Proposal initially seemed to be a success for the campaign for shareholder rights. Upon further review, some commentators observed "the regulatory approach taken in the Proposal [was] unnecessarily complex and in some aspects poorly aligned with shareholder interests."[56]

Under the Access Proposal:

> A proposal may be submitted by a shareholder (or group of shareholders) that is eligible to and has filed a Schedule 13G that includes specified public disclosures regarding its background and its

51. Brief of Appellee-Respondent, *supra* note 31, at 33. The SEC submitted an amicus brief supporting AIG's argument that shareholder proposals that "would result in contested elections" could be excluded. *AFSCME*, 462 F.3d at 126.

52. *AFSCME*, 462 F.3d at 123.

53. Brief of Harvard Law School Professors as Amici Curiae, *supra* note 25, at 5.

54. Brief of Appellant-Petitioner at 28-29, Am. Fed'n of State, County & Mun. Employees v. Am. Int'l Group, Inc., 462 F.3d 121 (2006) (No. 05-2825).

55. Shareholder Proposals, Exchange Act Release No. 56160, Investment Company Act Release No. 27914, 72 Fed. Reg. 43,466, 43,466 (Aug. 3, 2007).

56. Comment Letter from John C. Wilcox, Sr. Vice President, Head of Corporate Governance & Hye-Wo Choi, Vice President and Assoc. Gen. Counsel, Corporate Governance, Teachers Ins. and Annuity Ass'n of Am., to Nancy M. Morris, Secretary, SEC (Sept. 20, 2007), *available at* http://www.sec.gov/comments/s7-16-07/s71607-199.pdf (commenting on Shareholder Proposals in Release No. 34-56160 and 34-56161) [hereinafter Wilcox Letter].

> interactions with the company, that has continuously held more than 5% of the company's securities for at least one year, and that otherwise satisfies the procedural requirements of Rule 14a-8.[57]

A proposal could only be submitted by shareholders or groups of shareholders who held 5% of the company's voting stock.[58] Supporters state the 5% requirement is an eligibility requirement for filing a Schedule 13G which is a "well-understood system of disclosure [that] should reduce compliance costs for companies and shareholders."[59] The Access Proposal's critics objected to the 5% ownership requirement and stated that access provided was illusory.[60] The Council of Institutional Investors stated that its preliminary research "indicate[d] that even if the ten largest public pension funds were to aggregate their holdings of a single public company's securities, those funds combined would likely be unable to clear the five percent hurdle."[61] The 5% holding requirement alone would most likely result in "almost no shareholder proposals."[62]

Additionally, eligible 5% shares must be "continuously held for at least one year as of the date of submitting the proposal" for the purpose of "ensuring that proposals are made by shareholders with a significant long-term stake in the company."[63] Critics found the one year requirement unnecessary because "[t]he proposal already requires that shareholders proposing such a bylaw certify that they did not acquire or hold the stock for the purpose of effecting change or influencing control of the company."[64] Further, "any consolidation of holdings over a one-

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57. Shareholder Proposals, 72 Fed. Reg. at 43,470.

58. *Id.* at 43,472.

59. *Id.* at 43,469.

60. *See* Comment Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, to Nancy M. Morris, Secretary, U.S. Sec. & Exch. Comm'n, on Shareholder Proposals in Release Nos. 34-56160 and 34-56161 (Aug. 24, 2007), *available at* http://www.sec.gov/comments/s7-16-07/s71607-31.pdf (commenting on Shareholder Proposals in Release Nos. 34-56160 and 34-56161).

61. *Id.* at 3.

62. Kjer Letter, *supra* note 2.

63. Shareholder Proposals, Exchange Act Release No. 56160, Investment Company Act Release No. 27914, 72 Fed. Reg. 43,466, 43,472 (Aug. 3, 2007).

64. Comment Letter from Carl Levin, Member of Congress, to Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n (Sept. 27, 2007), *available at* http://www.sec.gov/comments/s7-16-07/s71607-329.pdf (commenting on Shareholder Proposals in Release Nos. 34-56160 and 34-56161) [hereinafter Levin Letter].

year horizon may constitute severe administrative and compliance difficulties for some investors who might under other circumstances be interested in sponsoring a proposal."[65]

The Access Proposal's disclosure requirements are extensive. In addition to the typical Schedule 13G disclosures, new disclosure rules would require shareholders to disclose "[t]he shareholder proponent's relationship with the company" and "[a]dditional relevant background information."[66] The relationship between the shareholder proponent and the company would require disclosure by the shareholder of direct and indirect communication with the company, description of any action sought in those communications, to whom the communications were made, whether there was reference to a possible proposal in the communications, and the company's response.[67]

The Access Proposal would also require shareholders to disclose their relationship with the company including employment, collective bargaining or consulting arrangements; any pending or threatened litigation with the company; and any other material relationship between the company and shareholder proponent.[68] The Access Proposal's supporters argue that these additional disclosures are useful for company shareholders when voting for or against a proposal.[69]

Critics argued the disclosure requirements "go far beyond anything shareholders would find useful in voting on a proxy access proposal" and in some respects exceed the "disclosure require[ments] of nominating shareholders in a proxy contest or of shareholders . . . [who] indicate that they intend to engage in actives that may result in a change of control of the company."[70] SEC Commissioner Annette L. Nazareth stated, "[t]he disclosure would have been more burdensome than in the takeover context."[71] Critics concluded that the additional disclosure

65. Kjer Letter, *supra* note 2.

66. Shareholder Proposals, 72 Fed. Reg. at 43,471.

67. *See id.* at 43,472-73.

68. *See id.* at 43,472.

69. *See id.* at 43,471.

70. Comment Letter from Gerald W. McEntee, International President, Am. Fed'n of State, County and Mun. Employees, AFL-CIO, to Nancy M. Morris, Secretary, U.S. Sec. & Exch. Comm'n, on Shareholder Proposals in Release Nos. 34-56160 and 34-56161 (Sept. 28, 2007), *available at* http://www.sec.gov/comments/s7-17-07/s71707-65.pdf [hereinafter McEntee Letter].

71. Annette L. Nazareth, Comm'r, U.S. Sec. & Exch. Comm'n, Shareholder Proposals Relating to the Election of Directors, Speech Before the U.S. Sec. & Exch. Comm'n (Nov. 28, 2007) (transcript available at http://www.sec.gov/news/speech/2007/

requirements are unwarranted and would interfere with the dialogue between shareholder proponents and companies.[72]

Some critics argue the need for shareholder access to the proxy statement has been replaced by electronic shareholder forums.[73] Others counter that electronic forums act as "an enhancement to rather than a replacement for more formal channels of communication between shareholders and companies."[74] Critics claim the expansion of shareholder access would result in "diminish[ed] rights of other stockholders, who are entitled to the assurance that company funds and management time and focus are employed . . . in the best interest of all stockholders."[75] One stockholder, as opposed to the board of directors, does not have a fiduciary duty to act in the best interests of all stockholders.[76]

IV. NON-ACCESS PROPOSAL

In the Non-Access Proposal, the SEC proposed to clarify Rule 14a-8 consistent with its interpretations that any proposal which could result in an election contest may be excluded from a company's proxy material.[77] The exclusion in Rule 14a-8(i)(8) would be revised to read: "If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election."[78] The Non-Access Proposal further clarified that "procedure" referenced any "procedures that would result in a contested election, either in the year in which the proposal is

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spch112807aln.htm) [hereinafter Nazareth Speech].

72. *See* McEntee Letter, *supra* note 70.

73. *See, e.g.*, Gordon, *supra* note 13, at 487.

74. Comment Letter from Michelle Edkins, Acting Chairman, ICGN S'holder Rights Comm., to Nancy M. Morris, Secretary, U.S. Sec. & Exch. Comm'n, on Shareholder Proposals in Release Nos. 34-56160 and 34-56161 (Oct. 2, 2007), *available at* http://www.sec.gov/comments/s7-16-07/s71607-462.pdf [hereinafter Edkins Letter].

75. Comment Letter from Keith F. Higgins, Committee Chair, Comm. on Fed. Reg. of Sec. of A.B.A., Sec. of Bus. L., to Nancy M. Morris, Secretary, U.S. Sec. & Exch. Comm'n, on Shareholder Proposals in Release Nos. 34-56160 and 34-56161 (Oct. 2, 2007), *available at* http://www.sec.gov/comments/s7-17-07/s71707-126.pdf [hereinafter Higgins Letter].

76. *See id.*

77. *See* Shareholder Proposals, Exchange Act Release No. 56160, Investment Company Act Release No. 27914, 72 Fed. Reg. 43,466, 43,468 (Aug. 3, 2007).

78. *Id.* at 43,487.

submitted or in subsequent years . . ."[79]

The Non-Access Proposal was a direct response to the Second Circuit's decision in *AFSCME*. The *AFSCME* Court stated that " . . . if the SEC determines that the interpretation of the election exclusion embodied in its 1976 Statement would result in a decrease in necessary disclosures or any other undesirable outcome, it can certainly change its interpretation of the election exclusion, provided that it explains its reasons for doing so."[80] The SEC stated the Non-Access Proposal was a means "to eliminate any uncertainty and confusion" and to ensure the proper functioning of the election exclusion.[81]

The Non-Access Proposal's supporters claim that the Commission should continue its long-standing interpretation of Rule 14a-8(i)(8).[82] A new interpretation such as the Access Proposal is not timely or needed.[83] Many supporters believe "that company proxy statements are not the appropriate medium for shareholders to nominate directors."[84] The fear is that allowing access would "increase the costs of director elections and shift the cost of proposing nominees . . . to all shareholders."[85]

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79. Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,161, Investment Company Act Release No. 27914, 72 Fed. Reg. 43,488, 43,492 (Aug. 3, 2007).

80. Am. Fed'n of State, County & Mun. Employees (AFSCME) v. Am. Int'l Group, Inc., 462 F.3d 121, 130 (2d Cir. 2006).

81. Shareholder Proposals Relating to the Election of Directors, 72 Fed. Reg. at 43,491.

82. *See* Higgins Letter, *supra* note 75. The Comment Letter from Keith F. Higgins recommended the following as the amended text for Rule 14a-8(i)(8):

> If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body, including, without limitation, (i) by opposing the nomination for election, the election as a director, or service for his or her full term of a current director or board nominee for election, (ii) by directly or indirectly resulting in the ineligibility of any such person for such nomination, election or service or (iii) by otherwise creating or establishing procedures or practices that in the current or subsequent years apply to or may result in a contested election of directors.

Id.

83. *See id.* Supporters further state, current changes such as the use of the Internet have provided shareholders with adequate means to conduct cost-effective director nominations. *See also* Comment Letter from Anne M. Mulchy, Chairman & CEO, Xerox Corp., and Chairman, Bus. Roundtable Corporate Governance Task Force, to Nancy M. Morris, Secretary, U.S. Sec. & Exch. Comm'n (Oct. 1, 2007), *available at* http://www.sec.gov/comments/s7-17-07/s71707-77.pdf (commenting on Shareholder Proposals in Release Nos. 34-56160 and 34-56161) [hereinafter Mulchy Letter].

84. Mulchy Letter, *supra* note 83.

85. *Id. See also* McEntee Letter, *supra* note 70. After the *AFSCME* ruling,

Further, critics believe that allowing shareholder nominees on company proxy materials would result in a *per se* contested election.[86]

One criticism of the Non-Access Proposal is that it would "sometimes prevent the exercise of fundamental state law rights."[87] Under state law, shareholders are granted the power to amend bylaws.[88] "Given the key role of director elections under state law, it makes no sense to treat proposals regarding shareholder access to the company proxy statement for the purpose of nominating director candidates differently from other kinds of proposals."[89] The result would be to "nullify the existing right of investors to adopt director election procedures through shareowner proposals."[90]

While some critics of the Non-Access Proposal question the need to fully deny shareholders proxy access in the electoral process,[91] others found it "would severely limit the ability of shareholders to influence the composition of the board of directors and would . . . be a retrograde step at a time when there is increasing demand from shareholders for director accountability."[92] Some critics worried that the Non-Access Proposal's adoption would lead to a competitive disadvantage and "would only reinforce the growing belief amongst global investors that the US regulatory environment favors company insiders at the expense of outside

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AFSCME received three proxy access proposals only one of which received majority support. *Id.* The other two proposals received 45% and 43% of shares voted. *Id.*

86. *See* Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,161, Investment Company Act Release No. 27914, 72 Fed. Reg. 43,488, 43,491 (Aug. 3, 2007).

87. Nazareth Speech, *supra* note 71.

88. *See* Comment Letter from Lucian Bebchuk, Professor, Harvard Law School, et al., to Nancy M. Morris, Secretary, U.S. Sec. & Exch. Comm'n, (Oct. 2, 2007), *available at* http://www.sec.gov/comments/s7-17-07/s71707-119.pdf (thirty-nine professors commenting on Shareholder Proposals in Release Nos. 34-56160 and 34-56161) [hereinafter Bebchuk Letter].

89. McEntee Letter, *supra* note 70.

90. Comment Letter from Peter H. Mixon, General Counsel, California Pub. Employee Ret. Sys., to Nancy M. Morris, Secretary, U.S. Sec. & Exch. Comm'n (Sept. 27, 2007), *available at* http://www.sec.gov/comments/s7-17-07/s71707-38.pdf (commenting on Shareholder Proposals in Release No. 34-56161).

91. *See* Levin Letter, *supra* note 64.

92. Edkins Letter, *supra* note 74. The letter further stated that "[t]he right of shareholders to remove directors, who are after all their agents or fiduciaries, exists in most markets outside the US." *Id.* While available, the right is rarely used, there is no evidence the right has been abused. *Id.*

shareholders."[93]

V. WORKABLE SOLUTION

Ultimately, the Commission adopted the Non-Access Proposal[94] despite the opposition by the vast majority of Comment Letters written to the SEC.[95] In response, former S.E.C. Chairman Arthur Levitt stated:

> It's a sad day when the S.E.C., the investor's advocate, chooses to gag the voices of those they are charged to protect. Not only do shareholders deserve a say in who runs the companies they own, but free and fair markets depend on this oversight. Fortunately I believe that it is only a matter of time before investors are given the shareholder access they deserve.[96]

"[B]oth [Access and Non-Access] proposals would produce unnecessary and undesirable impediments to shareholders' exercise of their right under state law to initiate bylaw amendments concerning shareholder nomination of directors."[97] The corporate law of many other common-law countries allows shareholders "the right to place director candidates on the corporate ballot."[98] The current proposal's less restrictive approach is certainly more desirable than completely closing shareholder access to the company proxy.

Under the 2009 proposed rule, the new Exchange Act Rule 14a-11 would allow qualified shareholders to include a director nominee in company proxy material unless prohibited by the company's charter/bylaws or by state law.[99] The proposal provides graded share-

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93. Comment Letter from Michael O'Sullivan, President, Australian Council of Super-Investors, et al., to Nancy M. Morris, Secretary, U.S. Sec. & Exch. Comm'n (Oct. 2, 2007), *available at* http://www.sec.gov/comments/s7-16-07/s71607-445.pdf (commenting on Shareholder Proposals in Release Nos. 34-56160 and 34-56161) [hereinafter O'Sullivan Letter].

94. *See generally* 17 C.F.R. § 240.14a-8 (2008).

95. *See* Nazareth Speech, *supra* note 71. Over 34,000 comment letters were received in response to the Access Proposal and over 8,000 letters were received in response to the Non-Access Proposal. *Id.*

96. Gretchen Morgenson, *S.E.C. Sends Investors to the Children's Table*, N.Y. TIMES, Dec. 2, 2007, at § 3.

97. Bebchuk Letter, *supra* note 88.

98. Lucian A. Bebchuk, *Shareholder Rights and the DGCL*, 26 DEL. LAWYER 16, 16 (Spring 2008).

99. *See* Facilitating Shareholder Director Nominations, Exchange Act Release Nos. 33-9046; 34-60089, 74 Fed. Reg. 29,024, 29,031 (June 18, 2009).

holder eligibility thresholds depending on the size of the company.[100] To meet thresholds, shareholders would be allowed to aggregate holdings.[101] Shareholders would have a one year holding requirement and would be required to represent their intent of continued ownership of their shares through the date of the annual meeting at which directors are elected.[102] Additionally, shareholders must attest to their intentions; the rule is not intended to facilitate shareholder seeking control of the company or the board.[103] The nominating shareholder would submit to the company and file with the SEC a new Schedule 14N.[104] The company proxy materials would include disclosure concerning the nominating shareholder.[105]

The proposed graded threshold requirements are refreshing when compared to the Access Proposal's flat 5% ownership requirement. The one year requirement is too restrictive especially considering the proposal already requires nominating shareholders to certify they are "not seeking to change the control of the company."[106] As of now, the current proposal's disclosure requirements are unavailable for comparison to the Access Proposal's excessive and burdensome disclosure requirements.

VI. CONCLUSION

While some companies found allowing shareholder access to proxy statements threatening,[107] supporters argued that Rule 14a-8's purpose is

100. *See id.* at 29,035 (For large accelerated filers (worldwide market value of $700 million or more), the shareholder must own at least 1 percent of the voting security. For accelerated filers (worldwide market value between $75 million and 700 million), the shareholder must own at least 3 percent of the voting security. For non-accelerated filers (worldwide market value less than $75 million), the shareholder must own at least 5 percent of the voting security.).

101. *See id.*

102. *See id.*

103. Facilitating Shareholder Director Nominations, 74 Fed. Reg. at 29,037.

104. *See id.* at 29,037. The new Schedule 14N would require shareholder disclosure of "the amount and percentage of securities owned by the nominating shareholder or group, the length of ownership of such securities, and the nominating shareholder's or groups intent to continue to hold the securities through the date of the meeting . . . ." *Id.* at 29,038.

105. *See id.* at 29,037-38.

106. *Id.*

107. *Shareholder Rights and Wrongs*, ECONOMIST, Dec. 1, 2007, at 80 ("The bosses

"not to force change on a company, but to get the attention of its board and senior management, promote dialogue and, when appropriate, conduct a shareholder referendum on issues of concern."[108] Furthermore, in a comment letter, the House Committee on Financial Services stated:

> As a general matter, we are in favor of facilitating greater proxy access for shareholders, but we appreciate concerns that director nominations on a company's proxy not be used to achieve a change of control of a company. We do not believe, however, that this concern should be used as an excuse for companies that fear shareholder participation to avoid any proposals and the resulting discussions of appropriate mechanisms for access to the proxy by longer-term shareholders on key corporate governance issues. Neither should such concerns be used to justify restriction or elimination of the ability of shareholders to include non-binding proposals on a company's proxy.[109]

Similarly, Senator Carl Levin expressed the need to address "inattentive and compliant boards of directors that fail to protect shareholder interests and too often place the interests of corporate management ahead of the interests of the corporation's owners."[110] This is especially troublesome because "the US legal and regulatory systems are built on the presumption that directors effectively protect the interest of shareholders."[111]

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insist they are actually lobbying to protect the interests of shareholders as a whole against minority shareholder activists, especially hedge funds, unions and campaigning, single-issue investors. This is nonsense.").

108. Wilcox Letter, *supra* note 56 (A group of Harvard Law School professors argued "allowing companies to exclude the considered bylaw amendment and other similar bylaw amendments would greatly undermine the Rule's policy goals and would adversely affect our corporate governance system."); Comment Letter from Lucian Bebchuk, Professor, Harvard Law School, et al., to Brian G. Cartwright, General Counsel, U.S. Sec. & Exch. Comm'n (Feb. 2, 2006), *available at* http://www.law.harvard.edu/faculty/bebchuk/Policy/48LawProfs_SEC.pdf (forty-eight law professors commenting on interpretation of SEC Rule 14a-8).

109. Comment Letter from Barney Frank, Member of Congress, et al., to Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n (Oct. 12, 2007), *available at* http://www.sec.gov/comments/s7-16-07/s71607-636.pdf (commenting on Shareholder Proposals in Release Nos. 34-56160 and 34-56161).

110. Levin Letter, *supra* note 64, at 1 ("The intractable problem of excessive pay unrelated to corporate performance - pay which is the sole responsibility of boards of directors to establish and review - provides still more proof of the need to create new incentives for meaningful boardroom oversight of management actions.").

111. O'Sullivan Letter, *supra* note 93.

The 2008 financial crisis only strengthens the argument for shareholder democracy. "Shareholders have long pressed for a greater role in nominating directors, reasoning that a director nominated by investors would analyze issues with investor concerns in mind, would represent those concerns in boardroom discussions, and would help remind other board members that their paramount duty is to company shareholders, not management."[112] Providing shareholders a greater influence in the board's composition would help in creating a functioning system of checks and balances.[113]

The results of the 2009 proposed rule amendments remain to be seen. SEC Chairman Mary Schapiro stated "[t]his proposal represents nearly seven years of debate about whether the federal proxy rules should support - or stand in the way of - shareholders exercising their fundamental right to nominate directors."[114]

112. Levin Letter, *supra* note 64.

113. *See* Kjer Letter, *supra* note 2.

114. SEC Press Release, *supra* note 22.