Concurrent Session: SEC Legal Issues

Thursday, March 23rd
9:45am – 11am
La Quinta Resort & Club, La Quinta, California

Moderator:
Scott Fenster, SVP-Legal, Equity Residential

Panelists:
Michael Hermsen, Partner, Mayer Brown LLP
Carrie Ratliff, Partner, King & Spalding LLP
David Slotkin, Partner, Morrison & Foerster LLP

United States

Summary Proxy Voting Guidelines

2017 Benchmark Policy Recommendations

Effective for Meetings on or after February 1, 2017

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3. SHAREHOLDER RIGHTS & DEFENSES

Advance Notice Requirements for Shareholder Proposals/Nominations

General Recommendation: Vote case-by-case on advance notice proposals, giving support to those proposals which allow shareholders to submit proposals/nominations as close to the meeting date as reasonably possible and within the broadest window possible, recognizing the need to allow sufficient notice for company, regulatory, and shareholder review.

To be reasonable, the company's deadline for shareholder notice of a proposal/nominations must not be more than 60 days prior to the meeting, with a submittal window of at least 30 days prior to the deadline. The submittal window is the period under which a shareholder must file his proposal/nominations prior to the deadline.

In general, support additional efforts by companies to ensure full disclosure in regard to a proponent's economic and voting position in the company so long as the informational requirements are reasonable and aimed at providing shareholders with the necessary information to review such proposals.

Amend Bylaws without Shareholder Consent

General Recommendation: Vote against proposals giving the board exclusive authority to amend the bylaws.

Vote for proposals giving the board the ability to amend the bylaws in addition to shareholders.

Control Share Acquisition Provisions

Control share acquisition statutes function by denying shares their voting rights when they contribute to ownership in excess of certain thresholds. Voting rights for those shares exceeding ownership limits may only be restored by approval of either a majority or supermajority of disinterested shares. Thus, control share acquisition statutes effectively require a hostile bidder to put its offer to a shareholder vote or risk voting disenfranchisement if the bidder continues buying up a large block of shares.

General Recommendation: Vote for proposals to opt out of control share acquisition statutes unless doing so would enable the completion of a takeover that would be detrimental to shareholders.

Vote against proposals to amend the charter to include control share acquisition provisions.

Vote for proposals to restore voting rights to the control shares.

Control Share Cash-Out Provisions

Control share cash-out statutes give dissident shareholders the right to "cash-out" of their position in a company at the expense of the shareholder who has taken a control position. In other words, when an investor crosses a preset threshold level, remaining shareholders are given the right to sell their shares to the acquirer, who must buy them at the highest acquiring price.

General Recommendation: Vote for proposals to opt out of control share cash-out statutes.

Disgorgement Provisions

U.S. Proxy Voting Policies and Procedures

(Excluding Compensation-Related)

Frequently Asked Questions

Updated: February 24, 2017

New/updated questions highlighted in yellow

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U.S. RESEARCH PROCEDURES QUESTIONS

1. When are proxy analyses issued?

U.S. proxy analyses are generally issued 13-25 calendar days before the shareholder meeting. The timing will depend on: the volume of meetings requiring coverage (e.g., at the height of U.S. proxy season in April through June, delivery is closer to 13 days); complexity of the proxy and agenda items; contentiousness of the issues; engagement required; and how close to the meeting the proxy materials were issued. Proxy contest or contested merger analyses are often issued closer to the meeting than these general guidelines.

2. How can a company get a copy of its proxy analysis?

All companies can access ISS' proxy analyses on their company *without charge* through Governance Analytics: https://login.isscorporatesolutions.com/galp/login. Governance Analytics is a web-based platform hosted by ISS Corporate Solutions (ICS)[1]. This is the best way to ensure timely receipt of the analysis, as an email notification is sent to the company's registered user(s) once a new proxy analysis on the company is published by ISS.

To obtain a login and password to Governance Analytics, please email a request to ICS Corporate Support team at contactus@isscorporatesolutions.com. Requests for logins or login assistance will typically be responded to within one business day. In addition to the free access to the company's proxy analysis (including historical reports), the login to Governance Analytics provides the company with access to view and verify the governance data collected for ISS' QualityScore governance rating on the company, and provides the company with the ability to verify the data ISS uses when analyzing an equity plan on the company's ballot prior to publication of the analysis- through the Equity Plan Data Verification feature.

These reports are provided to issuers as a courtesy, subject to the following conditions: (i) the reports are only for the company's internal use by employees of the company, and (ii) the company is expressly prohibited from sharing the reports, profiles or login credentials with any external parties (including but not limited to any external advisors retained by the company such as a law firm, proxy solicitor or compensation consultant). Please note that this restriction on sharing of published reports with outside advisors does not apply to draft reports being reviewed by the company; the restrictions on sharing of drafts are detailed in the letter accompanying the draft (see below for more information on the draft review process).

3. Can a company send the ISS proxy analysis to its shareholders or other parties?

No. The information contained in any ISS Proxy Analysis or Proxy Alert may not be republished, broadcast, or redistributed without the prior written consent of ISS.

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[1] ICS is a wholly owned subsidiary of Institutional Shareholder Services Inc. (ISS). ICS provides advisory services, analytical tools and information to companies to enable them to improve shareholder value and reduce risk through the adoption of improved corporate governance and executive compensation practices. The ISS Global Research Department, which is separate from ICS, will not give preferential treatment to, and is under no obligation to support, any proxy proposal of a company (whether or not that company has purchased products or services from ICS). No statement from an employee of ICS should be construed as a guarantee that ISS will recommend that its clients vote in favor of any particular proxy proposal.

4. What happens if the proxy analysis contains a factual error?

ISS strives to be as accurate as possible in our research and publications. Please check our Policy Guidelines and the FAQs concerning the issue; it generally is a matter of policy application rather than an error. If you do believe a report contains an error, please notify us as soon as possible at the Research Helpdesk (globalresearch@issgovernance.com). If we agree that there is a material change required, we issue a "Proxy Alert" to our clients.

5. How and when will ISS change a vote recommendation in a proxy alert?

ISS cannot and will not disclose or guarantee a vote recommendation, or a change of vote recommendation, in advance.

ISS does not proactively contact issuers seeking remediation of problematic governance practices; the onus is on issuers to take action in the best interests of their shareholders. If the company chooses to make changes or provide additional information to shareholders, for ISS to be able to respond, the information must be publicly disclosed: either in a filing with the SEC, or, if the company is not an SEC filer, in a press release. Email the link to the new information to Globalresearch@issgovernance.com. ISS will determine if new or materially changed publicly available information warrants an update to our analysis consistent with our policy. If the information is determined to be material, ISS will issue a proxy alert.

To ensure that all our institutional clients are able to review a change in our vote recommendation and act upon this information if they so choose, we generally will not issue a change to a vote recommendation closer than **5** business days to the meeting. This means that if a company is filing additional information with the SEC (or issuing a press release for non-SEC filers), ISS must be informed of this filing at least **5** business days before the meeting. For example, for a Thursday meeting, we will need to know of the filing no closer to the meeting than 5 p.m. Eastern the Thursday before (assuming no national holiday during that week). Any new information received closer than 5 business days before the meeting will be discussed in an informational alert if it is deemed to be material to the analysis even if there is no change to ISS' voting recommendations. Only under highly extraordinary circumstances will ISS issue an alert to change a vote recommendation closer than 5 business days before the meeting.

Proxy alerts are used to communicate corrections, updates, adjournments, and vote recommendation changes to our clients. A proxy alert is structured as an overlay on the original analysis; the first few pages show the updated information and any related vote recommendation change, but the original analysis lies underneath, and will continue to reflect the original information. This allows our clients to see the original report and the changes in one document. Any subsequent alerts will be layered on top of the previous alert(s). Proxy alerts are distributed to our institutional investor clients the same way our regular proxy analyses are distributed – through our ProxyExchange platform. The clients who received the original analysis will automatically receive any subsequent proxy alerts issued for that company.

Engagement with U.S. Research

Please see the Engagement Section of our website for more details.

6. Can a company discuss its proxy, once filed, with the analyst?

For non-contentious situations, it is the analysts' discretion whether engagement with the company is necessary or appropriate, and they generally only do so to clarify points on which they have questions. Further, ISS analyses are based only on publicly disclosed information, so all the information needed for shareholders and analysts to make their decisions should be in the proxy.

Providing the Research Helpdesk with company contact information is very useful, so that, if the analysts have questions, they can quickly contact the company.

If there are particular points you want to be sure the analysts are aware of (for example, information relevant to an equity compensation plan that may be in a footnote, or corporate governance changes the company has undertaken), please send an email to the Research Helpdesk (GlobalResearch@issgovernance.com) with the points outlined and the proxy page or other source noted – it will be put in the appropriate meeting folder so the analysts can review it when they are ready to do so.

Any information presented as factual must be public, in the proxy statement or other filing, in order to be included in our research reports. To maintain the integrity of our firewall, the Research Helpdesk staff will remove all references to the purchase of ISS Corporate Solutions' (ICS) products and services before forwarding emails to the Research analysts. If the references cannot be removed, the information will not be given to the analysts.

Drafts of Proxy Analyses

7. Can a company review the ISS analysis prior to publication?

In the United States, only companies in the S&P 500 index who signed up will receive a draft report for fact-checking, as these are the companies most widely held by our institutional clients. Furthermore, within this group, ISS does not normally allow preliminary reviews of any analysis relating to any special meeting or any meeting where the agenda includes a merger or acquisition proposal, proxy fight, or any item that ISS considers to be of a controversial nature, such as a "vote no" campaign. Detailed information on the U.S. draft process and sign-up is at http://www.issgovernance.com/iss-draft-review-process-u-s-issuers/.

Similarly, Canadian companies in the S&P/TSX Composite who signed up can review a draft of the analysis; the site information and registration is http://www.issgovernance.com/iss-draft-review-process-canadian-issuers/.

All U.S. companies with an equity plan as an agenda item on their proxy can review the data used in the ISS analysis of the plan. Details on Equity Plan Data Verification (EPDV) are available on our website: http://www.issgovernance.com/equity-plan-data-verification. Companies can also verify and update QuickScore information at all times, except for the period of time between the filing of the proxy and the release of ISS' proxy analysis. http://www.issgovernance.com/governance-solutions/investment-tools-data/quickscore/.

ISS US PROXY VOTING GUIDELINES QUESTIONS

8. Whom should I contact with questions on U.S. policies?

Please contact the Research Helpdesk: Globalresearch@issgovernance.com, 301-556-0576, with your questions. Email is preferable, in case the questions need to be referred to ISS analysts.

9. What can ISS tell us and not tell us about policies?

ISS will try to clarify policy questions as much as possible. We cannot answer questions about hypothetical scenarios, and we cannot give definitive answers on how we will recommend on proxy items before we analyze all relevant facts and circumstances as presented in the proxy. If it is a question we cannot answer, we will let you know.

SPECIFIC ISS PROXY VOTING POLICY QUESTIONS

The order of these questions generally follows in the order presented in our U.S. Proxy Voting Summary Guidelines available on our website in the Policy Gateway.

Audit-Related

10. Why did ISS include the "Tax Fees" under "Other Fees"?

ISS recognizes that certain tax-related services, e.g. tax compliance and preparation, are most economically provided by the audit firm. Tax compliance and preparation include the preparation of original and amended tax returns, refund claims, and tax payment planning. However, other services in the tax category, e.g. tax advice, planning, or consulting fall more into a consulting category. Therefore, these fees are separated from the tax compliance/preparation category and are added to the Non-audit fees. If the breakout of tax compliance/preparation fees cannot be determined, all tax fees are added to "Other" fees. ISS' benchmark policy is to compare the sum of Audit, Audit-Related, and Tax/Compliance Fees to Other Fees, and if Other Fees is greater, ISS will recommend against the Ratification of Auditors and the election of Audit committee members.

If the company provides a footnote to the audit fees table showing a breakout of the tax fees: those related to tax compliance and preparation fees, (i.e. the preparation of original and amended tax returns, refund claims, and tax payment planning), vs. those related to all other services in the tax category, such as tax advice, planning, or consulting, then ISS will use this information in application of our policy. This information can also be filed within the appropriate time frame after our analysis is released for a potential vote recommendation change. (See Question #5)

Board of Directors

Voting on Director Nominees in Uncontested Elections

I. Accountability

11. Classified Board structure policy: When does ISS apply the classified board structure policy?

The classified board structure policy is: if a director responsible for a governance problem is not up for election due to a classified board, ISS will recommend withhold or against votes on all appropriate nominees. This policy is generally not applied if the director in question has a governance issue related only to his or herself, (e.g., poor attendance, overboarded, or is an Affiliated Outside Director serving on a key committee), unless the issue is considered egregious. It is typically applied when ISS would normally recommend withhold on all the members of a committee – e.g., the compensation committee for problematic pay practices or a pay for performance disconnect, or the audit committee for continued material weaknesses in internal controls – and no one on the committee is a nominee on the ballot. The rationale is that a classified board further entrenches management and prevents shareholders from holding the responsible individuals accountable.

12. Poison Pills: What modification must be made to a pill that has a dead hand or slow hand provision to address an ISS withhold recommendation against all nominees for this issue?

For a deadhand provision, the amendment would need to eliminate all requirements in the Rights Agreement that actions, approvals, and determinations taken or made by the company's board of directors be taken or made by a majority of the "Continuing Directors" (sometimes also referred to as the disinterested directors).

For a slowhand, the amendment would need to remove the time restrictions on redemption of the pill following a change in the majority of the board as a result of a proxy contest.

13. What if the pill with a dead hand or slow-hand was approved by the public shareholders?

Even if a pill has features that cause ISS to recommend against the adoption of the pill, if the pill is approved by shareholders (with a broad shareholder base, not a controlled company, not prior to IPO, etc.), then ISS will not recommend against the board. For example: Marina Biotech (MRNA) had adopted a poison pill in 2010 that has a slow-hand, but it was approved by their broad shareholder base. ISS is not recommending against the board, as the pill was approved by shareholders.

14. After what date does the policy regarding adoption or renewal of non-shareholder-approved pills apply?

ISS' current policy on pill adoptions applies to pills adopted/renewed after the date the policy was announced, which was Nov 19, 2009. The previous policy, for pills adopted after Dec 7, 2004, was to recommend against the board only once for not putting the poison pill to a shareholder vote.

15. Why does ISS review annually-elected boards and classified boards differently when they have adopted and continue to hold a poison pill without shareholder approval?

There are 3 principles at work in this policy: 1) All poison pills should be put to a shareholder vote; 2) the term of a poison pill should be no longer than 3 years, so shareholders should be voting on an existing pill at least every 3 years; and 3) all board members should be held accountable for the adoption of the pill and for not putting the pill to a shareholder vote. So, for an annually-elected board, where all

members can be held accountable at once; over the life of the pill, ISS recommends withhold every 3 years based upon the frequency we would have expected the pill to be brought to a shareholder vote and it wasn't. For a classified board, it takes 3 years just to hold all board members accountable, and then the 3- year cycle at which the pill should have been put to a vote starts again, thus, the recommendations against all nominees each year.

16. What if a company adopts a poison pill before it is public?

In the case of an newly public company, ISS will recommend withhold on the entire board if the pill is not put to a vote at the first annual meeting of public shareholders or if the company does not commit to putting the pill to a shareholder vote within 12 months following the IPO. In the following years, as long as the pill exists and is not put to a shareholder vote, the withholds recommendations will continue as described in the FAQ above depending on whether the board is annually elected or classified.

17. What commitment language is ISS looking for concerning putting the poison pill to a binding shareholder vote?

Sample language:

"On [date] the Board of Directors determined that it will either (i) include in its proxy statement for the Company's [next year's] Annual Meeting of Stockholders a proposal (the "Rights Plan Proposal") soliciting stockholder approval of the Company's existing stockholder rights plan, or (ii) repeal the stockholder rights plan prior to the [next year's] Annual Meeting. In the event that the Company elects to include the Rights Plan Proposal in the proxy statement, and the Company does not receive the affirmative vote of the holders of [voting requirement], then the Company will promptly take action to repeal the stockholder rights plan."

18. Definition of "majority of shares cast" for Board Accountability and Responsiveness policies:

For policies that utilize "shares cast" as the measurement (e.g. management say-on-pay proposals, majority-supported shareholder proposals, and majority withholds on directors), ISS uses: For/ (For + Against). Abstentions are not counted. The base the issuer uses to determine if a proposal passed is not used, as doing so would result in an inconsistent basis for looking at voting outcomes across companies.

Restricting Binding Shareholder Proposals

19. What is the rationale for the policy at this time?

Shareholders' ability to amend the bylaws is a fundamental right. Under SEC Rule 14a-8, shareholders who have held shares valued at least $2,000 for one year are permitted to submit shareholder proposals, both precatory and binding, to amend bylaws. However, some states allow for companies to restrict this right in their charters.

ISS has identified fewer than 300 U.S. companies that prohibit shareholders from submitting a binding shareholder proposal. Further, a majority of US companies also maintain a majority vote standard for amendments to their charter or bylaws.

Over the last several years, shareholders have launched several campaigns at companies that do not provide this right and have specifically submitted precatory proposals on this issue. These campaigns have often been contentious and have generated interest in the wider investor community on prohibitions of binding shareholder proposals. Until recently, such prohibitions had gone largely unnoticed and the shareholder campaigns to remove the prohibition have shone a light on the issue.

20. What companies are not impacted by this policy?

The policy does not apply to open- or closed-end funds, nor to companies incorporated outside of the United States, even if they are U.S. Domestic Issuers.

21. Will substitution of supermajority vote requirements on binding shareholder bylaw amendments in lieu of a prohibition be viewed as sufficient?

Substituting a supermajority vote requirement in lieu of the prohibition will be viewed as an insufficient restoration of a fundamental right. Similarly, in lieu of the prohibition, any holding level or time requirements for shareholders submitting bylaw amendments that are in excess of SEC Rule 14a-8 will be viewed as an insufficient restoration of shareholders' rights.

22. How will ISS evaluate commitments to remove the prohibition within a given period of time?

ISS will generally not view commitments as sufficient to mitigate concerns. However, ISS will also evaluate each company on a case-by-case basis based on such factors as shareholder outreach, complete disclosure, board views, planned actions, etc.

Unilateral Bylaws/Charter Amendments

23. When did the unilateral bylaw/charter amendment policy start for newly-public companies?

The policy was adopted for shareholder meetings on or after Feb. 1, 2015. For newly public companies, those who held their first public shareholder AGM on or after this date are impacted by this policy.

24. Which types of unilateral bylaw/charter amendments are likely to be considered by ISS to materially diminish shareholders' rights?

If a unilaterally adopted amendment is deemed materially adverse to shareholder rights, ISS will recommend a vote against the board.

Materially adverse unilateral amendments include, but are not limited to:

- Authorized capital increases that do not meet ISS' Capital Structure Framework;
- Board classification to establish staggered director elections;
- Director qualification bylaws that disqualify shareholders' nominees or directors who could receive third-party compensation;

- Fee-shifting bylaws that require a suing shareholder to bear all costs of a legal action that is not 100 percent successful;
- Increasing the vote requirement for shareholders to amend charter/bylaws;
- Removing a majority vote standard and substituting plurality voting;
- Removing or restricting the right of shareholders to call a special meeting (raising thresholds, restricting agenda items); and
- Removing or materially restricting the shareholder's right to act in lieu of a meeting via written consent.

Unilaterally adopted bylaw amendments that are considered on a case-by-case basis, but generally are not considered materially adverse:

- Advance notice bylaws that set customary and reasonable deadlines;
- Director qualification bylaws that require disclosure of third-party compensation arrangements;
- Exclusive Venue/Forum (when the venue is the company's state of incorporation).

25. Why does ISS oppose unilaterally-adopted bylaws that disqualify any director nominee who receives third-party compensation ("director qualification bylaw")?

The adoption of restrictive director qualification bylaws without shareholder approval may be considered a material failure of governance because the ability to elect directors is a fundamental shareholder right. Bylaws that preclude shareholders from voting on otherwise qualified candidates unnecessarily infringe on this core franchise right.

However, ISS has not recommended voting against directors and boards at companies which have adopted bylaws precluding from board service those director nominees who fail to disclose third-party compensatory payments. Such provisions may provide greater transparency for shareholders, and allow for better-informed voting decisions.

Governance Failures

26. What is the purpose of the Governance Failures Policy?

The Governance Failures policy is designed to catch the one-off egregious actions that are not covered under other policies. If a type of action becomes commonplace, ISS will often break this out as its own, standalone policy.

The actions that most commonly fall under the Governance Failures policy were: unilateral bylaw amendments that diminish shareholders' rights; excessive pledging, and failure to opt out of state statutes requiring a classified board (Indiana and Iowa). A sharp increase in the incidence of unilateral bylaw amendments caused ISS to separate this out as a standalone policy for 2015. Also in 2015, the with the SEC's decision to express no view on Rule 14a-8(i)(9) exclusions brought into sharper focus the possibility of companies' excluding shareholder proposals from their ballots without no-action relief. These more common types of governance failures are discussed below.

27. What are ISS' expectations regarding whether a company includes a shareholder proposal on its ballot?

The ability of qualifying shareholders to include their properly presented proposals in a company's proxy materials is a fundamental right of share ownership, which is deeply rooted in state law and the federal securities statutes. Shareholder proposals promote engagement and debate in an efficient and cost-effective fashion.

Over the course of the past several decades, the SEC has played the role of referee in resolving disputes raised by corporate challenges to the inclusion of shareholder proposals in company proxy materials. While federal courts provide an additional level of review, the vast majority of shareholder proposal challenges have been resolved without the need to resort to costly and cumbersome litigation. While individual proponents and issuers often disagree with the SEC's determinations in these adversarial proceedings, the governance community recognizes the Commission's important role as an impartial arbiter of these disputes.

In early 2015, when the SEC suspended no-action relief for "conflicting" shareholder proposals, some companies were contemplating unilaterally excluding shareholder proposals. The SEC had announced that it was reviewing Rule 14a-8(i)(9), which allows companies to exclude a shareholder proposal that "directly conflicts" with a board-sponsored proposal. Additionally, SEC Chair Mary Jo White indicated that for proxy season 2015, the Commission's Division of Corporation Finance would express no view on the application of Rule 14a-8(i)(9). As a result, companies that intended to seek no-action relief on that basis were contemplating simply not including proposals. ISS provided the following guidance:

For companies that present both a board and shareholder proposal on the ballot on a similar topic, ISS will review each of them under the applicable policy.

ISS will view attempts to circumvent the normal avenues of dispute resolution and appeal with a high degree of skepticism[2]. Omitting shareholder proposals without obtaining regulatory or judicial relief risks litigation against the company. Presenting only a management proposal on the ballot also limits governance discourse by preventing shareholders from considering an opposing viewpoint, and only allowing them to consider and opine on the view of management.

Thus, under our governance failures policy, ISS will generally recommend a vote against one or more directors (individual directors, certain committee members, or the entire board based on case-specific facts and circumstances), if a company omits from its ballot a properly submitted shareholder proposal when it has not obtained:

1) voluntary withdrawal of the proposal by the proponent;
2) no-action relief from the SEC; or
3) a U.S. District Court ruling that it can exclude the proposal from its ballot.

The recommendation against directors in this circumstance is regardless of whether there is a board-sponsored proposal on the same topic on the ballot. If the company has taken unilateral steps to implement the proposal, however, the degree to which the proposal is implemented, and any material restrictions added to it, will factor into the assessment.

28. An executive has hedged company stock. How does ISS view such practice?

[2] As precedent, ISS recommended against the board of directors at Kinetic Concepts in 2011 for omitting a shareholder proposal when the SEC had denied the firm's request for no-action relief. ISS changed the vote recommendation when the board implemented the proposal.

Hedging is a strategy to offset or reduce the risk of price fluctuations for an asset or equity. Stock-based compensation or open market purchases of company stock should serve to align executives' or directors' interests with shareholders. Therefore, hedging of company stock through covered call, collar or other derivative transactions sever the ultimate alignment with shareholders' interests. Any amount of hedging will be considered a problematic practice warranting a negative vote recommendation against appropriate board members.

29. How does ISS define a significant level of pledging of company stock?

ISS' view is that any amount of pledged stock is not a responsible use of company equity. A sudden forced sale of significant company stock may negatively impact the company's stock price, and may also violate insider trading policies. In addition, share pledging may be utilized as part of hedging or monetization strategies that would potentially immunize an executive against economic exposure to the company's stock, even while maintaining voting rights. A significant level of pledged company stock is determined on a case-by-case basis by measuring the aggregate pledged shares in terms of common shares outstanding or market value or trading volume.

30. An executive has pledged a significant amount of company stock as collateral. What is the potential impact on election of directors?

In determining vote recommendations for the election of directors of companies who currently have executives or directors with pledged company stock, the following factors will be considered:

- Presence of anti-pledging policy that prohibits future pledging activity in the companies' proxy statement;
- Magnitude of aggregate pledged shares in terms of total common shares outstanding or market value or trading volume;
- Disclosure of progress or lack thereof in reducing the magnitude of aggregate pledged shares over time;
- Disclosure in the proxy statement that shares subject to stock ownership and holding requirements do not include pledged company stock; and
- Any other relevant factors.

If the company discloses a pledged amount, we will first consider the significance of the pledge. If we determine that it is at a level that raises significant risks for shareholders -- or, in some cases, if we determine that the incidence or significance of pledging at the company is increasing -- we may recommend against board members considered accountable for the company's policy on pledging (or lack thereof). But, if the company indicates that they have a policy that prohibits future new pledging and/or that they are encouraging executives/directors to unwind current transactions, these would be viewed as positive factors that could mitigate a negative recommendation at the current meeting.

31. Should an executive or director who has pledged a significant amount of company stock immediately dispose or unwind the position in order to potentially mitigate a negative vote recommendation?

An executive or director who has pledged a significant amount of company stock should act responsibly and not jeopardize shareholders' interests. The aggregate pledged shares should be reduced over time, and the company should adopt a policy that prohibits future pledging activity, and disclose that in its

proxy statement. Note that if the individual's aggregate pledged shares were to increase over time, a negative vote recommendation may be warranted despite the company's adoption of an anti-pledging policy.

II. Responsiveness

Majority-supported Shareholder Proposals

32. What does ISS consider as "responsive" to a majority-supported shareholder proposal?

Acting on a shareholder proposal will generally mean either full implementation of the proposal or, if the matter requires a vote by shareholders, a management proposal on the next annual ballot to implement the proposal. Responses that involve less than full implementation will be considered on a case-by-case basis, taking into account:

- Disclosed outreach efforts by the board to shareholders in the wake of the vote;
- Rationale provided in the proxy statement for the level of implementation;
- The subject matter of the proposal;
- The level of support for and opposition to the resolution in past meetings;
- Actions taken by the board in response to the majority vote and its engagement with shareholders;
- The continuation of the underlying issue as a voting item on the ballot (as either shareholder or management proposals); and
- Other factors as appropriate.

These factors are further described below:

Disclosed outreach efforts by the board to shareholders in the wake of the vote:

Key to any partial implementation of a majority supported shareholder proposal is outreach by the board to their significant shareholders who supported the proposal to understand why they supported it and what they are looking for the board to do in response. The “ask” of the proposal may not directly reflect shareholders’ concerns but instead may have been the vehicle most-readily available for them to express their concerns. For example, shareholders may be more interested in a stronger right to a special meeting, rather than the written consent right proposed. Or, they may want a more empowered lead director position in lieu of an independent chair.

While outreach to the proponent is important, it was a majority of shares that voted for the proposal. Therefore, the company should reach out beyond the proponent to its large shareholders to understand their goals in the support of the proposal.

Rationale provided in the proxy for the level of implementation:

The vast majority of shareholder proposals are precatory; they are not binding, and the board exercises its discretion to respond in a manner that it believes is in the best interest of the company. When a majority of shares, or a substantial minority, are cast in support of a proposal, the company should clearly disclose its response and explain the board’s rationale for the actions it has taken in the following year’s proxy statement.

The subject matter of the proposal:

Some matters are straightforward, almost binary decisions, and garner a strong consensus among institutional investors, such as:

Declassification proposals— either a board is classified, or it is annually elected. While shareholders may defer to the board's discretion as to timing of the declassification, there is generally no other action acceptable.

Majority vote standard—either a board has a plurality or a majority vote standard in uncontested elections. There is a consensus that a true majority vote standard is the board response required, and not just the adoption of a director resignation policy while maintaining a plurality vote standard.

Other items are more nuanced and allow for a broader range of implementation, such as the right to call a special meeting, the right for shareholders to be able to act by written consent, or proposals seeking an independent board chair. Please see FAQs below on these items for more details.

33. What would constitute a clearly insufficient response to a majority-supported shareholder proposal?

Clear examples of non-responsiveness by the board would include: no acknowledgement at all in the proxy statement that shareholders supported the proposal; dismissal of the proposal with no reasons given; or actions taken to prevent future shareholder input on the matter altogether.

34. Does the board's recommendation on a management proposal in response to a majority-supported shareholder proposal matter?

In general, the proposal should have a board recommendation of FOR. A recommendation other than a FOR, (e.g." None" or "Against") will generally not be considered as sufficient action taken. The level of support necessary to implement the proposal (e.g., a supermajority of shares outstanding) will be a consideration in evaluating the role of the board's recommendation.

35. Proxy Access proposals: How will ISS evaluate a board's implementation of proxy access in response to a majority-supported shareholder proposal?

ISS will evaluate a board's response to a majority- supported shareholder proposal for proxy access by examining whether the major points of the shareholder proposal are being implemented. Further, ISS will examine additional provisions that were not included in the shareholder proposal in order to assess whether such provisions unnecessarily restrict the use of a proxy access right. Any vote recommendations driven by a board's implementation of proxy access may pertain to individual directors, nominating/governance committee members, or the entire board, as appropriate.

ISS may issue an adverse recommendation if a proxy access policy implemented or proposed by management contains material restrictions more stringent than those included in a majority-supported proxy access shareholder proposal with respect to the following, at a minimum:

- **Ownership thresholds** above three percent;
- **Ownership duration** longer than three years;

- **Aggregation limits** below 20 shareholders;
- **Cap** on nominees below 20 percent of the board.

In instances where the cap or aggregation limit differs from what was specifically stated in the shareholder proposal, lack of disclosure by the company regarding shareholder outreach efforts and engagement may also warrant negative vote recommendations.

If an implemented proxy access policy or management proxy access proposal contains restrictions or conditions on proxy access nominees, ISS will review the implementation and restrictions on a case-by-case basis. Certain restrictions viewed as potentially problematic especially when used in combination include, but are not limited to:

- Prohibitions on resubmission of failed nominees in subsequent years;
- Restrictions on third-party compensation of proxy access nominees;
- Restrictions on the use of proxy access and proxy contest procedures for the same meeting;
- How long and under what terms an elected shareholder nominee will count towards the maximum number of proxy access nominees; and
- When the right will be fully implemented and accessible to qualifying shareholders.

Two types of restrictions will be considered especially problematic because they are so restrictive as to effectively nullify the proxy access right:

- Counting individual funds within a mutual fund family as separate shareholders for purposes of an aggregation limit; and
- The imposition of post-meeting shareholding requirements for nominating shareholders.

36. Declassify the Board Proposals: If the majority supported shareholder proposal specifies declassification in one year, is a phased-in transition over the next three years sufficient implementation?

Although a proponent may request immediate declassification, our institutional investor clients have indicated that a phased-in declassification that allows for directors to fulfill their full elected terms is generally acceptable. However, delays to the start of the phase-in of declassification (such as Ryder Systems' 2013 delay of the phase-in to 2016-2018) should be vetted with shareholders and the rationale for the long delay included in the proxy statement.

37. Independent Chair Proposals: is there any action short of appointing an independent chair that would be considered sufficient?

Full implementation would consist of separating the chair and CEO positions, with an independent director filling the role of chair. A policy that the company will adopt this structure upon the resignation of the current CEO would also be considered responsive.

Partial responses will be evaluated on a case-by-case basis, depending on the disclosure of shareholder input obtained through the company's outreach, the board's rationale, and the facts and circumstances of the case. There are many factors that can cause investors to support such proposals, without necessarily demanding an independent chair immediately. For example, through their outreach, a

company may learn that shareholders are concerned about the lack of a lead director, weaknesses in the lead director's responsibilities, or the choice of lead director. In such a case, creating or strengthening a robust lead director position may be considered a sufficient response, assuming no other factors are involved. If the company already has a robust lead director position, then the company's outreach to shareholders to discover the causes of the majority vote and subsequent actions to address the issue will be reviewed accordingly.

38. Shareholder proposals on Majority Vote Standards: Is adoption of a "majority vote policy" considered sufficient?

In general, adoption of a director resignation policy (sometimes called a majority vote policy) in lieu of a true majority vote standard is not considered a sufficient response. The "vote standard" is the standard which determines whether the director is an elected director: under a plurality vote standard, a director need only receive one vote to be "elected." A majority vote standard requires a director to receive support from a majority of the shares cast to be elected: if not achieved, and a new nominee would not be able to join the board; if the nominee is a continuing director, his or her legal status is a "holdover" director, not an elected director. The vote standard is usually embedded in the company's charter or bylaws, and is included in the proxy statement. A "majority vote policy" is a confusing term sometimes used to describe a director resignation policy, which is the post-election process to be followed if a director does not receive a majority of votes cast. Such resignation policies are usually found in a company's corporate governance guidelines, and can accompany either a majority or a plurality vote standard. Such a policy alone is not the same as a true majority vote standard.

39. Right for shareholders to call special meetings: If the shareholder proposal specifies an ownership threshold of 10 percent, but the company implements a higher threshold, or requires that one shareholder must hold that amount, is that sufficient?

According to our 2010 policy survey, 56 percent of institutional clients did not accept a higher threshold as a sufficient response. However, if the company's outreach to its shareholders finds a different threshold acceptable to them, and the company disclosed these results in its proxy statement, along with the board's rationale for the threshold chosen, this will be fully considered on a case-by-case basis. The ownership structure of the company will also be a factor in ISS' consideration.

40. Right for shareholders to call special meetings: What types of parameters set on the right are generally considered acceptable?

Restrictions on agenda items are generally seen as negating the right to call a special meeting; 71 percent of institutional investor respondents to our 2010 policy survey said this was not sufficient implementation. The more common type of agenda restriction seen is to exclude any agenda items that were on the previous annual meeting agenda, or will be on the upcoming annual meeting agenda. Such a prohibition would prevent shareholders from calling a special meeting to elect a dissident slate, as the annual meeting agendas would include election of directors on the ballot.

Reasonable limitations on the timing and number per year of special meetings are generally acceptable.

41. Right for shareholders to act by written consent: What limitations are generally acceptable?

Reasonable restrictions to ensure that the right to act by written consent could not potentially be abused are acceptable. In general, restrictions considered reasonable include:

- An ownership threshold of no greater than 10 percent;
- No restrictions on agenda items;
- A total review and solicitation period of no more than 90 days (to include the period of time for the company to set a record date after receiving a shareholder request to do so, and no more than 60 days from the record date for the solicitation process);
- Limits on when written consent may be used of no more than 30 days after a meeting already held or 90 days before a meeting already scheduled to occur; and
- A solicitation requirement that the solicitor must use best efforts to solicit consents from all shareholders.

Restrictions that go beyond these levels are examined in light of the disclosure by the company about its outreach to shareholders, the board's rationale, etc. An example was Amgen, which received majority support on a written consent proposal. It sought feedback from its shareholders, and in 2012 put on the ballot a management proposal discussing the shareholder feedback obtained and the procedural safeguards implemented in response to the feedback. Among these was a 15 percent ownership threshold, the same as their threshold to call special meetings.

42. Reducing super-majority vote requirements on charter/bylaw amendments: If the proposal calls for reducing the vote requirement on charter/bylaw amendments to a majority of shares cast, and the company reduces it for most provisions, but not all, is that considered sufficient?

In general, shareholders would look for all provisions to be reduced to the majority of shares cast. However, exceptions may occur. An example is where the supermajority applies only to a provision that would be antithetical to shareholders' rights, such as the ability to reclassify the board. Disclosure on which items were not reduced, and why, is a key consideration.

43. Reducing super-majority vote requirements: If a shareholder proposal calls for reducing requirement to a majority of shares cast, and the company reduces the level to majority of shares outstanding rather than shares cast, is that considered sufficient?

In general, reducing to the majority of cast is preferable among institutional investors. However, state law may mandate no less than a majority of outstanding shares threshold. The board's rationale and the disclosed outcome of the company's outreach to shareholders are key considerations.

In general, a reduction from a supermajority to a slightly lower supermajority (e.g. 75 percent to 66.7 percent), would not be considered a sufficient response, according to 71 percent of our institutional clients surveyed. However, the company's outreach to shareholders and board's rationale are also considerations.

44. What if a shareholder proposal is antithetical to the rights of shareholders?

Arguing that a proposal that received a majority of shareholder votes is antithetical to shareholders' interests, particularly at a widely held company, is a difficult proposition – it implies that shareholders are not acting in their own best interests. However, there are cases where majority-supported proposals go against the interests of minority shareholders, e.g. at controlled company AMERCO (2007, 2009-2012, subject to Nevada Court decisions on the matters). ISS obviously does not expect that companies will "act" on proposals contrary to the interest of all shareholders, particularly minority shareholders.

Likewise, ISS does not expect a company to act on a proposal invalidated by court rulings or state law. For example, there were majority-supported shareholder proposals on certain bylaw changes at Airgas in 2010 during their proxy fight with Air Products. The Delaware Supreme Court invalidated the bylaw changes; ISS would expect the company to act in accordance with the court rulings.

Director(s) receiving less than 50 percent of Shares Cast

45. What happens if a director received less than a majority (50 percent) of votes cast in the previous year?

If a director receives a majority of votes withhold/against him or her, ISS considers whether or not the company has addressed the underlying issues that led to the high level of opposition. Disclosed outreach to shareholders and disclosure of the steps taken in response to their findings, are key considerations. ISS may recommend withhold/against individual directors, a committee, or the entire board the following year if all the underlying issue(s) causing the high level of opposition are not addressed.

46. What is considered a sufficient response if a director receives less than majority support due to attendance issues?

If the director's attendance the following year is above the reporting threshold (75% of the aggregate of his/her board and committee meetings), that is generally considered sufficiently responsive. Chronic or widespread attendance issues may cause further consideration.

III. Composition

Attendance

47. What are the disclosure requirements on director attendance?

For exchange-listed companies, the SEC requires the following disclosure:

Item 407(b) *Board meetings and committees; annual meeting attendance*. (1) State the total number of meetings of the board of directors (including regularly scheduled and special meetings) which were held during the last full fiscal year. Name each incumbent director who during the last full fiscal year attended fewer than 75 percent of the aggregate of:

i. The total number of meetings of the board of directors (held during the period for which he has been a director); and

ii. The total number of meetings held by all committees of the board on which he served (during the periods that he served).

48. What if the company is not listed on an exchange – what attendance disclosure is needed?

Institutional investors expect similar attendance disclosure for non-listed companies as for listed companies.

49. What if there is no attendance disclosure?

Under the regulations, disclosure is only needed if a director attended less than 75 percent of the aggregate of his/her board and committee meetings for the period he/she served. Therefore, no disclosure would mean that all directors met the attendance threshold. However, many companies will include in their proxies an affirmative statement that all directors met the threshold, but it is not required. This affirmative disclosure is particularly helpful when a company provides additional details on attendance, but it is unclear if this disclosure is in addition to, or in lieu of, the required disclosure.

50. One of the acceptable reasons for director absence is missing one meeting when the total of all meeting was three or fewer. When does this apply?

If the total of all the director's meetings was three or fewer, and he/she missed just one, then, mathematically, the attendance would be below the 75% reporting threshold. That is why an exception is made - missing one meeting alone should not trigger the policy. This exception only applies when the aggregate of all the director's board and committee meetings is three or fewer. It does not apply when there were only three board meetings, or only three committee meetings, and the total of the director's board and committee meetings is four or more.

51. What exceptions to the attendance policy apply in the case of a newly-appointed director?

Companies generally schedule their board and committee meetings a year or more in advance. The expectation is that directors plan their schedules accordingly. However, newly appointed directors will not have this advance notification. Therefore, for newly appointed directors only, if it is disclosed that the director missed his/her meetings due to schedule conflicts, that is considered an acceptable reason.

In addition, the valid excuse of missing only one meeting if the total of all the meetings is three or fewer most often applies to new directors appointed late in the fiscal year when there are only a few meetings left to attend.

One not uncommon issue we find is unclear attendance disclosure associated with newly-appointed directors (see next FAQ). Director attendance for the previous fiscal year is supposed to be based on the period for which the director served. If that period were not for the full fiscal year, the disclosure should not be based on the full year. Unfortunately, some companies will report attendance for new directors based on the full fiscal year, or the disclosure may be unclear as to what period of time is being reported, for example: "All directors attended 75% of their board and committee meetings during the fiscal year, except for Director X, who joined the board in September".

52. What is ISS' policy on unclear attendance disclosure?

If the proxy disclosure is unclear and insufficient to determine whether a director attended at least 75 percent of the aggregate of his/her board and committee meetings during his/her period of service, ISS will recommend a vote against or withhold from the director(s) in question.

Investors expect directors to attend their board and committee meetings; poor attendance is a primary reason directors receive majority withhold or against votes. Although the SEC disclosure rules have not changed, the increasing incidence of unclear attendance disclosures caused ISS to adopt this policy before the 2013 proxy season.

Examples of deviations from the required disclosure include, but are not limited to:

- Not naming the director(s) who failed to meet the threshold attendance;
- Using a threshold of less than 75 percent;
- Using a threshold greater than 75 percent and reporting that a director did not achieve that threshold;
- Excluding special meetings from total meetings;
- Reporting attendance separately for regular vs. special meetings;
- Boosting the attendance records by including actions by written consents in total meetings;
- Reporting average attendance instead of threshold attainment;
- Reporting attendance per meeting or per committee rather than per director;
- Reporting aggregate board and aggregate committee attendance instead of the overall aggregate; and
- For directors who served for only part of a year, reporting attendance based on the full fiscal year rather than the period served, or ambiguity as to the period of reporting.

Oftentimes, the unclear disclosure results from a company's attempt to provide additional disclosure to its investors, not to obfuscate poor attendance. However, it is not clear whether the disclosure is supposed to be in addition to the standard disclosure, or in lieu of the required disclosure. In that case, the addition of a positive sentence to the effect that "during the fiscal year, all directors attended at least 75% of their board and committee for the period for which they served" clarifies that the required disclosure is met and the additional details provided are supplemental.

Overboarded Directors

53. What boards does ISS count when looking to see if a director is overboarded?

We include: public companies (we use S&P Capital IQ company type for the determination of whether a company is public), and mutual fund families. We do not include: non-profit organizations, universities, advisory boards, and private companies. Mutual funds are rolled up to mutual fund families, with one family counting as one board. Also, if service on another board is a required duty of the officer (e.g., as part of a joint marketing agreement), that board will not be counted.

54. How are subsidiaries of a publicly-traded company counted?

All subsidiaries with publicly- traded stock are counted as boards in their own right. Subsidiaries that only issue debt are not counted.

55. What vote recommendations will an overboarded CEO received from ISS?

ISS will not recommend withhold/against votes for overboarding at the company where he or she serves as CEO, but may do so at the outside boards.

Special consideration is given where the CEO of a parent company also serves on the boards of the company's publicly traded subsidiaries. ISS will not recommend withhold/against votes for overboarding on the parent company's CEO at the parent company, nor at any subsidiary board with over 50 ownership by the parent. At outside boards and at subsidiaries owned 50 percent or less by the parent, ISS will consider whether withhold/against votes are warranted on a case-by-case basis, considering among other factors:

- Structure of the parent subsidiary relationship (for example, holding company structure);
- Similarity of business lines between the parent and subsidiary;
- Percentage of subsidiary held by the parent company; and
- The total number of boards on which he/she serves.

56. Which CEOs are subject to the policy on overboarded CEOs?

The policy is applied only to CEOs of publicly-traded companies. It is not applied to CEOs of private companies. Nor does not apply to interim CEOs: there is no expectation that a director who steps in as interim CEO to fill the gap should drop his or her other boards for this short-term obligation.

57. Does ISS take into account if a director is transitioning off one board soon?

Yes. If the information is publicly disclosed that a director will be stepping off another board at the next annual meeting of that company to accommodate taking a place on a new board, ISS will not consider that board in determining if the director is overboarded.

IV. Independence

Determination of Independence

58. In the proxy analysis, where can one find why ISS classified a director as an "affiliated outsider"?

See the "Director Notes" under the Board Profile section of the proxy analysis. That provides all the affiliations the director has with the company. The material affiliations are shown in our Proxy Voting Guidelines under the Categorization of Directors table.

59. How does ISS determine whether the board of a U.S. issuer considers a director to be non-independent?

In the US, issuers subject to the reporting requirements of Item 407 of Regulation S-K are not required to explicitly identify their non-independent directors as long as they maintain fully independent Audit, Compensation, and Nominating committees. If a board maintains fully independent committees, it is

only required to identify its independent directors, including new nominees, in its proxy or annual report.

In these situations, ISS will generally conclude that if a board does not identify one or more directors as independent, then it does not consider such director(s) to be independent. ISS will also examine all relevant disclosures, including, but not limited to, director bios, related party transactions, committee disclosure, and potentially review the issuer's historical approach to director independence disclosure to determine whether an issuer may have omitted an independent director from its list of independent directors.

It is corporate governance best practice for boards to be transparent to shareholders regarding the independence status of each director. In the context of the aforementioned US disclosure rules, the failure of a board to identify a director as independent will generally be construed to mean that the board does not consider such director to be independent.

Overall Board Independence

60. When ISS looks at whether a board is "majority independent," whose definition of independence are you using?

ISS is using our definition of "independent outside director" to determine if the board is majority independent.

61. What if the board is 50 percent independent outsiders and 50 percent insiders/affiliated outsiders?

50 percent is not a majority. ISS would not consider this board majority independent.

62. What public commitment can a company make concerning adding an independent director (and thus making the board majority independent)?

Sample language:

"We are conducting a director search in the exercise of due care for a candidate as soon as practicable following our Annual Meeting of Stockholders. Our new director will not only satisfy the independence requirements under the listing requirements, but will have no material connection to our Company (that is, no material financial, personal, business, or other relationship that a reasonable person could conclude could potentially influence boardroom objectivity) prior to being appointed to the Board. We commit to having this new director in place within no more than six months after the upcoming shareholder meeting."

Committee Independence

63. Are non-voting, "ex-officio" members of committees considered as regular members of committees?

Yes. They are considered the same as any other committee member, with the same expectation of independence.

64. What steps can a company take to change a vote recommendation on an affiliated outside director serving on a key committee?

For ISS to change its vote recommendation, either:

- The director needs to resign from the key committee(s), or
- The material relationship causing the affiliation (e.g. professional relations with a firm associated with the director) would need to be terminated.

The resignation from the committee would have to be effective no later than the date of shareholder meeting and would need to be publicly disclosed. For example: "As of [date no later than the upcoming annual meeting date], [Director Name] will resign as a member of the [Committee]."

For terminating a professional relationship, it would need to be effective immediately, and remain in effect as long as the director serves on any key committees.

Professional vs. Transactional Relationships

65. How does the definition of affiliation differ in ISS' standards for professional vs. transactional relationships?

Both are derived from the definition of affiliation in NASDAQ Rule 5605—but the affiliation under professional services is more strict: a director (or immediate family member) only has to be an employee of the organization providing the professional service, as opposed to an executive officer in the case of a transactional relationship for him to be considered affiliated.

66. What criteria determine a professional relationship, and which types of services are considered professional under ISS' classification?

"Professional" services are frequently advisory in nature, involve access to sensitive company information, and have a payment structure that could create a conflict of interest. Commissions or fees paid to a director (or to an immediate family member or an entity affiliated with either the director or the immediate family member) are an indication that the relationship is a professional service.

- **Insurance Services:** Generally professional, unless the company explains why such services are not advisory. Transactional where the company has an insurance policy with and pays premiums to an entity with which one of the company's directors is affiliated will be considered a transactional relationship. However, the burden will be on the company to explain why the service is not advisory.

- **Information Technology Services:** Generally professional, except for tech support. Tech support is usually tied to a previous transactional relationship, typically a purchase of hardware or software, and does not involve strategic decision-making or a payment structure which could create a conflict of interest.

- **Marketing Services:** Generally professional, unless the company explains why such services are not advisory. Market research, market strategy, branding strategy, and advertising strategy are generally considered professional services. Sale of promotional materials or sponsorships, or the purchase of advertising, is considered transactional. However, the burden will be on the company to make the distinction.

- **Educational services**: Generally transactional.

- **Lobbying services:** Professional.

- **Executive search services:** Generally professional. Lower level employment services may be considered transactional, depending on the disclosure.

- **Property management and real estate services**: Generally professional, unless the company explains why such services are not advisory. These services are advisory in nature and have a payment structure that could create a conflict of interest.

67. What happens when the company provides professional services to the director or an entity associated with the director?

In the case of a company providing a professional service to one of its directors or to an entity with which one of its directors is affiliated, the relationship is considered transactional rather than professional. Since neither the director nor the entity with which the director is affiliated is receiving fees for the service, there is no direct financial tie which could compromise that director's independence.

68. How does ISS assess the terms of voting agreements or "standstill" agreements that arise from issuers' settlements with dissenting shareholders?

In addition to the classification of any directors that the dissident shareholder may have placed on the board pursuant to our Director Independence policy and section 2.15 of our Categorization of Directors table, ISS will examine the terms of the standstill agreement and any other conflicting relationships or related-party transactions and, pursuant to our Board Accountability policy, may issue negative recommendations affecting the reelection of Nominating Committee members if we deem any terms of or circumstances surrounding the agreement to be egregious.

Contested Elections: Proxy Contests and Proxy Access

69. How will ISS evaluate proxy access nominees?

ISS has a policy for evaluating director nominees in contested elections, which currently applies to proxy contests as well as proxy access nominations. However, the circumstances and motivations of a proxy contest and a proxy access nomination may differ significantly. In some cases, the nominating shareholder's views on the current leadership or company strategy may be opposed to the existing board's views. Alternatively, a shareholder nominator may generally agree with the company's strategy or have no specific critiques of incumbent directors, but wishes to propose an alternative candidate to address a specific concern, such as diversity, lack of refreshment or a perceived skills gap on the board.

It is also possible that a proxy access election would occur when there are available seats on the board for all the nominees.

Given this range of possible nominating circumstances, ISS has created additional analytical latitude for evaluating candidates nominated through proxy access. The clarified approach is informed by related policies in international markets such as the UK & Ireland, Europe, Japan, and Australia, but is also tailored to unique aspects of proxy access in the US. When evaluating candidates nominated pursuant to proxy access, ISS will take into account any relevant factors including, but not limited to, the following:

- Nominee/Nominator specific factors:
  - Nominators' rationale;
  - Nominators' critique of management/incumbent directors; and
  - Nominee's qualifications, independence, and overall fitness for directorship.

- Company specific factors:
  - Company performance relative to its peers;
  - Background to the contested situation (if applicable);
  - Board's track record and responsiveness;
  - Independence of directors/nominees;
  - Governance profile of the company;
  - Evidence of board entrenchment;
  - Current board composition (skill sets, tenure, diversity, etc.); and
  - Ongoing controversies, if any.
  -
- Election specific factors:
  - Whether the number of nominees exceeds the number of board seats; and
  - Vote standard for the election of directors.

70. How would ISS evaluate director nominees with third-party compensatory arrangements in a proxy contest?

Compensation arrangements with director nominees are among the factors ISS considers in our case-by-case analysis of proxy contests. Further discussion of ISS' analytic framework for contested elections is available in the U.S. and Canadian Summary Guidelines.

Independent Chair Shareholder Proposals

71. How does the new approach differ from the previous approach?

Under ISS' previous approach, the policy is to generally recommend for independent chair shareholder proposals unless the company satisfies all the criteria listed in the policy. Under the new approach, any single factor that may have previously resulted in a "For" or "Against" recommendation may be mitigated by other positive or negative aspects, respectively. Thus a holistic review of all of the factors related to company's board leadership structure, governance practices, and performance will be conducted under the new approach.

For example, under ISS' previous approach, if the lead director of the company did not meet each one of the duties listed under the policy, ISS would issue a For recommendation, regardless of the company's board independence, performance, or otherwise good governance practices.

Under the new approach, , in the example listed above, the company's performance and other governance factors could mitigate concerns about the less-than-robust lead director role. Conversely, a robust lead director role may not mitigate concerns raised by other factors.

72. What additional factors will ISS assess under the Independent Chair policy?

ISS will consider: the presence of an executive or non-independent chair in addition to the CEO; a recent recombination of the role of CEO and chair; and/or departure from a structure with an independent chair. ISS will also consider any recent transitions in board leadership and the effect such transitions may have on independent board leadership as well as the designation of a lead director role.

73. What does ISS consider a strong lead director role?

ISS will generally consider a lead director role to be robust if the lead independent director is elected by and from the independent members of the board (the role may alternatively reside with a presiding director, vice chairman, or rotating lead director; however, the director must serve a minimum of one year in order to qualify as a lead director). The lead director should also have clearly delineated and comprehensive duties, which should include, but are not limited to the following:

- serves as liaison between the chairman and the independent directors;
- approves information sent to the board;
- approves meeting agendas for the board;
- approves meeting schedules to assure that there is sufficient time for discussion of all agenda items;
- has the authority to call meetings of the independent directors;
- if requested by major shareholders, ensures that he or she is available for consultation and direct communication.

74. How will ISS consider board tenure?

Board tenure will not be a primary factor in determining a vote recommendation for independent chair shareholder proposals, but will be considered in aggregate with other factors. Concurrence of director/CEO tenure, lenghty directorships, or high average director tenure, may be considered. These concerns will be considered in the context of the overall leadership structure in determining whether the proposal presents the best leadership structure at the company.

75. How does ISS consider company performance?

ISS will consider one-, three-, and five-year TSR when evaluating company performance. Performance over the long-term will be weighed more heavily than short-term performance. Performance will be considered a significant factor in the holistic analysis of independent chair proposals.

76. How will the scope of a proposal have an effect on ISS' analysis?

ISS will consider the exact language of the resolved clause submitted in the proposal. Depending on company-specific circumstances, a resolved clause that seeks a policy to adopt an independent chairman so as not to violate any existing agreements or that seeks an independent chairman at the next leadership transition may be viewed more favorably than a proposal seeking an immediate change. For instance, if a company is performing well under its current board leadership structure, an immediate change may be unnecessarily disruptive.

77. What problematic governance practices will be considered negatively?

Governance practices that will be viewed negatively in the holistic review for independent chair proposals include, but are not limited to:

- Problematic compensation practices;
- Multiple related-party transactions or other issues putting director independence at risk;
- Failures of risk oversight;
- Adoption of shareholder-unfriendly bylaws without seeking shareholder approval;
- Failure of a board to adequately respond to majority-supported shareholder proposals or directors who do not receive majority support; and
- Flagrant actions by management or the board with potential or realized negative impacts on shareholders.

78. Will ISS consider a company's rationale for maintaining a non-independent chair?

Yes. ISS will consider the company's rationale as a factor that may be applicable in the holistic review. A "compelling" rationale will be subject to a case-by-case evaluation. For example, ISS will consider how the board's current leadership structure benefits shareholders and/or specific factors that may preclude the company from appointing an independent chair, if such disclosure by the company is provided.

Shareholder Rights & Defenses

79. Litigation Rights: How likely is ISS to support management proposals for fee-shifting bylaws?

As of early February 2014, approximately 50 bylaws allowing fee shifting have been adopted unilaterally, with none put to a shareholder vote. After examining the language of the ones adopted so far, it is unlikely that any, if put to a shareholder vote, would garner ISS' support. In fact, because they are so egregious, they merit votes against the board for their adoption.

80. Poison pills: What features of a qualifying offer clause are considered to strengthen its effectiveness and what features are considered to weaken its effectiveness?

Attributes of a qualifying offer clause that strengthen its effectiveness as a tool for shareholders include:

- Provision of a material adverse effect/condition ("MAE") clause;
- Reasonable requirements with respect to the length of time an offer is outstanding:

  - Offeror is not required to keep the offer open longer than 60 business days in the absence of an MAE clause or 90 business days if there is an MAE clause, and
  - No more than 15 business days following a price increase or an alternative bid or tender offer);
- Reasonable overall timing requirements with respect to the mechanics of calling a special meeting to vote on redemption of the pill (no longer than 150 business days from the time an offer is made until the time a special meeting is held).

Attributes of a qualifying offer clause that weaken its effectiveness and potentially discourage offers from being made include:

- A requirement that the offer be cash only;
- A provision allowing the company to declare an offer to not be a qualifying offer if the company procures an inadequacy opinion;
- A reverse due diligence requirement; and
- A requirement specifying the level of premium.

Capital/Restructuring

81. Are my company's one- and three-year TSRs in the bottom 10 percent of the U.S. market?

The reduced allowable increase applies to companies whose one- and three-year TSRs are both below the applicable threshold. The thresholds, updated quarterly, are available in our Policy Gateway under: TSR Information for U.S. Performance Related Policies.

The universe used for the "U.S. market" is the $C set in Standard & Poor's Research Insight product. To calculate these thresholds, we remove from the set any companies that do not have both one- and three-year TSRs.

82. When does ISS deem a risk of non-approval to be "specific and severe"?

Issuers should disclose any risks associated with shareholders' failure to approve a capitalization proposal in the proxy statement. The types of risks that may influence vote recommendations by virtue of being "specific and severe," if disclosed in the proxy statement, are as follows:

- In or subsequent to the company's most recent 10-K filing, the company's auditor raised substantial doubts about the company's ability to continue as a going concern;
- The company states that there is a risk of imminent bankruptcy or imminent liquidation if shareholders do not approve the increase in authorized capital; or
- A government body has in the past year required the company to increase its capital ratios.

83. When will an issuer's past use of shares drive vote recommendations?

If, within the past three years, the board adopted a poison pill without shareholder approval, repriced or exchanged underwater stock options without shareholder approval, or placed a substantial amount of stock with insiders at prices substantially below market value without shareholder approval, ISS will typically recommend that shareholders vote against the requested increase in authorized capital on the basis of imprudent past use of shares.

84. What disclosure is required to "declaw" preferred stock?

Sample Language:

"The board represents that it will not, without prior stockholder approval, issue or use the preferred stock for any defensive or anti-takeover purpose or for the purpose of implementing any stockholder rights plan."

Social/Environmental Issues

Lobbying Proposals

85. What does ISS look for when reviewing disclosure of a company's lobbying activity board oversight?

ISS reviews company materials to determine if the full board is primarily responsible for exercising oversight of a company's lobbying activities or if a committee of the board has been assigned responsibility for such oversight. The frequency of lobbying activity review is also considered, that is, whether just a general reference of responsibility is made or if a specific frequency of review (such as annually, biannually, or quarterly) is disclosed. ISS also looks for additional details regarding the scope of the board's (or delegated committee's) oversight responsibilities for both direct and indirect lobbying activity; such as reviewing compliance with existing company policies, or ensuring consistency with company values and public policy priorities.

86. What does ISS look for when reviewing a company's indirect lobbying expenditures?

When reviewing company disclosures of indirect lobbying expenditures, which are typically payments to trade associations and other groups, including membership dues used for lobbying purposes, a number of factors are considered. These factors include: (1) whether the company's reported lobbying expenditures are aggregated and provided as a single figure or if the company provides an itemized listing by recipient of its lobbying expenditures; and (2) whether the company comprehensively reports its lobbying expenditures or if information is only provided for the company's "significant" trade association relationships. With respect to the first factor, ISS also notes if the company provides information on the portion of trade association dues that were not tax deductible due to their use for lobbying purposes, and evaluates the level of disclosure on non-dues lobbying expenditures that were provided explicitly to support a trade association's lobbying activities.

87. What else does ISS consider when reviewing lobbying-related proposals?

In addition to the questions above, other factors are taken into consideration when preparing a lobbying-related proposal analysis and determining a vote recommendation. These include a company's disclosure and discussion of relevant lobbying policies and related management roles and oversight. ISS also considers whether the company has been associated with any recent lobbying-related controversies, fines, or litigation. Finally, ISS may also review and incorporate in our analysis and vote recommendation other relevant information per the ISS Global Approach.

Climate Change/Greenhouse Gas (GHG) Emissions

88. How does ISS evaluate a company's GHG emissions performance?

A company's GHG emissions performance indicates to shareholders whether the company's climate change policies and initiatives effectively manage its emissions and mitigate potential risks related to climate change. In recent years, a number of developments have indicated that government actions to cap and eventually reduce global GHG emissions are on the horizon, with some regulations already in place. Most prominent is the 2015 Paris Agreement, where 195 nations committed to limit global temperature rise to less than 2 degrees Celsius, with a more ambitious plan of limiting temperature rise to 1.5 degrees Celsius. As part of this agreement, the United States announced that it would reduce its emissions to 26-28 percent below 2005 levels by 2025. Resulting laws and regulations will have a greater impact on companies that are larger GHG emitters. As such, these companies may be exposed to a higher level of risk, particularly if they are lacking robust GHG emissions-reduction policies and initiatives.

As such, ISS takes into account the nature of the company's operations and its GHG emissions when reviewing emissions performance. Furthermore, ISS considers whether the company's emissions have increased or decreased over the period disclosed. When reviewing the emissions trend, ISS considers whether the emissions are disclosed in absolute terms (the company's overall emissions, typically measured in terms of total metric tonnes of carbon dioxide equivalent), or normalized terms (the company's absolute emissions divided by a normalizing factor, such as full-time employees or manufacturing output). If disclosed as absolute emissions, ISS looks to see if the company has made any recent acquisitions or sales of assets, or if there are other events that would impact the company's emissions.

As outlined in ISS' policy, GHG emissions performance is one factor that ISS considers when evaluating resolutions asking for the adoption of GHG emissions reduction goals. ISS also takes into account the disclosure of the company's GHG emissions-related management structure, including policies, board- and management-level oversight, and other climate change and emissions reduction initiatives.

The questions and answers in this FAQ document are intended to provide high-level guidance regarding the way in which ISS' Global Research Department will generally analyze certain issues in the context of preparing proxy analyses and vote recommendations for U.S. companies. However, these responses should not be construed as a guarantee as to how ISS' Global Research Department will apply its benchmark policy in any particular situation.

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Roadmap to Capital Markets Regulatory Changes

Roadmap to Capital Markets Regulatory Changes

Michael Hermsen

Proposed, Potential and Recently Adopted or Enacted[1] Rulemaking[2] and Legislation[3]
relating to the US capital markets, public company reporting and corporate governance

Proposed

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
Amendments to Interactive Data (XBRL) Program. The SEC proposed amendments to the XBRL rules to require companies to use Inline XBRL to file a single combined document.	SEC proposed rules on March 1, 2017	Comment period expires 60 days after publication of the release in the Federal Register	33-10323
Pay Ratio Disclosure. The SEC Acting Chair is soliciting comment on any unexpected challenges that issuers have experienced as they prepare for compliance with the new rule and whether relief is needed; and has directed the staff to reconsider the implementation of the rule based on any comments submitted and to determine as promptly as possible whether additional guidance or relief may be appropriate. See related topic under "Recently Adopted or Enacted" below.	Statement of Acting Chair Piwowar on Reconsideration of Pay Ration Rule Implementation on February 6, 2017	Comments requested by March 23, 2017	https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html

[1] Covers rulemaking and legislation adopted or enacted within the prior 3 months or that has been adopted but the effective date or implementation date has not yet been reached.
[2] Covers rulemaking by the US Securities and Exchange Commission, the New York Stock Exchange, the NASDAQ Stock Market, the Financial Industry Regulatory Association and the US Public Company Accounting Oversight Board.
[3] Any legislation not enacted before the end of the current term, must be reintroduced in the next Congress.
[4] For SEC matters, Anticipated Action Date is the date indicated by the SEC in the most recently issued Regulatory Flexibility Agenda.

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
Conflict Minerals. The SEC Acting Chair is soliciting comment on whether the 2014 Statement of the Division of Corporation Finance on the Conflicts Minerals Decision by Keith Higgins is still appropriate and whether additional relief is appropriate.	Statement of Acting Chair Piwowar on the Commission's Conflict Minerals Rule issued on January 31, 2017	Comments requested by March 17, 2017	https://www.sec.gov/corpfin/statement-on-sec-commission-conflict-minerals-rule.html
Universal Proxy. The SEC is proposing to amend the proxy rules to expand shareholders' ability to vote by proxy to choose among all duly-nominated candidates in a contested election of directors.	SEC proposed rules on October 26, 2016	Comment period expired on January 9, 2017	34-79164.
Shortening the Settlement Cycle. The SEC is proposing to amend Exchange Act Rule 15c6-1 to shorten the maximum settlement period from three days to two days. See related topic under "Recently Adopted or Enacted" below.	SEC proposed rules on September 28, 2016	Comment period expired on December 5, 2016	34-78962
Disclosure Update and Simplification. The SEC is proposing to amend certain disclosure requirements, primarily accounting and accounting related, that may have become redundant, duplicative, overlapping, outdated, or superseded, in light of other SEC disclosure requirements, U.S. GAAP, IFRS, or changes in the information environment.	SEC proposed rules on July 13, 2016	Comment period expired on November 2, 2016	33-10110 (33-10220)
Revisions to Smaller Reporting Company Definition. The SEC is proposing to amend the smaller reporting company definitions and related provisions.	SEC proposed rules on June 27, 2016	Comment period expired on August 30, 2016	33-10107
Modernization of Property Disclosures for Mining Registrants. The SEC is proposing to modernize the property disclosure requirements for mining registrants, and related guidance, currently set forth in Item 102 of	SEC proposed rules on June 16, 2016	Comment period expired on September 26, 2016	33-10098

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
Regulation S-K under the Securities Act of 1933 and the Securities Exchange Act of 1934 and in Industry Guide 7.			
Auditor's Report on an Audit of Financial Statements when the Auditor Expresses an Unqualified Opinion. The PCAOB is to retain the pass/fail model of the existing auditor's report but is seeking to enhance the form and content of the report to make it more relevant and informative to investors and other financial statement users. In particular, the auditor's report would include a description of "critical audit matters," which would provide audit-specific information about especially challenging, subjective, or complex aspects of the audit as they relate to the relevant financial statement accounts and disclosures.	Rules initially proposed August 13, 2013. Rules re-proposed May 11, 2016.		PCAOB 2016-003
Rules Regarding Incentive Compensation. The SEC, together with the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Housing Finance Agency, and the National Credit Union Administration (the "Agencies"), has reproposed regulations and guidelines with respect to incentive-based compensation practices at certain financial institutions that have $1 billion or more in total assets, as required by the Dodd Frank Act. Section 956 of the Dodd Frank Act requires that the Agencies prohibit incentive-based payment arrangements, or any feature of any such arrangement, at a covered financial institution that the Agencies determine encourages inappropriate risks by a financial institution by	Rules initially proposed April 14, 2011. Rules re-proposed on May 6, 2016.	Adopt final rules by April of 2017	34-64140 (initial proposal). 34-77776 (re-proposal).

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
providing excessive compensation or that could lead to a material financial loss. Under the Dodd Frank Act, a covered financial institution also must disclose to its appropriate Federal regulator the structure of its incentive-based compensation arrangements sufficient to determine whether the structure provides "excessive compensation, fees, or benefits" or "could lead to material financial loss" to the institution.			
Compensation Clawbacks – Listing Standards for Recovery of Erroneously Awarded Compensation. Section 954 of the Dodd Frank Act requires the SEC to adopt rules to direct national securities exchanges to prohibit the listing of securities of issuers that have not developed and implemented a policy providing for disclosure of the issuer's policy on incentive-based compensation and mandating the clawback of such compensation in certain circumstances.	SEC proposed rules on July 14, 2015	Adopt final rules by April of 2017	33-9861.
Pay versus Performance. Section 953(a) of the Dodd Frank Act added section 14(i) to the Exchange Act to require issuers to disclose information that shows the relationship between executive compensation actually paid and the financial performance of the issuer.	SEC proposed rules on May 7, 2015	Adopt final rules by April of 2017	34-74835.
Disclosure of Hedging by Employees, Officers and Directors. Section 955 of the Dodd Frank Act added section 14(j) to the Exchange Act to require issuers to disclose in an annual meeting proxy statement whether employees or members of the board of directors are permitted to engage in transactions to hedge or offset any	SEC proposed rules on February 17, 2015	Adopt final rules by April of 2017	33-9723.

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
decrease in the market value of equity securities granted to the employee or board member as compensation, or held directly or indirectly by the employee or board member.			
Amendments to Regulation D, Form D and Rule 156 under the Securities Act. The SEC proposed revisions to enhance its ability to evaluate the development of market practices in offerings under Rule 506 of Regulation D and address concerns that may arise in connection with permitting issuers to engage in general solicitation and general advertising under paragraph (c) of Rule 506.	SEC proposed rules on July 24, 2013	Adopt final rules by April of 2017	33-9416.
Reporting of Proxy Votes on Executive Compensation and Other Matters. The SEC is proposing to amend Exchange Act rules and Form N-PX to implement section 951 of the Dodd Frank Act that would require institutional investment managers subject to section 13(f) of the Exchange Act to report how they voted on any shareholder vote on executive compensation or golden parachutes pursuant to sections 14A(a) and (b) of the Exchange Act.	SEC proposed rules on October 28, 2010	Adopt final rules by April of 2017	34-63123

Potential

Request for Comment on possible changes to Industry Guide 3 (Statistical Disclosure by Bank Holding Companies). The SEC issued a request for comment to seek public input as to the disclosures called for by Industry Guide 3, noting that the financial services industry has changed dramatically since Guide 3 was first published and that the existing disclosure guidance may not in all cases reflect recent industry developments or	SEC issued request for comment on March 1, 2017	Comment period ends 60 days after publication of the release in the Federal Register	33-10321

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
changes in accounting standards related to financial and other reporting requirements.			
Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters. The SEC issued a notice for public comment on disclosure requirements in Subpart 400 – Items 401 through Item 407 – of Regulation S-K.	SEC issued notice on August 25, 2016	Comment period ended on October 31, 2016	33-10198
Implementation of Title I of the JOBS Act. The Division of Corporation Finance is considering recommending that the SEC propose conforming rule amendments to implement Title I of the Jobs Act with respect to emerging growth companies.		Indicated intent to propose rules by April of 2017	
Amendments to Financial Disclosures About Entities Other Than the Registrant. The Division of Corporation Finance is considering recommending that the SEC propose rules revising the financial disclosure requirements in Regulation S-X in connection with financial statements to be included in filings with respect to certain entities other than a registrant.	Concept release issued October 1, 2015	Indicated intent to propose rules by April of 2017	33-9929
Amendments to Regulation S-K and Regulation S-X. The Division of Corporation Finance is considering recommending that the SEC propose rules to update certain disclosure requirements in Regulations S-X and S-K.		Indicated intent to propose rules by April of 2017	
Corporate Board Diversity. The Division of Corporation Finance is considering recommending that the SEC propose amendments to the proxy rules to require additional disclosure about the diversity of board		Indicated intent to propose rules by April of 2017	

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
members and nominees.			
Concept Release on Possible Revisions to Audit Committee Disclosures. The SEC published a concept release to obtain information about the extent and nature of the public's interest in revising the audit committee disclosure requirements, which exist in their current form principally in Item 407 of Regulation S-K under the Securities Act and the Securities Exchange Act.	Concept release issued July 8, 2015	Indicated intent to propose rules by April of 2017	33-9862
Business and Financial Disclosures. The SEC published for comment a concept release on modernizing certain disclosure requirements in Regulation S-K.	Concept release issued April 22, 2016		33-10064.
Guide 3 Bank Holding Company Disclosure. The Division of Corporation is considering recommending that the SEC seek public comment on revising and updating the general instructions and statistical disclosures in Industry Guide 3.		Indicated intent to issue concept release by April of 2017	
SEC Regulatory Accountability Act would, among other things, amend the Securities Exchange Act of 1934 to direct the SEC, to: before issuing a regulation under the securities laws, identify the nature and source of the problem that the proposed regulation is designed to address; adopt a regulation only upon a reasoned determination that its benefits justify its costs; identify and assess available alternatives to any regulation; and ensure that any regulation is accessible, consistent, written in plain language, and easy to understand. In determining the costs and benefits of a proposed regulation, the SEC shall consider its impact on investor choice, market liquidity, and small businesses. In addition, the SEC shall: (1) periodically review its existing regulations to	Approved by the House. Referred to the Senate Banking, Housing and Urban Affairs Committee on January 17, 2017.		H.R. 78

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
determine if they are outmoded, ineffective, insufficient, or excessively burdensome; and (2) in accordance with such review, modify, streamline, expand, or repeal them. Whenever it adopts or amends a rule that is "major" (in terms of economic impact), the SEC shall state in its adopting release: (1) the regulation's purposes and intended consequences, (2) metrics for measuring the regulation's economic impact, (3) the assessment plan to be used to assess whether the regulation has achieved its stated purposes, and (4) any foreseeable unintended or negative consequences of the regulation.			
Helping Angels Lead Our Startups (HALOS) Act would direct the SEC to revise Regulation D to provide that the prohibition against general solicitation or general advertising will not apply to events with specified kinds of sponsors (including angel investor groups not connected to broker-dealers or investment advisers) where: presentations or communications are made by or on behalf of an issuer, but the advertising does not refer to any specific offering of securities by the issuer, the sponsor does not provide investment recommendations or advice to attendees, engage in investment negotiations with attendees, charge certain fees, or receive certain compensation; and no specific information regarding a securities offering is communicated beyond the type and amount of securities being offered, the amount of securities already subscribed for, and the intended use of proceeds from the offering.	Approved by the House. Referred to the Senate Committee on Banking, Housing and Urban Affairs on January 11, 2017.		H.R. 79

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
Recently Adopted or Enacted			
Exhibit Hyperlinks and HTML Format. On March 1, 2017, the SEC adopted rules requiring registrants that file registration statements and periodic and current reports that are subject to the exhibit requirements under Item 601 of Regulation S-K, or that file on Forms F-10 or 20-F, to include a hyperlink to each exhibit listed in the exhibit index of these filings.	SEC approved rules on March 1, 2017	Effective September 1, 2017 for filings made by large accelerated filers and accelerated filers; effective September 1, 2018 for all other filers	33-10322
Resource Extraction. On June 27, 2016, the SEC adopted rules requiring resource extraction issuers to disclose in an annual report payments made to foreign governments or the Federal government for the purpose of commercial development of oil, natural gas or miners.	On February 14, 2017, President Trump signed a joint resolution approved by Congress pursuant to the Congressional Review Act nullifying the SEC's resource extraction issuer payment disclosure rule.	Immediate	Public Law 115-4 (H.R. Res. 41)
Shortening the Settlement Cycle. The SEC has adopted rule changes proposed by the NYSE, NASDAQ and FINRA to conform their rules to the currently proposed change to amend Exchange Act Rule 15c6-1 to shorten the maximum settlement period from three days to two days.	FINRA rules adopted on February 9, 2017; NYSE and NASDAQ rules adopted on February 10, 2017	The SEC has not yet amended Rule 15c6-1. The rules will not become effective until the effective date of the SEC rule	34-80004 (FINRA) 34-80013 (NASDAQ) 34-80021 (NYSE)

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
		change. Currently it is contemplated that this could occur on September 5, 2017.	
SEC Small Business Advocate Act amends the Exchange Act to establish within the SEC an Office of the Advocate for Small Business Capital Formation and establish the Small Business Capital Formation Advisory Committee to provide the SEC with advice on SEC rules, regulations, and policies regarding its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, as they relate to: capital raising by emerging, privately held small businesses and publicly traded companies with less than $250 million in public market capitalization through securities offerings; trading in the securities of such businesses and companies; and public reporting and corporate governance requirements of such businesses and companies.	Enacted December 16, 2016		Public Law 114-284 (H.R. 3784)
Amendments to Facilitate Intrastate and Regional Securities Offerings. The SEC proposes to modernize Rules 147 and 504 under the Securities Act, adopt new Rule 147A and repeal Rule 505 to facilitate intrastate and regional securities offerings.	SEC approved rules on October 26, 2016	Amended Rule 147 and new Rule 147A are effective April 20, 2017; amended Rule 504 effective January 20, 2017; repeal of Rule 505 effective May 22, 2017	33-10238

ACTIVITY DESCRIPTION	CURRENT STATUS	ANTICIPATED ACTION DATE[4]	CITE
Improving the Transparency of Audits: Rules to Require Disclosure of Certain Audit Participants on a New PCAOB Form and Related Amendments to Auditing Standards. The PCAOB adopted new rules and related amendments to its auditing standards that will improve transparency regarding the engagement partner and other accounting firms that took part in the audit. The rules will require disclosure of the name of the engagement partner and information about other accounting firms on new PCAOB Form AP, *Auditor Reporting of Certain Audit Participants* to be filed with the PCAOB by the independent auditor.	SEC approved rules on May 9, 2016	Effective for audit reports issued on or after January 31, 2017 with respect to disclosure of the engagement partner and for audit reports issued June 30, 2017 with respect to disclosure of other accounting firms	34-77787
Pay Ratio Disclosure. The SEC adopted rules to require disclosure of the median of the annual total compensation of all employees of a registrant (excluding the chief executive officer), the annual total compensation of that registrant's chief executive officer, and the ratio of the median of the annual total compensation of all employees to the annual total compensation of the chief executive officer.	SEC adopted rules on August 5, 2015	Registrants must comply with the final rule for the first full fiscal year beginning on or after January 1, 2017	33-9887.

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March 1, 2017

REITs and Proxy Access

By: Michael Hermsen and Laura Richman

Proxy access initiatives made significant inroads during the last two proxy seasons. Much of the impetus for proxy access came from the Boardroom Accountability Project campaign launched by the Comptroller of New York City and the New York City Pension funds, which submitted proxy access proposals to 75 companies during the 2015 proxy season and to 72 companies for the 2016 proxy season. The proxy solicitation and corporate advisory firm, Alliance Advisors, reported that over 200 proxy access resolutions were submitted by shareholders during the 2016 US proxy season and that, as of February 1, 2017, 379 companies had adopted proxy access, of which 22 were real estate investment trusts ("REITs").[1]

According to Alliance Advisors, through July 1, 2016, shareholders voted on 79 shareholder-sponsored proxy access proposals, receiving on average 51.1 percent support from shareholders. Of these proxy access proposals, 41(representing 52 percent of the total) received majority votes in favor. This compares to 91 voted on shareholder-sponsored proxy access proposals in 2015, receiving an average 54.8% support from shareholders and 55 of which received majority votes in favor.[2] The difference between the number of proxy access proposals submitted by shareholders and those actually voted on is due to negotiated withdrawals and voluntary adoptions by companies.

Beginning early in the 2016 proxy season, the Staff granted a series of no-action requests to allow companies to exclude from their proxy statements shareholder proposals requesting the adoption of proxy access where the companies had adopted proxy access provisions that they claimed "substantially implemented" such shareholder proposals before their annual shareholders meetings. The Staff agreed that the companies had substantially implemented the shareholder proposals where they had adopted provisions granting proxy access to shareholders who held three percent of the company's stock for three years, even though the provisions adopted did not completely mirror the other terms of the shareholder proposals. In these cases, the Staff was satisfied that the proposals that the companies adopted achieved the "essential objective" of the proxy access provision requested by the shareholder proposals. [3]

Substantially all of the US proxy access provisions that have been adopted use a three percent ownership/three-year threshold, comparable to the threshold that the SEC adopted in its original proxy access rule, which was vacated by court action. Other typical terms include requiring shareholders to have full voting and economic ownership in order to use proxy access and allowing aggregation by groups of not more than 20 shareholders to reach the designated threshold. It is also common to limit the number of proxy access nominees to 20 percent of the board, but often with a minimum of two nominees. Although there are quite a few other details on which proxy access provisions vary, to a large degree there have been a sufficient number of US proxy access provisions adopted that there is a growing consensus as to which variations are viewed as "market."

A comparison of the core proxy access provisions adopted by companies in general and those adopted by REITs shows no significant difference.

Core Provision Comparison

Companies in General[4]	**REITs**
Percentage ownership threshold	
3% (99%) 5% (1%)	3% (100%)
Years of ownership	
3 (100%)	3 (100%)
Number of holders that may make up a group	
20 (91%) 25 (4%) 10 (1%) Other (4%)	20 (77%) 25 (13%) 10 (5%) 5 (5%)
Number of directors that may be elected by proxy access	
Greater of 2 or 20% (67%) 20% (20%) Greater of 2 or 25% (7%) 25% (7%)	Greater of 2 or 20% (46%) 20% (27%) 25% (18%) Greater of 2 or 25% (9%)

Companies that do not allow for proxy access may receive shareholder proposals requesting that proxy access be adopted. Such companies may want to consider having one on "the shelf" in case they receive a shareholder proposal and would then be in a position to act relatively promptly or adopting their own proxy access provisions in order to incorporate the detailed aspects in a manner that they think makes sense, while at the same time satisfying the essential objectives test necessary to persuade the Staff that the shareholder proposals have been substantially implemented.

Companies that have already adopted proxy access provisions may nevertheless receive proxy access shareholder proposals that request amendments to specific features of their existing provisions that certain shareholders find objectionable (so-called "fix-it proposals"). Among the provisions shareholders are seeking to amend in existing proxy access proposals include:

- Increasing the number of proxy access nominees to the board of directors to the greater of 25 percent or two nominees;

- Eliminating the cap on the number of shareholders that can aggregate their shares to achieve the required three percent ownership threshold for proxy access nominations;

- Eliminating renominations based on the number or percentage of votes received in any election;

- Permitting loaned securities to be counted toward the ownership threshold in certain circumstances;

- Eliminating any requirement to continue to hold shares after the meeting; and

- Eliminating any ability of the board to amend a proxy access bylaw.

When a shareholder requests particular amendments to a proxy access provision, a company should expect that it will be more difficult to convince the Staff that a proposal has been substantially implemented by an existing proxy access provision that does not contain the revisions that are being specifically requested. To date the Staff has been reluctant to allow companies to exclude "fix-it proposals" even where the Staff would allow the exclusion of a shareholder proposal from a company's proxy statement if it related to adoption of a proxy access provision on similar terms. Where the Staff has allowed a company to exclude a "fix-it proposal," it appears that the Staff is focusing closely on the facts and circumstances presented by companies in reaching their conclusion, including such things as whether a company has 20 shareholders whose aggregate holdings could meet the ownership threshold.[5]

It will be important for companies to monitor how shareholders view the "fix-it proposals" during the upcoming proxy season. The results of these proposals will provide valuable information for companies trying to decide what terms to include when adopting a proxy access bylaw or for companies trying to decide how to respond to their own "fix-it proposal." Accordingly, despite the many voluntary adoptions of proxy access bylaw provisions during the past year, proxy access is likely to be an area of continued focus by companies and shareholders during the coming year.

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[1] Most recent listing and core terms available at http://allianceadvisorsllc.com/wp-content/uploads/2017/02/Companies-with-Proxy-Access-2-1-17.pdf.

[2] Available at http://allianceadvisorsllc.com/wp-content/uploads/2016/07/Alliance-Advisors-Newsletter-July-2016-2016-Proxy-Season-Review.pdf.

[3] See, e.g., SEC no-action letter issued to Amazon, Inc. dated March 3, 2016, available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/jamesmcritchieamazon030316-14a8.pdf.

[4] See footnote 1 for more information.

[5] For examples of letters reaching opposite conclusions where the proponent in each case sought to amend a proxy access bylaw to increase the number of shareholders to 50 who could be aggregated for purposes of meeting the ownership threshold, see, SEC no-action letter issued to Citigroup Inc. dated February 10, 2017 available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/kennethsteinercitigroup021017-14a8.pdf and SEC no-action letter issued to Eastman Chemical Company dated February 14, 2017 available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/johncheveddeneastman021417-14a8.pdf.

Time to Update Risk Factors

Updating risk factors is an important part of the process of preparing a company's annual report on Form 10-K or Form 20-F pursuant to the rules of the US Securities and Exchange Commission. Item 503(c) of Regulation S-K requires a plain English explanation of how risks impact the company and its securities. This presentation must specifically identify significant factors that add risk to an investment.

The complete set of risk factors must appear in the annual report on Form 10-K or Form 20-F. Therefore, now is the right time for calendar-year public companies to review the entirety of their risk factor disclosures to determine if there are any new risks that should be discussed and if there are any existing risk factors that should be modified.

The risk factors should not be a generic discussion of risks that could impact any company or any securities but must be tailored for the specific issues affecting the company as the operating environment changes—and 2016 was a year of change. Some key risk factor topics to consider at this time, either as stand-alone risk factors or intertwined as part of other risk factor discussions, include the following:

Cybersecurity. Awareness of the significance of cybersecurity from both an economic and a security perspective has grown dramatically over the past few years. There is a greater recognition that cybersecurity is an issue that impacts companies of all types and that cybersecurity risks are increasing. Accordingly, companies should assess whether they need to expand or revise their cybersecurity disclosures to avoid potentially incomplete or misleading disclosure, especially in light of any events that may have occurred over the past year, whether or not such events were particular to them.[1]

Climate Change and Sustainability. Sustainability and climate change have garnered increasing attention, including in the context of risk factor disclosure. Climate change risk factor disclosure may discuss the impact of existing or pending legislation, regulation or international accords, as well as the physical impact of climate change or the impact of public awareness of sustainability issues on a company's business. To the extent deemed relevant, a risk factor could also discuss uncertainties with respect to potential changes in climate change regulation and treaties under the new US administration. Because climate change is an evolving area, the necessity for and scope of a climate change and sustainability risk factor is something that a company should carefully consider when preparing its upcoming annual report on Form 10-K or Form 20-F, as well as future annual reports.

Changes in US Administration. As the Trump presidency and new Congress get under way, it is too early to predict the changes in law and regulation that may result from the change in administration. However, there are a number of areas that have been publicly targeted for change that could impact the risk profile of certain companies. For example, companies in the health care or insurance industries may face risks relating to the Affordable Care Act and

possible replacements. Some companies may be facing increased risks with respect to potential withdrawal or modification of international trade agreements. Others may be concerned about changes in tax policy, such as the elimination of renewable energy tax credits or significant changes to the current system. Some companies have already begun to include risk factor disclosure relating to the change in the US administration. As the disclosure season progresses, issuers are encouraged to monitor developments regarding legislation and regulatory shifts, even if only proposed.

Brexit. Following the United Kingdom referendum last summer in favor of leaving the European Union, some companies began including Brexit risk factors in their periodic reports to address political, social and economic uncertainty, as well as stock market volatility and currency exchange rate fluctuations. For example, Brexit has been mentioned in the context of risk factors on topics such as currency exchange rates, global economic conditions and international operations, as well as having been discussed as a separate risk factor. Brexit is an ongoing process that will take some time to fully negotiate and implement. The BBC reports that Prime Minister Theresa May intends to trigger the process to initiate the negotiations for the terms of the UK's separation from the European Union by the end of March 2017, meaning the United Kingdom will be expected to leave the European Union by the summer of 2019.[2] As Brexit progresses, impacted companies should continually evaluate whether Brexit poses a risk to them and what level of Brexit-related disclosure is appropriate under the circumstances. This disclosure may need to continue to evolve over the next couple of years.

Energy Sector. The energy sector continues to reel from the decline in oil prices that at their lowest point in 2016 fell more than 70 percent from their June 2014 levels. Given the general economic conditions and the competition inherent in the industry, energy companies are looking at an unpredictable future. In addition to those topics set forth above, the primary risks that should be considered by energy companies, where applicable, are fluctuations in the price and volatility of oil, gas or energy commodities; supply risks; political, regulatory or legislative developments; operational and exploration and production risks; limited access to capital or indebtedness; inaccurate reserve estimates; hydraulic fracturing regulation; changes in and level of demand; shortage of rigs and equipment or personnel; and exposure to and use of hedging and derivative instruments.

Practical Considerations. Each company should consider its specific risk profile when determining if its risk factor presentation is sufficiently comprehensive and current. If a topic is not relevant for a company, the company should not include it as a risk factor, even if many other companies do. Likewise, if a company has a unique risk, that risk should be discussed even if other companies do not disclose a comparable risk factor. Foreign private issuers should consider specific jurisdictional or regional risks unique to their particular geography.

The topics highlighted above are not the only areas to consider as part of an annual review of risk factor disclosure. The past year had many developments that may have impacted companies' risk profiles. Companies may be facing increased risk due to terrorism and related security costs. Fluctuations in currency rates and commodity prices also may have significant impact. Political turmoil and changes in various parts of the world might affect business. There may be industry-specific developments that present risks for certain companies. Companies should assess whether their existing risk factors are adequate to cover recent developments.

Companies should review risk factors of similarly situated companies to identify topics to consider for disclosure in their own risk factors,

including updates that have been presented in quarterly reports over the past year.

In addition to deciding what revisions are needed from a factual point of view, each company should review its risk factor discussion to be sure it is clearly presented in relation to the company and does not merely contain a boilerplate discussion of general risks.

If a risk factor update could materially impact a company's financial results, it may also be appropriate for that company to discuss that aspect in the management's discussion and analysis, or comparable section, of its annual report on Form 10-K or Form 20-F.

For more information about the topics raised in this Legal Update, please contact the author of this Legal Update, Laura D. Richman, at +1 312 701 7304, any of the following lawyers or any other member of our Corporate & Securities practice.

Laura D. Richman
+1 312 701 7304
lrichman@mayerbrown.com

David S. Bakst
+1 212 506 2551
dbakst@mayerbrown.com

Jason T. Elder
+852 2843 2394
jason.elder@mayerbrownjsm.com

Robert F. Gray, Jr.
+1 713 238 2600
rgray@mayerbrown.com

Michael L. Hermsen
+1 312 701 7960
mhermsen@mayerbrown.com

Thomas Kollar
+852 2843 4260
thomas.kollar@mayerbrownjsm.com

Endnotes

[1] For further information about the SEC's views on cybersecurity disclosure, see CF Disclosure Guidance: Topic 2 at https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

[2] http://www.bbc.com/news/uk-politics-32810887.

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SEC Proposes Universal Proxy Cards for Contested Director Elections

David M. Lynn and Scott Lesmes

11/16/2016

Corporate Governance and Public Companies Counseling + Compliance

Client Alert

On October 26, 2016, the Securities and Exchange Commission (the "Commission"), in 2-1 vote, proposed revisions to its proxy rules that would require registrants and dissident shareholders to use universal proxy cards naming all board nominees in contested elections of directors. Under current rules, registrants and dissidents use competing proxy cards, which effectively prevent shareholders from voting by proxy for their chosen mix of director candidates, but rather require them to vote for either the registrant's nominees or the dissident's preferred mix of dissident nominees and registrant nominees. Shareholders must attend, or have a representative attend, the shareholders' meeting in person to vote for a slate of directors that is not available via either proxy card. A universal proxy card as proposed by the Commission would include all registrant and dissident nominees on one card, as well as any proxy access nominees. A key goal of the proposed rules, as stated by Commission Chair Mary Jo White, is to "allow shareholders to vote by proxy in a manner that more closely replicates how they can vote in person at a shareholder meeting."

In the same release, the Commission also proposed revisions to the proxy rules applicable to all director elections that are designed to ensure that proxy cards specify all voting options available to shareholders in elections of directors and would require clear disclosure of the effect of withheld votes in elections governed by the plurality voting standard.

The Commission's press release announcing the proposed rules, an accompanying fact sheet, and the full text of the proposed rules are available on the SEC's website. Comments on the proposed rules are due on January 9, 2017.

Background

Under current rules, a director candidate may be included on a proxy card only if the candidate consents to inclusion. In the context of a contested election, a candidate of the registrant is very unlikely to consent to being included on a dissident's proxy card and the registrant is very unlikely to seek to include a dissident nominee on its proxy card. As a result, shareholders typically will receive a proxy card from the registrant with its nominees and a proxy card from the dissident with its nominees. If the dissident's proxy card contains a "short slate" (that is, it contains fewer nominees than board seats up for election), current Commission rules (known as the "short slate rules") permit the dissident to include the names of registrant nominees for whom it will *not* cast proxies received from shareholders. Shareholders then must choose whether to submit proxies for the registrant's slate using the registrant's proxy card or the dissident's slate using the dissident's proxy card. If a shareholder desires to cast votes for a mix of registrant and dissident director candidates that is not reflected in the dissident's short-slate proxy card, the shareholder must attend the shareholders meeting and cast the vote in person or appoint a representative to attend the meeting and vote on the shareholder's behalf. With a universal proxy card, all candidates would appear on a single card, allowing shareholders to "mix and match" nominees from both parties as the shareholder desires. Under the plurality voting standard applicable to contested elections, the nominees receiving the most "for" votes would be elected to the board of directors.

The Commission has considered universal proxy cards in the past, including in connection with amendments to the proxy rules adopted in 1992 and a proposed rule in 2003. In recent years, the movement towards the use of a universal proxy cards has gained momentum through various activities, including the following:

- In 2013, the Commission's Investor Advisory Committee recommended that the Commission consider revisions to the proxy rules to permit the use of universal proxy cards in "short-slate" director elections.
- In 2014, the Council of Institutional Investors ("CII") petitioned the Commission for rulemaking on the use of universal proxy cards.
- In 2015, the Commission held a roundtable on proxy voting issues, including the use of universal proxy cards.
- In 2015, CII sent another letter to the Commission urging rulemaking on universal proxy cards.
- In 2015, Commission Chair White announced to the Society for Corporate Governance that she had asked Commission staff to present recommendations on universal proxy rulemaking to the Commission.

The U.S. House of Representatives, however, has made clear its opposition to universal proxy cards, voting earlier this year to add language to a spending bill that would have prevented universal proxy rules. The bill, however, has not passed the Senate.

Key Elements of the Proposed Rules on Universal Proxy

Inclusion of All Nominees on Proxy Card in Contested Elections. The proposed rules would require registrants and dissident shareholders to use universal proxy cards in all non-exempt solicitations in contested director elections at annual meetings. Under the proposed rule's revised definition of "bona fide nominee" in Rule 14a-4(d), any person who has consented to being named in *any* proxy statement relating to the registrant's next meeting of shareholders for the election of directors may be included on the registrant's and the dissident's respective proxy card. Nominees would still be required to consent to serve if elected; if a nominee intends to serve only if one of the party's slate of candidates is elected, the applicable proxy statement must disclose that fact. As a universal proxy would obviate the need for the current "short slate" rule, the proposed rules would eliminate that rule.

If a shareholder or group of shareholders also has submitted one or more proxy access nominees for inclusion in the registrant's proxy materials, those nominees would be included on a universal proxy card. (We note, however, that proxy access bylaw provisions often prohibit proxy access nominees in the event of a contested election.) The universal proxy card must distinguish between registrant, dissident and proxy access nominees, as discussed further under "Presentation and Format" below.

Presentation and Format. Although registrants and dissidents may design their own universal proxy cards, the proposed rules set forth various requirements as to formatting and presentation of the cards, which are intended to ensure a clear and fair presentation of nominees from all parties. The requirements include the following:

- The card must distinguish clearly between registrant nominees, dissident nominees, and any proxy access nominees.
- Within each group of nominees, the nominees must be listed in alphabetical order.
- All nominees must be presented on the card in the same font type, style and size.
- The proxy card must clearly state the maximum number of nominees for whom shareholders may grant proxy authority.
- The proxy card must clearly state the treatment of a proxy executed in a manner that grants authority to vote for more or fewer nominees than the number of directors being elected or in a manner that does not grant authority to vote with respect to any nominees.

A universal proxy card could allow shareholders to vote for the full slate of registrant nominees or dissident nominees as a group if: (1) both the registrant and the dissident have proposed a full slate of nominees; and (2) there are no proxy access nominees.

Procedural Requirements. The proposed rules contain various notice and filing requirements, including the following:

- The dissident, in addition to complying with the advance notice requirements of the registrant's bylaws, must provide the registrant with the names of its nominees at least 60 days prior to the anniversary of the prior year's annual meeting. The proposed rules would require the registrant to include this deadline in its proxy materials, similar to the existing requirement to provide the Rule 14a-8 deadline for shareholder proposals.
- The registrant must provide the dissident with the names of its intended nominees no later than 50 calendar days prior to the anniversary of the prior year's annual meeting.
- The dissident must file its definitive proxy statement with the Commission by the later of 25 days before the meeting date or five calendar days after the registrant files its definitive proxy statement.
- The dissident must solicit shareholders holding at least a majority of the voting power of shares entitled to vote in the election, meaning it must mail proxy materials to those shareholders or make the proxy materials available to those shareholders via notice-and-access. (The Commission is seeking comment regarding whether dissidents should be required to solicit all shareholders, as retail investors holding smaller positions likely would be most impacted by the rules as proposed.)

As is the case under current rules, the registrant and the dissident would continue to prepare and disseminate their own proxy materials, and solicit shareholders to return their proxy cards or otherwise vote for their respective slate of candidates. The registrant and dissident, however, would be required in their proxy statements to refer shareholders to the other party's proxy statement for information about that party's nominees and to state that the other party's proxy statement is available free-of-charge on the Commission's website.

Comparing Universal Proxy to Proxy Access. Many registrants have recently adopted proxy access bylaw provisions that permit a shareholder, or a group of shareholders, meeting various ownership and other requirements to have a limited number of director nominees included in the registrant's proxy materials, including the proxy card. Proxy access bylaws also typically permit the nominating shareholder(s) to include a 500-word statement in support of their nominees in the registrant's proxy statement. In contrast, nominees of a dissident shareholder in a proxy context are not included in the registrant's proxy materials; the dissident prepares and files with the Commission its own proxy materials and conducts its own solicitation of shareholders at its expense. Shareholders putting forth director nominees through proxy access can avoid the substantial costs associated with a proxy contest, but they also must comply with the requirements and conditions of the proxy access bylaw provisions, which often include restrictions on the nominating shareholder's intention to change or influence control of the registrant in addition to ownership and other eligibility requirements. As proxy access nominees would already be included in a registrant's proxy materials, a universal proxy card stands to benefit more a dissident shareholder in a proxy contest situation, but the dissident still must conduct its own solicitation at its expense.

Disclosure of Voting Standards and Voting Options

The Commission also proposed rules regarding disclosure of voting standards and voting options that would apply to proxy statements and proxy cards for both contested and uncontested elections of directors. The Commission proposed these rules in response to concerns that some proxy statement disclosures are ambiguous with respect to voting standards in director elections, particularly in light of the widespread adoption of majority voting in elections of directors. Under the

proposed rules, proxy cards would have to include "against" and "abstain" voting options when there is a legal effect to a vote against a nominee under state law. This legal effect generally arises when a registrant has a majority voting standard for director elections. Further, registrants would not be permitted to include a "withhold" option on the proxy card in that situation. If a registrant utilizes a plurality voting standard for director elections, it would be required to disclose in its proxy statement the treatment and effect of a "withhold" vote (i.e., that "withholds" have no legal effect in plurality voting).

The Outlook for the Proposed Rules

As evidenced by numerous Commission requests for comments on the proposed rules, as well as early commentary on the proposed rules, concerns exist as to the potential impact of mandatory universal proxy cards. Those concerns include, among others:

- whether a universal proxy card would lead to voter confusion;
- whether the proposed rules would lead to more proxy contests and the election of more (or less) dissident nominees;
- whether a universal proxy card would lead to undesired outcomes, such as shareholders being more likely to vote for a mixed slate of nominees that neither the registrant nor the dissident is in favor of;
- whether a universal proxy card may lead to more invalid votes - for example, would it be more likely that shareholders will vote inadvertently for more nominees than available board seats; and
- whether retail investors will be negatively impacted by the requirement that dissidents need only solicit a majority of shareholders rather than all shareholders.

Given the above and other concerns, we expect substantial comment and debate on the proposed rules. Further, upcoming and anticipated changes at the Commission may impact elements of the proposed rules or the priority of universal proxy cards relative to other potential Commission actions.

With respect to the proposed rules regarding disclosure of voting standards and voting options, we recommend that registrants review their existing disclosures to ensure such disclosure is clear. Given the concern expressed by the Commission and Commission staff regarding ambiguity of disclosures in some proxy statements under existing rules, we expect this to be an area of particular review and comment by the Commission staff in the upcoming proxy season.

REIT Wise® 2017

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What's next from the SEC?

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REITWise 2017: What's Next from the SEC?

March 9, 2017

Agenda

What to expect from the Securities and Exchange Commission under the new administration

- Challenges to the Commission's independence and regulatory roll-back efforts
- The Choice Act
- Capital formation related developments
- Investment management developments
- Enforcement developments

“Regulatory Accountability” Measures

Regulatory Accountability Act

Regulatory Accountability Act	
Revise Rulemaking Procedures Under the Administrative Procedures Act ("APA")	• Would revise federal rulemaking procedures under the APA to require applicable federal agency to make all preliminary and final factual determinations based on certain *evidence*.

Consideration of Numerous Factors Prior to Issuing Rule	• Federal agency must consider, among other factors, the:
	  • legal authority under which a rule may be proposed;
	  • specific nature and significance of the problem the rule addresses; and
	  • any reasonable alternatives.

New Rulemaking Notice Requirements	• Rulemaking notice requirements would be revised to require agencies to, among other things:
	  • publish in Federal Register advance notice of proposed rulemaking involving a "major" or "high-impact rule;"
	  • hold a hearing before the adoption of any "high-impact rule;" and
	  • provide interested persons with an opportunity to participate in the rule-making process.

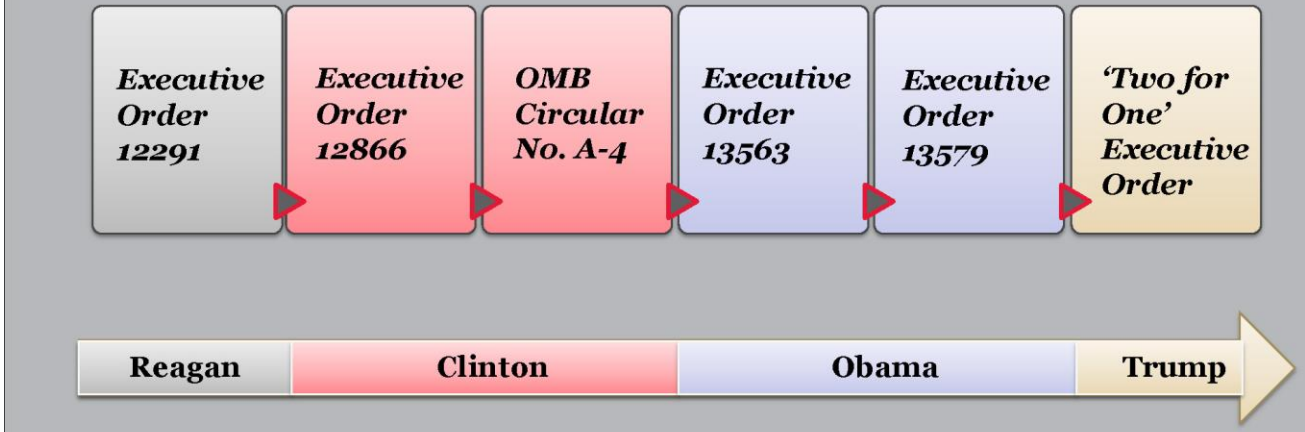
SEC Regulatory Accountability Act

SEC Regulatory Accountability Act	
Revisions to the Exchange Act	SEC would be directed to: • identify the nature and source of the problem that the proposed regulation is designed to address (prior to issuing a regulation under the securities laws); • adopt regulations only after a determination that its benefits justify its costs; • identify and assess available alternatives to any regulation; and • ensure that regulation is accessible, consistent, written in plain language, and easy to understand.
Determination of Cost and Benefits	The SEC would be required to consider a rule's impact on investor choice, market liquidity, and small businesses (*cf.* current standard under *Business Roundtable v. SEC* ("[SEC's] statutory obligation [is] to determine as best it can the economic implications of the rule.").
Additional Obligations of the SEC	• Periodically review its existing regulations to determine if they are outmoded, ineffective, insufficient, or excessively burdensome; and • In accordance with such review, modify, streamline, expand, or repeal them.
"Major" Rule Adoption or Amendment	SEC would be required to state in its adopting release: • the regulation's purposes and intended consequences; • metrics for measuring the regulation's economic impact; • the assessment plan used to assess if the regulation has achieved its stated purposes; and • any foreseeable unintended or negative consequences of the regulation.

Presidential Actions in 2017

- On January 30, 2017, President Trump issued an Executive Order, titled *Reducing Regulation and Controlling Regulatory Costs*.
  - Notes that the policy of the executive branch is to be "prudent and financially responsible in the expenditure of funds, from both public and private sources."
  - Establishes a regulatory cap for fiscal year 2017—unless prohibited by law, whenever an executive department or agency publicly proposes for notice and comment (or otherwise promulgates a new regulation), it must identify at least two existing regulations to be repealed.
- On February 2, 2017, the Office of Information and Regulatory Affairs issued its *Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017*.
  - Explains that departments and agencies may comply with the requirements of the Executive Order "by issuing two 'deregulatory' actions for each new significant regulatory action that imposes costs."

Cost-Benefit Requirements Within the Rulemaking Process



Cost-Benefit Requirements Within the Rulemaking Process: Pre-Trump

- ***Executive Order 12291 (Feb. 1981).***
  - Regulatory Impact Analysis must be conducted in connection with every "Major Rule."
  - Must contain a description of the potential: (i) benefits of rule; (ii) costs of rule; and (iii) net benefits of rule.
- ***Executive Order 12866 (Oct. 1993)*** *(revokes Executive Order 12291).* Agencies should assess all costs/benefits of viable regulatory alternatives, including the alternative of not regulating.
  - "Significant" regulatory actions must be submitted to Office of Information and Regulatory Affairs ("OIRA") for review.
- ***OMB Circular A-4 (Sept. 2003).*** Designed to ". . . standardiz[e] the way benefits and costs of Federal regulatory actions are measured and reported."
  - "Good regulatory analysis" encompasses: (i) a statement of the need for a proposed action; (ii) an examination of alternative approaches; and (iii) an evaluation of benefits and costs, including cost-benefit and cost-effectiveness analyses.
  - To properly evaluate costs and benefits of regulations and alternatives, an agency must:
    - Explain how the actions required by the rule are linked;
    - Identify a baseline; and
    - Identify the expected undesirable side-effects and ancillary benefits.
  - "Opportunity cost" is the appropriate concept for valuing benefits and costs.
    - "Willingness-to-pay" captures the notion of opportunity cost.
    - However, "willingness-to-accept" can also be instructive.

- ***Executive Order 13563 (Jan. 18, 2011)***
  - Regulatory system must "take into account benefits and costs, both quantitative and qualitative" and measure "the actual results of regulatory requirements.
  - Each executive agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.
  - Where feasible, executive agencies should consider values that are "difficult or impossible to quantify" (e.g., equity, human dignity, fairness and distribute impacts).
- ***Executive Order 13579 (July 11, 2011)***
  - Extends Executive Order 13563 to independent regulatory agencies.
  - Independent regulatory agencies should consider how best to promote "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome . . ."

Pre-Trump, cont'd.

Core Principles for Regulating the United States Financial System

- On February 3, 2017, President Donald Trump signed the Executive Order on Core Principles for Regulating the United States Financial System. The order outlined seven principles of regulation, or "Core Principles", which the Trump Administration will follow to regulate the U.S. financial system. The principles were listed as follows:
  - Empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
  - Prevent taxpayer-funded bailouts;
  - Foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry;
  - Enable American companies to be competitive with foreign firms in domestic and foreign markets;
  - Advance American interests in international financial regulatory negotiations and meetings;
  - Make regulation efficient, effective, and appropriately tailored; and
  - Restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework.

The Choice Act

The Financial Choice Act

- The Financial Choice Act of 2016 (the "Choice Act") is viewed as the first major concerted effort to provide an alternative to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") as a way to end "Too Big to Fail."
- As currently drafted, the Choice Act would impact U.S. securities laws by:
  - Repealing a number of the specialized disclosure provisions contained in the Dodd-Frank Act; and
  - Subsuming various "JOBS Act 2.0" capital formation measures that have largely been presented as standalone bills.

The Choice Act

Reforms to Title IX of the Dodd-Frank Act:	
Fiduciary Duty Rule	• Requires the SEC to report to the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs on certain matters before promulgating a heightened standard of conduct for broker-dealers.
Asset-Backed Securities and Credit Rating Agencies	• Eliminates the risk retention requirements for certain asset-backed securities. • Repeals the Franken Amendment.
Relief for Smaller Issuers	• Modifies threshold for ability to rely on the exemption from Section 404(b) of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").
Executive Compensation, Incentive-Based Compensation, and Pay Ratio Disclosure	• Repeals the Dodd-Frank Act provisions relating to incentive-based compensation and pay ratio disclosures.

The Choice Act: Reforms Affecting Capital Formation

Title X of the Financial Choice Act			
Simplification of Small Business Mergers, Acquisitions, Sales, and Brokerage	Encouraging Employee Ownership	Foster Innovation Through Temporary Exemption for Low-Revenue Issuers	Safe Harbor for Micro Offerings
Simplification of Small Company Disclosure Requirements	SEC Overpayment Credit	Enhance Small Business Capital Formation	Improvements to Private Placements
Accelerating Access to Capital	Fair Access to Investment Research	Revisions to the Prohibition Against General Solicitation and Advertising	Investor Limitations for Qualifying Venture Capital Funds
Establishment of an SEC Small Business Advocate	Small Business Credit Availability	Venture Exchanges	Adjustments to Crowdfunding Regime

- ***Simplification of Small Business Mergers, Acquisitions, Sales, and Brokerage***. Amends Section 15(b) of the Exchange Act to exempt an "M&A broker" from Exchange Act registration.
- ***Encouraging Employee Ownership***. Increases the threshold for disclosures relating to compensatory benefit plans.
- ***Simplification of Small Company Disclosure Requirements.*** EGCs and issuers with less than $25 billion in total annual gross revenues would be exempt from Extensible Business Reporting Language requirements for financial statements and other periodic reporting.
- ***SEC Overpayment Credit.*** New mechanism for the refunding or crediting of overpayment of fees paid in connection with Section 31 of the Exchange Act.

Reforms to Capital Formation, cont'd.

Reforms to Capital Formation, cont'd.

- ***Fair Access to Investment Research.*** Expands the safe harbor for investment fund research provided by Rule 139 under the Securities Act.
- ***Accelerating Access to Capital.*** Expands the eligibility for use of a registration statement on Form S-3.
- ***Establishment of an SEC Small Business Advocate.*** Amends Section 4 of the Exchange Act by establishing within the SEC an "Office of the Advocate for Small Business Capital Formation."
- ***Small Business Credit Availability.*** Requires that the SEC promulgate regulations to codify the terms of an exemptive application already issued to a business development company ("BDC") allowing the BDC to own interests in an investment adviser.
- ***Foster Innovation Through Temporary Exemption for Low-Revenue Issuers.*** Provides a temporary exemption for "low-revenue issuers" from Section 404(b) of the Sarbanes-Oxley Act.

Reforms to Capital Formation, cont'd.

- ***Enhance Small Business Capital Formation.*** Amends Section 503 of the Small Business Investment Incentive Act by requiring the SEC to review the findings and recommendations of the Government-Business Forum on Capital Formation.
- ***Revisions to the Prohibition Against General Solicitation and Advertising.*** Requires the SEC to revise Reg D to reflect the guidance contained in the *Michigan Growth Capital Symposium* no-action letter.
- ***Venture Exchanges.*** Amends Section 6 of the Exchange Act by enabling a national securities exchange to elect to be treated as a "venture exchange."
- ***Safe Harbor for Micro Offerings.*** Provides a safe harbor from Section 4 of the Securities Act for certain micro offerings.
- ***Improvements to Private Placements.*** Amends Reg D in an attempt to ensure that the proposed amendments released by the SEC in July 2013 would be foreclosed from being adopted.

- ***Investor Limitations for Qualifying Venture Capital Funds.*** Amends Section 3(c)(1) of the Investment Company Act by allowing a "qualifying venture capital fund" to maintain holders of up to 250 U.S. persons without having to register under the Investment Company Act.
- ***Adjustments to Crowdfunding Regime.*** Adds a new provision under Section 4(a)(6) of the Securities Act, which would provide an exemption for securities offered by certain issuers:
  - Public float less than $75 million as of most recent semi-annual period; *or*
  - Where total public float is zero, annual revenues of less than $50 million as of most recently completed fiscal year.
- ***Corporate Governance Reform and Transparency.*** Requires "proxy advisory firms" to register under the Exchange Act before providing proxy voting research, analysis, or recommendations to any client.

Reforms to Capital Formation, cont'd.

The Choice Act: Repeal of Certain Specialized Public Company Disclosures

Would repeal the following provisions of the Dodd-Frank Act:	
Section 1502	• Requires certain persons to disclose annually whether any "conflict minerals" are necessary to the functionality or production of a product of the person originated in the Democratic Republic of the Congo or an adjoining country.
Section 1503	• Requires the SEC to promulgate rules that require an issuer that files reports pursuant to Section 13(a) or Section 15(d) of the Exchange Act and is an operator, or maintains a subsidiary that is an operator, of a coal or other mine to include, in each periodic report filed with the SEC, certain information for the time covered by the report.
Section 1504	• Requires that the SEC issue rules that require reporting issuers engaged in resource extraction activities, including the commercial development of oil, natural gas, or minerals, to disclose in their annual reports certain payments made to the U.S. federal government or a foreign government.

Changes to the as-introduced Version of the Financial Choice Act

- The Choice Act 2.0 contains additional provisions that would:
  - Modernize Section 12(g) registration requirements for smaller reporting companies.
    - Eliminate annual verification of accredited investor status; and
    - Increase revenue and shareholder thresholds.
  - Increase the exemption from registration as an investment company for "qualified angel funds" from 100 to 500 investors.
  - Increase the SEC Rule 701 threshold from $10 to $20 million with an inflation trigger.
  - Extend the ability to "test the waters" to all companies (not just EGCs).
  - Confidential filings will be available to all companies registering shares for sale for the first time.
  - Increase the Reg A+ $50 million threshold to $75 million per year plus the addition of an inflation trigger.

Aspects of the Choice Act Already in Motion: Pay Ratio Disclosure Rule

- The SEC adopted the Pay Ratio Disclosure Rule in August 2015 to implement Section 953(b) of the Dodd-Frank Act.
- The Pay Ratio Disclosure Rule requires a public company to disclose the ratio of the median of the annual total compensation of all employees to the annual total compensation of the chief executive officer.
- On February 6, 2017, Acting Chairman of the SEC Michael Piwowar requested public comment on any unexpected challenges that issuers have experienced in connection with complying with the Pay Ratio Disclosure Rule.

Aspects of the Choice Act Already in Motion: Public Company Disclosures

- On January 31, 2017, Acting Chairman of the SEC Michael Piwowar directed the SEC staff to "reconsider whether the 2014 guidance on the Conflict Minerals Rule is still appropriate and whether any additional relief is appropriate."
- On February 14, 2017, President Trump approved Congress' joint resolution to repeal the SEC's Resource Disclosure Rule.
  - The joint resolution was passed by Congress in February 2017 pursuant to the Congressional Review Act.
  - The Congressional Review Act permits Congress to, among other things, disapprove a final agency rule within 60 days from when it was issued.

Other Capital Formation Matters

Capital formation related measures

- The SEC will have an opportunity to continue to advance the efforts already underway, including the following:
  - The Disclosure Effectiveness initiative
  - Amending the Smaller Reporting Company definition
  - Amending the accredited investor definition

Disclosure Effectiveness

- The SEC's April 13, 2016 concept release asks many questions about the disclosure of business and financial information required by Regulation S-K; prior to that, the SEC had solicited comments in 2015 regarding concepts related to financial statements required under Regulation S-X
- The broader disclosure effectiveness efforts have been wide-ranging and have encouraged voluntary efforts to improve disclosure in periodic reports
- It is particularly difficult to predict how and when concepts may turn into actual rulemaking

- ***Financial Information and the MD&A***: The release discusses the Commission's guidance over the years on the objectives of the MD&A section, the use of an executive-level overview and the types of trend data that the Commission has sought. In this regard, the release requests comment on various matters, including whether the sources of Commission guidance on MD&A should be consolidated, whether a different format or presentation should be required, and whether auditor involvement should be required.
- ***Risks and Risk Management***: The release asks whether all risk related disclosures required to be included in a report should be consolidated, and whether this would improve the quality of the information.
- ***Line Item Requirements***: The Concept Release also seeks comment regarding specific items of Regulation S-K.
- ***Industry Guides***: Consistent with the JOBS Act Regulation S-K study, the release solicits comments on the various industry guides.
- ***Exhibits***: The release also seeks input on Item 601 of Regulation S-K related to exhibit requirements.

Disclosure Effectiveness, cont'd.

Disclosure Effectiveness, cont'd.

- ***Principles-Based Disclosures or Prescriptive Disclosures***: The Concept Release raises the age-old "principles-based" versus "prescriptive" disclosure question. The release solicits input on the most effective approach as between principles-based and prescriptive disclosure requirements and offers up a third concept, "objectives-based" disclosure requirements for consideration.
- ***Investor Sophistication***: The Concept Release asks an important question that often is the very first question we ask when we are writing a memorandum or an alert: in crafting disclosures, what level of sophistication should be presumed of the reader?
- ***Scaled Disclosures***: Scaled disclosures are available to smaller reporting companies (SRCs) and the JOBS Act made certain disclosure accommodations available to EGCs.
- ***Frequency of Disclosures***: The release addresses the current debate regarding "short-termism" by acknowledging the possibility that quarterly disclosure requirements may lead management of public companies to focus on near term results rather than long-term investment.

Other Related Initiatives

- Revising industry guides
- Comment request on the "400 Series" of Regulation S-K
- Exhibit hyperlinking – final rule adopted March 1, 2017
- Inline XBRL – rule proposed on March 1, 2017

Smaller Reporting Companies

- On June 27, 2016, SEC proposed amendments to the definition of "smaller reporting company" (SRC) that would expand the number of companies that have this status.
- Under the proposed amendments, registrants with a public float of less than $250 million would qualify as SRCs. The amendments are intended to promote capital formation by reducing the burdens on SRCs without significantly altering the total mix of information available to investors.
- SRCs are eligible for a number of disclosure accommodations under Regulation S-K and Regulation S-X. The proposed amendments do not affect the scope of these existing scaled disclosure requirements. The Commission will review the scaled disclosure requirements as part of its Disclosure Effectiveness Initiative.
- The Commission is also proposing amendments to the definitions of "accelerated filer" and "large accelerated filer.

Smaller Reporting Companies, cont'd.

PROPOSED AMENDMENTS TO THE SMALLER REPORTING COMPANY DEFINITION		
Registrant Category	Current Definition	Proposed Definition
Reporting Registrant	Less than $75 million of public float at end of second fiscal quarter	Less than $250 million of public float at end of second fiscal quarter
Registrant Filing Initial Registration Statement	Less than $75 million of public float within 30 days of filing	Less than $250 million of public float within 30 days of filing
Registrant with Zero Public Float	Less than $50 million of revenues in most recent fiscal year	Less than $100 million of revenues in most recent fiscal year
Non-Smaller Reporting Company that Seeks to Qualify as a Smaller Reporting Company Based on Public Float	Less than $50 million of public float at end of second fiscal quarter	Less than $200 million of public float at end of second fiscal quarter
Non-Smaller Reporting Company with Zero Public Float that Seeks to Qualify as a Smaller Reporting Company	Less than $40 million of revenues in most recent fiscal year	Less than $80 million of revenues in most recent fiscal year

Examination and Enforcement Developments

Enforcement

- Changes can be expected
  - More cases being settled and less headline seeking enforcement litigation
  - Less onerous restrictions on foreign public companies
  - Less zealous enforcement of Foreign Corrupt Practice Act
    - Clayton has expressed views on a less zealous approach to FCPA, but that was before the DOJ and the SEC targeted many non-US Companies; the DOJ and the SEC collected a total of $1.8 billion in FCPA fines, penalties and disgorgement in 2016.
    - Clayton questioned the unilateral approach of the US and, since his comments, the DOJ and the SEC have accomplished much in building international coalitions and relationships with law enforcement agencies around the globe. In effect, the DOJ and the SEC have "institutionalized" global anti-corruption enforcement, and it will be extremely difficult for any future administration to dismantle this existing infrastructure.

Enforcement, cont'd.

- Changes can be expected (cont'd)
  - Settlements are more likely to seek new safeguards, not fines that punish stockholders
  - Less use of disclosure to promote corporate governance
    - Focus on financial disclosure meaningful to investors, not executive compensation
    - Possible reduced access to proxy statement disclosure by public interest groups
  - Scale back rules viewed as slowing economic growth
  - Emphasis on speed of review and increased effort to promote capital formation
  - Less emphasis on regulation and reduced oversight of asset managers

NATIONAL

ASSOCIATION

OF

REAL ESTATE

INVESTMENT

TRUSTS®

July 21, 2016

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Delivered Electronically

Re: Concept Release on Business and Financial Disclosure Required by Regulation S-K; 17 CFR Parts 210, 229, 230, 232, 239, 240 and 249; Release Nos. 33-10064, 34-77599; File No. S7-06-16; RIN 3235-AL78

Dear Mr. Fields:

The National Association of Real Estate Investment Trusts (NAREIT) is the worldwide representative voice for real estate investment trusts (REITs) and publicly-traded real estate companies with an interest in U.S. real estate and capital markets. We represent a large and diverse industry including equity REITs, which own commercial properties, mortgage REITs, which invest in mortgage securities, REITs traded on major stock exchanges, public non-listed REITs and private REITs. Public U.S. REITs collectively own nearly $2 trillion of real estate assets and, by making investment in commercial real estate available in the form of stock, our REIT members enable all investors – importantly, small investors – to achieve what once only large institutions and the wealthy could.

NAREIT supports the goals of the Securities and Exchange Commission's (SEC, or the Commission) Disclosure Effectiveness Initiative and appreciate this opportunity to submit comments responding to the *Concept Release on Business and Financial Disclosure Required by Regulation S-K* (*Concept Release*)[1].

♦ ♦ ♦

REITs as publicly traded real estate companies are a growing asset class, both domestically and abroad. Last year S&P and MSCI announced that for the first time since the Global Industry Classification Standard (GICS®) was created in 1999, it will create a new headline sector named *Real Estate*, which will be predominately populated by equity REITs and will become effective August 31, 2016.[2] Promoting *Real Estate* to a GICS® headline sector from its current

[1] All page references here in refer to the ***Federal Register*** version of *Business and Financial Disclosure Required by Regulation S-K* , 81 FR 23915 (April 22, 2016).

[2] S&P Dow Jones Indices, *S&P DOW JONES INDICES AND MSCI ANNOUNCE AUGUST 2016 CREATION OF A REAL ESTATE SECTOR IN THE GLOBAL INDUSTRY CLASSIFICATION STANDARD* (GICS®) STRUCTURE [Press Release, (March 13, 2015)], available at https://www.msci.com/documents/10199/6aac98e5-a0f6-485c-ad7c-20394024e07f.

♦ ♦ ♦

industry classification under *Financials* recognizes the growing position of REITs in the global investment landscape. Worldwide, 36 countries currently have enacted laws supporting equity REITs, which own and operate real estate assets.[3]

REITs as publicly traded real estate companies share many commonalities with other SEC-registered companies, but also exhibit important differences. Most relevant to disclosure, the "real estate-centric" nature of REITs presents some challenges for meaningful financial reporting. Historical cost accounting for real estate assets implicitly assumes that the value of real estate assets diminishes predictably over time, although this has not been accurate over the long periods of time in which real estate investments have historically been valued. To address this anomaly, in 1991, NAREIT, working with its corporate members and the REIT investment community, developed a non-GAAP measure of REIT performance, NAREIT Funds from Operations (FFO), which is calculated by adding depreciation and amortization related to real estate to GAAP net income and subtracting gains and losses from real estate sales.

NAREIT FFO is now widely used as a supplemental metric to measure operating performance and has been recognized by the SEC since 2002 as a standard non-GAAP performance measure for the real estate industry.[4] REIT disclosure practices, incorporating NAREIT FFO metrics, are consistently praised by the financial and investor communities for their transparency and comparability.[5] NAREIT continues to engage in efforts to refine the understandability and uniformity of FFO estimates.

NAREIT and its members have long understood the critical importance of communicating accurate and material business and financial information to REIT investors and appreciate this historic opportunity to participate in the SEC's Disclosure Effectiveness Initiative. NAREIT convened groups of NAREIT members of its committees on government relations, accounting and sustainability in a series of conference calls to discuss the disclosure topics most relevant to REITs that are raised in the *Concept Release*. Although the views of NAREIT members on some

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[3] Available at https://www.reit.com/investing/reit-basics/global-real-estate-investment.

[4] *See* SEC, *The Use of Non-GAAP Financial Measures* (May 17, 2016), available at https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm; *See also*, SEC, *Frequently Asked Questions Regarding the Use of Non-GAAP Financial Measures* (June 13, 2003), available at https://www.sec.gov/divisions/corpfin/faqs/nongaapfaq.htm ("Question 7:What measure was contemplated by 'funds from operations' in footnote 50 to the adopting release, which indicates that companies may use 'funds from operations per share' in earnings releases and materials that are filed or furnished to the Commission, subject to the requirements of Regulation G and Item 10(e) of Regulation S-K? Answer 7: Footnote 50 contemplated only the measure 'funds from operations' defined and clarified, as of January 1, 2000, by the National Association of Real Estate Investment Trusts.").

[5] *See, e.g.*, Chilton Capital Management investment team, as reported in *Seeking Alpha* (May 3, 2016) ("In fact, we would argue that REIT disclosures rank near the top of all sectors, making them extremely transparent to investors. Upon spending the time to understand some of these new metrics, we believe that market participants will determine that REITs are *less* complex than the average company and FFO estimates, dividend forecasts, and valuations are *more* accurate."), available at http://seekingalpha.com/article/3970520-gics-change-validates-investment-merits-reits.

topics varied, there was overwhelming agreement on key foundational points, which are summarized below:

- NAREIT strongly believes that materiality, as evaluated through the eyes of a "reasonable investor" under the prevailing Supreme Court[6] standard, should continue to be the guidepost of the SEC's disclosure regime and that reform efforts should focus on best ways to ensure the disclosure of *company-specific* material information to investors;[7]
- NAREIT strongly favors a "Principles-based" approach to SEC disclosure and believes it is best suited to the constantly evolving business environment in which REITs and other businesses operate. We agree that the disclosure requirements should be streamlined and suggest that limiting prescriptive "line-item" disclosure requirements would reduce "over-disclosure" of irrelevant, outdated or immaterial information;
- NAREIT appreciates the SEC's recognition of the value of NAREIT FFO, an industry-wide Non-GAAP metric, to REIT investors;
- NAREIT believes that greater coordination between the SEC and FASB would reduce overlapping and redundant disclosure requirements and lead to better disclosure;
- NAREIT believes that Principles-based disclosure based on materiality remains the best approach to environmental, sustainability and similar disclosures and does not believe that the SEC should prescribe specific standards or reporting frameworks in this area; and,
- NAREIT suggests that SEC disclosure reform should incentivize long-term business value creation rather than short-term results. Reforms should prioritize reporting rules and metrics that highlight long-term results.

I. Core Company Business Information (Item 101)

The *Concept Release* seeks general comments on the usefulness of disclosure required by Item 101 of Regulation S-K and whether it duplicates information provided elsewhere in the reports.

NAREIT supports efforts to streamline the reporting of core company business information generally, through the elimination of redundant, outdated and excessive reporting requirements. We believe that streamlining efforts should adopt a Principles-based approach and that additional line-item reporting should be resisted.

NAREIT also generally supports the idea, raised in Question 28 of the *Concept Release*, of a rule change that would "require a more detailed discussion of a registrant's business in the initial filing, and in subsequent filings only require a summary of the registrant's business along with a discussion of material changes in the business as previously disclosed in the registrant's Form

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[6] ***TSC Industries, Inc. v. Northway, Inc***., 426 U.S. 438 (1976) at 449.
[7] NAREIT's comments herein primarily address proposed disclosure reforms related to the requirements of SEC Forms 10-K, 10-Q and 8-K (collectively referred to herein as'34 Act reports).

10-K…" There are many forms that this suggestion could assume, including permitting registrants to lodge a "date and time stamped" basic company profile in the EDGAR system, which could be updated as necessary (again, date and time stamped). This would not eliminate the need for periodic reports, but would likely streamline reporting and reduce compliance burdens.

However, we do not favor core business reporting requirements that would effectively impose "continuous reporting" obligations, because we believe that the existing '34 Act reporting, including Form 8-K filings, are sufficient to provide investors with timely updates. Moreover, as noted in section VI below (Frequency of Interim Reporting) some NAREIT members also question whether current quarterly reporting obligations lead to excessive managerial and investor focus on short-term results at the expense of long-term sustainable value.

Item 102 of Regulation S-K

The *Concept Release* poses a series of questions about Item 102 of *Regulation S-K*, relating to the disclosure of the location and general character of important physical properties of the registrant and its subsidiaries, noting that some registrants have questioned the continuing relevance of this requirement.[8] Item 102 clearly has more relevance for REITs than some other registrants.

NAREIT generally believes that reforms here should also be Principles-based and caution against the adoption of new prescriptive rules mandating specific forms or terms for disclosing physical property, or attempts to redefine materiality in this context. There is tremendous variation in the types and forms of real property and real property ownership among subcategories of REITs and even within REIT subcategories. Principles-based rules will continue to provide the flexibility to management to fashion meaningful communication about real properties to investors.

Most REITs are also required to submit Schedule III (as defined by Regulation S-X rule 210.5-04(c))[9], which requires even more extensive disclosure about the individual properties held by REITs than Item 102, overlapping some Item 102 requirements and conflicting with others. The burdens of Schedule III preparation for REITs have become substantial. Many REITs devote considerable time and resources to Schedule III preparation, which requires copious details about individual properties, such as original purchase price, cumulative capital improvements, the year acquired or developed and accumulated depreciation and amortization. Moreover, some NAREIT members report that their investor feedback does not support the value to investors of the incremental detail currently required by Schedule III. They tell us that their investors are typically more interested in information about particular geographies or categories of properties, which can provide the basis of comparisons between companies.

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[8] *Concept Release* at 23937.
[9] 17 CFR 210.12-28 - Real estate and accumulated depreciation.

Further, the SEC's rules related to interactive data[10] now require extensive XBRL tagging of much of the information included in Schedule III. As noted above, there is significant variation in the types and forms of real property held by REITs. Many large REITs have complex real estate portfolios requiring customized tagging of literally thousands of discrete items that are *sui generis*, producing Schedule III disclosures that are overly complex, difficult to compare and often of little incremental value to investors.

NAREIT recommends that disclosure compliance burdens and confusing duplication be eased by incorporating those requirements of Schedule III that do provide additional useful information into Item 102. Alternatively, Schedule III could be amended to allow for aggregation of properties in a geographic region and/or by similar property types.

Industry Guides

The *Concept Release* seeks input on "whether the Industry Guides elicit disclosure that is important to investment and voting decisions."[11] NAREIT generally endorses the periodic reevaluation and updates of all SEC guidance, including Securities Act Industry Guide 5 – Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships (Industry Guide 5),[12] which has particular relevance to REITs. With regard to Industry Guide 5, we note that it currently prescribes multiple quantitative disclosures in tabular format, making preparation onerous. We suggest that these requirements be reevaluated and streamlined so that material quantitative information may be disclosed into a single table.

Further, we are generally concerned that additional static, line-item requirements would not benefit investors, and we therefore urge the SEC against attempting to broadly codify guidance contained in Industry Guide 5 into Regulation S-K, as some have suggested.[13]

Similarly, the *Concept Release* alludes to past SEC efforts to integrate the disclosure requirements for the registration of an initial offering and subsequent periodic reporting. Question 203 specifically asks if the SEC should "move to consolidate industry-specific

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[10] *Interactive Data to Improve Financial Reporting, Release No. 33-9002* (Jan. 20, 2009), available at https://www.sec.gov/rules/final/finalarchive/finalarchive2009.shtml.

[11] *Concept Release* at 23967.

[7] Securities Act Industry Guide 5 by its terms, applies only to real estate limited partnerships, however, in 1991 the SEC stated that "the requirements contained in the Guide should be considered, as appropriate, in the preparation of registration statements for real estate investment trusts and for all other limited partnership offerings." *See, Securities Act Release No. 33-6900* (June 25, 1991), available at https://www.sec.gov/rules/interp/1991/33-6900.pdf

[13] *See, e.g.*, Division of Corporation Finance, U.S. Securities and Exchange Commission, *Report on Review of Disclosure Requirements in Regulation S-K* (Dec. 2013) (the "*SEC 2013 Staff Report*") at16 and 103 ("In addition, review could be made as to whether any of the Industry Guide provisions should be codified in Regulation S-K…). *See also, Release No. 33-10098, Modernization of Property Disclosures for Mining Registrants* (June 16, 2016) (codifying the Industry Guide 7 into new subpart 1300 of Regulation S-K), available at http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.

disclosure requirements," such as those set forth in Form S-11, into Regulation S-K. NAREIT strongly believes that disclosure reform should streamline the disclosure process, not simply aggregate existing rules, or worse, increase prescriptive line-item requirements. We urge that any such consolidation efforts be guided by a Principles-based approach focused on company-specific materiality.

II. Company Performance, Financial Information and Future Prospects

Selected Financial Data (Item 301) including Instruction 2

NAREIT recommends that disclosure of Selected Financial Data only be required for three years rather than the current five years, except where the inclusion of the two fiscal years preceding those three fiscal years is required to illustrate material trends in the registrant's business. NAREIT also believes that Instruction 2 currently provides "a reasonable balance between specified content and a flexible approach" and urges the SEC not to adopt "a more prescriptive approach"(Q. 76). Registrants should continue to have the flexibility to present selected data that best illustrates trends in their financial condition and the results of operations. For REITs, this additional information may include NAREIT FFO and other non-GAAP metrics, which may be significant to an understanding of the trends in financial condition and results of operations. Retaining the current Instruction 2 requirements would permit registrants to continue to provide additional information that is material to their business.

The *Concept Release* also seeks comment on whether the SEC should require auditor involvement (*e.g.*, audit, review or specified procedures) for Item 301 disclosure (Q. 77). NAREIT does not believe that additional auditor involvement should be required with regard to disclosures made under Items 301, 302 or 303. Currently, the registrant's auditor is required to review the table of selected financial data to ensure that there is no inconsistency between this data and the financial statements on which the auditor has rendered an audit opinion. In addition, if any non-GAAP metric is included in the table, such metric must be reconciled to the nearest GAAP metric, which is subject to audit.

Supplementary Financial Information (Item 302)

NAREIT believes that interim results can be misleading and that including this quarterly data in annual financial statements may obscure important trends. The *Concept Release* requests comment on whether Item 302(a)(1), which requires disclosure of quarterly financial data of selected operating results, "remains useful and relevant," noting that much of the required data has already been reported in prior quarterly reports. (Qs. 67-75). As noted in section V below, in addition to concerns about such data being misleading, many NAREIT members are concerned that quarterly reporting generally may incentivize excessive focus on short-term results at the expense of long-term performance. Based on these concerns, NAREIT suggests that the SEC should consider eliminating Item 302 (a)(1).

Finally, as noted above, we do not believe that it would provide additional benefit to investors to "require auditor involvement on the reliability of the disclosure under Item 302" (Q. 82).

Content and Focus of MD&A (Item 303 - Generally)

MD&A is a critical part of a registrant's financial reporting to investors and other financial statement users. However, NAREIT agrees that MD&A disclosure could be streamlined and recommends that Item 303 revisions follow a Principles-based approach. NAREIT believes that management is best positioned to determine whether an operating trend or change in financial condition is material to its business and should be discussed in MD&A and does not believe that it would be useful to impose quantitative thresholds to determine the materiality of trends or to adopt other prescriptive requirements (Q. 89). Rather, Item 303 should continue to provide management the flexibility to present its own perspective of the registrant's financial condition and results of operations.

NAREIT also agrees that it would improve the quality of MD&A disclosure if the SEC would consolidate its disparate sources of guidance on MD&A into a single place (Q. 90).

Finally, as noted above, each registrant's auditors currently must ensure that MD&A includes no information that is materially misleading and/or inconsistent with audited financial statements. NAREIT believes that expanding auditor involvement in MD&A disclosures would be costly and is unlikely to benefit investors. (Q. 96).

Key Indicators of Financial Condition and Results from Operations

While noting that both financial and non-financial key indicators and performance measures vary considerably across industries and even among industry segments,[14] the *Concept Release* requests comment on whether the SEC should mandate the disclosure of key indicators (Qs. 103-6). NAREIT believes that registrants should retain the flexibility to disclose key indicators and performance measures that they deem material or that illustrate material trends. However, NAREIT is concerned that prescriptive requirements mandating the disclosure of designated key indicators could lead to confusing disclosure overload without corresponding benefit to investors.

Disclosure rules applicable to such measures should be Principles-based and afford management the flexibility to disclose key indicators specific to its business when appropriate (and omit these when not material). Specifically, the SEC should not require registrants to disclose all

[14] *Concept Release* at 23944 ("For example, electronic gaming or social media companies typically discuss their numbers of monthly active users; numbers of unique users; numbers of unique payers; and other metrics relating to usage. Software service companies typically discuss their numbers of subscribers; customer renewal rates; and customer retention rates. Hospitals typically discuss their numbers of admissions; numbers of beds; the average length of inpatient stays; and occupancy rates.")

performance metrics and other key variables, or even a defined set of metrics. Requiring registrants to disclose *all* relevant key indicators and business drivers would be so expansive as to provide information that could easily confuse investors, rather than provide information to evaluate the investment quality of a registrant. This is especially true for key performance indicators similar to those referenced in the *Concept Release*[15] that have no uniform definition.

For example, the *Concept Release* noted that "[r]etailers typically discuss comparable store sales, sales per square foot or gross merchandise value."[16] Many retail shopping centers are owned by REITs and "tenant sales per square foot" *may, in some instances,* be a useful metric to illustrate REIT operating results. However, not all retailers, retail centers, nor shopping center REITs, compile this data and/or calculate this metric, and among those who do, there is considerable variation, because it does not have a standardized definition. As a result, comparisons among retailers and /or among shopping center REITs could prove misleading to investors.

Similarly, real estate companies that operate as REITs generally report NAREIT FFO which, as noted above, is widely accepted as a standardized industry-wide performance measure and facilitates transparency and comparability. On the other hand, requirements specifying the disclosure of some, or all, business drivers that impact the calculation FFO, many of which are not uniformly defined, would be similarly confusing and possibly misleading.

Critical Accounting Estimates

Needless to say, critical accounting estimates and the disclosures related to them may represent important information to investors. However, disclosure of critical accounting estimates should be guided by materiality and should be Principles-based. In undertaking reform, NAREIT urges the SEC to coordinate with the FASB to integrate current SEC and FASB requirements, which are now often duplicative.

NAREIT agrees that the SEC should also clarify the disclosure objectives related to critical accounting estimates in MD&A and should also refine the definition of "critical accounting policies" to ensure that only significant accounting policies in financial statements that provide distinct and useful information to investors are disclosed (Q. 138).

NAREIT agrees that there is often duplication in the disclosure of accounting estimates and policies and suggests that the SEC consider rule changes to permit or require cross referencing, which would reduce repetition between MD&A and the notes to the financial statements. Alternatively, the SEC could permit registrants to post a comprehensive listing of accounting policies on a company's website, with cross referencing through hyperlinks. Companies could update accounting policies as new standards are issued (Q. 139).

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[15] *Id*.
[16] *Id*.

III. Risk and Risk Management

Risk Factor Disclosure

The *Concept Releas*e requests comment on Items 305 and 503(c) of Regulation S-K, relating to risk factor disclosure and disclosures about market risk, as well as the overall approach to risk management and risk management processes. NAREIT agrees with many of the comments from other registrants, as reported in the *Concept Release,* that risk factor disclosure has become so voluminous that material information is often obscured. NAREIT also agrees with observations by SEC Chair White, among others, suggesting that "disclosure overload" can be motivated by liability concerns, possibly exacerbated by the *Private Securities Litigation Reform Act of 1995* (*PSLRA*).[17]

NAREIT recommends that reform of risk factor disclosure should follow a Principles-based approach, focused exclusively on risks that are material to an understanding a *specific registrant's business,* rather than risks "common to an industry or to registrants in general" (Q. 149). Specifically,

- NAREIT largely supports the recommendation set forth in the *SEC 2013 Staff Report,* suggesting that the consolidation of "requirements relating to risk factors, legal proceedings and other quantitative and qualitative information about risk and risk management into a single requirement."[18]
- NAREIT agrees with the suggestion included in the *Concept Release* that it could be helpful if the SEC, from time to time, issued guidance specifying risks it considers to be generic to all registrants that are *not* required to be disclosed (Q. 150).
- NAREIT disagrees with several other suggestions mentioned in the *Concept Release*. Specifically, we disagree that "each risk factor be accompanied by a specific discussion of how the registrant is addressing the risk" (Q. 145). Similarly, NAREIT does not agree that the SEC should require registrants to discuss the probability of occurrence and the effect on performance for each risk factor (Q. 146), or that it should require registrants to "identify and disclose in order their ten most significant risk factors without limiting the total number of risk factors disclosed"(Q. 147). NAREIT tends to believe that this kind of reporting would be speculative, pose liability risk and provide little value to investors.

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[17] SEC Chairman Mary Jo White, *The Path Forward on Disclosure remarks at the National Association of Corporate Directors - Leadership Conference (Oct. 15, 2013)* available at https://www.sec.gov/News/Speech/Detail/Speech/1370539878806 .
[18] *SEC 2013 Staff Report* at 99.

Forward Looking Statements--Safe Harbor Provisions

NAREIT strongly believes that the safe harbor provisions of the *PSLRA* [19] have been beneficial to REITs and their investors and have succeeded in promoting the provision of material forward-looking information to investors. We urge the SEC to ensure that any recommendations for streamlining risk factor disclosure requirements do not result in unnecessarily increasing liability exposure for registrants.

IV. Disclosure of Information Relating to Public Policy and Sustainability Matters

REITs, as a group, are highly focused on operating their properties sustainably and committed to conserving energy and other scarce resources. Moreover, many REITs have long records of leadership roles on sustainability matters.[20] Several listed REITs are among *Fortune* 100 pioneers in releasing comprehensive sustainability data and information to the public in the form of annual sustainability reports, or by periodic website updates.[21] However, NAREIT believes that the existing standard of materiality coupled with the current disclosure framework is adequate and sufficiently flexible to enable REITs to disclose material sustainability information to their investors. Most importantly, NAREIT opposes any attempt by the SEC to adopt additional detailed, prescriptive sustainability disclosure requirements.

Just as real estate assets vary considerably across the REIT sector, across geographies and business models, so, too, do appropriate and successful REIT sustainability efforts. The same energy conservation strategies and measurement tools are unlikely to work for a New York City medical center and a shopping center in Duluth. The age, location, utility infrastructure and configuration of local government services will often influence, or limit, viable REIT sustainable strategies. Correspondingly, our members have told us that their investors do not uniformly seek detailed information regarding environmental matters and that those who do appropriately seek distinct information from say, a lodging REIT, than from a higher energy-use data center REIT, or from a multifamily REIT. In other words, "one size does not fit all," even within the REIT sector.

Nevertheless, most NAREIT members readily endorse the value of developing some voluntary standard metrics of comparability regarding energy use and sustainable performance for real

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[19] 15 U.S. Code 77z–2 - Application of safe harbor for forward-looking statement.
[20] Several U.S. REITs have been named ENERGY STAR®. "Partner of the Year**"** by the U.S. Environmental Protection Agency (EPA) since the program's inception, including (but not limited to) Simon Properties, Macerich, AvalonBay Communities, Inc., Boston Properties, Inc., Kilroy Realty Corporation, Prologis, HCP., Inc., Vornado Realty Trust, Hersha Hospitality Trust, and SL Green Realty Corp. The CDP (formerly the "Carbon Disclosure Project") has also recognized several U.S. REITs for efforts toward addressing climate change, including Host Hotels & Resorts, Inc., Macerich and **S**imon Property Group in 2015.
[21] Vosilla, Behrendt and Hanson**,** *State of the Industry: Sustainability Reporting in the REIT Sector – 2016 Update* (2016) available at http://www.usgbc.org/resources/state-industry-sustainability-reporting-reit-sector-%E2%80%93-2016-update.

property assets and believe such metrics increasingly contribute to a vibrant global property market for tenants and investors alike. For this reason, some NAREIT members have, for many years, voluntarily participated in the *Global Real Estate Sustainability Benchmark* (*GRESB*) assessment.[22] *GRESB*, a unit of *The Green Building Certification Institute (GBCI)*,[23] is an industry-driven organization, based in the Netherlands, committed to assessing the environmental, social, and governance (ESG) performance of real assets globally, including the performance of real estate portfolios and infrastructure assets. In 2015, 707 property companies and funds participated in the *GRESB* annual survey. The *GRESB* database covers 49,000 assets in 46 countries.[24] Organizations, such as the Global Reporting Initiative (GRI)[25] and the Sustainability Accounting Standards Board (SASB) have drawn heavily on GRESB research and in some cases have adopted its metrics.[26]

Today, many REITs already determine that certain information about their sustainability practices and/or related status of their real property assets is useful to investors and accordingly provide this information in their '34 Act reports. Also, as noted above, many REITs publish comprehensive corporate sustainability reports and/ or post this information on their websites, or on social media. Some do both and much more. In any event, NAREIT believes that a "one size fits all approach" to sustainability reporting is not appropriate. Some NAREIT members have voiced skepticism that placing detailed prescriptive reporting requirements into the '34 Act would lead to incremental conservation gains for the REIT sector.

NAREIT is generally comfortable that the existing standard of materiality coupled with the current SEC public company disclosure framework provides the flexibility to disclose material sustainability information to investors. We believe that REITs are in the best position to determine whether particular sustainability information is material to investors and whether it should be disclosed. In this regard, it is noteworthy that REITs as a group report high levels of engagement with investors. Several of our members recounted instances when shareholders have

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[22] *See, e.g.,2015 GRESB Report* (September 2, 2015), available at https://www.gresb.com/results2015/downloads.
[23] GBCI is a third-party organization that provides independent oversight of professional credentialing and project certification programs related to green building. GBCI is committed to ensuring precision in the design, development and implementation of measurement processes for green building performance (through project certification) and green building practice (through professional credentials and certificates). *See*, http://www.gbci.org .
[24] *Id*.
[25] GRI reports that it is currently partnering with GRESB in developing construction and real estate reporting tools, *See, e.g.*, https://www.globalreporting.org/standards/sector-guidance/sector-guidance/construction-and-real-estate/Pages/Reporting-Tools.aspx.
[26] SASB's *Research Brief, Real Estate Owners Developers and Investment Trus*ts (March 2016), draws heavily on GRESB data, available at http://www.sasb.org/approach/our-process/industry-briefs/infrastructure-sector-industry-briefs/. According to its press release, SASB's recently-issued provisional Sustainability Standards for the Real Estate Sector "leverage[s] the industry-specific and widely used GRESB Real Estate Assessment. Over 75% of the quantitative metrics contained in the SASB standard are aligned with GRESB or require no additional data collection," available at http://www.prnewswire.com/news-releases/sasb-issues-provisional-sustainability-accounting-standards-for-infrastructure-sector-300243040.html.

requested and have been readily provided with additional sustainability information. We also note that all investors have the option of submitting shareholder proposals to promote particular sustainability practices by particular firms if they have unmet needs.

Voluntary Sustainability Reporting Frameworks

The *Concept Release* notes that "several organizations have published or are working on sustainability reporting frameworks" (Q. 219). Not all NAREIT members are familiar with these frameworks, many of which are in early stages, although about a dozen NAREIT members participated in recent outreach sponsored by SASB's Industry Working Group for the Infrastructure Sector.[27] Those who are familiar with them report a range of opinions, although relatively few have detailed knowledge of the relative merits of the alternative approaches. NAREIT does not believe that it would be helpful for the SEC to preempt these private efforts or to adopt and codify any one of them, or even to codify more than one of them into Regulation S-K at this time. We believe that voluntary standards are inherently more flexible and easier to update and adapt to new facts and investor demands than federal agency rules promulgated under the *Administrative Procedures Act*.

Costs and Burdens

Moreover, there are significant costs associated with the collection, analysis, validation and management of the data that would be required by some of the sustainability frameworks referenced in the *Concept Release*, which may impose a burden on many businesses, including REITs. In recent outreach to our members, 78% of the respondents indicated that that they would likely need to implement costly new procedures and/or systems to compile and report the type of information required by these frameworks. Many companies would be required to upgrade equipment and/or acquire additional technology to capture and track data and also add additional staff to monitor performance and analyze results. Some of these frameworks would require firms to arrange costly third-party data verification. Additionally, the capture of additional reportable tenant information, as proposed by some reporting frameworks, may not be feasible for all property categories and when it is possible could add substantially to these costs estimates.[28]

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[27] The roster of participants in the activities of SASB's Infrastructure Sector Task Force is available at http://www.sasb.org/sectors/infrastructure/. NAREIT also submitted comments to SASB's Infrastructure Sector Task Force. *See*, https://www.reit.com/advocacy/policy/other-federal-legislation/sustainability-green-initiatives.

[28] RealFoundations, a professional services firm focused on the real estate industry that was retained by NAREIT estimated that the costs for an average property portfolio (containing 200 commercial assets) to implement a system capable of managing and reporting the type of data required by many of these types of sustainability frameworks would exceed $1 million and that operational expenses associated with system data collection, normalization, monitoring and reporting may add an additional 20-40% of system purchase and installation costs on an annual basis. *See*, www.realfoundations.net.

V. Company Websites and Social Media for Non-Financial Information

As the *Concept Release* acknowledges, "some registrants already provide information about ESG matters in sustainability corporate social responsibility reports or on their websites" and NAREIT members are a category of registrants that make excellent use of their corporate websites for information about sustainability, corporate responsibility and other ESG-related information.

Questions 307-317 of the *Concept Release* pose a series of questions about the use of company websites in the SEC disclosure regime, including whether there are categories of business or financial information that the SEC should permit registrants to disclose by posting on their websites in lieu of including in their periodic reports (Q. 312)." NAREIT members increasingly seek avenues outside '34 Act reports, including websites and social media, to communicate a variety of kinds of non-financial information to investors—updates about sustainability efforts being only one example. Much of this information is not "material" in the '34 Act sense, but may be of interest or value to investors and others. Some REIT members have suggested that if there were a mechanism outside'34 Act reporting that permitted the dissemination of a range of non-financial information without increasing liability concerns,[29] the value of'34 Act reports (likely streamlined) would be enhanced. In undertaking disclosure reform, NAREIT urges the SEC to consider ways in which REITs and other businesses may more readily furnish such non-financial information, whether ESG or otherwise, outside of '34 Act filings.

VI. Frequency of Interim Reporting

The *Concept Release* poses a series of questions regarding the frequency of '34 Act periodic reports and asks if the SEC should allow certain categories of registrants to file periodic reports on a less frequent basis, such as semi-annually, and if so, what these categories of registrants should be and what disclosure should be provided.

Some NAREIT members believe that "short-termism," incentivized by quarterly reporting, is a problem for U.S. businesses and capital markets generally, including for the REIT sector. Accordingly, these members have suggested that it would be beneficial if SEC disclosure reform efforts include a thorough analysis of the relative merits of a semi-annual reporting regime, such as has been adopted in other jurisdictions, as well as of other options, such as the suggestion put forth the *Concept Release* that the SEC permit abbreviated reporting for the first and third quarters of each year (Q. 282).

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[29] In this regard, we acknowledge that corporate website content is appropriately subject to the anti-fraud provisions of the '34 Act. Less clear is the application of the safe harbor provisions of the *PSLRA* to such non-financial disclosures. Some have suggested that the safe harbor provisions currently apply to certain sustainability disclosures and others have suggested that it would be beneficial if the SEC clarified the extent of coverage.

♦ ♦ ♦

VII. Conclusion

NAREIT and its members have a long-time commitment to investing in efforts to serve the needs of REIT investors and appreciate this opportunity to participate in the SEC's Disclosure Effectiveness Initiative by submitting these comments. NAREIT believes that a Principles-based disclosure framework that provides REITs as publicly traded real estate companies and other registrants with the flexibility to communicate company-specific, material information to investors in an accessible form best serves investors. In reworking its disclosure framework to serve the needs of the 21st century investor community, NAREIT urges the SEC to propose Principles-based rule changes to Regulation S-K and to resist pressures to develop prescriptive rules mandating specific disclosures of either financial or non-financial information.

We would be happy to discuss these comments at any time. Please feel free to contact me at ([redacted], or [redacted]; or any of the following NAREIT professionals: Tony M. Edwards, EVP & General Counsel [redacted]); Sheldon M. Groner, EVP, Finance & Operations, ([redacted]); George Yungmann, SVP, Financial Standards [redacted]); or Christopher Drula, VP, Financial Standards [redacted]).

Respectfully submitted,

Victoria P. Rostow

Victoria P. Rostow
Senior Vice President, Policy & Regulatory Affairs

cc: Sonia Barros, Esq., Assistant Director, Division of Corporation Finance
Rick A. Fleming, Investor Advocate
Karen Garnett, Esq., Associate Director, Division of Corporation Finance
Daniel Gordon, Senior Assistant Chief Accountant, Division of Corporation Finance
James Schnurr, Chief Accountant

NATIONAL

ASSOCIATION

OF

REAL ESTATE

INVESTMENT

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October 28, 2016

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Delivered Electronically

Re: Proposed Rule on Disclosure Update and Simplification; 17 CFR Parts 210, 229, 230, 239, 240, 249, and 274; Release No. 33-10110, 34-78310; IC-32175; File No. S7-15-16; RIN 3235-AL82

Dear Mr. Fields:

This letter is submitted by the National Association of Real Estate Investment Trusts® (NAREIT) in response to the Securities and Exchange Commission's (SEC) Proposed Rule on *Disclosure Update and Simplification (17 CFR Parts 210, 229, 230, 239, 240, 249, and 274; Release No. 33-10110, 34-78310; IC-32175; File No. S7-15-16; RIN 3235-AL82)* (the Proposed Rule or Proposal).

NAREIT is the worldwide representative voice for real estate investment trusts (REITs) and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate and finance income-producing real estate, as well as those firms and individuals who advise, study and service those businesses.

REITs are generally deemed to operate as either Equity REITs or Mortgage REITs. Our members that operate as Equity REITs acquire, develop, lease and operate income-producing real estate. Our members that operate as Mortgage REITs finance housing and commercial real estate, by originating mortgages or by purchasing whole loans or mortgage backed securities in the secondary market.

A useful way to look at the REIT industry is to consider an index of stock exchange-listed companies like the FTSE NAREIT All REITs Index, which covers both Equity REITs and Mortgage REITs. This Index contains 221 companies representing an equity market capitalization of $1.052 trillion as of September 30, 2016. Of these companies, 181 were Equity REITs representing 94.5% of total U.S. listed REIT equity market capitalization (amounting to $994

1875 I Street, NW, Suite 600, Washington, DC 20006-5413
Phone 202-739-9400 Fax 202-739-9401 REIT.com

billion)[1]. The remainder, as of September 30, 2016, was 40 publicly traded Mortgage REITs with a combined equity market capitalization of $58 billion.

NAREIT and its members have long understood the critical importance of communicating accurate and material business and financial information to REIT investors and appreciate the opportunity to participate in this phase of the SEC's Disclosure Effectiveness Initiative. NAREIT fundamentally believes that eliminating redundant and outdated disclosure requirements improves the effectiveness and usefulness of the information presented to investors and analysts while also decreasing the costs of preparing that information, which ultimately benefits shareholders.

To that end on July 21, 2016, NAREIT submitted a comment letter responding to the SEC's *Concept Release on Business and Financial Disclosure Required by Regulation S-K.* In NAREIT's July 21, 2016 comment letter we emphasized that NAREIT strongly believes that materiality, as evaluated through the eyes of a "reasonable investor" under the prevailing Supreme Court[2] standard, should continue to be the guidepost of the SEC's disclosure regime and that we believe that a "Principles-based" approach to disclosure is best suited to the constantly evolving business environment in which REITs and other businesses operate.

NAREIT's comment letter on the Proposed Rule was developed by a task force of NAREIT members, including members of NAREIT's Best Financial Practices Council. Members of the task force include financial executives of both Equity and Mortgage REITs, representatives of major accounting firms, institutional investors and industry analysts.

In analyzing the Proposed Rule, NAREIT considered the following guiding principles that we suggest should guide the SEC's efforts to update and simplify SEC disclosures:

- Simplification efforts should rigorously maintain the long-standing distinction between historical information and forward-looking disclosures. Forward-looking information (subject to safe-harbor protections) should continue to be set forth in Management's Discussion and Analysis (MD&A) and historical data and related disclosures should be reported in the footnotes to the annual or interim financial statements;

- The SEC should maintain the existing division of oversight duties between the FASB and the SEC by maintaining the FASB's role in developing accounting standards and related disclosure guidance for financial statements and the SEC's charge of developing and reviewing MD&A disclosure requirements;

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[1] https://www.reit.com/sites/default/files/returns/FNUSIC2016.pdf.
[2] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) at 449.

- We endorse efforts to reduce repetitive disclosures in annual and quarterly reports and urge the SEC and FASB to coordinate efforts to ensure that interim disclosures - both in MD&A and in the notes to the financial statements - do not simply repeat annual disclosures, absent a material change; and,

- We urge the SEC to develop and implement an ongoing systematic process (such as FASB's current process) to comprehensively identify and eliminate outdated or redundant disclosure requirements, at regular intervals or upon the issuance of new requirements.

The following is a discussion of NAREIT's recommendations on the Proposed Rule that are relevant to REITs. Our comments below are keyed to the relevant sections of the Proposal, which are referenced by citations in parentheticals

1. Overlapping Requirements - Proposed Deletions (Proposal, Section III, C)

a. REIT Disclosures (Proposal, Section III, C, 1)

i. Undistributed Gains or Losses on the Sale of Properties

NAREIT supports the Proposed Rule's suggestion to delete Rule 3-15(a)(2) of Regulation S-X. NAREIT agrees that Regulation S-X's current requirement that REITs present undistributed gains or losses on the sale of properties on a book basis does not provide meaningful information to investors. Based on discussions with REIT analysts and investors, the disclosures required by Rule 3-15(c) of Regulation S-X of the tax status of distributions provide users of financial statements with the information they need.

ii. Status as a REIT

NAREIT concurs with the Proposed Rule's conclusion that Regulation S-K and Regulation S-X currently contain overlapping disclosure requirements about an issuer's status as a REIT. NAREIT observes that issuers typically repeat the disclosures of REIT status. We further note that U.S. GAAP, in ASC Topic 740, also requires disclosure when an entity is not subject to entity level income taxes because its income is taxed directly to its owners. Therefore, NAREIT supports the SEC's proposal to eliminate Rule 3-15(b) of Regulation S-X. In our view, deletion of the requirement to disclose the entity's REIT status and the principal assumptions that underlie the decisions regarding the applicability of federal income taxes in the financial statements would not result in a material change in the disclosures provided by REITs, as this information is presented elsewhere in a Form 10-K or registration statement.

b. Ratio of Earnings to Fixed Charges (Proposal, Section III, C, 18)

NAREIT concurs with the suggestion set forth in the Proposed Rule to delete the requirement to disclose the historical and pro forma ratios of Earnings to Fixed Charges. Given the often large depreciation charges for REITs and real estate companies, the ratio does not provide meaningful information to investors. In the event that investors are interested in the ratio, NAREIT understands that the financial statements currently disclose many of the components of this ratio, allowing investors to compute this metric. In addition, NAREIT notes that this specific metric predates many of the other ratios, analytical tools and sophisticated financial models that currently are at the financial statement users' disposal and readily calculated based on information in the financial statements. Therefore, NAREIT does not see a continued need for the SEC to require this narrowly focused metric.

2. Overlapping Requirements – Potential Modifications, Eliminations, or FASB Referrals (Proposal, Section III, E)

a. REIT Disclosures – Tax Status of Distributions (Proposal, Section III, E, 1)

NAREIT suggests that the SEC eliminate the requirement in Rule 3-15(c) of Regulation S-K for REITs to disclose the tax status of distributions as ordinary income, capital gain, or return of capital. This information is provided to shareholders in Form 1099 much earlier than when the Form 10-Ks are filed with the SEC. Additionally, this information is communicated to the general public on NAREIT's website. Therefore, NAREIT does not believe that duplicative disclosure is necessary.

b. Legal Proceedings (Proposal, Section III, E, 15)

As noted in the Proposed Rule, issuers frequently repeat or reference the disclosures required by Regulation S-K Item 103 ("Item 103") in their historical financial statements. However, the Proposed Rule also acknowledges that there are several differences in the criteria set forth in Regulation S-K and U.S. GAAP for disclosing legal proceedings. Although NAREIT generally favors streamlining overlapping reporting requirements, we do not believe it would be appropriate to incorporate the requirements of Item 103 into the footnotes to the U.S. GAAP financial statements. In this circumstance, we believe there are different objectives for the respective disclosures, objectives that are best achieved by the existing rules. Further, while it is appropriate for the financial statement disclosures to be covered by the audit opinion of an issuer's independent auditor, NAREIT believes it would be unnecessarily burdensome and costly to expand that audit requirement to address the incremental information required by Item 103 if it was relocated to the financial statements.

As noted in the Proposed Rule, there are many differences between the two disclosure regimes in this regard. For example, Regulation S-K, which focuses on the factual information investors may reasonably require to make an informed investment decision, logically may require an array

of fact-specific material qualitative information regarding legal proceedings, including factual bases and timing of legal actions, and information regarding courts, agencies, parties and allegations. Regulation S-K also exempts some ordinary routine litigation from disclosure, which may not be material. U.S. GAAP, which is concerned with material financial statement consequences of legal proceedings, necessarily applies a different framework to requiring disclosure. As catalogued in the Proposed Rule, Regulation S-K and U.S. GAAP also have different standards of materiality, with Regulation S-K having quantitative disclosure thresholds for certain matters. Relocating Item 103 disclosures into the historical financial statements would subject factual information that may not have direct financial consequences to audit or review, internal controls and XBRL requirements, as well as place it outside the safe harbor protections of the Private Securities Litigation Reform Act of 1995

For these reasons, NAREIT does not believe that wholesale relocation of Item 103 disclosures into the historical financial statements would improve the effectiveness of disclosures, or provide meaningful incremental benefit to investors. However, we would encourage the SEC to reconsider the quantitative disclosure thresholds in Item 103 to determine if those bright lines (either in absolute dollars or percentage terms) remain relevant to investors.

3. Superseded Requirements (Proposal, Section V)

Gain or Loss on Sale of Properties by REITs (Proposal, Section V, B 3)

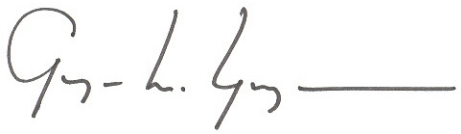
Rule 3-15(a)(1) of Regulation S-X has presented a potential conflict between SEC and U.S. GAAP requirements for some time: the SEC's rule requires all gains and losses on the sale of properties to be presented outside of continuing operations, whereas U.S. GAAP does not permit that presentation unless the properties sold meet the definition of a discontinued operation. That conflict was manageable when most sales of properties met the U.S. GAAP definition of a discontinued operation. However, in 2014 the FASB issued new financial reporting guidance narrowing the definition of a discontinued operation[3]. As a result of the FASB's new definition, NAREIT believes that very few sales of properties by REITs are permitted to be presented outside of continuing operations under U.S. GAAP. This creates a clear and frequently occurring conflict between U.S. GAAP and Rule 3-15(a)(1). Therefore, NAREIT welcomes and fully supports the SEC's proposal to eliminate Rule 3-15(a)(1).

* * *

[3]UPDATE NO. 2014-08—PRESENTATION OF FINANCIAL STATEMENTS (TOPIC 205) AND PROPERTY, PLANT, AND EQUIPMENT (TOPIC 360): REPORTING DISCONTINUED OPERATIONS AND DISCLOSURES OF DISPOSALS OF COMPONENTS OF AN ENTITY (April 2014).

We thank the SEC for the opportunity to comment on the Proposed Rule. If you would like to discuss our views in greater detail, please contact George Yungmann, NAREIT's Senior Vice President, Financial Standards, at gyungmann@nareit.com or 1-202-739-9432, Victoria Rostow, NAREIT's Senior Vice President, Policy & Regulatory Affairs, at vrostow@nareit.com or 1-202-739-9431, or Christopher T. Drula, NAREIT's Vice President, Financial Standards, at cdrula@nareit.comor 1-202-739- 9442.

Respectfully submitted,



George L. Yungmann
Senior Vice President, Financial Standards
NAREIT

Victoria Rostow
Senior Vice President, Policy & Regulatory Affairs
NAREIT

Christopher T. Drula
Vice President, Financial Standards
NAREIT

cc: Wesley R. Bricker, Interim Chief Accountant, Office of the Chief Accountant
Russell G. Golden, Chairman, Financial Accounting Standards Board
Rick A. Fleming, Investor Advocate
Karen Garnett, Esq., Associate Director, Division of Corporation Finance
Sonia Barros, Esq., Assistant Director, Division of Corporation Finance
Daniel Gordon, Senior Assistant Chief Accountant, Division of Corporation Finance

Public Statement

Reconsideration of Conflict Minerals Rule Implementation

Acting Chairman Michael S. Piwowar

Jan. 31, 2017

Today, I directed the staff to reconsider whether the 2014 guidance on the conflict minerals rule is still appropriate and whether any additional relief is appropriate.

Since May 2014, the Commission has partially stayed compliance with the rule, after the U.S. Court of Appeals for the D.C. Circuit found that the rule violated the First Amendment. This partial stay has done little to stem the tide of unintended consequences washing over the Democratic Republic of the Congo and surrounding areas.

While visiting Africa last year, I heard first-hand from the people affected by this misguided rule. The disclosure requirements have caused a *de facto* boycott of minerals from portions of Africa, with effects far beyond the Congo-adjacent region. Legitimate mining operators are facing such onerous costs to comply with the rule that they are being put out of business. It is also unclear that the rule has in fact resulted in any reduction in the power and control of armed gangs or eased the human suffering of many innocent men, women, and children in the Congo and surrounding areas. Moreover, the withdrawal from the region may undermine U.S. national security interests by creating a vacuum filled by those with less benign interests.

Given these facts on the ground, I believe that it is essential to hear from interested persons on all aspects of the rule and guidance.

A comment page regarding reconsideration of the conflict minerals rule and guidance has been created — submit detailed comments.

* * *

More Information:

- Statement of Acting Chairman Piwowar on the Commission's Conflict Minerals Rule

Comments Received

Modified: Jan. 31, 2017

Public Statement

Reconsideration of Pay Ratio Rule Implementation

Acting Chairman Michael S. Piwowar

Feb. 6, 2017

The Commission adopted the pay ratio disclosure rule in August 2015 to implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The rule requires a public company to disclose the ratio of the median of the annual total compensation of all employees to the annual total compensation of the chief executive officer.

Based on comments received during the rulemaking process, the Commission delayed compliance for companies until their first fiscal year beginning on or after January 1, 2017. Issuers are now actively engaged in the implementation and testing of systems and controls designed to collect and process the information necessary for compliance. However, it is my understanding that some issuers have begun to encounter unanticipated compliance difficulties that may hinder them in meeting the reporting deadline.

In order to better understand the nature of these difficulties, I am seeking public input on any unexpected challenges that issuers have experienced as they prepare for compliance with the rule and whether relief is needed. I welcome and encourage the submission of detailed comments, and request that any comments be submitted within the next 45 days.

I have also directed the staff to reconsider the implementation of the rule based on any comments submitted and to determine as promptly as possible whether additional guidance or relief may be appropriate.

I understand that issuers need to be informed of any further Commission or staff action as soon as possible in order to plan and adjust their implementation processes accordingly. I encourage commenters and the staff to expedite their review in light of these unique circumstances.

Comments Received

Modified: Feb. 6, 2017

Speech

Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability

Chair Mary Jo White

Keynote Address via videoconference International Corporate Governance Network Annual Conference San Francisco, California

June 27, 2016

Thank you, Anne [Sheehan] for that generous introduction, for your leadership on the SEC's Investor Advisory Committee and, most importantly, for championing the interests of investors for so many years. ICGN is a vital global forum for investors to share insights and ideas, but also important because of its steadfast focus on the well-being of the broader markets, the world economy and indeed our planet. Although I would rather be with you in person today, it is a pleasure and privilege to be here by way of videoconference from Washington, D.C. where I need to be to monitor the impact of recent international events for all of you.

Investors and regulators everywhere share a common interest in effective disclosures, robust corporate governance practices and strong corporate cultures, which are fundamental for fair and efficient markets and to achieve sustainable value. But, as the preamble to ICGN's Global Governance Principles acknowledges,[1] there are differences from jurisdiction to jurisdiction as to what precisely we are trying to achieve and the tools available to us. So, I thought I would begin by discussing the regulatory framework in the United States with respect to corporate governance matters and how the SEC, long known as "the disclosure agency," fits into the framework. Then, reflecting on the extent of the SEC's disclosure authority, I will discuss my perspective on the work we are doing on three important subjects on your agenda – board diversity; non-GAAP financial measures; and sustainability reporting.

The Role of the SEC in Corporate Governance

Dictating corporate governance practices in the United States is generally outside the scope of the SEC's regulatory authority. And there is no national uniform code of governance for public companies as there is in many other countries.[2] Rather, in the United States, corporate governance is, with some exceptions, the domain of each of our fifty states under their corporate law, which tends to accord shareholders relatively limited rights over corporate management and governance.[3]

The SEC has an impact on corporate governance through its disclosure powers – requiring public companies to provide investors with the information they need to make informed investment and voting decisions.[4] The SEC thus does not decide who may sit on a corporate board, but our rules do require disclosure about those who serve or are nominated to serve as directors and, importantly, why they were selected to serve.[5]

In some cases, legislation is passed that specifically provides both substantive requirements and disclosure requirements intended to bring about substantive change. For example, under the Sarbanes-Oxley Act, directors who are members of an audit committee of public companies listed on national

exchanges must be independent[6] and, if at least one member is not a "financial expert," companies must disclose that fact and say why.[7] In a similar vein, although the SEC cannot set the form or amount of pay of corporate executives, our rules have long required detailed disclosure about executive compensation.[8] The Dodd-Frank Act enacted in 2010 also empowered the SEC and other financial regulators to establish permissible parameters for incentive compensation at certain financial institutions to avoid incentivizing the kind of excessive risk-taking associated with the financial crisis.[9] A joint agency rule proposal to do that is now out for public comment.[10]

Given the nature of the largely state law-based governance framework for U.S. companies, it has been a continuing challenge for investors – institutional as well as retail – to play as significant a role in corporate governance as the more empowered shareholders in many European companies.[11] Indeed, in past years, some have analogized the role of investors in U.S. companies to what some parents say to their children: you are to be seen, but not heard.[12] While this characterization was always an exaggeration, it does underscore the challenge. But the picture has changed – for the better – and active and engaged shareholders and the efforts of the ICGN are part of the movement that continues to lead the charge.

Direct engagement with shareholders of U.S. companies, particularly with institutional shareholders, has increased significantly in recent years – a development that I have strongly encouraged.[13] This engagement has been buttressed with rights shareholders have under SEC rules, specifically Rule 14a-8, to have their own proposals included in a company's proxy statement to be voted on by all shareholders. These proposals can cover a wide range of issues, including environmental, social and corporate governance ones. This is an avenue that shareholders increasingly use to get traction and initiate meaningful dialogue with boards and executives for changes on issues of importance to them.[14]

There are significant success stories resulting from these efforts and the private ordering by companies responding to shareholder views. Prominent examples include the near disappearance of staggered boards,[15] majority vote standards becoming the norm across the S&P 1500,[16] and the recent successes of proxy access proposals resulting in 35% of the S&P 500 adopting proxy access, compared to 1% two years ago.[17]

From time to time, the U.S. Congress also acts to directly provide shareholders rights not accorded to them by state law. "Say on pay," for example, was a mandate in the Dodd-Frank Act, which enabled shareholders to cast a non-binding vote on a company's executive compensation.[18]

As you can tell even from this brief description, corporate governance in the United States is a patchwork driven by state law, supplemented by federal law including SEC regulations, private ordering prompted by shareholder advocacy, and sheer doggedness by all of you. While this regulatory patchwork can be frustrating, we all have some powerful tools at our disposal. Regulators have disclosure and enforcement powers that can be used on a range of issues. Investors can directly engage with boards and senior management, use shareholder proposals, vote out directors and, if all else fails, vote with your feet. Different investors, of course, may have different objectives and interests. Investors with relatively short-term investment objectives, for example, often will have very different perspectives than long-term investors on a variety of matters, including those related to corporate governance, buybacks and sustainability practices, to name just a few. So, we can seldom say that a particular practice or disclosure is "what investors as a whole want." It is not that simple.

You may ask then what is the appropriate role for the SEC in this space. Once again, there is not a simple answer. As you consider that question, we must recognize the limits of the SEC's authority, including as it relates to the environmental, social and governance matters that are of increasing

importance to a growing number of investors and other constituents. If we are not sufficiently mindful of the scope of our authority and other legal requirements, the courts will remind us, as they have before. [19]

The range of issues on which investors and companies can effectively engage on together, however, is not so circumscribed. When investors find that common ground between their concerns and the business objectives of a company, they can achieve traction with boards and senior management, and your potential universe of impact and influence is nearly limitless. That is why I would urge you to not only seek disclosures on the issues you care deeply about, but to also focus on the underlying corporate action where you want to see initiatives and changes by companies consistent with your priorities, whether it be on climate change, cybersecurity risks, political spending, or a whole host of other subjects. While specific disclosures can certainly provide more transparency and further certain goals, practices that are designed solely to satisfy disclosure requirements may not meaningfully address the underlying issues that are at the root of your priority. As the Global Reporting Initiative's ("GRI") Reporting 2025 Project Analysis on Sustainability put it, commenting on improving sustainability disclosure: "Despite the increasing transparency, change towards a sustainable economy is progressing slowly."[20]

This challenge does not at all minimize the critical importance of robust disclosure –transparency is indeed the premise upon which the U.S. capital markets have been built and it is their source of strength. Investors and potential investors must be given the information they need to make informed investment and voting decisions. And it is also our responsibility at the SEC, using the "materiality" lens, [21] to ensure that our disclosure regime evolves to continue to provide the total mix of information necessary for the "reasonable investor" whose priorities and investing behavior also continue to evolve. [22]

To that end, in connection with the staff's ongoing disclosure effectiveness review, the SEC recently issued a broad-based concept release seeking input from investors, issuers and other affected market participants on our business and financial disclosure requirements.[23] Our overall challenge is to re-focus the lens of disclosure to better serve today's investors. The challenge for investors is even greater – to use your voices not only to inform us about the disclosures you need to make informed decisions, [24] but also to influence corporate behavior to better protect and generate sustainable corporate value.

Having now set the table at a 30,000-foot level, let me turn specifically to three of your agenda items and discuss our efforts and my perspective on each of them: diversity on boards; non-GAAP financial measures; and sustainability reporting. I have chosen these three areas to highlight because of their importance, my own focus on them, and because they each also serve to illustrate the challenges that investors and the SEC face in our respective roles.

Board Diversity

Diversity on boards, and in organizations more generally, is very important to me and I have not shied away from expressing my strong views on the topic.[25] As a former member of a public company board and its audit committee, I have seen first-hand what the research is telling us – boards with diverse members function better and are correlated with better company performance.[26] This is precisely why investors have – and should have – an interest in diversity disclosure about board members and nominees.

As you know, major efforts are underway in the United States and elsewhere to improve board diversity. Many qualified candidates are out there and there are extensive resources available to nominating committees that can provide a rich supply of highly qualified and diverse candidates.[27] A few statistics underscore the importance of these efforts.

Minority directors on boards of the top 200 companies on the S&P 500 have stagnated at 15% for the last several years, and the percentage of these companies with at least one minority director actually declined from 90% in 2005 to 86% in 2015.[28] In 2009, women held only 15.2% of board seats at Fortune 500 companies[29] and that number has only risen to 19.9% in the past six years[30]; 73% of new directorships in 2015 at S&P 500 companies went to men.[31] At this rate, the GAO has estimated that it could take more than 40 years for women's representation on boards to be on par with men's.[32] The low level of board diversity in the United States is unacceptable.

I continue to urge that CEOs and boards of public companies act aggressively to alter this landscape and to do so quickly. Not only is it the right thing to do – it makes good business sense. I was pleased to see that the Business Roundtable, whose CEO members lead companies with $7 trillion in annual revenues and over 16 million employees, announced in April that it was "putting diversity front and center in their search for board directors."[33] I will be looking to see the results of their announcement. You can do your part by continuing to exercise your voices (loudly) to keep the issue of board diversity front and center – and demand concrete actions and meaningful progress now.

The role of the SEC on board diversity, as on many other important corporate governance issues, is focused on disclosure. The SEC does not have the authority to mandate board diversity, but, in 2009, the Commission adopted a rule requiring companies to disclose whether, and if so, how their nominating committees consider diversity and, if they have a policy on diversity, how its effectiveness is assessed.[34] The rule does not define diversity and the adopting release made clear that there was no single way required to define the term. It left it to companies to say what they mean by diversity in their policies and disclosures.

What has been the impact of our rule? Companies' disclosures on board diversity in reporting under our current requirements have generally been vague and have changed little since the rule was adopted. Very few companies have disclosed a formal diversity policy and, as a result, there is very little disclosure on how companies are assessing the effectiveness of their policies.[35] Companies' definitions of diversity differ greatly, bringing in life and work experience, living abroad, relevant expertise and sometimes race, gender, ethnicity, and sexual orientation. But these more specific disclosures are rare and, not surprisingly, there are investors who are not satisfied.[36]

Some companies, however, have done a good job of providing more useful information to investors on board diversity. A growing number of company proxy statements have recently begun to voluntarily provide an analysis of data, accompanied by pie charts and bar graphs, to describe the state of the board's gender, race and ethnic diversity composition, sometimes in addition to other categories – that is one of the positive results of private ordering. This more specific information is clearly more useful to investors. And based on the voluntary disclosures we have seen, it appears that it would not be difficult for companies to prepare disclosures that would include the more specific categories of diversity investors are seeking.

To respond to these issues, I announced in January that I had directed the SEC staff to review our rule and the extent and quality of disclosures that have followed, with an eye toward revising the rule if there was a need. And, I can report today that the staff is preparing a recommendation to the Commission to propose amending the rule to require companies to include in their proxy statements more meaningful

board diversity disclosures on their board members and nominees where that information is voluntarily self-reported by directors. Some may oppose even minimally more prescriptive diversity disclosure requirements. My view is that the SEC has a responsibility to ensure that our disclosure rules are serving their intended purpose of meaningfully informing investors. This rule does not and it should be changed. Our lens of board diversity disclosure needs to be re-focused in order to better serve and inform investors.

Non-GAAP Financial Measures

Let me now turn to another of your agenda items, non-GAAP financial measures, which implicate the centerpiece of our disclosure regime – the disclosure of financial information. This is familiar territory for us all. Our rules require companies to file financial statements prepared in accordance with U.S. generally accepted accounting principles ("U.S. GAAP") or, in the case of foreign private issuers, International Financial Reporting Standards ("IFRS").[37] This essential disclosure requirement makes great sense: accounting standards developed thorough a robust process conducted by an independent accounting standard setter – the Financial Accounting Standards Board ("FASB") in the United States – that provide comparability among companies on the financial information that is most critical to investors.

While periodically reporting financial results according to U.S. GAAP is the lodestar of our disclosure regime, we also allow, indeed require, companies to tell their own stories in their MD&A. We ask companies to explain and analyze their results of operations through the eyes of management. As you know, MD&A, earnings releases, and investor presentations produced by companies often include non-GAAP financial measures to convey, in management's assessment, a clearer picture of how they see the company's results of operations in a way that GAAP results alone may not convey.

Not surprisingly, our rules governing these communications make clear that the presentation of non-GAAP measures cannot be misleading and require that they be reconciled to the appropriate GAAP measure so that investors and analysts can compare them to the one that is consistently defined under the GAAP requirements.[38] I generally think it is a good idea to provide companies with this flexibility and we do hear that investors want non-GAAP information. But recently I have had significant concerns about companies taking this flexibility too far and beyond what is intended and allowed by our rules.

In too many cases, the non-GAAP information, which is meant to supplement the GAAP information, has become the key message to investors, crowding out and effectively supplanting the GAAP presentation. Jim Schnurr, our Chief Accountant, Mark Kronforst, our Chief Accountant in the Division of Corporation Finance and I, along with other members of the staff, have spoken out frequently about our concerns to raise the awareness of boards, management and investors.[39] And last month, the staff issued guidance addressing a number of troublesome practices which can make non-GAAP disclosures misleading: the lack of equal or greater prominence for GAAP measures; exclusion of normal, recurring cash operating expenses; individually tailored non-GAAP revenues; lack of consistency; cherry-picking; and the use of cash per share data.[40] I strongly urge companies to carefully consider this guidance and revisit their approach to non-GAAP disclosures. I also urge again, as I did last December, that appropriate controls be considered and that audit committees carefully oversee their company's use of non-GAAP measures and disclosures.[41]

We are watching this space very closely and are poised to act through the filing review process, enforcement and further rulemaking if necessary to achieve the optimal disclosures for investors and the markets.

Sustainability Disclosures

The third and final item on your agenda that I will cover today is sustainability reporting – obviously, a topic of great importance, interest and complexity.

I will start with the baseline. Our rules and guidance are clear that, to the extent issues about sustainability are material to a company's financial condition or results of operations, they must be disclosed.[42] But deciding whether such disclosures are triggered in a particular context is often easier said than done when trying to calibrate materiality to phenomena that have a longer term horizon than most other financial metrics do. And measuring whether and how a company will sustain its performance in a changing global physical and legal environment, which is itself uncertain, is not an easy undertaking.

To begin with, sustainability encompasses a very broad range of topics that may relate to a company's risk profile, trends or uncertainties that could affect financial performance.[43] These could include climate change, resource scarcity, corporate social responsibility, and good corporate citizenship.[44] The importance of such issues can also vary significantly by industry and company.

Despite the complexities, a considerable amount of very good work is being done and disclosures on certain sustainability issues are increasingly being made, both in reports separate from companies' financial filings and also in some companies' annual reports.[45] In 2015, 75% of the S&P 500 companies published a sustainability or corporate responsibility report[46] and over 90% of the world's 250 largest companies did so.[47]

A number of organizations have also published useful guidelines or are developing sustainability disclosure frameworks and metrics.[48] The GRI Sustainability Framework, for example, is now being widely used by companies to prepare their sustainability reports.[49] Another organization, the Sustainability Accounting Standards Board ("SASB"), is developing voluntary sustainability standards for approximately eighty industries in ten sectors.[50] These and other constructive efforts continue to mature sustainability reporting.

Still, many believe that current sustainability reporting, even as it continues to evolve, is not adequate.[51] Some advocate for more companies to report and on more comparable sustainability indicia and with more consistency.[52] Others push for "integrated reporting" where traditional financial reporting is combined with what to date has been primarily confined to a company's social responsibility or sustainability report.[53]

At this juncture, the path forward on enhancing sustainability reporting is clearly still developing. Unlike financial disclosures, established and agreed upon sustainability metrics for reporting do not yet exist. In many countries outside of Europe and South Africa, sustainability reporting is still largely voluntary.[54] And as you know, there is much debate about climate change and how to address it.

Currently, disclosure of sustainability information under SEC rules is being addressed by a combination of our materiality-based approach to disclosure, guidance on certain issues,[55] and shareholder engagement on a range of sustainability topics, whether through direct dialogue with management or our Rule 14a-8 shareholder proposal process. Although we are seeing increased disclosure and engagement on sustainability matters, we are taking a more focused look at such disclosures, particularly related to climate change, in our annual filings reviews.

We understand, however, that there are those who do not believe that our materiality-based approach to sustainability disclosure goes far enough.[56] That is one of the reasons we included a discussion of the topic in our recent Regulation S-K Concept Release and solicited input from investors and others on

whether we should consider line-item disclosure on certain issues.[57] I encourage you to share your perspectives and give us your input on whether changes are needed, and if so, what specifically should be changed.[58]

There is, in short, more work and thinking to be done on sustainability reporting at the SEC, and by companies and investors, including on whether, when, where, and how to provide disclosure and what precisely should be provided. The issue has our attention. But disclosure alone will not achieve the ultimate results many investors and other constituents are seeking.

And so I urge investors who are seeking to alter corporate behavior on sustainability to continue to use your stewardship and influence to bring about the strategic, supply chain and business model changes you think need to be made by companies to address the underlying risks and priorities. Encourage and prod companies to acknowledge sustainability objectives that are in line with what makes the most sense for their businesses, demand that they describe what they are doing to achieve those objectives and how they are doing against your expectations. We at the SEC will continue to closely monitor developments and to engage with investors and others as we review and enhance our current rules to fulfill our obligation to investors to provide them with the information they need to make investment and voting decisions in today's world.

Conclusion

It is obviously not possible in my time with you today to do justice to all of the important issues of mutual interest and priority on your conference agenda. What I can say in closing is that your engagement on behalf of investors and your promotion of good corporate governance around the world is very impressive and important to the SEC. I look forward to a continuing and active dialogue with you for the benefit of all investors and our global economic well-being. I wish you a very productive conference.

Thank you.

[1] *See generally* ICGN Global Governance Principles, *available at* https://www.icgn.org/policy.

[2] *See OECD Corporate Governance Factbook 2015* at pages 20-21 for a list of the national corporate governance codes and principles in 40 countries, *available at* http://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf. *See also* European Corporate Governance Codes Network, *available at* http://www.ecgcn.org/Corporate-Governance-Reports.aspx for links to the corporate governance codes and guidance in 28 European countries. *See also* Stephen Davis, Jon Lukomnik, David Pitt-Watson, *What They Do With Your Money: How the Financial System Fails Us and How to Fix It*, Yale University Press (2016), at pages 227-228.

[3] D. Gordon Smith, Matthew Wright, Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 Fordham L. Rev. 125, 140 (2011) (describing the limits of shareholder power under Delaware law).

[4] *See* Preamble of the Securities Act (stating it is "An Act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." 48 Stat. 74 (1933). In enacting the mandatory disclosure system under the Exchange Act, Congress sought to promote complete and accurate information in the secondary trading markets. *See* S. Rep. No. 73-1455, 73rd Cong., 2nd Sess., 1934 at 68 (stating "[o]ne of the prime concerns of the exchanges should be to make available to the public,

honest, complete, and correct information regarding the securities listed") and H.R. Rep. No. 73-1383, 73rd Cong., 2nd Sess., 1934 at 11 (stating "[t]here cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.").

[5] *See* Item 401 of Regulation S-K.

[6] *See* Section 301 of the Sarbanes-Oxley Act; NYSE Manual Section 303A.07(a); NASDAQ Rule 5605(c)(2)(A)(i).

[7] *See* Section 407 of the Sarbanes-Oxley Act and Item 407(d)(5) of Regulation S-K.

[8] *See* Item 402 of Regulation S-K; SEC Staff Report on Review of Disclosure Requirements in Regulation S-K, at 54, *available at* https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf (discussing the history of executive compensation disclosure requirements).

[9] *See* Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

[10] Joint Agency Proposed Rule: Incentive-based Compensation Arrangements, Release No. 34-77776 (May 6, 2016), *available at* https://www.sec.gov/rules/proposed/2016/34-77776.pdf.

[11] *See, e.g.,* Arthur R. Pinto, *The European Union's Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations*, 32 Fordham Int'l L.J. 587, 612 (2009) ("In Europe, shareholders are generally considered to have more power to act within the shareholder meeting compared to U.S. shareholders and this power relates to the shareholder ability to add to the agenda."); Sofie Cools, *The Real Difference between the US and Continental Europe: Distribution of Powers*, 30 Del. J. Corp. L. 697, 703 (2005) ("[Comparing the U.S. to Continental Europe underscores] just how few legal powers shareholders have in the United States and how fundamental the distribution of legal powers is in shaping the character of corporate life.")

[12] *See, e.g.*, Sanford M. Jacoby, Convergence by Design: The Case of CalPERS in Japan, 55 Am. J. Comp. L. 239 (2007), at n. 15.

[13] *See* Mary Jo White, Chair, U.S. Securities and Exchange Commission, *A Few Observations on Shareholders in 2015* (Mar. 19, 2015), *available at* https://www.sec.gov/news/speech/observations-on-shareholders-2015.html.

[14] *See*, *e.g.*, Shareholders set to file record number of ESG-related proposals in 2015 (Mar. 12, 2015), *available at* http://www.irmagazine.com/articles/sustainability/20660/shareholders-set-file-record-number-esg-related-proposals-2015/; Proxy Preview, Record Number of Social and Environmental Shareholder Resolutions Filed in 2015 (Mar. 5, 2015), *available at* http://www.proxypreview.org/wp-content/uploads/2015/03/release-record-number-of-social-and-environmental-shareholder-resolutions-filed-in-2015.pdf; and Proxy Access Proposals, posted by Avrohom J. Kess, Simpson Thacher & Bartlett LLP (Aug. 10, 2015), *available at* https://corpgov.law.harvard.edu/2015/08/10/proxy-access-proposals/.

[15] *See, e.g.*, Shareholder Rights Project, *available at* http://www.srp.law.harvard.edu/ (describing the major results of a project to assist institutional investors in moving S&P 500 and Fortune 500 companies towards annual elections).

[16] *See* ISS 2016 Board Practices Study, posted by Carol Bowie, Institutional Shareholder Services (Jun. 1, 2016), *available at* https://corpgov.law.harvard.edu/2016/06/01/iss-2016-board-practices-study/.

[17] *See, e.g.*, Wall Street Journal, "Time to ReThink 'One Share, One Vote'" (Jun. 23, 2016), *available at* http://www.wsj.com/articles/time-to-rethink-one-share-one-vote-1466722733; Sullivan & Cromwell LLP, Proxy Access 2016: Market Trends and Shareholder Proposal Developments (Nov. 10, 2015), *available at* https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Proxy_Access_2016_Market_Trends_and_Shareholder_Proposal_Developments.pdf.

[18] *See* Section 951 of the Dodd-Frank Act. *See also* Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Release No. 33-9178 (Jan. 25, 2011), *available at* https://www.sec.gov/rules/final/2011/33-9178.pdf.

[19] *See, e.g.*, *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990).

[20] Sustainability and Reporting Trends in 2025 – Preparing for the Future – GRI's Reporting 2025 Project: First Analysis Paper, May 2015, *available at* https://www.globalreporting.org/resourcelibrary/Sustainability-and-Reporting-Trends-in-2025-1.pdf.

[21] *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). *See also* SEC Staff Accounting Bulletin No. 99 – Materiality, Release No. SAB 99 (Aug. 12, 1999), *available at* https://www.sec.gov/interps/account/sab99.htm (SAB 99).

[22] As the Supreme Court has noted, determinations of materiality require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him…." *TSC Industries*, 426 U.S. at 450. *See also* SAB 99.

[23] Business and Financial Disclosure Required by Regulation S-K, Release No. 33-10064 (Apr. 13, 2016) ("Regulation S-K Concept Release"), *available at* https://www.sec.gov/rules/concept/2016/33-10064.pdf.

[24] *See, e.g.*, Id.; Request for Comment on the Effectiveness of Financial Disclosures about Entities Other than the Registrant, Release No. 33-9929 (Sep. 25, 2015), *available at* https://www.sec.gov/rules/other/2015/33-9929.pdf; Modernization of Property Disclosures for Mining Registrants, Release No. 33-10098 (Jun. 16, 2016), *available at* https://www.sec.gov/rules/proposed/2016/33-10098.pdf.

[25] *See, e.g.*, Mary Jo White, Chair, U.S. Securities and Exchange Commission, *The Pursuit of Gender Parity in the American Boardroom*, Keynote Remarks at the Women's Forum of New York Breakfast of Corporate Champions (Nov. 19, 2015), *available at* https://www.sec.gov/news/speech/gender-parity-in-the-american-boardroom.html; Mary Jo White, Chair, U.S. Securities and Exchange Commission, *A Conversation with Chair Mary Jo White*, Keynote Session, 43rd Annual Securities Regulation Institute (Jan. 26, 2016), *available at* https://www.sec.gov/news/speech/securities-regulation-institute-keynote-white.html.

[26] *See, e.g.*, McKinsey & Co., Diversity Matters (Apr. 2015), *available at* http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters; Deborah L. Rhode and Amanda K. Packel, Diversity on Corporate Boards: How Much Difference Does Difference Make, 39 Del. J. Corp. L., 2 (2014); Report of the National Association of Corporate Directors Blue Ribbon Commission, The Diverse Board: Moving From Interest to Action (National Association of Corporate Directors, 2012).

[27] *See, e.g.*, Women's Forum of New York, *available at* http://womensforumny.org/index.cfm/corporate-board-initiative/; The Thirty Percent Coalition, *available at* http://www.30percentcoalition.org/resources; and Catalyst, *available at* http://www.catalyst.org/catalyst-corporate-board-resource.

[28] 2015 Spencer Stuart Board Index, *available at* https://www.spencerstuart.com/~/media/pdf%20files/research%20and%20insight%20pdfs/ssbi-2015_110215-web.pdf.

[29] *See* Catalyst. 2009 Catalyst Census: Fortune 500 Women Board Directors, *available at* http://www.catalyst.org/knowledge/2009-catalyst-census-fortune-500-women-board-directors-0.

[30] *See* Another Study Shows Little Progress Getting Women on Boards, Wall Street Journal (Jun. 14, 2016), *available at* http://www.wsj.com/articles/another-study-shows-little-progress-getting-women-on-boards-1465876862.

[31] *See* Catalyst. 2015 *Catalyst Census: Women and Men Board Directors.* New York: Catalyst, 2016, *available at* http://www.catalyst.org/knowledge/2015-catalyst-census-women-and-men-board-directors.

[32] *See* U.S. Government Accountability Office, Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements (Dec. 2015), *available at* http://www.gao.gov/assets/680/674008.pdf.

[33] *See* Business Leaders Add Boardroom Diversity to Best Practices List (Apr. 20, 2016), *available at* http://businessroundtable.org/media/news-releases/business-leaders-add-boardroom-diversity-best-practices-list.

[34] Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 2009), *available at* http://www.sec.gov/rules/final/2009/33-9089.pdf.

[35] *See supra n.32*.

[36] *See, e.g.*, Petition for Amendment of Proxy Rule Regarding Board Nominee Disclosure–Chart/Matrix Approach, (Mar. 31, 2015), *available at* https://www.sec.gov/rules/petitions/2015/petn4-682.pdf.

[37] *See* Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Release No. 33-8879 (Dec. 21, 2007), *available at* https://www.sec.gov/rules/final/2007/33-8879.pdf. Foreign private issuers also may file financial statements using another comprehensive body of accounting, but must provide a reconciliation to U.S. GAAP. *See* Item 17(c) of Form 20-F.

[38] Regulation G (17 CFR 244.200 et seq.) and Item 10(e) of Regulation S-K (17 CFR 229.10(e)).

[39] *See, e.g.*, Mary Jo White, Chair, U.S. Securities and Exchange Commission, *Maintaining High-Quality, Reliable Financial Reporting: A Shared and Weighty Responsibility* (Dec. 9, 2015),*available at* https://www.sec.gov/news/speech/keynote-2015-aicpa-white.html; James V. Schnurr, Chief Accountant, U.S. Securities and Exchange Commission, *Remarks before the 12th Annual Life Sciences Accounting and Reporting Congress* (Mar. 22, 2016), *available at* https://www.sec.gov/news/speech/schnurr-remarks-12th-life-sciences-accounting-congress.html; Wesley R. Bricker, Deputy Chief Accountant, U.S. Securities and Exchange Commission, *Remarks before the 2016 Baruch College Financial Reporting Conference* (May 5, 2016), *available at* https://www.sec.gov/news/speech/speech-bricker-05-05-16.html; and Mark Kronforst, Chief Accountant, Division of Corporate Finance, U.S. Securities and Exchange Commission, Remarks at 36th Annual Ray Garrett Jr. Corporate and Securities Law Institute (Apr. 28, 2016).

[40] *See* Division of Corporation Finance Compliance and Disclosure Interpretations on Non-GAAP Financial Measures, *available at* https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm.

[41] *See* Mary Jo White, Chair, U.S. Securities and Exchange Commission, *Maintaining High-Quality, Reliable Financial Reporting: A Shared and Weighty Responsibility* (Dec. 9, 2015), *available at* https://www.sec.gov/news/speech/keynote-2015-aicpa-white.html.

[42] In addition to the information required to be disclosed, Securities Act Rule 408 and Exchange Act Rule 12b-20 require registrants to disclose such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading. *See* 17 CFR 230.408 and 240.12b-20. *See also, e.g.*, Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 8, 2010), *available at* https://www.sec.gov/rules/interp/2010/33-9106.pdf.

[43] *See* PricewaterhouseCoopers LLP, Sustainability goes mainstream: Insights into investor views, May 2014, *available at* https://www.pwc.com/us/en/governance-insights-center/publications/sustainability-goes-mainstream-investor-views.html. *See also, e.g.,* World Federation of Exchanges, Exchange Guidance and Recommendation – October 2015, ("WFE Guidance"), *available at* http://www.world-exchanges.org/home/index.php/news/world-exchange-news/world-exchanges-agree-enhanced-sustainability-guidance.

[44] *See, e.g.*, WFE Guidance.

[45] *See e.g.*, The Conference Board, Inc., Sustainability Practices 2015: Key Findings, *available at* http://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-corporate-governance/us-aers-ccg-sustainability-practices-report-the-conference-board-050815.pdf.

[46] *See* Press Release, Governance & Accountability Institute, Seventy-Five Percent (75%) of the S&P 500 Index Published Corporate Sustainability Reports in 2014, *available at* https://globenewswire.com/news-release/2015/06/10/743618/0/en/FLASH-REPORT-Seventy-Five-Percent-75-of-the-S-P-500-Index-Published-Corporate-Sustainability-Reports-in-2014.html.

[47] *See* KPMG, Currents of Change: The KPMG Survey of Corporate Responsibility Reporting 2015 (Nov. 24, 2015), *available at* https://www.kpmg.com/FR/fr/IssuesAndInsights/ArticlesPublications/Documents/Survey-of-CR-Reporting-112015.PDF.

[48] *See* Mark Carney, Breaking the Tragedy of the Horizon – Climate Change and Financial Stability, speech (Sept. 29, 2015) (noting that there are nearly 400 initiatives to provide information), *available at* http://www.bankofengland.co.uk/publications/Pages/speeches/2015/844.aspx.

[49] For example, according to an industry study, about seventy percent of corporate responsibility reporting in the Americas uses the Global Reporting Initiative reporting framework. KPMG LLP*, Currents of Change: The KPMG Survey of Corporate Responsibility Reporting 2015* (Nov. 24, 2015), *available at* https://assets.kpmg.com/content/dam/kpmg/pdf/2016/02/kpmg-international-survey-of-corporate-responsibility-reporting-2015.pdf.

[50] *See* http://www.sasb.org/sasb/vision-mission/.

[51] *See, e.g.*, Ernst & Young LLP, *Tomorrow's Investment Rules 2.0*, 2015 ("Tomorrow's Investment Rules 2015"), at 19, *available at* http://www.ey.com/Publication/vwLUAssets/EY-tomorrows-investment-rules-2/$FILE/EY-tomorrows-investment-rules-2.0.pdf (stating that, in a survey of more than 200 institutional investors around the world, "…almost two-thirds of respondents say companies do not adequately disclose information about ESG risks, and nearly 40% call for companies to do so more fully in the future.").

[52] *See, e.g.*, Michelle Edkins, Levelling the Playing Field on Sustainability Risk, *available at* https://www.blackrock.com/corporate/en-us/literature/publication/levelling-the-playing-field-on-sustainability-risk.pdf.

[53] *See* International Integrated Reporting Council, *The International IR Framework*, Dec. 2013, *available at* http://integratedreporting.org/wp-content/uploads/2015/03/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf; Robert G. Eccles and George Serafeim, *Corporate and Integrated Reporting: A Functional Perspective* (Harvard Business School, Working Paper 14-094 May 5, 2014).

[54] *See, e.g.*, The Hauser Center for Nonprofit Organizations; Initiative for Responsible Investment, "Current Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges" (2012), *available at* http://hausercenter.org/iri/wp-content/uploads/2011/08/CSR-Disclosures-Update-6-27-13.pdf.

[55] *See* Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 2, 2010), *available at* https://www.sec.gov/rules/interp/2010/33-9106.pdf and Division of Corporation Finance, Disclosure Guidance: Topic No. 2 Cybersecurity (Oct. 13, 2011), *available at* https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

[56] *See, e.g.*, letters from Carbon Tracker Initiative (Feb. 13, 2015), Allianz Global Investors (Aug. 13, 2015) and Union of Concerned Scientists (May 5, 2015), *available at* https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml.

[57] *See* Regulation S-K Concept Release, at Section IV.F.3.

[58] Comments on the Regulation S-K Concept Release can be submitted online at: https://www.sec.gov/cgi-bin/ruling-comments.

Modified: June 27, 2016

CORPORATION FINANCE

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Non-GAAP Financial Measures

Last Update: May 17, 2016

These Compliance & Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of the rules and regulations on the use of non-GAAP financial measures. The bracketed date following each C&DI is the latest date of publication or revision.

QUESTIONS AND ANSWERS OF GENERAL APPLICABILITY

Section 100. General

Question 100.01

Question: Can certain adjustments, although not explicitly prohibited, result in a non-GAAP measure that is misleading?

Answer: Yes. Certain adjustments may violate Rule 100(b) of Regulation G because they cause the presentation of the non-GAAP measure to be misleading. For example, presenting a performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business could be misleading. [May 17, 2016]

Question 100.02

Question: Can a non-GAAP measure be misleading if it is presented inconsistently between periods?

Answer: Yes. For example, a non-GAAP measure that adjusts a particular charge or gain in the current period and for which other, similar charges or gains were not also adjusted in prior periods could violate Rule 100(b) of Regulation G unless the change between periods is disclosed and the reasons for it explained. In addition, depending on the significance of the change, it may be necessary to recast prior measures to conform to the current presentation and place the disclosure in the appropriate context. [May 17, 2016]

Question 100.03

Question: Can a non-GAAP measure be misleading if the measure excludes charges, but does not exclude any gains?

Answer: Yes. For example, a non-GAAP measure that is adjusted only for non-recurring charges when there were non-recurring gains that occurred during the same period could violate Rule 100(b) of Regulation G. [May 17, 2016]

Question 100.04

Question: A registrant presents a non-GAAP performance measure that is adjusted to accelerate revenue recognized ratably over time in accordance with GAAP as though it earned revenue when customers are billed. Can this measure be presented in documents filed or furnished with the Commission or provided elsewhere, such as on company websites?

Answer: No. Non-GAAP measures that substitute individually tailored revenue recognition and measurement methods for those of GAAP could violate Rule 100(b) of Regulation G. Other measures that use individually tailored recognition and measurement methods for financial statement line items other than revenue may also violate Rule 100(b) of Regulation G. [May 17, 2016]

Section 101. Business Combination Transactions

Question 101.01

Question: Does the exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed in communications relating to a business combination transaction extend to the same non-GAAP financial measures disclosed in registration statements, proxy statements and tender offer materials?

Answer: No. There is an exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed in communications subject to Securities Act Rule 425 and Exchange Act Rules 14a-12 and 14d-2(b)(2); it is also intended to apply to communications subject to Exchange Act Rule 14d-9(a)(2). This exemption does not extend beyond such communications. Consequently, if the same non-GAAP financial measure that was included in a communication filed under one of those rules is also disclosed in a Securities Act registration statement or a proxy statement or tender offer statement, no exemption from Regulation G and Item 10(e) of Regulation S-K would be available for that non-GAAP financial measure.

In addition, there is an exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed pursuant to Item 1015 of Regulation M-A, which applies even if such non-GAAP financial measures are included in Securities Act registration statements, proxy statements and tender offer statements. [Jan. 11, 2010]

Question 101.02

Question: If reconciliation of a non-GAAP financial measure is required and the most directly comparable measure is a "pro forma" measure prepared and presented in accordance with Article 11 of Regulation S-X, may companies use that measure for reconciliation purposes, in lieu of a GAAP financial measure?

Answer: Yes. [Jan. 11, 2010]

Section 102. Item 10(e) of Regulation S-K

Question 102.01

Question: What measure was contemplated by "funds from operations" in footnote 50 to Exchange Act Release No. 47226, Conditions for Use of Non-GAAP Financial Measures, which indicates that companies may use "funds from operations per share" in earnings releases and materials that are filed or furnished to the Commission, subject to the requirements of Regulation G and Item 10(e) of Regulation S-K?

Answer: The reference to "funds from operations" in footnote 50, or "FFO," refers to the measure defined as of January 1, 2000, by the National Association of Real Estate Investment Trusts (NAREIT). NAREIT has revised and clarified the definition since 2000. The staff accepts NAREIT's definition of FFO in effect as of May 17, 2016 as a performance measure and does not object to its presentation on a per share basis. [May 17, 2016]

Question 102.02

Question: May a registrant present FFO on a basis other than as defined by NAREIT as of May 17, 2016?

Answer: Yes, provided that any adjustments made to FFO comply with Item 10(e) of Regulation S-K and the measure does not violate Rule 100(b) of Regulation G. Any adjustments made to FFO must comply with the requirements of Item 10(e) of Regulation S-K for a performance measure or a liquidity measure, depending on the nature of the adjustments, some of which may trigger the prohibition on presenting this measure on a per share basis. See Section 100 and Question 102.05. [May 17, 2016]

Question 102.03

Question: Item 10(e) of Regulation S-K prohibits adjusting a non-GAAP financial performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years. Is this prohibition based on the description of the charge or gain, or is it based on the nature of the charge or gain?

Answer: The prohibition is based on the description of the charge or gain that is being adjusted. It would not be appropriate to state that a charge or gain is non-recurring, infrequent or unusual unless it meets the specified criteria. The fact that a registrant cannot describe a charge or gain as non-recurring, infrequent or unusual, however, does not mean that the registrant cannot adjust for that charge or gain. Registrants can make adjustments they believe are appropriate, subject to Regulation G and the other requirements of Item 10(e) of Regulation S-K. See Question 100.01. [May 17, 2016]

Question 102.04

Question: Is the registrant required to use the non-GAAP measure in managing its business or for other purposes in order to be able to disclose it?

Answer: No. Item 10(e)(1)(i)(D) of Regulation S-K states only that, "[t]o the extent material," there should be a statement disclosing the additional purposes, "if any," for which the registrant's management uses the non-GAAP financial measure. There is no prohibition against disclosing a non-GAAP financial measure that is not used by management in managing its business. [Jan. 11, 2010]

Question 102.05

Question: While Item 10(e)(1)(ii) of Regulation S-K does not prohibit the use of per share non-GAAP financial measures, the adopting release for Item 10(e), Exchange Act Release No. 47226, states that "per share measures that are prohibited specifically under GAAP or Commission rules continue to be prohibited in materials filed with or furnished to the Commission." In light of Commission guidance, specifically Accounting Series Release No. 142, *Reporting Cash Flow and Other Related Data*, and Accounting Standards Codification 230, are non-GAAP earnings per share numbers prohibited in documents filed or furnished with the Commission?

Answer: No. Item 10(e) recognizes that certain non-GAAP per share performance measures may be meaningful from an operating standpoint. Non-GAAP per share performance measures should be reconciled to GAAP earnings per share. On the other hand, non-GAAP liquidity measures that measure cash generated must not be presented on a per share basis in documents filed or furnished with the Commission, consistent with Accounting Series Release No. 142. Whether per share data is prohibited depends on whether the non-GAAP measure can be used as a liquidity measure, even if management presents it solely as a performance measure. When analyzing these questions, the staff will focus on the substance of the non-GAAP measure and not management's characterization of the measure. [May 17, 2016]

Question 102.06

Question: Is Item 10(e)(1)(i) of Regulation S-K, which requires the prominent presentation of, and reconciliation to, the most directly comparable GAAP financial measure or measures, intended to change the staff's practice of requiring the prominent presentation of amounts for the three major categories of the statement of cash flows when a non-GAAP liquidity measure is presented?

Answer: No. The requirements in Item 10(e)(1)(i) are consistent with the staff's practice. The three major categories of the statement of cash flows should be presented when a non-GAAP liquidity measure is presented. [Jan. 11, 2010]

Question 102.07

Question: Some companies present a measure of "free cash flow," which is typically calculated as cash flows from operating activities as presented in the statement of cash flows under GAAP, less capital expenditures. Does Item 10(e)(1)(ii) of Regulation S-K prohibit this measure in documents filed with the Commission?

Answer: No. The deduction of capital expenditures from the GAAP financial measure of cash flows from operating activities would not violate the prohibitions in Item 10(e)(1)(ii). However, companies should be aware that this measure does not have a uniform definition and its title does not describe how it is calculated. Accordingly, a clear description of how this measure is calculated, as well as the necessary reconciliation, should accompany the measure where it is used. Companies should also avoid inappropriate or potentially misleading inferences about its usefulness. For example, "free cash flow" should not be used in a manner that inappropriately implies that the measure represents the residual cash flow available for discretionary expenditures, since many companies have mandatory debt service requirements or other non-discretionary expenditures that

are not deducted from the measure. Also, free cash flow is a liquidity measure that must not be presented on a per share basis. See Question 102.05. [May 17, 2016]

Question 102.08

Question: Does Item 10(e) of Regulation S-K apply to filed free writing prospectuses?

Answer: Regulation S-K applies to registration statements filed under the Securities Act, as well as registration statements, periodic and current reports and other documents filed under the Exchange Act. A free writing prospectus is not filed as part of the issuer's registration statement, unless the issuer files it on Form 8-K or otherwise includes it or incorporates it by reference into the registration statement. Therefore, Item 10(e) of Regulation S-K does not apply to a filed free writing prospectus unless the free writing prospectus is included in or incorporated by reference into the issuer's registration statement or included in an Exchange Act filing. [Jan. 11, 2010]

Question 102.09

Question: Item 10(e)(1)(ii)(A) of Regulation S-K prohibits "excluding charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures, other than the measures earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation and amortization (EBITDA)." A company's credit agreement contains a material covenant regarding the non-GAAP financial measure "Adjusted EBITDA." If disclosed in a filing, the non-GAAP financial measure "Adjusted EBITDA" would violate Item 10(e), as it excludes charges that are required to be cash settled. May a company nonetheless disclose this non-GAAP financial measure?

Answer: Yes. The prohibition in Item 10(e) notwithstanding, because MD&A requires disclosure of material items affecting liquidity, if management believes that the credit agreement is a material agreement, that the covenant is a material term of the credit agreement and that information about the covenant is material to an investor's understanding of the company's financial condition and/or liquidity, then the company may be required to disclose the measure as calculated by the debt covenant as part of its MD&A. In disclosing the non-GAAP financial measure in this situation, a company should consider also disclosing the following:

- the material terms of the credit agreement including the covenant;
- the amount or limit required for compliance with the covenant; and
- the actual or reasonably likely effects of compliance or non-compliance with the covenant on the company's financial condition and liquidity. [Jan. 11, 2010]

Question 102.10

Question: Item 10(e)(1)(i)(A) of Regulation S-K requires that when a registrant presents a non-GAAP measure it must present the most directly comparable GAAP measure with equal or greater prominence. This requirement applies to non-GAAP measures presented in documents filed with the Commission and also earnings releases furnished under Item 2.02 of Form 8-K. Are there examples of disclosures that would cause a non-GAAP measure to be more prominent?

Answer: Yes. Although whether a non-GAAP measure is more prominent than the comparable GAAP measure generally depends on the facts and circumstances in which the disclosure is made, the staff would consider the following examples of disclosure of non-GAAP measures as more prominent:

- Presenting a full income statement of non-GAAP measures or presenting a full non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures;
- Omitting comparable GAAP measures from an earnings release headline or caption that includes non-GAAP measures;
- Presenting a non-GAAP measure using a style of presentation (e.g., bold, larger font) that emphasizes the non-GAAP measure over the comparable GAAP measure;
- A non-GAAP measure that precedes the most directly comparable GAAP measure (including in an earnings release headline or caption);
- Describing a non-GAAP measure as, for example, "record performance" or "exceptional" without at least an equally prominent descriptive characterization of the

comparable GAAP measure;

- Providing tabular disclosure of non-GAAP financial measures without preceding it with an equally prominent tabular disclosure of the comparable GAAP measures or including the comparable GAAP measures in the same table;
- Excluding a quantitative reconciliation with respect to a forward-looking non-GAAP measure in reliance on the "unreasonable efforts" exception in Item 10(e)(1)(i)(B) without disclosing that fact and identifying the information that is unavailable and its probable significance in a location of equal or greater prominence; and
- Providing discussion and analysis of a non-GAAP measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence. [May 17, 2016]

Question 102.11

Question: How should income tax effects related to adjustments to arrive at a non-GAAP measure be calculated and presented?

Answer: A registrant should provide income tax effects on its non-GAAP measures depending on the nature of the measures. If a measure is a liquidity measure that includes income taxes, it might be acceptable to adjust GAAP taxes to show taxes paid in cash. If a measure is a performance measure, the registrant should include current and deferred income tax expense commensurate with the non-GAAP measure of profitability. In addition, adjustments to arrive at a non-GAAP measure should not be presented "net of tax." Rather, income taxes should be shown as a separate adjustment and clearly explained. [May 17, 2016]

Question 102.12

Question: A registrant discloses a financial measure or information that is not in accordance with GAAP or calculated exclusively from amounts presented in accordance with GAAP. In some circumstances, this financial information may have been prepared in accordance with guidance published by a government, governmental authority or self-regulatory organization that is applicable to the registrant, although the information is not required disclosure by the government, governmental authority or self-regulatory organization. Is this information considered to be a "non-GAAP financial measure" for purposes of Regulation G and Item 10 of Regulation S-K?

Answer: Yes. Unless this information is *required* to be disclosed by a system of regulation that is applicable to the registrant, it is considered to be a "non-GAAP financial measure" under Regulation G and Item 10 of Regulation S-K. Registrants that disclose such information must provide the disclosures required by Regulation G or Item 10 of Regulation S-K, if applicable, including the quantitative reconciliation from the non-GAAP financial measure to the most comparable measure calculated in accordance with GAAP. This reconciliation should be in sufficient detail to allow a reader to understand the nature of the reconciling items. [Apr. 24, 2009]

Section 103. EBIT and EBITDA

Question 103.01

Question: Exchange Act Release No. 47226 describes EBIT as "earnings before interest and taxes" and EBITDA as "earnings before interest, taxes, depreciation and amortization." What GAAP measure is intended by the term "earnings"? May measures other than those described in the release be characterized as "EBIT" or "EBITDA"? Does the exception for EBIT and EBITDA from the prohibition in Item 10(e)(1)(ii)(A) of Regulation S-K apply to these other measures?

Answer: "Earnings" means net income as presented in the statement of operations under GAAP. Measures that are calculated differently than those described as EBIT and EBITDA in Exchange Act Release No. 47226 should not be characterized as "EBIT" or "EBITDA" and their titles should be distinguished from "EBIT" or "EBITDA," such as "Adjusted EBITDA." These measures are not exempt from the prohibition in Item 10(e)(1)(ii)(A) of Regulation S-K, with the exception of measures addressed in Question 102.09. [Jan. 11, 2010]

Question 103.02

Question: If EBIT or EBITDA is presented as a performance measure, to which GAAP financial measure should it be reconciled?

Answer: If a company presents EBIT or EBITDA as a performance measure, such measures should be reconciled to net income as presented in the statement of operations under GAAP. Operating income would not be considered the most directly comparable GAAP financial measure because EBIT and EBITDA make adjustments for items that are not included in operating income. In addition, these measures must not be presented on a per share basis. See Question 102.05. [May 17, 2016]

Section 104. Segment Information

Question 104.01

Question: Is segment information that is presented in conformity with Accounting Standards Codification 280, pursuant to which a company may determine segment profitability on a basis that differs from the amounts in the consolidated financial statements determined in accordance with GAAP, considered to be a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: No. Non-GAAP financial measures do not include financial measures that are required to be disclosed by GAAP. Exchange Act Release No. 47226 lists "measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP" as examples of such measures. The measure of segment profit or loss and segment total assets under Accounting Standards Codification 280 is the measure reported to the chief operating decision maker for purposes of making decisions about allocating resources to the segment and assessing its performance.

The list of examples in Exchange Act Release No. 47226 is not exclusive. As an additional example, because Accounting Standards Codification 280 requires or expressly permits the footnotes to the company's consolidated financial statements to include specific additional financial information for each segment, that information also would be excluded from the definition of non-GAAP financial measures. [Jan. 11, 2010]

Question 104.02

Question: Does Item 10(e)(1)(ii) of Regulation S-K prohibit the discussion in MD&A of segment information determined in conformity with Accounting Standards Codification 280?

Answer: No. Where a company includes in its MD&A a discussion of segment profitability determined consistent with Accounting Standards Codification 280, which also requires that a footnote to the company's consolidated financial statements provide a reconciliation, the company also should include in the segment discussion in the MD&A a complete discussion of the reconciling items that apply to the particular segment being discussed. In this regard, see Financial Reporting Codification Section 501.06.a, footnote 28. [Jan. 11, 2010]

Question 104.03

Question: Is a measure of segment profit/loss or liquidity that is not in conformity with Accounting Standards Codification 280 a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: Yes. Segment measures that are adjusted to include amounts excluded from, or to exclude amounts included in, the measure reported to the chief operating decision maker for purposes of making decisions about allocating resources to the segment and assessing its performance do not comply with Accounting Standards Codification 280. Such measures are, therefore, non-GAAP financial measures and subject to all of the provisions of Regulation G and Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Question 104.04

Question: In the footnote that reconciles the segment measures to the consolidated financial statements, a company may total the profit or loss for the individual segments as part of the Accounting Standards Codification 280 required reconciliation. Would the presentation of the total segment profit or loss measure in any context other than the Accounting Standards Codification 280 required reconciliation in the footnote be the presentation of a non-GAAP financial measure?

Answer: Yes. The presentation of the total segment profit or loss measure in any context other than the Accounting Standards Codification 280 required reconciliation in the footnote would be the presentation of a non-GAAP financial measure because it has no

authoritative meaning outside of the Accounting Standards Codification 280 required reconciliation in the footnotes to the company's consolidated financial statements. [Jan. 11, 2010]

Question 104.05

Question: Company X presents a table illustrating a breakdown of revenues by certain products, but does not sum this to the revenue amount presented on Company X's financial statements. Is the information in the table considered a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: No, assuming the product revenue amounts are calculated in accordance with GAAP. The presentation would be considered a non-GAAP financial measure, however, if the revenue amounts are adjusted in any manner. [Jan. 11, 2010]

Question 104.06

Question: Company X has operations in various foreign countries where the local currency is used to prepare the financial statements which are translated into the reporting currency under the applicable accounting standards. In preparing its MD&A, Company X will explain the reasons for changes in various financial statement captions. A portion of these changes will be attributable to changes in exchange rates between periods used for translation. Company X wants to isolate the effect of exchange rate differences and will present financial information in a constant currency — e.g., assume a constant exchange rate between periods for translation. Would such a presentation be considered a non-GAAP measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: Yes. Company X may comply with the reconciliation requirements of Regulation G and Item 10(e) by presenting the historical amounts and the amounts in constant currency and describing the process for calculating the constant currency amounts and the basis of presentation. [Jan. 11, 2010]

Section 105. Item 2.02 of Form 8-K

Question 105.01

Question: Item 2.02 of Form 8-K contains a conditional exemption from its requirement to furnish a Form 8-K where earnings information is presented orally, telephonically, by webcast, by broadcast or by similar means. Among other conditions, the company must provide on its web site any financial and other statistical information contained in the presentation, together with any information that would be required by Regulation G. Would an audio file of the initial webcast satisfy this condition to the exemption?

Answer: Yes, provided that: (1) the audio file contains all material financial and other statistical information included in the presentation that was not previously disclosed, and (2) investors can access it and replay it through the company's web site. Alternatively, slides or a similar presentation posted on the web site at the time of the presentation containing the required, previously undisclosed, material financial and other statistical information would satisfy the condition. In each case, the company must provide all previously undisclosed material financial and other statistical information, including information provided in connection with any questions and answers. Regulation FD also may impose disclosure requirements in these circumstances. [Jan. 11, 2010]

Question 105.02

Question: Item 2.02 of Form 8-K contains a conditional exemption from its requirement to furnish a Form 8-K where earnings information is presented orally, telephonically, by webcast, by broadcast or by similar means. Among other conditions, the company must provide on its web site any material financial and other statistical information not previously disclosed and contained in the presentation, together with any information that would be required by Regulation G. When must all of this information appear on the company's web site?

Answer: The required information must appear on the company's web site at the time the oral presentation is made. In the case of information that is not provided in a presentation itself but, rather, is disclosed unexpectedly in connection with the question and answer session that was part of that oral presentation, the information must be posted on the company's web site promptly after it is disclosed. Any requirements of Regulation FD also must be satisfied. A webcast of the oral presentation would be sufficient to meet this requirement. [Jan. 11, 2010]

Question 105.03

Question: Does a company's failure to furnish to the Commission the Form 8-K required by Item 2.02 in a timely manner affect the company's eligibility to use Form S-3?

Answer: No. Form S-3 requires the company to have filed in "a timely manner all reports required to be filed in twelve calendar months and any portion of a month immediately preceding the filing of the registration statement." Because an Item 2.02 Form 8-K is furnished to the Commission, rather than filed with the Commission, failure to furnish such a Form 8-K in a timely manner would not affect a company's eligibility to use Form S-3. While not affecting a company's Form S-3 eligibility, failure to comply with Item 2.02 of Form 8-K would, of course, be a violation of Section 13(a) of the Exchange Act and the rules thereunder. [Jan. 11, 2010]

Question 105.04 [withdrawn]

Question 105.05

Question: Company X files its quarterly earnings release as an exhibit to its Form 10-Q on Wednesday morning, prior to holding its earnings conference call Wednesday afternoon. Assuming that all of the other conditions of Item 2.02(b) are met, may the company rely on the exemption for its conference call even if it does not also furnish the earnings release in an Item 2.02 Form 8-K?

Answer: Yes. Company X's filing of the earnings release as an exhibit to its Form 10-Q, rather than in an Item 2.02 Form 8-K, before the conference call takes place, would not preclude reliance on the exemption for the conference call. [Jan. 11, 2010]

Question 105.06

Question: Company A issues a press release announcing its results of operations for a just-completed fiscal quarter, including its expected adjusted earnings (a non-GAAP financial measure) for the fiscal period. Would this press release be subject to Item 2.02 of Form 8-K?

Answer: Yes, because it contains material, non-public information regarding its results of operations for a completed fiscal period. The adjusted earnings range presented would be subject to the requirements of Item 2.02 applicable to non-GAAP financial measures. [Jan. 11, 2010]

Question 105.07

Question: A company issues its earnings release after the close of the market and holds a properly noticed conference call to discuss its earnings two hours later. That conference call contains material, previously undisclosed, information of the type described under Item 2.02 of Form 8-K. Because of this timing, the company is unable to furnish its earnings release on a Form 8-K before its conference call. Accordingly, the company cannot rely on the exemption from the requirement to furnish the information in the conference call on a Form 8-K. What must the company file with regard to its conference call?

Answer: The company must furnish the material, previously non-public, financial and other statistical information required to be furnished on Item 2.02 of Form 8-K as an exhibit to a Form 8-K and satisfy the other requirements of Item 2.02 of Form 8-K. A transcript of the portion of the conference call or slides or a similar presentation including such information will satisfy this requirement. In each case, all material, previously undisclosed, financial and other statistical information, including that provided in connection with any questions and answers, must be provided. [Jan. 15, 2010]

Section 106. Foreign Private Issuers

Question 106.01

Question: The Note to Item 10(e) of Regulation S-K permits a foreign private issuer to include in its filings a non-GAAP financial measure that otherwise would be prohibited by Item 10(e)(1)(ii) if, among other things, the non-GAAP financial measure is required or expressly permitted by the standard setter that is responsible for establishing the GAAP used in the company's primary financial statements included in its filing with the Commission. What does "expressly permitted" mean?

Answer: A measure is "expressly permitted" if the particular measure is clearly and specifically identified as an acceptable measure by the standard setter that is responsible for establishing the GAAP used in the company's primary financial statements included in its filing with the Commission.

The concept of "expressly permitted" can be also be demonstrated with explicit acceptance of a presentation by the primary securities regulator in the foreign private issuer's home country jurisdiction or market. Explicit acceptance by the regulator would include (1) published views of the regulator or members of the regulator's staff or (2) a letter from the regulator or its staff to the foreign private issuer indicating the acceptance of the presentation — which would be provided to the Commission's staff upon request. [Jan. 11, 2010]

Question 106.02

Question: A foreign private issuer furnishes a press release on Form 6-K that includes a section with non-GAAP financial measures. Can a foreign private issuer incorporate by reference into a Securities Act registration statement only those portions of the furnished press release that do not include the non-GAAP financial measures?

Answer: Yes. Reports on Form 6-K are not incorporated by reference automatically into Securities Act registration statements. In order to incorporate a Form 6-K into a Securities Act registration statement, a foreign private issuer must specifically provide for such incorporation by reference in the registration statement and in any subsequently submitted Form 6-K. See Item 6(c) of Form F-3. Where a foreign private issuer wishes to incorporate by reference a portion or portions of the press release provided on a Form 6-K, the foreign private issuer should either: (1) specify in the Form 6-K those portions of the press release to be incorporated by reference, or (2) furnish two Form 6-K reports, one that contains the full press release and another that contains the portions that would be incorporated by reference (and specifies that the second Form 6-K is so incorporated). Using a separate report on Form 6-K containing the portions that would be incorporated by reference may provide more clarity for investors in most circumstances. A company must also consider whether its disclosure is rendered misleading if it incorporates only a portion (or portions) of a press release. [Jan. 11, 2010]

Question 106.03

Question: A foreign private issuer publishes a non-GAAP financial measure that does not comply with Regulation G, in reliance on Rule 100(c), and then furnishes the information in a report on Form 6-K. Must the foreign private issuer comply with Item 10(e) of Regulation S-K with respect to that information if the company chooses to incorporate that Form 6-K report into a filed Securities Act registration statement (other than an MJDS registration statement)?

Answer: Yes, the company must comply with all of the provisions of Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Question 106.04

Question: If a Canadian company includes a non-GAAP financial measure in an annual report on Form 40-F, does the company need to comply with Regulation G or Item 10(e) of Regulation S-K with respect to that information if the company files a non-MJDS Securities Act registration statement that incorporates by reference the Form 40-F?

Answer: No. Information included in a Form 40-F is not subject to Regulation G or Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Section 107. Voluntary Filers

Question 107.01

Question: Section 15(d) of the Exchange Act suspends automatically its application to any company that would be subject to the filing requirements of that section where, if other conditions are met, on the first day of the company's fiscal year it has fewer than 300 holders of record of the class of securities that created the Section 15(d) obligation. This suspension, which relates to the fiscal year in which the fewer than 300 record holders determination is made on the first day thereof, is automatic and does not require any filing with the Commission. The Commission adopted Rule 15d-6 under the Exchange Act to require the filing of a Form 15 as a notice of the suspension of a company's reporting obligation under Section 15(d). Such a filing, however, is not a condition to the

suspension. A number of companies whose Section 15(d) reporting obligation is suspended automatically by the statute choose not to file the notice required by Rule 15d-6 and continue to file Exchange Act reports as though they continue to be required. Must a company whose reporting obligation is suspended automatically by Section 15(d) but continues to file periodic reports as though it were required to file periodic reports comply with Regulation G and the requirements of Item 10(e) of Regulation S-K?

Answer: Yes. Regulation S-K relates to filings with the Commission. Accordingly, a company that is making filings as described in this question must comply with Regulation S-K or Form 20-F, as applicable, in its filings.

As to other public communications, any company "that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934" must comply with Regulation G. The application of this standard to those companies that no longer are "required" to report under Section 15(d) but choose to continue to report presents a difficult dilemma, as those companies technically are not subject to Regulation G but their continued filing is intended to and does give the appearance that they are a public company whose disclosure is subject to the Commission's regulations. It is reasonable that this appearance would cause shareholders and other market participants to expect and rely on a company's required compliance with the requirements of the federal securities laws applicable to companies reporting under Section 15(d). Accordingly, while Regulation G technically does not apply to a company such as the one described in this question, the failure of such a company to comply with all requirements (including Regulation G) applicable to a Section 15(d)-reporting company can raise significant issues regarding that company's compliance with the anti-fraud provisions of the federal securities laws. [Jan. 11, 2010]

Section 108. Compensation Discussion and Analysis/Proxy Statement

Question 108.01

Question: Instruction 5 to Item 402(b) provides that "[d]isclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e); however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements." Does this instruction extend to non-GAAP financial information that does not relate to the disclosure of target levels, but is nevertheless included in Compensation Discussion & Analysis ("CD&A") or other parts of the proxy statement - for example, to explain the relationship between pay and performance?

Answer: No. Instruction 5 to Item 402(b) is limited to CD&A disclosure of target levels that are non-GAAP financial measures. If non-GAAP financial measures are presented in CD&A or in any other part of the proxy statement for any other purpose, such as to explain the relationship between pay and performance or to justify certain levels or amounts of pay, then those non-GAAP financial measures are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K.

In these pay-related circumstances only, the staff will not object if a registrant includes the required GAAP reconciliation and other information in an annex to the proxy statement, provided the registrant includes a prominent cross-reference to such annex. Or, if the non-GAAP financial measures are the same as those included in the Form 10-K that is incorporating by reference the proxy statement's Item 402 disclosure as part of its Part III information, the staff will not object if the registrant complies with Regulation G and Item 10(e) by providing a prominent cross-reference to the pages in the Form 10-K containing the required GAAP reconciliation and other information. [July 8, 2011]

Modified: May 17, 2016

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229, 232, 239 and 249

[RELEASE NOS. 33-10322; 34-80132; FILE NO. S7-19-16]

RIN 3235-AL95

EXHIBIT HYPERLINKS AND HTML FORMAT

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments that will require registrants that file registration statements and reports subject to the exhibit requirements under Item 601 of Regulation S-K, or that file Forms F-10 or 20-F, to include a hyperlink to each exhibit listed in the exhibit index of these filings. To enable the inclusion of such hyperlinks, the amendments also require that registrants submit all such filings in HyperText Markup Language ("HTML") format.

DATES: Effective on September 1, 2017.

Compliance Dates: Registrants must comply with the final rules for filings submitted on or after September 1, 2017. A registrant that is a "smaller reporting company," as defined in Securities Act Rule 405 and Exchange Act Rule 12b-2, or that is neither a "large accelerated filer" nor an "accelerated filer," as defined in Exchange Act Rule 12b-2, and that submits filings in ASCII need not comply with the final rules until September 1, 2018, one year after the effective date.

The compliance date with respect to any Form 10-D that will require hyperlinks to any exhibits filed with Form ABS-EE is delayed until Commission staff has completed technical programming changes to allow issuers to include such forms in a single submission. Once these programming changes are complete, the Commission will publish in the Federal Register a document notifying the public of the compliance date for Form 10-D.

FOR FURTHER INFORMATION CONTACT: N. Sean Harrison, Special Counsel, at (202) 551-3430, in the Office of Rulemaking, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Item 601 of Regulation S-K,[1] Forms 20-F[2] and F-10,[3] and Rules 11,[4] 102[5] and 105[6] of Regulation S-T.[7]

I. Introduction

On August 31, 2016, we proposed rule and form amendments to require registrants to include a hyperlink to each exhibit identified in the exhibit index in any registration statement or report that is required to include exhibits under Item 601 of Regulation S-K or under Form F-10 or Form 20-F.[8] In addition, because the text-based American Standard Code for Information Interchange ("ASCII") format cannot support functional hyperlinks, we proposed to require registrants filing such registration statements or reports to file these forms on EDGAR in HTML. These proposals were intended to facilitate easier access to these exhibits for investors and other users of the information.

We received comment letters from individuals, professional and trade associations, law firms and other interested parties.[9] The commenters overwhelmingly supported the proposal to

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[1] 17 CFR 229.601.

[2] 17 CFR 249.20f.

[3] 17 CFR 239.40.

[4] 17 CFR 232.11.

[5] 17 CFR 232.102.

[6] 17 CFR 232.105.

[7] 17 CFR 232.10 *et seq*.

[8] *See* Release No. 33-10201 (Aug. 31, 2016) [81 FR 62689] (the "Proposing Release").

[9] The commenters were: the Center for Audit Quality ("CAQ"); the Corporate Governance Coalition for Investor Value ("CGCIV"); the Council of Institutional Investors ("CII"); the Credit Roundtable ("CRT"); Davis Polk &

require registrants to include hyperlinks to the exhibits filed with registration statements or reports. Some commenters suggested that we adopt additional requirements, such as requiring registrants to refile exhibits that were previously filed in paper. Other commenters expressed concerns about some aspects of the proposed amendments and suggested modifications to the proposals. We have reviewed and considered all of the comments that we received on the proposals. The final rules reflect changes made in response to these comments. We discuss the changes in more detail below.

II. Discussion of the Final Amendments

A. Hyperlinking to Exhibits

We proposed to amend Item 601 of Regulation S-K and Rules 11 and 102[10] of Regulation S-T to require registrants to include a hyperlink to each filed exhibit as identified in the exhibit index, unless the exhibit is filed in paper pursuant to a temporary or continuing hardship exemption under Rules 201[11] or 202[12] of Regulation S-T or pursuant to Rule 311[13] of Regulation S-T. We proposed corresponding amendments to Form F-10 and Form 20-F to require foreign private issuers to include hyperlinks to the exhibits filed with these forms. We are adopting

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Wardwell LLP ("Davis Polk"); the Chamber of Commerce; Ernst & Young LLP ("E&Y"); the Investor Advocacy Clinic at Georgia State University College of Law ("IAC"); Veronique Joseph; Mary Sue; the Maryland State Bar Association ("MDSBA"); Reed Smith LLP; the Securities Industry and Financial Markets Association ("SIFMA"); the Structured Finance Industry Group ("SFIG"); Jacob Vollmer; and John Wahh.

[10] Rule 102 of Regulation S-T requires each exhibit to an electronic filing to be filed electronically unless there is an applicable exemption.

[11] 17 CFR 232.201.

[12] 17 CFR 232.202.

[13] 17 CFR 232.311.

these requirements substantially as proposed, but with some changes reflecting comments we received.[14]

1. Proposed Amendments

Item 601 of Regulation S-K specifies the exhibits that registrants must file with registration statements filed under the Securities Act of 1933 ("Securities Act")[15] and Securities Exchange Act of 1934 ("Exchange Act")[16] and with periodic and current reports under the Exchange Act, which we refer to collectively in this release as the "registration statements and reports." Item 601 also requires registrants to include an exhibit index that lists each exhibit included with the filing.[17] Once an exhibit is filed, registrants can incorporate it by reference to meet the exhibit requirements in subsequent filings to the extent permitted by our rules or the applicable disclosure form.[18]

Under the current system, someone seeking to retrieve and access an exhibit that has been incorporated by reference must review the exhibit index to determine the filing in which the exhibit is included, and then must search through the registrant's filings to locate the relevant filing. This process can be both time consuming and cumbersome.

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[14] We are also adopting an amendment to Rule 102(a) of Regulation S-T to correct an outdated reference to a rule that was rescinded.

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

[16] 15 U.S.C. 78a *et seq*.

[17] *See* Item 601(a)(2) of Regulation S-K [17 CFR 229.601(a)(2)]. Rule 102(d) of Regulation S-T [17 CFR 232.102(d)] and Exchange Act Rule 0-3(c) [17 CFR 240.0-3(c)] also require filings with exhibits to include an exhibit index.

[18] *See, e.g.*, Item 10(d) of Regulation S-K [17 CFR 229.10(d)]. Item 10(d) provides, with certain exceptions, that where rules, regulations, or instructions to forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted.

We proposed to apply the amendments to nearly all of the registration statements and reports that are required to include exhibits under Item 601, specifically Forms S-1,[19] S-3,[20] S-4,[21] S-8,[22] S-11,[23] F-1,[24] F-3,[25] F-4,[26] SF-1,[27] and SF-3[28] under the Securities Act; and Forms 10,[29] 10-K,[30] 10-Q, 8-K,[31] and 10-D[32] under the Exchange Act. In addition, we proposed corresponding amendments to Form F-10 and Form 20-F. However, the proposed amendments excluded the exhibits filed with Form ABS-EE as well as any XBRL exhibits. We excluded the exhibits filed with Form ABS-EE because the form is used solely to facilitate the filing of tagged data and related information that must be filed as exhibits to that form. Form ABS-EE does not permit exhibits to be incorporated by reference and is filed in unconverted code. XBRL exhibits are similarly filed in unconverted code.[33] Therefore, we concluded preliminarily that it was not necessary to require hyperlinks to exhibits filed with Form ABS-EE or to XBRL exhibits.

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[19] 17 CFR 239.11.

[20] 17 CFR 239.13.

[21] 17 CFR 239.25.

[22] 17 CFR 239.16b.

[23] 17 CFR 239.18.

[24] 17 CFR 239.31.

[25] 17 CFR 239.33.

[26] 17 CFR 239.34.

[27] 17 CFR 239.44.

[28] 17 CFR 239.45.

[29] 17 CFR 249.210.

[30] 17 CFR 249.310.

[31] 17 CFR 249.308.

[32] 17 CFR 249.312.

[33] The Commission announced in June 2016 a time-limited program to permit registrants to voluntarily file structured financial statement data using Inline XBRL. Inline XBRL allows registrants to file the required information and data tags in one document rather than requiring a separate exhibit for the interactive data. *Order Granting Limited and Conditional Exemption Under Section 36(a) of the Securities Exchange Act of 1934 from Compliance with Interactive Data File Exhibit Requirement in Forms 6-K, 8-K, 10-Q, 10-K, 20-F and 40-F to*

The proposed amendments would require a registrant to include an active hyperlink to each exhibit identified in the exhibit index of the filing. If the filing is a periodic or current report under the Exchange Act, a registrant would be required to include an active hyperlink to each exhibit listed in the exhibit index when the report is filed. If the filing is a registration statement, the registrant would only be required to include an active hyperlink to each exhibit in the version of the registration statement that becomes effective. This was to ensure that the most complete exhibit index was hyperlinked and located in one primary document.

2. Comments on the Proposed Rule

Commenters overwhelmingly supported the proposed amendments to require exhibit hyperlinks.[34] Many commenters agreed that hyperlinking to exhibits would make it easier for investors and other users to retrieve and access these documents from Commission filings.[35] Several commenters stated that the proposal would significantly reduce the amount of time required for investors to access information and also enhance the functionality of the EDGAR filing system.[36] Two commenters supported the proposed exclusion of Form ABS-EE exhibits and XBRL exhibits because the exhibits are directly attached to that Form ABS-EE filing, and

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Facilitate Inline Filing of Tagged Financial Data, Release No. 34-78041 (June 13, 2016) [81 FR 39741]. In a companion release issued on March 1, 2017, the Commission proposed amendments that, among other things, would require the use of the Inline XBRL format for the submission of operating company financial statement information and mutual fund risk/return summaries. *Inline XBRL Filing of Tagged Data*, Release No. 33-10323 (Mar. 1, 2017). The amendments we are adopting in this release, the Inline XBRL proposals and the voluntary filing program are part of the Commission's continuing efforts and interest in modernizing the format of the information filed on EDGAR to make it more accessible to investors and other users.

[34] No commenters opposed these proposals.

[35] *See*, *e.g.*, letters from CII, E&Y, IAC and MDSBA.

[36] *See* letters from CII, CRT and IAC.

therefore an investor should have no difficulties locating the applicable attached exhibits.[37] The same two commenters supported the proposed exclusion of XBRL exhibits.

We requested comment on whether we should we revise Form 6-K[38] filed by foreign private issuers or other multi-jurisdictional disclosure system forms used by certain Canadian issuers, such as Forms F-7,[39] F-8,[40] and F-80,[41] to require exhibit hyperlinks. One commenter stated that the benefits of requiring exhibit hyperlinks in Form 6-K would be minor.[42] This commenter observed that Form 6-K does not have any prescribed exhibit requirements, in contrast to Form 20-F, which does require the filing of relevant disclosure documents as exhibits.

In the Proposing Release, we also requested comment on whether we should require registrants to include hyperlinks to the exhibits filed with an initial registration statement and each pre-effective amendment to the registration statement. One commenter supported requiring exhibit hyperlinks in the version of the registration statement that becomes effective, as proposed.[43] This commenter stated that the effective version of the registration statement would be the version that is most often reviewed by an investor and other users, and because exhibits may be revised or replaced during the registration process, it would be the version that properly referenced all of the exhibits filed with the registration statement that had not been replaced or revised.

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[37] *See* letters from Davis Polk and SFIG.

[38] 17 CFR 249.306.

[39] 17 CFR 239.37.

[40] 17 CFR 239.38.

[41] 17 CFR 239.41.

[42] *See* letter from Davis Polk.

[43] *See* letter from SFIG.

Two commenters stated that exhibit hyperlinks should be required in the pre-effective amendment to the registration statement that includes the preliminary prospectus distributed in connection with an offering.[44] One of these commenters stated that the information found in exhibits would be most relevant when the preliminary prospectus used to market an offering is distributed because that is when investors are beginning to make an investment decision.[45]

Another commenter supported requiring exhibit hyperlinks in the initial registration statement and each subsequent pre-effective amendment rather than just in the registration statement that becomes effective.[46] This commenter stated that exhibit hyperlinks would improve the navigability of the pre-effective amendments, and that the incremental burden of including hyperlinks in the initial registration statement and any pre-effective amendments would not be significant because each subsequent pre-effective amendment would only add or update hyperlinks (in the event of superseded or amended exhibits) to the exhibit index that was last filed.

We also requested comment on whether we should require registrants to refile in electronic format any exhibit previously filed in paper so that a registrant can include a hyperlink from the exhibit index to such exhibits. We received a number of comments on this question. Three commenters stated we should require registrants to file electronically all previously filed paper exhibits.[47] Two of these commenters stated that it would be particularly beneficial to investors if organizational documents, such as certificates of incorporation, were made available

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[44] *See* letters from Reed Smith and SIFMA.

[45] *See* letter from SIFMA.

[46] *See* letter from Davis Polk.

[47] *See* letters from CII, MDSBA and Reed Smith.

on EDGAR.[48] The other commenter maintained that any burden and expense of refiling a previously filed paper exhibit would be minimal because it was unlikely that many registrants would have a significant number of paper exhibits created prior to the time that the registrant became subject to mandated electronic filing on EDGAR.[49] A different commenter suggested that registrants should be permitted to post organizational documents on their websites as an alternative to refiling paper exhibits.[50]

Conversely, three commenters did not support requiring registrants to refile previously filed paper exhibits.[51] Two of these commenters stated that requiring registrants to refile paper exhibits could significantly increase the cost burden to registrants.[52] The other commenter suggested that, rather than requiring the refiling of paper exhibits, we should instead encourage registrants to voluntarily refile exhibits originally filed in paper.[53]

3. Final Rule

After considering the comments, we are adopting the exhibit hyperlinking requirement substantially as proposed with some modifications. Under the final rules, registrants will be required to include a hyperlink to each exhibit identified in the exhibit index, unless the exhibit is filed in paper pursuant to a temporary or continuing hardship exemption under Rules 201 or 202 of Regulation S-T, or pursuant to Rule 311 of Regulation S-T. This requirement will apply to the forms for which exhibits are required under Item 601 of Regulation S-K.

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[48] *See* letters from CII and Reed Smith.

[49] *See* letter from MDSBA.

[50] *See* letter from Reed Smith.

[51] *See* letters from Davis Polk, SFIG and SIFMA.

[52] *See* letters from Davis Polk and SFIG.

[53] *See* letter from SIFMA.

However, as proposed, the final rules exclude any XBRL exhibits.[54] The final rules also exclude exhibits that are filed with Form ABS-EE. Since these exhibits are directly attached to that Form ABS-EE filing, which is essentially a cover page, an investor should have no difficulties locating the applicable exhibits.[55] In addition, we are adopting, as proposed, the amendments to Forms F-10 and 20-F to require exhibit hyperlinks in these forms. At this time, we are not requiring exhibit hyperlinks in other forms under the multi-jurisdictional disclosure system used by certain Canadian issuers or in Form 6-K, as we agree with the commenter's suggestion that hyperlinks in these forms may have less utility because exhibits, and an exhibit index, are not required for these forms.[56]

We are persuaded by commenters that exhibit hyperlinks in the initial registration statement and each subsequent pre-effective amendment, rather than just the registration statement that becomes effective, would further enhance the navigability of these documents, which may be used by investors to begin making investment decisions before effectiveness. Accordingly, we are amending Item 601 of Regulation S-K to require that each exhibit identified in the exhibit index (other than exhibits filed with Form ABS-EE or an exhibit filed in XBRL) must include an active link to an exhibit that is filed with the registration statement or report, or if the exhibit is incorporated by reference, an active hyperlink to the exhibit separately filed on EDGAR.

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[54] Although these exhibits are excluded under the final rules, the Commission is continuing efforts to modernize the format of information filed on EDGAR. *See* note 33 above.

[55] Asset-backed issuers are required to incorporate by reference Form ABS-EE information in Form 10-D. Therefore, under the final rule, issuers will be required to include hyperlinks in the Form 10-D to any asset data file or asset-related document filed on Form ABS-EE that is incorporated by reference into the Form 10-D. We are, however, delaying the compliance date for any Form 10-D that will require hyperlinks to any exhibits filed with Form ABS-EE. *See* Section II.B.3 below.

[56] *See* letter from Davis Polk.

In order to provide electronic filers time to prepare filings to include hyperlinks to exhibits, the final rules will take effect on September 1, 2017. However, we encourage early compliance with the new filing requirements.

As noted above, a few commenters suggested that we require the refiling of any exhibits previously filed only in paper. In particular, commenters stated that articles of incorporation and by-laws should be required to be refiled electronically, given the importance of these documents to investors.[57] We are not amending the final rules to require registrants to refile electronically any documents in paper, including organizational documents. In our experience, only a limited number of registrants have not electronically filed their articles of incorporation or by-laws, and we are mindful of commenters' concerns about imposing additional compliance burdens.[58]

B. HTML Format for Registration Statements and Reports

In connection with the proposed exhibit hyperlinking requirements, we proposed amendments to Rule 105 of Regulation S-T to require registrants to file registration statements and reports that include exhibits in the HTML format.[59] We are adopting this proposal with a few changes made in response to comments.

1. Proposed Rules

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[57] *See* letters from CII and MDSBA.

[58] For example, in connection with the economic analysis of the final rules, we examined a random sample of 146 Form 10-K filings made from October 1, 2015 to September 30, 2016. The articles of incorporation and by-laws filed with the Form 10-Ks in the sample were all filed electronically. *See* Section IV.A below. In addition, we note that registrants have the option to restate in electronic format an exhibit that was previously filed in paper. *See* Rule 102(a) of Regulation S-T.

[59] We are continuing to consider ways to further enhance the presentation and usability of the exhibit index. For example, HTML tags identifying the exhibit index would make it possible to include a hyperlink to the index on a registrant's search results EDGAR landing page, which could allow investors and other users to more easily access the exhibits.

Rule 105 of Regulation S-T sets forth the limitations on, and liability for, the use of HTML documents and hyperlinks in electronic filings. Rule 105, among other things, currently permits hyperlinking to other documents within the same filing, such as exhibits, and to documents contained in other forms or schedules that have been previously filed on EDGAR. In addition, Rule 105 prohibits hyperlinking to websites, locations or other documents that are outside of the EDGAR system.

Currently, registrants must submit electronic filings to the Commission using the EDGAR system in either the ASCII format or the HTML format. HTML has features that allow documents prepared in this format to include hyperlinks to another place within the same document or to a separate document. In contrast, documents prepared in the ASCII format cannot support functional hyperlinks.[60] Because the ASCII format does not support hyperlink functionality, the exhibit hyperlinking requirement would be feasible only if registrants are required to file in HTML. Under the proposed amendment, registrants would be required to file registration statements and reports subject to the exhibit filing requirements under Item 601 of Regulation S-K, and Forms 20-F and F-10, in HTML format. In the Proposing Release, we noted that, during 2015, only 175 registrants made filings in ASCII and that the HTML format has largely replaced ASCII as the filing format for the forms that would be affected by the amendments.[61]

2. Comments on the Proposed Rules

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[60] HTML documents, however, can hyperlink to an ASCII document.

[61] During the 2015 calendar year, over 114,000 of the affected forms were filed on EDGAR. Approximately 845 (less than one percent) of those filings were submitted in the ASCII format.

No commenter opposed the proposed amendment to require HTML filings and two commenters specifically supported it.[62] Three commenters suggested that we establish a phase-in or transition period for ASCII filers.[63] Two of these commenters advocated providing smaller reporting companies and non-accelerated filers with one additional year beyond the compliance date for accelerated filers to comply with the exhibit hyperlinking proposals,[64] and the third commenter did not specify the length of the extension.

In the Proposing Release, we requested comment on whether there are any particular difficulties in requiring registrants to provide hyperlinks to the exhibits identified in Item 601 of Regulation S-K that are filed with a registration statement or report, as proposed. Several commenters took this opportunity to provide their views on the liability issues concerning inadvertent or inaccurate hyperlinks. Two commenters expressed concern that Rule 105(c) of Regulation S-T would extend civil and antifraud liability to hyperlinks that are automatically created by software programs.[65] Three commenters contended that inaccurate or inactive hyperlinks should not give rise to any liability or other penalties.[66] Two commenters stated registrants should not be required to amend a previously filed report to correct an inaccurate or

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[62] *See* letters from Davis Polk and Reed Smith.

[63] *See* letters from CGCIV, Chamber of Commerce and Reed Smith.

[64] *See* letters from CGCIV and Chamber of Commerce.

[65] *See* letters from CGCIV and Chamber of Commerce. In previous guidance, the Commission noted: "Some word processing programs automatically transform inactive textual references to electronic addresses (URLs) to hyperlinks. In addition, some browsers transform URLs to hyperlinks. We do not wish to discourage filers from including URLs to their own web sites or to our web site at www.sec.gov in their filings. Filers who include these URLs in HTML filings, accordingly, should take reasonable steps when they create the document in order to prevent URLs from being converted into hyperlinks. If this is done, Rule 105 should not be read as imposing liability on any such hyperlinks that may be created after the filing is made." Release No. 33-7855 (Apr. 24, 2000) [81 FR 62689].

[66] *See* letters from Reed Smith, SFIG and SIFMA.

failed hyperlink.[67] One commenter suggested that we should allow a registrant to make a correction to an inaccurate hyperlink in the registrant's next report that includes an exhibit index.[68] The other commenter suggested that we consider providing a mechanism to alert investors to inactive or obsolete hyperlinked exhibits and provide an efficient and simple process to correct such hyperlinks.[69]

3. Final Rule

After considering the comments, we are adopting the amendments to Rule 105 of Regulation S-T substantially as proposed but with minor modifications. Under the final rules, registrants will be required to file in HTML format a registration statement or report subject to the exhibit filing requirements under Item 601 of Regulation S-K, and Forms 20-F and F-10. While the affected registration statements and reports will be required to be filed in HTML pursuant to the amendments to Rule 105, registrants may continue to file in ASCII any schedules or forms that are not subject to the exhibit filing requirements under Item 601, such as proxy statements, or other documents included with a filing, such as an exhibit.

In response to comments, we are adopting a phase-in period for non-accelerated filers[70] and smaller reporting companies.[71] Non-accelerated filers and smaller reporting companies that submit filings in ASCII will have an additional one year after the effective date of the final rules to begin to comply with the rules. During the phase-in period, these filers may continue to file

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[67] *See* letters from E&Y and Reed Smith.

[68] *See* letter from Reed Smith.

[69] *See* letter from E&Y.

[70] Although the term "non-accelerated filer" is not defined in Commission rules, we use this term to refer to a reporting company that does not meet the definition of either an "accelerated filer" or a "large accelerated filer" under Exchange Act Rule 12b-2.

[71] "Smaller reporting company" is defined in Securities Act Rule 405 [17 CFR 230.405], Exchange Act Rule 12b-2 [17 CFR 240.12b-2], and Item 10(f)(1) of Regulation S-K [17 CFR 229.10(f)(1)].

registration statements or reports in ASCII and will not need to include hyperlinks to the exhibits listed in the exhibit indexes of their filings. We are persuaded that a delay in the compliance date for these registrants may help mitigate some of the cost burdens for smaller reporting companies related to switching over to the HTML format.

We are also adopting a phase-in period for certain filings on Form 10-D. Currently, the staff is working on programming changes to EDGAR that will allow issuers to include the Form 10-D and Form ABS-EE in a single submission so that the required hyperlinks can be created at the time the Form 10-D is filed. The implementation of these programming changes will not be completed by the effective date of the final rules. Accordingly, we are delaying the compliance date with respect to any Form 10-D that will require hyperlinks to any exhibit filed with Form ABS-EE. We will publish a document on our website and in the Federal Register announcing the compliance date for Form 10-D when it is determined.

A few commenters noted that it would not be possible to hyperlink to an exhibit that is filed for the first time with a registration statement or report because no web address would be available for that exhibit before the filing is made. Although these commenters make a valid point, as explained below, we do not believe this will prevent registrants from complying with the final rules. Rule 11 of Regulation S-T defines the term "hyperlinks" to mean the representation of an Internet address in a form that an Internet browser application can recognize as an Internet address.[72] We used the term "hyperlinks" more generically in the Proposing Release to include, in addition to links to a previously filed exhibit that is being incorporated by reference into the registration statement or report, links from a registration statement or report to

[72] In the Proposing Release, we proposed a minor change to the definition of the term "hypertext links or hyperlinks" in Rule 11 of Regulation S-T to delete the term "hypertext links." We are adopting this change.

an exhibit that is being filed at the same time. As we noted in the Proposing Release, HTML has features that allow electronic documents prepared in this format to include links to another place within the same document or to a separate document. Thus, under the EDGAR system, registrants can include a link to an exhibit that is filed with a registration statement or report. In connection with the adoption of these amendments, we will be issuing an updated EDGAR Filer Manual that will describe the procedures needed to create a hyperlink to an exhibit that the registrant previously filed with a registration statement or report and the procedures needed to create a link to an exhibit that is being filed at the same time as the registration statement or report.

In response to the concerns of several commenters regarding the means to correct inaccurate exhibit hyperlinks, we are adding an instruction to Rule 105 stating that a registrant must correct a nonfunctioning hyperlink or hyperlink to the wrong exhibit by filing, in the case of a registration statement that is not yet effective, a pre-effective amendment to such registration statement, or in the case of a registration statement that is effective or an Exchange Act report, in the next Exchange Act periodic report that requires, or includes, an exhibit pursuant to Item 601 of Regulation S-K (or in the case of a foreign private issuer, pursuant to Form 20-F or Form F-10).[73] Furthermore, we note that where a filing contains an inaccurate exhibit hyperlink, the inaccurate hyperlink alone would not render the filing materially deficient, nor affect a registrant's eligibility to use short-form registration statements.

[73] Once the registration statement is effective, the registrant must correct an inaccurate hyperlink in its next Exchange Act periodic report that contains an exhibit index, or alternatively, the registrant could correct the inaccurate hyperlink by filing a post-effective amendment to the registration statement.

In addition, we remind registrants that EDGAR does not accept documents containing web addresses that hyperlink to external websites.[74] In light of the fact that many of the liability issues identified by commenters appear most relevant for hyperlinks to external websites, we do not believe that a reexamination of the liability treatment of hyperlinks is warranted at this time. However, as we continue to consider the expanded use of hyperlinks in Commission filings, we will bear these considerations in mind.

III. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

IV. Economic Analysis

We are adopting amendments that will require registrants that file registration statements and reports that are subject to the exhibit requirements under Item 601 of Regulation S-K, or that file on Forms F-10 or 20-F, to include a hyperlink to each exhibit identified in the exhibit index of these filings and to submit all such filings in HTML format.[75]

We are sensitive to the costs and benefits of the final rules. In this economic analysis, we examine the current regulatory framework and market practices, which together constitute a baseline for analysis, and discuss the anticipated economic effects of the amendments, relative to

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[74] *See* Rule 105(b) of Regulation S-T. If a document is filed containing a hyperlink to an external website, EDGAR will reject the document and the electronic filer must resubmit the document without the hyperlink to the external website.

[75] The amendments exclude exhibits filed with Form ABS-EE and XBRL exhibits.

this baseline, and their potential effects on efficiency, competition, and capital formation.[76] We also consider the potential costs and benefits of reasonable alternatives to the amendments.

Where practicable, we attempt to quantify the economic effects of the amendments; however, in certain cases, we are unable to do so because we lack necessary information. We do, however, provide a qualitative assessment of the likely economic effects. The proposing release requested comment on all aspects of the economic effects, including the costs and benefits of the proposals and possible alternatives to the proposed amendments. The Commission also solicited comment in the proposing release on whether the proposals, if adopted, would promote efficiency, competition, or capital formation, or have an impact or burden on competition.

A. Baseline

The amendments will affect all registrants that file registration statements and reports that are required to include exhibits under Item 601 of Regulation S-K, specifically Forms S-1, S-3, S-4, S-8, S-11, SF-1, SF-3, F-1, F-3, and F-4 under the Securities Act and Forms 10, 10-K, 10-Q, 8-K, and 10-D under the Exchange Act. In addition, the amendments will affect registrants that file on Forms F-10 and 20-F. Although registrants that currently file registration statements and reports in HTML format will not be affected by the requirement to file in HTML format, they will be required to include hyperlinks from the exhibits identified in the exhibit index to the exhibits that are filed with the document or that were previously filed with another document. Because the ASCII format does not support hyperlink capabilities, registrants that currently file

[76] Exchange Act Section 23(a)(2) [15 U.S.C. 78w(a)] requires us, when adopting rules, to consider the impact that any new rule would have on competition. In addition, Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)] direct us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

these forms and reports in ASCII format will be required to file in HTML in addition to complying with the exhibit hyperlinking requirement.

We estimate that, from October 1, 2015 to September 30, 2016, 9,221 registrants filed either a registration statement or a report in HTML, while 152 registrants made filings in ASCII. Table 1 below shows the number of registration statements and reports that registrants filed with the Commission from October 1, 2015 to September 30, 2016. Table 1 also presents the number of filings submitted in HTML format and ASCII format, respectively, including amendments. Because hyperlinking is not available in ASCII format, we present the baseline analysis of filings separately for HTML and ASCII formats.

Table 1: Number of Registration Statements and Reports Filed from October 1, 2015 to September 30, 2016

	Number of Filings (including Amendments)	
Securities Act Registration Statements and Exchange Act Forms	HTML	ASCII
Form S-1	2,295	12
Form S-3	940	6
Form S-4	716	0
Form S-8	1,988	1
Form S-11	128	0
Form SF-1	6	0
Form SF-3	154	0
Form F-1	237	0
Form F-3	113	0
Form F-4	90	0
Form F-10	117	0
Form 10[77]	340	54
Form 20-F	751	0
Form 10-K	8,349	65
Form 10-Q	21,278	142
Form 8-K[78]	73,337	282
Form 10-D	5,947	236

[77] The number of Form 10s includes Forms 10-12B and 10-12G.

[78] The number of Form 8-Ks includes Form 8-K12B.

As shown in Table 1, among the types of forms affected by the amendments, Forms S-1, S-8, 10-K, 10-Q, 10-D, and 8-K were the most frequently filed in HTML format from October 1, 2015 to September 30, 2016. As a proxy for registrants' size, we used the filer status that registrants reported in their Form 10-K from October 1, 2015 to September 30, 2016. We found that 32.5% of the registration statements and reports (including amendments) filed in HTML format were filed by large accelerated filers, 21.3% by accelerated filers and 35.2% by smaller reporting companies or non-accelerated filers.[79]

From October 1, 2015 to September 30, 2016, a limited set of form types were filed in ASCII format. In particular, Forms 8-K, 10-D, 10-Q and 10-K were most frequently filed in ASCII format. We found that, of the registration statements and reports (including amendments) filed in ASCII, 4.5% were filed by large accelerated filers, 0.8% by accelerated filers, and 56% by smaller reporting companies or non-accelerated filers.[80]

To draw a baseline indicative of the current disclosure practices by HTML filers, we selected a random sample of 600 filings of registration statements and reports (including amended filings) from October 1, 2015 to September 30, 2016. This sample included 146 randomly selected Form 10-K filings and 454 randomly selected other filings in HTML format.

The amendments will require registrants to include hyperlinks for all exhibits listed in the exhibit index, whether included with the filing or incorporated by reference from a previously filed document. Table 2 below shows the average and median number of exhibits[81] listed in the random sample of 600 filings by the type of forms affected by the amendments.

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[79] The remaining 11% of filings in HTML format from October 1, 2015 to September 30, 2016 were filed by registrants whose filer status was not indicated.

[80] The remaining 38.7% of sampled filings in ASCII format were filed by registrants whose filer status was not indicated.

[81] We did not include XBRL exhibits because these exhibits are not covered by the final rules.

Table 2: Number of Exhibits

	Number of Exhibits Listed in the Index		Number of Exhibits Filed with the Form		Number of Exhibits Incorporated by Reference		Number of Sampled Filings
	Average[82]	Median[83]	Average	Median	Average	Median	
Form S-1	29.1	20.0	10.8	5.0	18.3	0.0	16
Form S-3	10.4	10.0	4.5	4.0	5.9	4.0	17
Form S-4	50.6	18.0	11.9	9.0	37.2	14.0	9
Form S-8	5.6	5.0	3.1	3.0	2.5	2.5	24
Form S-11	24.7	30.0	14.3	10.0	10.3	0.0	3
Form SF-1	--	--	--	--	--	--	0
Form SF-3	8.4	6.0	6.1	4.0	2.3	2.0	11
Form F-1	21.8	22.5	20.6	22.5	1.1	0.0	8
Form F-3	8.0	7.5	4.8	4.0	3.25	1.5	8
Form F-4	20.2	23.0	15.2	17.0	1.0	0.5	5
Form F-10	17.0	17.0	15.0	15.0	2.0	2.0	1
Form 10	6.6	2.0	6.6	2.0	0.0	0.0	7
Form 20-F	32.6	34.0	11.2	8.0	21.4	27.0	5
Form 10-K	34.8	31.0	7.5	6.0	26.6	24.5	146
Form 10-Q	7.1	5.5	4.0	4.0	3.1	0.5	50
Form 8-K	1.3	1.0	1.2	1.0	0.1	0.0	265
Form 10-D	1.0	1.0	0.8	1.0	0.0	0.0	25
All Forms	19.5	10.0	5.7	4.0	13.8	3.0	600
Forms S-1, S-4, S-11, F-1, F-4, F-10, 20-F and 10-K	33.4	28.0	8.8	11.0	23.8	18.0	193
Other Forms & Reports	3.0	1.0	2.1	1.0	1.9	0.0	407

Table 2 shows a significant variation in the number of exhibits listed in the exhibit index across different types of forms. Among the Securities Act registration statements, Forms S-1, S-4, S-11, F-1, F-4 and F-10 typically contain a large number of exhibits, while among the Exchange Act reports, Forms 20-F and 10-K contain significantly more exhibits than other form types. Overall, Forms S-1, S-4, S-11, F-1, F-4, F-10, 20-F and 10-K had a median number of 33 exhibits, compared to a median of three exhibits in the other nine types of registration statements

[82] Average represents the sum of number of exhibits divided by the number of sampled forms for each form type.

[83] Median represents the middle number of exhibits for each form type when the numbers of exhibits are listed from the smallest to the largest. For instance, for Forms S-1, the number of exhibits listed in the index ranged from 1 to 125, with 20 as the middle number.

and reports. Forms S-1, S-4, S-11, F-1, F-4, F-10, 20-F and 10-K also had significantly more exhibits incorporated by reference than the other nine types of registration statements and reports affected by the amendments.

In general, the number of exhibits slightly decreases with a registrant's size for the sampled filings submitted from October 1, 2015 to September 30, 2016. Of the 600 sampled filings, the filings by non-accelerated filers and smaller reporting companies had a median of five exhibits; filings by accelerated filers had a median of three exhibits; and large accelerated filers had a median of two exhibits.

Of the 600 sampled filings, we found that the exhibit indexes of only 48 (8%) of the filings included hyperlinks. We found 14 out of 48 filings included hyperlinks for all exhibits. In the 34 instances when registrants did not include hyperlinks for all exhibits, they were more likely to include hyperlinks to exhibits incorporated by reference. Of the sampled filings on Form S-1, S-4, S-11, F-1, F-4, F-10, 20-F and 10-K, approximately 4% had exhibit indexes that contained hyperlinks for one or more exhibits in the index ("partially hyperlinked"). In particular, while we found four fully hyperlinked Form 10-Ks, 18 of the 146 sampled Form 10-Ks were partially hyperlinked.

Table 3: Type of Forms from which Exhibits were Incorporated by Reference

Exhibit Incorporated By Reference From: / Into:	Form S-1	Form F-1	Form 10-K	Form 20-F	Form 8-K	Form 10-Q	Other Forms with Exhibit Index Requirement	Other Forms without Exhibit Index Requirement[84]

[84] Pursuant to Securities Act Rule 411 [17 CFR 230.411] and Exchange Act Rule 12b-23 [17 CFR 240.12b-23], registrants can, under certain conditions, incorporate information by reference in answer, or partial answer, to an item of a registration statement or report. Generally, the incorporated information must be filed as an exhibit to the registration statement or report. In our analysis of the 600 sampled filings, we found several exhibits that were filed for this purpose.

Form S-1	20%	0%	14%	0%	31%	11%	22%	1%
Form S-3	14%	0%	2%	0%	57%	10%	9%	8%
Form S-4	42%	0%	10%	0%	24%	6%	10%	8%
Form S-8	30%	0%	5%	2%	30%	13%	12%	8%
Form S-11	0%	0%	0%	0%	45%	3%	0%	52%
Form SF-1	0%	0%	0%	0%	0%	0%	0%	0%
Form SF-3	0%	0%	0%	0%	44%	0%	56%	0%
Form F-1	0%	0%	0%	67%	0%	0%	0%	33%
Form F-3	0%	77%	0%	4%	0%	0%	0%	19%
Form F-4	0%	0%	0%	0%	0%	0%	0%	100%
Form F-10	0%	0%	0%	0%	0%	0%	97%	3%
Form 10	0%	0%	0%	0%	0%	0%	0%	0%
Form 20-F	1%	7%	0%	73%	0%	0%	1%	18%
Form 10-K	8%	0%	19%	0%	43%	18%	7%	4%
Form 10-Q	6%	0%	13%	1%	55%	13%	6%	5%
Form 8-K	10%	0%	10%	0%	45%	10%	0%	25%
Form 10-D	0%	0%	0%	0%	0%	0%	0%	0%

Under the amendments, the hyperlink requirement will make exhibits incorporated by reference in the affected registration statements and reports more easily accessible. For the exhibits incorporated by reference that were listed in the 600 sampled filings, Table 3 shows the form types from which the exhibits were incorporated. The majority of exhibits were incorporated from the same registration statements and reports affected by the amendments. For example, exhibits in Forms S-1 were largely incorporated from previously filed Forms 8-K, 10-K, S-1, and 10-Q. Only a small percentage of exhibits were incorporated from form types without an exhibit index requirement, such as proxy statements.

ASCII Filers

We reviewed 200 registration statements and reports filed in ASCII format from October 1, 2015 to September 30, 2016. In particular, we reviewed 60 Form 10-Ks and a randomly selected sample of 140 other forms filed in ASCII format, including amendments. The exhibit indexes in the ASCII filings listed significantly lower average and median numbers of exhibits than in HTML filings. For example, the sampled Form 10-Qs and 10-Q/As reported a median of one exhibit. The 60 Form 10-Ks and 10-K/As filed in ASCII format from October 1, 2015 to

September 30, 2016 included a median of two exhibits, mostly filed with the form. Given that the ASCII format does not support hyperlinks, no exhibit index included hyperlinks.

B. Potential Economic Effects

Relative to unlinked cross-references, hyperlinks will not only supply users with the location of a specific exhibit, but also allow users to reach that location more easily and quickly. Requiring exhibit hyperlinks will help investors and other users to access a particular exhibit more efficiently as they will not need to search within the filing or through different filings made over time to locate the exhibit. Many commenters agreed that hyperlinking would make it easier for investors and other users to retrieve exhibit information from SEC filings.[85] Several commenters agreed that hyperlinking would reduce the amount of time required for investors to access exhibit information.[86]

We expect that hyperlinks will be more beneficial in reducing search costs in the case of exhibits incorporated by reference than in the case of exhibits filed with the filing, and in particular, we expect these benefits to be most pronounced in the case of incorporation by reference from a filing that was not recently filed because more recent filings are displayed first on the EDGAR search results page. Further, we expect hyperlinks will have greater benefits in the case of registrants that submit more filings. Overall, we believe the amendments will reduce search costs for investors. For example, depending on the nature of the business or size of the registrant, a registrant may file multiple registration statements or reports in a given quarter or fiscal year. Requiring exhibit hyperlinks will make it easier for investors and other users to find and access a particular exhibit that was originally filed with a previous filing.

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[85] *See*, *e.g.*, letters from CII, E&Y, IAC and MDSBA.

[86] *See* letters from CII, CRT and IAC.

The final rule will also require registrants to include hyperlinks to all exhibits required by Item 601 of Regulation S-K, Form F-10 and Form 20-F in each amendment. We believe hyperlinking to exhibits filed with each pre-effective amendment will be particularly beneficial to investors who begin to make an investment decision before the registration statement becomes effective, such as investors considering the preliminary prospectus.[87]

To the extent that hyperlinks ease the navigation process for investors and other users, hyperlinks may also facilitate a more thorough review of a registrant's registration statements and reports and encourage more effective monitoring over time. The potential reduction of search costs and the enhanced ability of investors to review a registrant's disclosure may result in more informed investment and voting decisions, potentially enhancing allocative efficiency and capital formation by registrants.

As a result of the amendments, both HTML and ASCII registrants will incur compliance costs to include hyperlinks in their exhibit indexes. The cost of inserting a hyperlink to an exhibit incorporated by reference would likely be greater than the cost of inserting a link to an exhibit filed with the document. While the average cost itself of inserting a hyperlink is minimal,[88] the total hyperlinking costs for registrants would be a function of two main factors: (1) how many registration statements and reports a registrant files that require an exhibit index; and (2) how many exhibits in the exhibit index of these registration statements and reports are either filed with the filing or incorporated by reference and would be subject to the hyperlinking requirement.

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[87] Several commenters supported requiring exhibit hyperlinks in pre-effective amendments. *See* letters from Davis Polk, Reed Smith and SIFMA.

[88] For purposes of the Paperwork Reduction Act, we estimate that registrants will incur, on average, between one and four burden hours to hyperlink to required exhibits, depending on the specific form type. See Section IV.D below.

For filers reporting in HTML, our baseline analysis indicates that few filers currently include fully hyperlinked exhibit indexes in registration statements and reports. Our analysis of a random sample of registration statements and reports filed between October 1, 2015 and September 30, 2016 indicates that approximately 8% of HTML filers included at least a partially hyperlinked exhibit index in their filings. For these HTML filers, the cost of fully hyperlinking their exhibit indexes could be less than for those HTML filers that have not previously hyperlinked their exhibit indexes.

In addition to these costs, filers reporting in ASCII will incur costs to switch to HTML. While the registrants that file in ASCII and therefore will be affected by the amendment to require HTML are primarily small entities, we expect that the costs of switching to HTML will not be significant given the cost of software with built-in HTML and hyperlink features is minimal. In addition, the final rule will allow an extended phase-in period for non-accelerated filers and smaller reporting companies. The delay in compliance should mitigate some of the burdens for those entities that are more likely to be adversely affected by the cost of switching from making filings in ASCII to HTML.

Overall, given the modest costs involved, we do not expect that the amendments will have significant competitive effects for registrants.

C. Alternatives

We considered five alternatives to the final rules. First, instead of requiring hyperlinks in the exhibit index within registration statements and reports requiring an exhibit index under Item 601 of Regulation S-K and Forms F-10 and 20-F, we considered requiring registrants to include hyperlinks in a subset of these registration statements and reports. For example, we could have limited the hyperlinks requirement to exhibit indexes in those registration statements and reports

that typically include lengthy exhibit indexes. Our analysis of a random sample of registration statements and reports filed from October 1, 2015 to September 30, 2016 indicates that exhibit indexes are more frequently included in filings on Forms S-1, S-8, 10-K, 10-Q, 8-K, and 10-D, but are lengthier in Forms S-1, S-4, S-11, F-1, F-4, F-10, 20-F, and 10-K based on the average and median number of exhibits included in the exhibit index. For example, Forms 8-K and 10-Q are the forms most frequently filed but typically list a limited number of exhibits, most of which are included in the filing itself rather than incorporated by reference. Relative to the final rules, the alternative of limiting the scope of the exhibit hyperlinking requirement to fewer form types would lead to cost savings for registrants but also a smaller reduction in search costs for investors and other users.

Second, instead of requiring registrants to hyperlink each exhibit included in the exhibit index, we considered requiring registrants to hyperlink only exhibits incorporated by reference. Our analysis of the random sample of filings submitted from October 1, 2015 to September 30, 2016 indicates that, among the registration statements and reports, Forms 20-F and 10-K typically include a higher number of exhibits incorporated by reference. This alternative would lead to nominal cost savings for registrants but also a smaller reduction in search costs for investors, although search costs related to exhibits filed with the document would be relatively limited.

Third, we considered requiring registrants to file and update a compilation of exhibits separately from the Form 10-K and other forms. A separate compilation of exhibits could have more prominence and make it easier for investors and other users to access relevant information on EDGAR, as there would be only one compilation for all exhibits regardless of what forms a registrant may file. Requiring a separate compilation, however, would impose an additional

burden on registrants to prepare, file and update this disclosure and could make our disclosure regime more complex to the extent that relevant information is spread over multiple filings. Relatedly, several commenters suggested that a centralized exhibit page or a company profile landing page on EDGAR could provide more direct access to the exhibits.[89] We are continuing to consider ways to further enhance the presentation and usability of the exhibit index on the EDGAR system.[90]

Fourth, we considered excluding ASCII filers from the requirement to hyperlink to each exhibit identified in the exhibit index and permitting them to continue filing in ASCII. Relative to the amendments, this alternative could be beneficial to ASCII filers as they would not incur the additional, although minimal, compliance costs of switching to HTML and hyperlinking their exhibit indexes. However, under this alternative, investors and other users of the information disclosed in ASCII filings would not benefit from reduced search costs. As noted above, the number of registrants affected by this amendment will be minimal, and the phase-in period for non-accelerated filers and smaller reporting companies should mitigate some of these costs.

Fifth, given the relevance of organizational documents, such as articles of incorporation and by-laws, to understanding a registrant's corporate structure and operations, we considered requiring registrants to refile electronically on EDGAR their organizational documents previously filed in paper.[91] We anticipate that the economic effects of this alternative would be minimal since only a limited number of registrants have not filed their articles of incorporation

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[89] *See* letters from CRT, Davis Polk and E&Y.

[90] *See* note 59 above.

[91] Several commenters suggested that it would be particularly beneficial to investors if organizational documents previously filed in paper were available on EDGAR. *See*, e.g., letters from CII and Reed Smith.

or by-laws in electronic format.[92]

V. Paperwork Reduction Act

A. Background

Certain provisions of the final rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[93] We published a notice requesting comment on the collection of information requirements in the Proposing Release for the amendments, and we submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[94] The titles for the collections of information are:

"Form S-1" (OMB Control No. 3235-0065);

"Form S-3" (OMB Control No. 3235-0073);

"Form S-4" (OMB Control No. 3235-0324);

"Form S-8" (OMB Control No. 3235-0066);

"Form S-11" (OMB Control No. 3235-0067);

"Form F-1" (OMB Control No. 3235-0258);

"Form F-3" (OMB Control No. 3235-0256);

"Form F-4" (OMB Control No. 3235-0325);

"Form F-10" (OMB Control No. 3235-0380);

"Form SF-1" (OMB Control No. 3235-0707);

"Form SF-3" (OMB Control No. 3235-0690);

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[92] *See* note 57 above.

[93] 44 U.S.C. 3501 *et seq*.

[94] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

"Form 10" (OMB Control No. 3235-0064);

"Form 20-F" (OMB Control No. 3235-0288);

"Form 10-K" (OMB Control No. 3235-0063);

"Form 10-Q" (OMB Control No. 3235-0070);

"Form 8-K" (OMB Control No. 3235-0060);

"Form 10-D" (OMB Control No. 3235-0604);

"Regulation S-K" (OMB Control No. 3235-0071); and

"Regulation S-T" (OMB Control No. 3235-0424).[95]

The forms, reports and Regulation S-K were adopted under the Securities Act and the Exchange Act and set forth the disclosure requirements for registration statements and reports filed by registrants to help investors make informed investment and voting decisions. Regulation S-T was adopted under the Securities Act and the Exchange Act and sets forth the requirements for the electronic submission of documents filed or otherwise submitted to the Commission. The hours and costs associated with preparing and filing the forms and reports constitute reporting and cost burdens imposed by each collection of information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed.

[95] The paperwork burdens from Regulations S-K and S-T are imposed through the forms that are subject to the requirements in these regulations and are reflected in the analysis of those forms. To avoid a PRA inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to each of Regulation S-K and Regulation S-T.

B. Summary of the Final Amendments

As described in more detail above, we are adopting amendments to Regulations S-K and S-T and Forms F-10 and 20-F to require registrants that file registration statements and reports subject to the exhibit requirements under Item 601 of Regulation S-K, or that file on Forms F-10 and 20-F, to submit these registration statements and reports in HTML format and to include a hyperlink from each exhibit identified in the exhibit index of such forms to the exhibit as filed on EDGAR (other than an exhibit filed in XBRL or exhibits filed with Form ABS-EE). The final rules will require registrants to include hyperlinks to all exhibits required by Item 601, Form F-10 or Form 20-F in each amendment to a registration statement or report on these forms.

C. Summary of Comment Letters and Revisions to Proposals

In the Proposing Release, we requested comment on our PRA burden hour and cost estimates and the analysis used to derive such estimates. We did not receive any comments that addressed our PRA analysis and burden estimates of the proposed amendments.

In response to comments on the proposed amendments, we have made one change to the rule proposals that will affect the compliance burdens for issuers. Under the final rules, registrants will be required to include hyperlinks to all exhibits required by Item 601, Form F-10 or Form 20-F in each amendment to a registration statement or report.

D. Revisions to the Burden and Cost Estimates Burden

We anticipate that the final amendments will increase the burdens and costs for registrants to prepare and file the affected forms. We believe the burdens associated with hyperlinking exhibits will remain minimal as the registrant, in preparing a filing, will already be preparing the exhibits and exhibit index for such filing and will have readily available all of the information necessary to create the hyperlinks. In addition, we assume that the average burden

hours of requiring exhibit hyperlinks will vary based on the number of exhibits that are filed with an affected form. For purposes of the PRA, based on the average and median number of exhibits shown in Table 2 above, we estimate the average burden for a registrant to hyperlink to exhibits would be four hours for Forms 10-K and 20-F; three hours for Forms S-1, S-4, S-11, SF-1, F-1, F-4 and F-10; two hours for Forms S-3, S-8, SF-3, F-3, 10 and 10-Q; and one hour for Forms 10-D and 8-K.

As a result of the change to the final rules described above, we have increased our burden estimates by one hour for all of the affected forms to reflect the burden for including hyperlinks to all required exhibits in each amendment to a registration statement or report.

These estimates represent the average burden for all registrants, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual registrants based on a number of factors, including the size and complexity of their operations.

The tables below show the total annual compliance burden, in hours and in costs, of the collection of information resulting from the proposed amendments.[96] The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take an issuer to prepare and review the exhibit hyperlinks. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. For purposes of the PRA, we estimate that 75% of the burden of preparation for Exchange Act reports is carried by the registrant internally and that 25% of the burden of preparation is carried by outside professionals retained by the

[96] For convenience, the estimated hour and cost burdens in the table have been rounded to the nearest whole number.

registrant at an average cost of $400 per hour.[97] For the registration statements on Forms 10, S-1, S-3, S-4, S-11, F-1, F-3, F-4, SF-1 and SF-3, and Exchange Act report Form 20-F, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour. For the registration statement on Form S-8, we estimate that 50% of the burden of preparation is carried by the company internally and that 50% of the burden of preparation is carried by outside professionals.

Table 4. Incremental Paperwork Burden under the Final Amendments for Exchange Act Forms.

Exchange Act Forms	Proposed number of affected responses (A)	Incremental Burden Hours/Form (B)	Total Incremental Burden Hours (C)=(A)*(B)	75% Company (D)=(C)*0.75	25% Professional (E)=(C)*0.25	Professional Costs (F)=(E)*$400
Form 10	238	3	714	178	536	$214,200
Form 20-F[98]	725	4	3,625	906	2719	$1,087,500
Form 10-K	8,137	4	40,685	30,514	10,171	$4,068,400
Form 10-Q	22,907	3	68,721	51,541	17,180	$6,872,100
Form 8-K	118,387	2	236,774	177,580	59,194	$23,677,400
Form 10-D	13,014	2	26,028	19,521	6,507	$2,602,800
Total			376,547			$38,522,400

Table 5. Incremental Paperwork Burden under the Final Amendments for Securities Act Registration Statements.

Securities	Proposed	Incremental	Total	25% Company	75%	Professional

[97] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms and other persons who regularly assist registrants in preparing and filing reports with the Commission.

[98] The calculations for Form 20-F reflect an allocation of a 25% internal burden carried by the company and a 75% external burden carried by outside professionals.

Act Registration Statements	number of affected responses (A)	Burden Hours/Form (B)	Incremental Burden Hours (C)=(A)*(B)	(D)=(C)* 0.25	Professional (E)=(C)* 0.75	Costs (F)=(E)*$400
Form S-1	901	4	3,604	901	2,703	$1,081,200
Form S-3	1,082	3	3,246	811	2,435	$973,800
Form S-4	619	4	2,476	619	1,857	$742,800
Form S-8[99]	2,200	3	6,600	3,300	3,300	$1,320,000
Form S-11	100	4	400	100	300	$120,000
Form SF-1	6	4	24	6	18	$7,200
Form SF-3	71	3	213	53	160	$63,900
Form F-1	63	4	252	63	189	$75,600
Form F-3	107	3	321	80	241	$96,300
Form F-4	68	4	272	68	204	$81,600
Form F-10	40	4	160	40	120	$48,000
Total			17,568			$4,610,400

VI. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis (FRFA) has been prepared in accordance with the Regulatory Flexibility Act.[100] This FRFA relates to final amendments that will require registrants to submit registration statements and reports subject to the exhibit requirements under Item 601 of Regulation S-K, or Forms 20-F and F-10 in HTML format, to include a hyperlink to each exhibit listed in the exhibit index of such registration statement or report.

A. Need for the Amendments

The main purpose of the amendments is to improve investors' access to information—in particular, the ability of investors and other users to retrieve and access exhibits that are filed on EDGAR.

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[99] The calculation for Form S-8 reflects an allocation of a 50% internal burden carried by the company and a 50% external burden carried by outside professionals.

[100] 5 U.S.C. 601 *et seq*.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the Initial Regulatory Flexibility Analysis ("IRFA"), including the number of small entities that would be affected by the proposed rules, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA. Several commenters, however, addressed aspects of the proposed amendments that could potentially affect small entities. In particular, two commenters expressed concerned that the proposed HTML formatting requirement would place a disproportionate burden on smaller reporting companies and non-accelerated filers.[101] These commenters advocated providing smaller reporting companies and non-accelerated filers with one additional year beyond the compliance date for accelerated filers to comply with the amendments.

C. Small Entities Subject to the Final Rules

The final rules will affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[102] For purposes of the Regulatory Flexibility Act, under our rules, an issuer, other than an investment company, is a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities that does not exceed $5 million.[103] An

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[101] *See* letters from CGCIV and Chamber of Commerce.

[102] 5 U.S.C. 601(6).

[103] *See* Securities Act Rule 157 [17 CFR 230.157] and Exchange Act Rule 0-10(a) [17 CFR 240.0-10(a)].

investment company, including a business development company,[104] is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[105] We estimate that there are 837 issuers, other than investment companies, that will be subject to the final rules that may be considered small entities.[106] In addition, we estimate that there are 34 investment companies that will be subject to the final rules that may be considered small entities.

D. Reporting, Recordkeeping, and other Compliance Requirements

The final rules will impose new compliance requirements for small entities. The final rules will require all registrants (including small entities) that file registration statements and reports that are subject to the exhibit requirements under Item 601 of Regulation S-K, or that file on Forms F-10 or 20-F, to file these forms in HTML format and to hyperlink to each exhibit (other than an exhibit filed in XBRL or exhibits filed with Form ABS-EE) identified in the exhibit index contained in the form. The final rules will also require registrants to include hyperlinks to all of the exhibits required by Item 601, Form 10-F or Form 20-F in each amendment to a registration statement or report.

E. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the final rules, we considered the following alternatives:

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[104] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a-2(a)(48) and 80a-53-64].

[105] *See* Exchange Act Rule 0-10(a).

[106] This estimate is based on a review of XBRL data, where available, submitted with Form 10-K and Form 20-F filings with fiscal periods ending between January 31, 2015 and January 31, 2016.

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

We believe the amendments to require the inclusion of hyperlinks in the exhibit index will impose only minimal burdens on registrants. Similarly, we believe the requirement to submit registration statements and reports in HTML format should not impose significant costs. During calendar year 2015, approximately 0.74% of the forms that would be affected by the proposed amendments were filed in ASCII, and we believe that the HTML format has largely replaced the ASCII format for these form types. The limited use of ASCII indicates that the final amendments will affect only a limited number of registrants on a one-time basis. While the registrants that file forms in ASCII that would be affected by the proposal to require HTML are primarily small entities, we expect that the burden to switch from ASCII to HTML will not be significant because the software tools to file in HTML format are now widely used and available at a minimal cost. Accordingly, we do not believe that it is necessary to exempt small entities from the proposed amendments. For similar reasons, we have not sought to clarify, consolidate or simplify the proposed amendments' requirements for small entities.

Nevertheless, to minimize the initial compliance burden on small entities and give them additional time to prepare for compliance with the final rules, we are adopting a phase-in period for non-accelerated filers and smaller reporting companies that submit filings in ASCII. These registrants will have one year after the effective date of the final rules to begin to comply with

the rules. During the phase-in period, a non-accelerated filer or a smaller reporting company that submits filings in ASCII may continue to file registration statements or reports in ASCII and will not need to include hyperlinks to the exhibits listed in the exhibit indexes of its filings.

The final rules use design rather than performance standards in order to promote uniform filing requirements for all registrants.

VII. Statutory Authority

The amendments contained in this release are being adopted under the authority set forth in Sections 6, 7, 8, 10 and 19(a) of the Securities Act, and Sections 3, 12, 13, 15(d), 23(a) and 35A of the Exchange Act.

List of Subjects

17 CFR Parts 229, 232, 239 and 249

Reporting and recordkeeping requirements, Securities.

TEXT OF THE FINAL AMENDMENTS

For the reasons set out in the preamble, the Commission is amending Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 229 — STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 – REGULATION S-K

1. The authority citation for Part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78*ll*, 78 mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11 and 7201 et seq.; 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111-203,

124 Stat. 1904; Sec. 102(a)(3) Pub. L. 112-106, 126 Stat. 309; and Sec. 84001, Pub. L. 114-94, 129 Stat. 1312.

2. Amend §229.601 by revising paragraph (a)(2) to read as follows:

§229.601 (Item 601) Exhibits.

(a) * * *

(2) Each registration statement or report shall contain an exhibit index, which must appear before the required signatures in the registration statement or report. For convenient reference, each exhibit shall be listed in the exhibit index according to the number assigned to it in the exhibit table. If an exhibit is incorporated by reference, this must be noted in the exhibit index. Each exhibit identified in the exhibit index (other than an exhibit filed in eXtensible Business Reporting Language or an exhibit that is filed with Form ABS-EE) must include an active link to an exhibit that is filed with the registration statement or report or, if the exhibit is incorporated by reference, an active hyperlink to the exhibit separately filed on EDGAR. If a registration statement or report is amended, each amendment must include hyperlinks to the exhibits required with the amendment. For a description of each of the exhibits included in the exhibit table, see paragraph (b) of this section.

* * * * *

PART 232 — REGULATION S-T — GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

3. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

4. Amend §232.11 by revising the definition of the terms "Hypertext links or hyperlinks" to read as follows:

§232.11 Definition of terms used in part 232.

* * * * *

Hyperlinks. The term *hyperlinks* means the representation of an Internet address in a form that an Internet browser application can recognize as an Internet address.

* * * * *

5. Amend §232.102 by revising paragraphs (a) and (d) to read as follows:

§232.102 Exhibits.

(a) Exhibits to an electronic filing that have not previously been filed with the Commission shall be filed in electronic format, absent a hardship exemption. Previously filed exhibits, whether in paper or electronic format, may be incorporated by reference into an electronic filing to the extent permitted by §229.10(d) of this chapter, Rule 411 under the Securities Act (§230.411 of this chapter), Rule 12b-23 or 12b-32 under the Exchange Act (§240.12b-23 or §240.12b-32 of this chapter), Rules 0-4, 8b-23, and 8b-32 under the Investment Company Act (§§270.0-4, 270.8b-23 and 270.8b-32 of this chapter) and Rule 303 of Regulation S-T (§232.303). An electronic filer may, at its option, restate in electronic format any exhibit incorporated by reference that originally was filed in paper format.

* * * * *

(d) Each electronic filing requiring exhibits must include an exhibit index which must appear before the required signatures in the document. The index must list each exhibit filed, whether filed electronically or in paper. For electronic filings on Form F-10 (§239.40 of this

chapter), Form 20-F (§249.220f of this chapter), or filings subject to Item 601 of Regulation S-K (§229.601 of this chapter), each exhibit identified in the exhibit index (other than an exhibit filed in eXtensible Business Reporting Language or an exhibit that is filed with Form ABS-EE (§249.1401 of this chapter)) must include an active link to an exhibit that is filed with the document or, if the exhibit is incorporated by reference, an active hyperlink to the exhibit separately filed on EDGAR. Whenever a filer files an exhibit in paper pursuant to a temporary or continuing hardship exemption (§232.201 or §232.202) or pursuant to §232.311, the filer must place the letter "P" next to the listed exhibit in the exhibit index of the electronic filing to reflect the fact that the filer filed the exhibit in paper. In addition, if the exhibit is filed in paper pursuant to §232.311, the filer must place the designation "Rule 311" next to the letter "P" in the exhibit index. If the exhibit is filed in paper pursuant to a temporary or continuing hardship exemption, the filer must place the letters "TH" or "CH," respectively, next to the letter "P" in the exhibit index. Whenever an electronic confirming copy of an exhibit is filed pursuant to a hardship exemption (§232.201 or §232.202(d)), the exhibit index should specify where the confirming electronic copy can be located; in addition, the designation "CE" (confirming electronic) should be placed next to the listed exhibit in the exhibit index.

* * * * *

6. Amend §232.105 by revising the section heading, paragraphs (b) and (c) and adding new paragraph (d) to read as follows:

§232.105 Use of HTML and hyperlinks.

* * * * *

(b) Electronic filers may not include in any HTML document hyperlinks to sites, locations, or documents outside the HTML document, except links to officially filed documents

within the current submission and to documents previously filed electronically and located in the EDGAR database on the Commission's public website (www.sec.gov). Electronic filers also may include within an HTML document links to different sections within that single HTML document.

(c) If a filer includes an external hyperlink within a filed document, the information contained in the linked material will not be considered part of the document for determining compliance with reporting obligations, but the inclusion of the link will cause the filer to be subject to the civil liability and antifraud provisions of the federal securities laws with reference to the information contained in the linked material.

(d) Electronic filers submitting Form F-10 (§239.40 of this chapter), Form 20-F (§249.220f of this chapter), or a registration statement or report subject to Item 601 of Regulation S-K (§229.601 of this chapter), must submit such registration statement or report in HTML and each exhibit identified in the exhibit index (other than an exhibit filed in eXtensible Business Reporting Language or an exhibit filed with Form ABS-EE (§249.1401 of this chapter)) must include an active link to an exhibit that is filed with the registration statement or report or, if the exhibit is incorporated by reference, an active hyperlink to the exhibit separately filed on EDGAR, unless such exhibit is filed in paper pursuant to a temporary or continuing hardship exemption under Rules 201 or 202 of Regulation S-T (§232.201 or §232.202) or pursuant to Rule 311 of Regulation S-T (§232.311).

Instructions to paragraph (d).

(1) No hyperlink is required for any exhibit incorporated by reference that has not been filed with the Commission in electronic format.

(2) An electronic filer must correct an inaccurate or nonfunctioning link or hyperlink to an exhibit, in the case of a registration statement that is not yet effective, by filing an amendment to the registration statement containing the inaccurate or nonfunctioning link or hyperlink; or, in the case of a registration statement that has become effective or an Exchange Act report, an electronic filer must correct the inaccurate or nonfunctioning link or hyperlink in the next Exchange Act periodic report that requires, or includes, an exhibit pursuant to Item 601 of Regulation S-K (§229.601 of this chapter) or, in the case of a foreign private issuer (as defined in §229.405 of this chapter), Form 20-F (§249.220f of this chapter) or Form F-10 (§239.40 of this chapter). Alternatively, an electronic filer may correct an inaccurate or nonfunctioning link or hyperlink in a registration statement that has become effective by filing a post-effective amendment to the registration statement.

* * * * *

PART 239 — FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

7. The authority citation for Part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78o-7 note, 78u-5, 78w(a), 78*ll*, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, 80a-37, and Sec. 71003 and Sec. 84001, Pub. L. 114-94, 129 Stat. 1312, unless otherwise noted.

8. Amend Form F-10 (referenced in §239.40) by revising paragraph D of General Instruction II to read as follows:

Note: The text of Form F-10 does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM F-10

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

* * * * *

II. Application of General Rules and Regulations

* * * * *

D. A registrant must file the registration statement in electronic format via the Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232). For assistance with technical questions about EDGAR or to request an access code, call the EDGAR Filer Support Office at (202) 551-8900. For assistance with the EDGAR rules, call the Office of Information Technology in the Division of Corporation Finance at (202) 551-3600.

Include an exhibit index in the registration statement, which must appear before the required signatures in the document. The exhibit index must list each exhibit according to the letter or number assigned to it. If an exhibit is incorporated by reference, this must be noted in the exhibit index. Each exhibit identified in the exhibit index (other than an exhibit filed in eXtensible Business Reporting Language) must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference an active hyperlink

to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment. For paper filings, the pages of the manually signed original registration statement should be numbered in sequence, and the exhibit index should give the page number in the sequential numbering system where each exhibit can be found.

If filing the registration statement in paper under a hardship exemption in Rule 201 or 202 of Regulation S-T (17 CFR 232.201 or 232.202), or as otherwise permitted, a registrant must file with the Commission at its principal office five copies of the complete registration statement and any amendments, including exhibits and all other documents filed as a part of the registration statement or amendment. The registrant must bind, staple or otherwise compile each copy in one or more parts without stiff covers. The registrant must further bind the registration statement or amendment on the side or stitching margin in a manner that leaves the reading matter legible. The registrant must provide three additional copies of the registration statement or amendment without exhibits to the Commission.

* * * * *

PART 249 — FORMS, SECURITIES EXCHANGE ACT OF 1934

9. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; 12 U.S.C. 5461 et seq.; 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3) Pub. L. 112-106, 126 Stat. 309 (2012), Sec. 107 Pub. L. 112–106, 126 Stat. 313 (2012), and Sec. 72001 Pub. L. 114-94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

10. Amend Form 20-F (referenced in §249.220f) by revising the fourth paragraph of the introductory text under "Instructions as to Exhibits" to read as follows:

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20-F

* * * * *

Part III

* * * * *

Item 19. Exhibits.

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

Include an exhibit index in each registration statement or report you file, which must appear before the required signatures in the document. The exhibit index must list each exhibit according to the number assigned to it below. If an exhibit is incorporated by reference, this must be noted in the exhibit index. Each exhibit identified in the exhibit index (other than an exhibit filed in eXtensible Business Reporting Language) must include an active link to an exhibit that is filed with the registration statement or report or, if the exhibit is incorporated by reference an active hyperlink to the exhibit separately filed on EDGAR. If a registration statement or report is amended, each amendment must include active hyperlinks to the exhibits

required with the amendment. For paper filings, the pages of the manually signed original registration statement should be numbered in sequence, and the exhibit index should give the page number in the sequential numbering system where each exhibit can be found.

* * * * *

By the Commission.

March 1, 2017

Brent J. Fields
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-79164; IC-32339; File No. S7-24-16

RIN 3235-AL84

Universal Proxy

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to the federal proxy rules to require the use of universal proxies in all non-exempt solicitations in connection with contested elections of directors other than those involving registered investment companies and business development companies. Our proposal would require the use of universal proxies that include the names of both registrant and dissident nominees and thus allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholder meeting. We further propose amendments to the form of proxy and proxy statement disclosure requirements to specify clearly the applicable voting options and voting standards in all director elections.

DATES: Comments should be received on or before [insert date 60 days after date of publication in the Federal Register].

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
- Send an email to rule-comments@sec.gov. Please include File Number S7-24-16 on the subject line; or

- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-24-16. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549-1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the SEC's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Tiffany Posil, Special Counsel, or Christina Chalk, Senior Special Counsel, in the Office of Mergers and Acquisitions, at (202) 551-3440, or Steven G. Hearne, Senior Special Counsel, in the Office of Rulemaking, at (202) 551-3430, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing new Rule 14a-19 and amendments to Rules 14a-2,[1] 14a-3,[2] 14a-4,[3] 14a-5,[4] 14a-6,[5] 14a-101[6] under the Securities Exchange Act of 1934 ("Exchange Act").[7]

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1 17 CFR 240.14a-2.

2 17 CFR 240.14a-3.

3 17 CFR 240.14a-4.

4 17 CFR 240.14a-5.

5 17 CFR 240.14a-6.

6 17 CFR 240.14a-101.

7 15 U.S.C. 78a et seq.

I. INTRODUCTION

A. Background

A shareholder's ability to participate in the election of directors has been recognized as a fundamental part of state corporate law.[8] State statutes require corporations to hold an annual meeting of shareholders for the purpose of electing directors.[9] Today, few shareholders of companies with a class of securities registered under the Exchange Act attend a registrant's meeting to vote in person. Rather, the primary way for shareholders to learn about matters to be decided on at a meeting and to vote on the election of directors is through the proxy process.

While state law typically authorizes the use of proxies to permit shares to be voted without shareholders attending the meeting,[10] parties soliciting proxy authority to vote Exchange Act-registered securities must comply with the federal proxy rules pursuant to Section 14 of the Exchange Act.[11] Section 14 of the Exchange Act authorizes the Commission to establish rules and regulations governing the solicitation of any proxy or consent or authorization in respect of any security registered pursuant to Section 12 of the Exchange Act. Registrants with reporting obligations only under Exchange Act Section 15(d) and foreign private issuers are not subject to the federal proxy rules. The congressional report accompanying the Exchange Act stated that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a

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8 See Preston v. Allison, 650 A.2d 646, 649 (Del. 1994); see also Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.").

9 See, e.g., Model Bus. Corp. Act § 7.01 (2008); Cal. Corp. Code § 600(b) (2009); Del. Code. Ann. tit. 8, § 211(b) (2009); N.Y. Bus. Corp. Law § 602(b) (2009).

10 See, e.g., Del. Code Ann. tit. 8, § 212.

11 15 U.S.C. 78n(a).

public exchange."[12] The congressional committees recommending passage of Section 14(a) proposed that "the solicitation and issuance of proxies be left to regulation by the Commission"[13] and explained that Section 14(a) would give the Commission the "power to control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which have frustrated the free exercise of the voting rights of stockholders."[14] Regulation of the proxy process has been a core function of the Commission since its inception. In discussing the regulation of the proxy process, Chairman Ganson Purcell explained to a committee of the House of Representatives in 1943: "The rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law . . . ."[15]

Enhancing the ability of shareholders to exercise their right to elect directors through the proxy process has been the focus of numerous rule proposals, staff reports and comment letters over the years.[16] In the 1990s, the Commission conducted an

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12 H. R. Rep. No. 73-1383, 2d Sess., at 13 (1934). See also Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 381 (1970); J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964). The congressional report accompanying the Exchange Act further indicated that "[i]nasmuch as only the exchanges make it possible for securities to be widely distributed among the investing public, it follows as a corollary that the use of the exchanges should involve a corresponding duty of according to shareholders fair suffrage." H. R. Rep. No. 73-1383, 2d Sess., at 14 (1934).

13 S. Rep. No. 73-792, 2d Sess., at 12 (1934).

14 H.R. Rep. No. 73-1383, 2d Sess., at 14 (1934). Courts have found that the relevant legislative history also demonstrates an "intent to bolster the intelligent exercise of shareholder rights granted by state corporate law." Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 421 (D.C. Cir. 1992); see also Borak, 377 U.S. at 431.

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

16 See, e.g., Reexamination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process, and Corporate Governance Generally, Release No. 34-13482 (Apr. 28, 1977) [42 FR 23901 (May 11, 1977)]. See also Reexamination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process, and Corporate Governance Generally, Release No. 34-13901 (Aug. 29, 1977) [42 FR 44860 (Sept. 7, 1977)]; Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, U.S. Securities and Exchange Commission (July 15, 2003), available at

extensive examination of the effectiveness of the proxy voting process and its effect on corporate governance. This review resulted in amendments to the federal proxy rules that sought to reduce regulatory constraints on communication among shareholders and the effective exercise of shareholder voting rights.[17] In the 2000s, the Commission focused on the shareholder franchise by seeking public input through roundtables[18] and engaging in rulemaking relating to the inclusion of shareholder nominees for director in the registrant's proxy materials.[19] The current approach to shareholder proposals under Rule

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https://www.sec.gov/news/studies/proxyrpt.htm, Security Holder Director Nominations; Release No. 34-48626 (Oct. 14, 2003) [68 FR 60784 (Oct. 23, 2003)] (proposing rules to require companies to include shareholder nominees in their proxy materials in the event a director receives over 35 percent withhold votes or a shareholder proposal requesting access receives more than 50 percent of the votes); Shareholder Proposals, Release No. 34-56160 (July 27, 2007) [72 FR 43466 (Aug. 3, 2007)] (proposing rules relating to the inclusion of bylaw amendments regarding nomination procedures and the inclusion of shareholder nominees in the registrant's proxy materials); and Proxy Disclosure and Solicitation Enhancements, Release No. 34-60280 (July 10, 2009) [74 FR 35076 (July 17, 2009)] (proposing to modify the short slate rule to make it available to a non-management soliciting person seeking authority to vote for nominees named in the registrant's or in any other person's proxy statement).

17 See Regulation of Communications Among Shareholders, Release No. 34-30849 (June 23, 1992) [57 FR 29564 (July 2, 1992)] ("Short Slate Rule Revised Proposing Release") and Regulation of Communications Among Shareholders, Release No. 34-31326 (Oct. 16, 1992) [57 FR 48276 (Oct. 22, 1992)] ("Short Slate Rule Adopting Release"). The amendments sought to address some of these concerns by establishing an exemption for persons not seeking proxy authority, establishing a safe harbor from the definition of solicitation for certain types of shareholder communications, and allowing dissident shareholders to seek proxy authority to vote for some of management's nominees when seeking minority representation on the board of directors.

18 See, e.g., Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007) and Roundtable on Proxy Voting Mechanics (May 24, 2007). Materials related to the 2007 roundtables, including an archived broadcast and a transcript of the roundtable, are available on-line at https://www.sec.gov/spotlight/proxyprocess.htm.

19 See, e.g., Facilitating Shareholder Director Nominations, Release No. 33-9046 (June 10, 2009) [74 FR 29024 (Jun. 18, 2009)] (proposing rules to require registrants to include shareholder nominees in a registrant's proxy materials); Facilitating Shareholder Director Nominations, Release. No. 33-9136 (Aug. 25, 2010) [75 FR 56668 (Sept. 16, 2010)] (adopting rules to require, under certain circumstances, a registrant's proxy materials to provide shareholders with information about, and the ability to vote for, shareholder nominees for director). In 2011, the U.S. Court of Appeals for the District of Columbia vacated the part of the 2010 rules that required, in certain circumstances, a registrant's proxy materials to provide shareholders with information about, and the ability to vote for, a shareholder's nominees for director. See Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (vacating Exchange Act Rule 14a-11). Contemporaneous amendments to Exchange Act Rule 14a-8 (17 CFR 240.14a-8) that permit bylaw amendments allowing shareholder nominees to be included in registrant proxy materials were not challenged in the litigation and remain in effect.

14a-8 permits proposals relating to bylaw amendments that would allow shareholder director nominees to be included in a registrant's proxy materials alongside the registrant's slate of director nominees.

Despite these initiatives, under the current proxy rules, shareholders voting by proxy in a contested election[20] may not be able to replicate the vote they could cast if they voted in person at a shareholder meeting because the choices available to shareholders voting for directors through the proxy process are not the same as those available to shareholders voting in person at a shareholder meeting. Shareholders voting in person at a meeting may select among all of the duly nominated[21] director candidates proposed for election by any party and vote for any combination of those candidates. Shareholders voting by proxy, however, are limited to the selection of candidates provided by the party soliciting the shareholder's proxy. Although the current proxy rules allow a soliciting party to provide shareholders with the full selection of nominees if all such nominees have consented to being named on its proxy card, aspects of the current proxy rules[22] and the parties' strategic interests typically result in limiting shareholders' choice to the slates of nominees chosen by the soliciting parties. Thus, shareholders voting by proxy are unable to make selections based solely on their preferences for

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[20] As used in this release, the term "contested election" refers to an election of directors where a registrant is soliciting proxies in support of nominees and a person or group of persons is soliciting proxies in support of director nominees other than the registrant's nominees. We recognize that a contested election can be defined in broader terms.

[21] A duly nominated director candidate is a candidate whose nomination satisfies the requirements of any applicable state or foreign law provision or a registrant's governing documents as they relate to director nominations.

[22] See infra Section I.B for a discussion of Rule 14a-4(d)(1), the bona fide nominee rule, and the definition of a bona fide nominee in Rule 14a-4(d)(4).

particular candidates. As discussed in Section I.C. below, some shareholders have recently highlighted this limitation and requested Commission action.[23]

The changes to the federal proxy rules we propose today would allow a shareholder voting by proxy to choose among director nominees in an election contest in a manner that reflects as closely as possible the choice that could be made by voting in person at a shareholder meeting. To this end, we are proposing to require the use of a "universal proxy," or a proxy card that includes the names of all duly nominated director candidates for whom proxies are solicited, for all non-exempt solicitations in contested elections.[24] We believe that shareholders should be afforded the opportunity to fully exercise their vote for the director nominees they prefer. This concept – that the proxy voting process should mirror to the greatest extent possible the vote that a shareholder could achieve by attending the shareholders' meeting and voting in person – has guided our efforts in proposing these changes.[25] We have looked to this concept because we

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23 See Letter from the Council of Institutional Investors (Jan. 8, 2014), available at https://www.sec.gov/rules/petitions/2014/petn4-672.pdf (requesting that the Commission eliminate the requirement to obtain a nominee's consent to be named on a proxy card in a contested election and allow shareholders to vote for their preferred combination of nominees on a single proxy card). See also Letter from the California Public Employees' Retirement System (Apr. 6, 2015), available at https://www.sec.gov/comments/4-681/4681-10.pdf ("We strongly believe that shareowners should have the ability to vote for any combination of director candidates in contested elections. . . . We believe that achieving this ideal requires the Commission to adopt necessary technical fixes to the bona fide nominee rule and adopt a mandatory universal proxy card.").

24 Although investment companies are subject to the federal proxy rules, the amendments that we are proposing today would not apply to investment companies registered under Section 8 of the Investment Company Act of 1940 or business development companies as defined by Section 2(a)(48) of the Investment Company Act of 1940. See infra Section II.D.

25 We recognize that the proxy process may not be able to perfectly replicate the vote in a director election that can be achieved by attending a meeting and voting in person. For example, the proposed mandatory universal proxy system would not enable shareholders to vote by proxy on a director nomination presented from the floor of the meeting and not included in a proxy statement. However, this is a rare occurrence due to the prevalence of advance notice bylaw provisions and the low chance for success of nominations from the floor without soliciting proxies. We further note that the proposed universal proxy system does not seek to replicate the voting choices a shareholder would have on non-election proposals if voting in person at a shareholder meeting.

believe that replicating the vote that could be achieved at a shareholder meeting is the most appropriate means to ensure that shareholders using the proxy process are able to fully and consistently exercise the "fair corporate suffrage" available to them under state corporate law and that Congress intended our proxy rules to effectuate.[26]

B. Current Proxy Voting Process in Contested Elections

Shareholders that attend a meeting in person generally vote by casting a written ballot provided at the meeting that includes the names of all duly nominated candidates for the board of directors.[27] Thus, in a contested election, shareholders attending the meeting in person and casting a written ballot can vote for the nominees of their choice from each party's slate of nominees, up to the specified number of board seats up for election. In contrast, in the proxy solicitation process for an election contest, the registrant's director nominees[28] are typically presented as one slate in the registrant's proxy statement and proxy card, and the dissident's[29] full or partial slate[30] of nominees is presented in the dissident's proxy statement and proxy card. Unlike submitting ballots when a shareholder attends a meeting in person, a shareholder generally may not validly

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The current proxy rules do not limit shareholders' exercise of their voting rights on non-election proposals to the same extent they limit the exercise of shareholders' rights on election proposals because parties can include another party's non-election proposal on the proxy card without such party's consent. As a result, our rulemaking efforts have focused on director election proposals.

26 See supra notes 12 and 15.

27 Based on the staff's conversations with parties frequently engaged in the tabulation of ballots for contested elections.

28 We recognize that a registrant's board of directors (or a nominating committee it creates) commonly nominates directors for election to the board. For ease of reference, we refer to those nominees as "registrant nominees" throughout this release.

29 The term "dissident" as used in this release refers to a soliciting person other than the registrant who is soliciting proxies in support of director nominees other than the registrant's nominees.

30 "Partial slate" as used in this release refers to the nomination of a number of director candidates that is less than the number of directors being elected at the meeting. "Full slate" as used in this release refers to the nomination of a number of director candidates that is equal to the number of directors being elected at the meeting.

submit two separate proxy cards, even when the total number of nominees for which the two cards are marked does not exceed the number of directors being elected. In general, under state law, a later-dated proxy card revokes any earlier-dated one and invalidates the votes on the earlier-dated card.[31] Shareholders voting by proxy are therefore effectively required to submit their votes on either the registrant's or the dissident's proxy card and cannot pick and choose from nominees on both cards.

Additionally, shareholders voting by proxy are generally limited in their choice of nominees by Exchange Act Rule 14a-4(d)(1), the "bona fide nominee rule,"[32] which provides that no proxy shall confer authority to vote for any person to any office for which a "bona fide nominee is not named in the proxy statement." The term "bona fide nominee" is defined as a nominee who has "consented to being named in the proxy statement and to serve if elected."[33] Thus, in an election contest, one party may not include the other party's nominees on its proxy card unless the other party's nominees consent. In the staff's experience, such consent is rarely provided. Because contested elections are usually contentious, the nominees may refuse to consent to being included on the opposing party's card because of a perceived advantage to forcing shareholders to choose between the competing slates of nominees. A party's nominees may also refuse to consent to being named on the opposing party's proxy card because the nominees do not want to appear to support the opposing party's position or director nominees. As a

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31 See, e.g., Standard Power & Light Corp. v. Inv. Assocs., 51 A.2d 572, 608 (Del. 1947); Parshalle v. Roy, 567 A.2d 19, 23 (Del. Ch. 1989). See also R. Franklin Balotti, et al., Delaware Law of Corporations and Business Organizations, § 7.20 (3d ed. 2015) ("Except in the case of irrevocable proxies, a subsequent proxy revokes a former proxy. In determining whether a proxy is subsequent, the date of execution controls.").

32 17 CFR 240.14a-4(d)(1).

33 17 CFR 240.14a-4(d)(4).

result, shareholders are limited in their ability to vote for directors from both the registrant's and the dissident's slate.

Moreover, since neither party is required to include the other party's nominees, even if a nominee consents to being named on the other party's proxy card, that other party can determine whether to include the nominee for strategic or other reasons. In the staff's experience, a party will seek to have its nominees included on the opposing party's proxy card when the party believes its slate is at a disadvantage in the election contest. The party that appears to have an advantage in the contest then has no strategic incentive to include the other party's nominees on its proxy card.[34] Thus, even though a mechanism exists where shareholders could receive a proxy card listing all of the nominees in a contested election, because competing parties rarely have an incentive to include the other party's nominees on their card, shareholders today are almost always required to choose between competing proxy cards.

Currently, for shareholders to be assured that they can vote for the mix of registrant and dissident nominees that they choose (i.e., to "split their vote"), they generally must attend the meeting in person and vote. Shareholders that hold their securities in street name are required to take the additional step of obtaining a legal proxy from their broker before they are permitted to vote at the meeting. We understand that in some close elections, proxy solicitors and parties to the contest have helped shareholders

[34] For example, when a proxy advisory firm recommends a vote for some, but not all, dissident nominees, in the absence of a universal proxy shareholders seeking to cast a vote for the recommended dissident nominees must use the dissident's proxy card. In that circumstance, a registrant may want to use a universal proxy to allow shareholders to vote for some registrant nominees while voting for some dissident nominees in accordance with the proxy advisory firm's recommendation. The dissident nominees, however, may have no incentive to consent to their inclusion on a universal proxy if they believe it is strategically advantageous to have shareholders choose between the two cards because it may result in shareholders voting on the dissident card and, as a result, more dissident nominees being elected.

who hold a large stake in the registrant split their votes by arranging for an in-person representative to vote their shares at the meeting on the ballots used for in-person voting. Since the ballots provided at the meeting include the names of both registrant and dissident nominees, this arrangement allows those shareholders to choose from all duly nominated candidates.[35] However, these options for splitting votes are either not made available to or are impractical for most other shareholders who are, therefore, more limited in their ability to vote for their preferred combination of director nominees.

Rule 14a-4(d)(4), the "short slate rule," was adopted in 1992 to permit a dissident seeking to elect a minority of the board to "round out its slate" by soliciting proxy authority to vote for some registrant nominees on the dissident's card. Prior to adopting this rule, shareholders voting using the proxy card of a dissident seeking to elect a partial slate were disenfranchised with respect to the remaining seats on the board, which served as a disincentive for shareholders to grant proxies to that dissident.[36] As the Commission noted in adopting the short slate rule, the bona fide nominee rule "has acted to prevent the form of proxy from being used to allow shareholders to exercise their state law right through the proxy process, and as a result, has both cut off shareholder rights and greatly disadvantaged shareholder nominees seeking minority representation on the board of

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[35] In those instances, the proxy solicitor creates a provisional ballot to reflect the split vote. We are also aware of instances where proxy solicitors have sought to facilitate vote splitting for some shareholders who hold a large stake in the registrant by instructing them to obtain a legal proxy and modify the registrant's proxy card to indicate their preferred combination of nominees by striking any registrant nominee they do not support and indicating the dissident nominee they wish to support. Parties to contested elections have questioned whether this approach is consistent with the current definition of a bona fide nominee in Rule 14a-4(d)(4).

[36] See Short Slate Rule Revised Proposing Release, at 29573 (noting that "shareholders may be unwilling to execute a proxy that does not contain authority to vote for all seats up for election, absent cumulative voting, since the shareholder would not be exercising its full voting power.")

directors." The Commission adopted the short slate rule to mitigate the disadvantage that dissidents faced when putting forth a partial slate of nominees.[37]

The short slate rule permits a dissident to indicate on its card that it intends to use its proxy authority to vote for the registrant nominees other than the nominees named on the card and thereby allows shareholders to vote for the registrant nominees other than those specified. The shareholder also is provided an opportunity to write in the names of any other registrant nominees with respect to which the shareholder withholds voting authority, although to do so, the shareholder must consult the registrant's soliciting materials in order to obtain the names of all registrant nominees. The short slate rule is available only in election contests in which the dissident is seeking to elect nominees that would constitute a minority of the board and it applies only to the dissident.[38] In addition, the short slate rule permits the dissident, not the shareholder, to select which, if any, of the registrant nominees to vote for using the short slate proxy card.

As originally proposed, Rule 14a-4(d) would have permitted proponents to include the names of registrant nominees on the proponent proxy card.[39] Commenters from the registrant community opposed the amendment, suggesting that including registrant nominees on the dissident's card could imply that the registrant nominees supported the dissident's position, that it would confuse shareholders, and that minority representation on the board would cause the board to be less effective. The Commission responded by adopting the current version of the short slate rule that permits the dissident

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37 See Short Slate Rule Adopting Release.

38 Registrants are not permitted to rely on the short slate rule to solicit authority to vote for some of the dissident's nominees. Theoretically, a registrant might wish to rely on the short slate rule if it was proposing a partial slate of nominees that would constitute a minority of the board. However, as a practical matter, such solicitations very rarely occur.

39 See Short Slate Rule Revised Proposing Release.

to name the registrant nominees for whom the dissident will not vote. The Commission also stated that commenters' concerns that the election of dissident nominees to the board could hinder the board's effectiveness are arguments best made to the shareholders and determined in an election.[40] In taking this measured step of adopting a modified short slate rule, the Commission noted the appeal of a universal proxy in permitting shareholders to exercise their vote in the same manner as at a shareholder meeting.[41]

While the short slate rule provides the opportunity, in a contested election where a dissident is seeking election of a minority of the board, for a shareholder to use a proxy card to vote for all seats up for election, it does not provide that shareholder the opportunity to choose among all registrant and dissident nominees. To address this limitation, in recent years, proxy solicitors for registrants and dissidents have facilitated vote splitting to allow a few large shareholders to choose among all registrant and dissident nominees in a contested election. In addition, some commentators have suggested the possibility of requiring both parties to include each other's nominees on their own proxy cards.[42] We believe it is appropriate to now consider a more direct route for shareholders to exercise the same vote as they could if voting in person at a shareholder meeting. Revising our rules to facilitate the full exercise of the shareholder franchise would reduce the costs for shareholders to vote for their choice of director

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40 See Short Slate Rule Adopting Release, at 48288.

41 Id. While neither proposing nor adopting a universal proxy, the Commission acknowledged that requiring a registrant to include dissident nominees in the registrant's proxy statement "would represent a substantial change in the Commission's proxy rules."

42 See, e.g., Richard J. Grossman & J. Russel Denton, Never Mind Equal Access: Just Let Shareholders "Split Their Ticket", The M&A Lawyer (Jan. 2009) (discussing the issue of shareholders seeking to split their votes and recommending requiring the use of a universal proxy card in bona fide election contests); Tom Ball, The Quest for Universal Ballots: Might Boards Benefit Too?, Deal Lawyers (Nov.-Dec. 2014), available at http://www.morrowco.com/wp-content/uploads/2015/01/Deal-Lawyers-article-on-Universal-Ballots-Nov-Dec-20141.pdf (suggesting universal proxy could have strategic benefits for registrants in certain situations).

nominees and provide all shareholders of the company the same voting opportunities currently available to only certain shareholders.

C. Recent Feedback on the Proxy Voting Process

In 2013, the Commission's Investor Advisory Committee ("IAC")[43] recommended that we explore revising our proxy rules to provide proxy contestants with the option to use a universal proxy card in connection with short slate director nominations.[44] In early 2014, we received a rulemaking petition ("Rulemaking Petition") requesting that we require the use of a universal proxy that would allow shareholders to vote for their preferred combination of registrant and dissident nominees in contested director elections.[45] In response to this feedback, the Commission staff undertook a review of the proxy rules and the Commission held a roundtable in February 2015 to explore ways to improve proxy voting, including through the adoption of universal proxies.[46]

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43 The IAC was established in April 2012 pursuant to Section 911 of the Wall Street Reform and Consumer Protection Act [Pub. L. No. 111-203, sec. 911, 124 Stat. 1376, 1822 (2010)] ("Dodd-Frank Act") to advise the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace. The Dodd-Frank Act authorizes the Investor Advisory Committee to submit findings and recommendations for review and consideration by the Commission. The IAC made its universal proxy card recommendation at its July 25, 2013 meeting. See Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots (Jul. 25, 2013), available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf ("IAC Recommendation").

44 A "short slate director nomination" occurs where dissident nominees, if elected, would constitute a minority of the board of directors. See Rule 14a-4(d).

45 See Letter from the Council of Institutional Investors (Jan. 8, 2014), available at http://www.sec.gov/rules/petitions/2014/petn4-672.pdf. The Rulemaking Petition requested that the Commission eliminate the requirement to obtain a nominee's consent to be named on a proxy card in a contested election and to allow shareholders to vote for their preferred combination of nominees on a single proxy card.

46 See Proxy Voting Roundtable, U.S. Securities and Exchange Commission (Feb. 19, 2015), available at http://www.sec.gov/spotlight/proxy-voting-roundtable.shtml.

The IAC has observed that many retail and institutional investors do not have the practical ability to attend shareholder meetings in person and vote by ballot, which would permit them to choose among all of the candidates who are duly nominated.[47] The IAC recommended that the Commission explore revising the bona fide nominee rule to permit the use of universal proxies. In reaching this recommendation, the IAC noted that the effect of the bona fide nominee rule, in conjunction with state corporate law voting provisions, is that shareholders voting by proxy have no practical ability to vote for a combination of dissident nominees and registrant nominees, in contrast to shareholders' ability to pick among all of the duly nominated candidates when they vote in person at a meeting.[48]

The Rulemaking Petition requested that the Commission amend the proxy rules to remove the requirement to obtain the consent of the opposition's nominees prior to including those nominees on a proxy card and require the use of a universal proxy that would allow shareholders to vote for their preferred combination of registrant and dissident nominees. The Rulemaking Petition contended that such amendments are necessary to fully enfranchise shareholders. It also noted that universal proxy cards would be less likely to confuse shareholders and less complex than proxy cards under the short slate rule, thus resulting in a less cumbersome voting process.

At the February 2015 proxy voting roundtable,[49] one panel addressed the current state of contested elections and whether changes should be made to the federal proxy

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47 See IAC Recommendation, at 1.

48 See IAC Recommendation. In addition, the IAC recommended that the Commission explore whether all or only a portion of duly nominated candidates must or may appear on a universal proxy card.

49 See supra note 46.

rules to facilitate the use of universal proxy cards. The discussion focused on, among other things, whether universal proxies would increase the frequency of election contests or provide an advantage to one party or the other in a contested election. Some panelists stated that universal proxies would result in more contests;[50] others stated that they could facilitate settlements or accommodations with dissidents before a contest arose resulting in fewer contests.[51] Several panelists asserted that adopting universal proxy would more closely replicate the vote that could be made by voting in person at a shareholder meeting,[52] while another asserted that such a change should not be made in a vacuum without more broadly addressing the proxy voting process.[53] While panelists differed on many aspects of the universal proxy card, the fundamental concept that the proxy system should allow shareholders to vote by proxy as closely as possible to how they could vote in person at a shareholder meeting was generally acknowledged.[54]

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50 See, e.g., Unofficial Transcript of the Proxy Voting Roundtable (Feb. 19, 2015) ("Roundtable Transcript"), comments of David A. Katz, Partner, Wachtell, Lipton, Rosen & Katz LLP, at 41, Anne Simpson, Senior Portfolio Manager and Director of Global Governance, CalPERS, at 43 and Steve Wolosky, Partner, Olshan Frome & Wolosky, LLP, at 48-49, available at http://www.sec.gov/spotlight/proxy-voting-roundtable/proxy-voting-roundtable-transcript.txt.

51 See, e.g., Roundtable Transcript, comments of Michelle Lowry, Professor, Drexel University, at 60 and Lisa M. Fairfax, Professor, George Washington University Law School, at 48.

52 See, e.g., Roundtable Transcript, comments of Lisa M. Fairfax, Professor, George Washington University Law School, at 30 and Anne Simpson, Senior Portfolio Manager and Director of Global Governance, CalPERS, at 35-36, 73.

53 See, e.g., Roundtable Transcript, comments of David A. Katz, Partner, Wachtell, Lipton, Rosen & Katz LLP, at 74. We note, however, that the panelist did not specify what other parts of the proxy system should be addressed.

54 In a comment letter following the roundtable, one commenter reiterated its recommendation that the Commission propose rules to facilitate the use of universal proxies for contested elections, contending that such a change would enfranchise shareholders by permitting them to vote for the combination of nominees that they believe best serves their economic interest, lessen shareholder confusion concerning the proxy and lower shareholders' costs to vote. See Letter from the Council of Institutional Investors (Mar. 5, 2015), available at http://www.sec.gov/comments/4-681/4681-7.pdf. In contrast, another commenter suggested that mandating universal proxies would facilitate election contests that are disruptive to public companies and instead encouraged more robust communications between management and shareholders. See Letter from the Center for Capital Markets Competitiveness (Feb. 18, 2015), available at http://www.sec.gov/comments/4-681/4681-6.pdf.

D. Need for Proposed Amendments

We believe the proxy system should allow shareholders to achieve by proxy the vote they could cast in person at a shareholder meeting. We believe that the right to vote is of particular importance when shareholders are deciding among candidates in a contested election. While the Commission has taken some steps in the past to facilitate shareholders' ability to choose among the nominees in competing slates, such as through the adoption of the short slate rule, we are concerned that the current proxy rules may not allow shareholders to fully exercise their voting rights. In particular, our rules may not permit shareholders to select their preferred combination of nominees through the proxy process, even though they could do so if they were to attend a shareholder meeting. In its review of proxy contests, the staff has become aware of parties engaging in practices to facilitate split voting for certain, typically large, shareholders.[55] The staff has also observed other "self-help" measures intended to facilitate split voting, such as attempting to allow shareholders to "write in" their candidate of choice on a proxy card, or in the case of registrants that are at risk of losing a majority of the seats on the board, nominating less than the total number of directors up for election to effectively assure the election of some dissident nominees. We believe a universal proxy card would better enable shareholders to have their shares voted by proxy for their preferred candidates and eliminate the need for special accommodations to be made for shareholders outside the federal proxy process in order to be able to make such selections. We further believe that a universal proxy system would help to ensure that all shareholders of the company are

[55] See supra note 35 and accompanying text.

consistently and uniformly afforded the ability to select the director candidates of their choice in contested elections.

As a result, we are proposing to require the use of universal proxies in all non-exempt solicitations in connection with contested elections where a person or group of persons is soliciting proxies in support of director nominees other than the registrant's nominees. We are proposing this approach because our rationale for requiring the use of universal proxies – that the proxy voting process should allow as much as possible the voting choices that a shareholder would have when attending the meeting and voting in person – applies equally to all contested elections. We believe our rules should allow shareholders to select the combination of nominees that best aligns with their interests in any contested election.

In proposing these changes, we are cognizant of concerns that have been raised that including one party's nominees on the other party's proxy card could cause shareholder confusion or imply that the soliciting party supports the other party's nominees. We believe that some of these concerns would be mitigated by the amendments we propose today, including the proposed requirement to clearly distinguish between the registrant and dissident nominees on the proxy card.[56] To the extent that the proposed amendments do not fully alleviate these concerns, we believe they can be addressed through disclosure in the proxy statement.

We are also mindful that some have expressed that dissident representation on a board could lead to a less effective board of directors due to dissension, loss of collegiality and fewer qualified persons being willing to serve. As explained in more

[56] See proposed Rule 14a-19(e)(3).

detail in Section IV.D below, while the proposed amendments are expected to result in reduced costs for shareholders seeking to split their votes, it is unclear whether the amendments would affect the number of dissident nominees elected to the board.[57] Similarly, it is unclear whether registrants would necessarily face an increased incidence of changes in board dynamics. If the proposed amendments result in additional dissident representation, it is difficult to predict whether such additional dissident representation would enhance or detract from board effectiveness and shareholder value.[58] Similar concerns were expressed at the time the Commission adopted the short slate rule.[59] As the Commission stated in adopting the short slate rule, arguments that the election of dissident nominees will hinder the board's effectiveness are best made to the shareholders for their consideration when making voting decisions and "should not be a basis for imposing … regulatory barriers to the full exercise of the shareholder franchise."[60] Nevertheless, we solicit comment on the possible positive or negative impact the amendments could have on board performance. In particular, we solicit data on the effect of the proposed amendments on both the number of proxy contests and the resulting effect, if any, on dissident or incumbent director representation on boards. For the reasons discussed throughout this release, we preliminarily believe that facilitating the full exercise of the shareholder franchise by a broader group of shareholders may justify mandating the use of universal proxies in contested elections.

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57 See infra Section IV.D.3 (discussing potential economic effects on outcomes of contested elections).

58 See infra Section IV.C (discussing broad economic considerations).

59 See Short Slate Rule Adopting Release.

60 See Short Slate Rule Adopting Release, at 48288.

II. PROPOSED AMENDMENTS

Section 14 of the Exchange Act authorizes the Commission to establish rules and regulations governing the solicitation of any proxy or consent or authorization in respect of any security registered pursuant to the Exchange Act. In regulating the proxy process, we have sought to facilitate the rights shareholders have traditionally had under state law. We believe the current proxy rules could be improved to allow shareholders to more efficiently and fully exercise these rights in contested elections. To that end, we are proposing amendments to our proxy rules that would permit shareholders to vote by proxy for any combination of candidates for the board of directors, as they could if they attended the shareholder meeting in person and cast a written ballot.[61]

In order to provide for the use of universal proxy cards in contested elections, we are proposing to amend the proxy rules to establish new procedures for the solicitation of proxies, the preparation and use of proxy cards and the dissemination of information about all director nominees in contested elections. Specifically, we are proposing amendments that would:

- Revise the consent required of a bona fide nominee;
- Eliminate the short slate rule;
- Require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections;

[61] As discussed in Section II.D, the amendments we are proposing today to implement a mandatory universal proxy system would not apply to investment companies registered under Section 8 of the Investment Company Act of 1940 or business development companies as defined by Section 2(a)(48) of the Investment Company Act of 1940.

- Require dissidents to provide registrants with notice of intent to solicit proxies in support of nominees other than the registrant's nominees and the names of those nominees;
- Require registrants to provide dissidents with notice of the names of the registrant's nominees;
- Prescribe a filing deadline for dissidents' definitive proxy statement;
- Require dissidents to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors; and
- Prescribe requirements for universal proxy cards.

We also are proposing additional improvements to the proxy voting process by making changes to the form of proxy. Consistent with our goal of facilitating shareholder voting in director elections, we are proposing additional amendments that would apply to all director elections. First, we are proposing to amend Rule 14a-4(b) to mandate that proxy cards include an "against" voting option when applicable state laws give effect to a vote against. We are similarly proposing amendments to require proxy cards to give shareholders the ability to "abstain" in an election where a majority voting standard is in effect. Finally, we are also proposing amendments to the proxy statement disclosure requirements to mandate disclosure about the effect of a "withhold" vote in an election.

A. Bona Fide Nominees and the Short Slate Rule

The current proxy rules limit the ability of parties in a contested election to include the names of all nominees on their proxy card. Exchange Act Rules 14a-4(d)(1) and 14a-4(d)(4) provide that no proxy may confer authority to vote for any nominee unless that nominee has consented to being named in the proxy statement and to serve if elected. As a result, a party in a contested election cannot include on its proxy card a

nominee from the opposing party without the express authorization of that nominee, which is rarely provided. These proxy rules, along with state law rules regarding the effect of later-dated proxy cards, effectively create a system in which parties to a contested election distribute their own proxy cards that include only a subset of all director nominees. Ultimately, these limitations restrict the voting choices available to shareholders using the proxy process, as these shareholders are unable to use a proxy to vote for a combination of nominees of their choice.

The Commission sought to address some of the concerns about shareholders' inability to split their vote between the registrant's and the dissident's proxy cards through the adoption of the short slate rule.[62] The short slate rule permits a dissident seeking to elect a minority of the board to solicit authority to vote for some of the registrant's nominees on its proxy card. However, to comply with Rule 14a-4(d)(4), the dissident is only permitted to include on its proxy card the names of the registrant's nominees for whom it will not vote. While this rule provides shareholders with some additional choices in the proxy voting process, shareholders wishing to vote for nominees for all of the board seats up for election are still limited to voting by proxy for the combination of nominees that either the dissident or registrant chooses. Moreover, the short slate rule does not contemplate a registrant proposing a partial slate of nominees (or nominating less than the total number of directors to be elected), a tactic that may be advantageous for some registrants.[63]

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62 See Short Slate Rule Adopting Release.

63 See Ronald Barusch, Dealpolitick: Management Takes Page from Activist Playbook with "Short Slates," Wall St. J. (July 31, 2014), available at http://blogs.wsj.com/moneybeat/2014/07/31/dealpolitik-management-takes-page-from-activists-playbook-with-short-slates/ (referencing a new trend among registrants that are at risk of losing a

1. Revision to the Consent Required of a Bona Fide Nominee

To allow for proxy cards that reflect the complete choice of candidates for election, we are proposing amendments to Rule 14a-4(d) to change the definition of "bona fide nominee"[64] for registrants other than investment companies registered under Section 8 of the Investment Company Act of 1940 ("funds") and business development companies as defined by Section 2(a)(48) of the Investment Company Act of 1940 ("BDCs").[65] Proposed Rule 14a-4(d)(1)(i) would define a bona fide nominee as a person who has consented to being named in a proxy statement relating to the registrant's next meeting of shareholders at which directors are to be elected. This would effectively expand the scope of a nominee's consent to include consent to being named in any proxy statement for the applicable meeting. By changing the requirement that a person consent to being named in "a" proxy statement instead of being named in "the" proxy statement,[66] parties in a contested election will be able to include all director nominees on their proxy cards, rather than only those nominees who have consented to being named on that particular party's proxy card.[67] This change would remove a current impediment to a registrant or a dissident including the other party's nominees on its proxy card.

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majority of the seats on the board in which the registrant nominates less than the total number of directors up for election to effectively assure the election of some dissident nominees).

64 See proposed Rule 14a-4(d)(1)(i).

65 As discussed in Section II.D, the amendments we are proposing today to implement a mandatory universal proxy system would not apply to funds or BDCs. For purposes of the rules that apply to funds and BDCs, the definition of a bona fide nominee and the short slate rule in current Rule 14a-4(d)(4) would be retained in proposed Rule 14a-4(d)(1)(ii).

66 We also are proposing a corresponding change from "the" proxy statement to "a" proxy statement in Rule 14a-4(c)(5).

67 We are proposing these amendments at the same time we propose Rule 14a-19 that would require the use of universal proxies in non-exempt solicitations in all contested elections, assuming certain conditions are met. See infra Section II.B. We note, however, that the proposed amendments to the bona fide nominee rule could operate independently from the proposed requirement to use universal proxies. The proposed amendments to the bona fide nominee rule, standing alone,

We are cognizant of the concerns that have been raised about allowing the parties in an election contest to include the other party's nominees on their proxy card. These include concerns that listing registrant nominees on a dissident's proxy card could imply that registrant nominees support the dissident and would serve with dissident nominees, if elected, and objections about nominees being forced to lend their name, stature and reputation to the election campaign of a person with whom the nominee did not choose to run.[68] Similarly, there may be a question as to whether listing dissident nominees on a registrant's proxy card could lend credibility to the dissident nominees or imply that the registrant supports the dissident nominees. We believe, however, that these concerns would be mitigated by the proposed requirement to clearly distinguish between the registrant and dissident nominees on the proxy card[69] and through disclosure in each party's proxy statement. We also believe the proposed presentation and formatting requirements coupled with the fact that all nominees would be included on the card help to minimize these concerns. In contrast to the presentation of nominees on a dissident's proxy card under the short slate rule where the dissident's partial slate of nominees is presented together with certain registrant nominees (albeit in an indirect manner), the nominees of each party would be grouped together and presented on a universal proxy

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essentially would allow parties the option of providing a universal proxy or alternatively providing a proxy with just some of the opposing party's nominees. We request comment below about this approach, including whether there are additional changes we should make to our rules to better enable the amendments to Rule 14a-4(d) to operate independently.

68 The Commission noted these and other concerns when adopting the short slate rule in 1992. See Short Slate Rule Adopting Release, at 48288. We believe these concerns would be especially acute if we were to amend only Rule 14a-4(d) to change the consent required of a bona fide nominee, because such an amendment would allow the parties to choose which of the other party's nominees to include on their proxy card. We recognize that such concerns could be mitigated by the proposed requirement to clearly distinguish between each party's nominees, and registrants could further mitigate these concerns through disclosures in their soliciting materials. We request comment below regarding other ways to address them.

69 See proposed Rule 14a-19(e)(3).

card as a separate slate of the nominating party. As a result, we believe it would be less likely under a universal proxy system that shareholders would reasonably conclude that the registrant's nominees support the dissident simply because the registrant's nominees are included on the dissident's proxy card.

We also believe that some of these issues would be less acute with the implementation of a mandatory system for universal proxies in all contested elections. If mandatory use of universal proxies is implemented, we believe it would be increasingly unlikely that shareholders would conclude that the registrant's nominees support a dissident's campaign simply because the registrant's nominees are included on the dissident's proxy card. We also believe that these concerns can be addressed through disclosure in the proxy statement.

Proposed Rule 14a-4(d)(1)(i) would retain the requirement that a nominee consent to serve, if elected. The consent requirement would continue to help ensure that a registrant or dissident does not nominate a person who has not consented to serve as a director of the registrant.[70] As the Commission indicated when adopting the short slate rule, a proxy statement should disclose if any nominee has determined to serve only if its nominating party's slate is elected or to resign if one or more of the opposing party's nominees were elected to the board of directors.[71]

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[70] While the proposed amendments to Rule 14a-4(d)(1) to change the consent required of a bona fide nominee could operate independently from proposed Rule 14a-19, which would require the use of a universal proxy card, we are not proposing a change to the consent requirement without mandatory use of universal proxy cards in contested elections. See infra Section II.B for a discussion of mandatory use of universal proxies.

[71] See Short Slate Rule Adopting Release, at 48289 n.78.

Request for Comment

1. We are proposing to amend Rule 14a-4(d)(1) to change the requirement that a nominee consent to being named in "the" proxy statement to require that the nominee consent to being named in "a" proxy statement for the next meeting at which directors are to be elected. This change would enable parties in a contested election to include all director nominees on their proxy card, including nominees of an opposing party. Should we amend the requirement as proposed? Why or why not? Could there be potential concerns with opposing parties naming nominees of the other party on their proxy card? Please explain. How can we address or mitigate any such concerns?

2. Should the proposed amendments to Rule 14a-4(d)(1) be adopted without proposed Rule 14a-19, which would require the mandatory use of universal proxies?[72] Why or why not? If only the proposed amendments to Rule 14a-4(d)(1) were adopted and a party in a contested election had the option, but was not required, to include all director nominees on its proxy card, would proposed Rule 14a-4(d)(1) further the goal of effectively facilitating shareholders' ability to vote by proxy for director nominees as they could vote in person at a meeting? Why or why not?

3. If we were to adopt the proposed amendments to Rule 14a-4(d)(1) to permit the parties in an election contest to include the other party's nominees on their proxy card without mandating the use of universal proxies for all parties, are there other amendments that would need to be adopted to facilitate the operation of proposed Rule 14a-4(d)(1)? For example, should we permit parties to decide whether to include some or all of the opposing party's nominees? Should we instead require a party seeking to

[72] See infra Section II.B for a discussion of proposed Rule 14a-19 and the proposed mandatory universal proxy system.

include names of an opposing party's nominees on its proxy card to include the names of all of the opposing party's nominees? Should we consider rules that would require a party opting to use a universal proxy to provide notice of its intent to use a universal proxy and the names of its nominees or require the other party to provide a list of its nominees to the party seeking to use a universal proxy? Would other amendments be necessary, such as the proposed amendments concerning the form and format of the proxy card or additional disclosure requirements?

4. Do the proposed amendments allow the soliciting parties in a contested election to adequately address the concerns raised about possible voter confusion arising from nominees of one party being placed on the proxy card of an opposing party or creating an implication that a party's nominees support the opposing party and would serve with the opposing party's nominees, if elected? Are there other ways that the amendments could address these concerns? For example, should we require a statement that inclusion of an opposing party's nominees on the proxy card should not be construed as an endorsement of the opposing party's views or nominees?

5. When adopting the short slate rule, the Commission indicated that the possibility that nominees may not serve if elected with one or more of the opposing party's nominees is best addressed through disclosure. Should we adopt an amendment requiring disclosure about the possibility that nominees may refuse to serve if elected with any of the opposing party's nominees? Should we require disclosure describing how the resulting vacancy can be filled under the registrant's governing documents and applicable state law?

6. Are there any additional disclosures that we should require in the proxy materials or on the proxy card or other steps we should take to address concerns with the

proposed amendments to Rule 14a-4(d)(1) to permit opposing parties to name each other's director nominees on their proxy cards?

2. Elimination of the Short Slate Rule

We are proposing revisions to Rule 14a-4(d) to eliminate the short slate rule for registrants other than funds and BDCs.[73] The short slate rule was adopted to mitigate concerns about a dissident's inability to allow shareholders to vote on its proxy card for all board seats up for election when soliciting in support of a partial slate of nominees.[74] Proposed Rule 14a-4(d)(1)(i) would permit a proxy to confer authority to vote for a nominee named on a proxy card if that nominee consented to being named in any proxy statement for the applicable meeting. Additionally, each party in a contested election would be required to include on its proxy card all candidates that have consented to being named on a proxy card for the applicable meeting.[75] Thus, if a dissident solicits proxies in support of a partial slate of nominees, our proposed rules would permit shareholders to vote for any combination of registrant and dissident nominees in order to cast a vote for a full slate of directors.

As a result, the short slate rule would no longer be necessary to accomplish its intended purpose. While the elimination of the short slate rule would take away the ability of a dissident to select the registrant nominees it prefers to round out its slate of nominees, the dissident still would have the ability to include recommendations for its preferred registrant nominees in its proxy materials. If the short slate rule is eliminated and mandatory universal proxy is adopted, shareholders would be able to select their

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73 See supra note 65.

74 See Short Slate Rule Adopting Release, at 48288.

75 See infra Section II.B for a discussion of proposed Rule 14a-19.

preferred combination of nominees, including the registrant nominees, if any, when voting for directors using the dissident's proxy card.

Request for Comment

7. If we change the consent required of a bona fide nominee, as proposed, is there any reason the short slate rule, or a modified version of the rule, should be retained? If so, what circumstances would warrant the continued use of the short slate rule and should it be modified to enhance its utility?

8. While the short slate rule permits a dissident seeking to elect a minority of the board to solicit authority to vote for some of the registrant's nominees on its proxy card, the dissident is only permitted to include on its proxy card the names of the registrant's nominees for whom it will not vote. Should we consider modifying the short slate rule to enable a dissident soliciting in support of a slate that would constitute a minority of the board to round out its slate by soliciting authority to vote for the dissident's choice of registrant nominees whose names are included on the dissident's card instead of the current system of soliciting authority to vote for registrant nominees who are not named?

9. Should we retain the short slate rule but modify it to make it available to dissidents soliciting authority to vote for a slate of nominees that, if elected, would constitute a majority of the board of directors?

10. Should we retain the short slate rule but modify it to make it available to registrants as well as dissidents? A registrant can nominate less than the total number of directors up for election to ensure that some dissident nominees are elected. Should we make a modified short slate rule available to the registrant in that scenario?

11. Should we consider any modified version of the short slate rule instead of a universal proxy system? Would a modified version of the short slate rule further the goal of effectively facilitating shareholders' ability to vote by proxy for director nominees as they could vote in person at a meeting? Please explain.

3. Solicitation Without a Competing Slate

While the impetus for proposing amendments to Rule 14a-4(d), as described above, is to address situations in which there are competing slates for the board of directors, we note that the proposed amendments would affect the conduct of proxy contests even when a proponent is not nominating its own candidates for the board of directors. A proponent might, for example, seek authority to vote "against" one or more (but fewer than all) of the registrant nominees. In that situation, the bona fide nominee rule currently would prevent the proponent from naming, and soliciting votes "for," any of the other registrant nominees because they have not consented to being named in the proponent's proxy statement. Furthermore, the short slate rule is not available for a proponent's solicitation of authority to vote "against" one or more of the registrant nominees.[76]

Another situation in which a proponent might seek to solicit proxies without nominating its own candidates would be where a proponent wants to solicit votes for its own proposal that is unrelated to director elections (e.g., a corporate governance proposal). While a proponent in that case might want to include the registrant nominees on its proxy card so that shareholders supporting its proposal would be able to use the

[76] While the short slate rule currently permits a proponent to seek authority to vote for registrant nominees when the proponent is nominating at least one candidate (so long as the proponent's candidate or candidates would constitute a minority of the board of directors), the rule does not address a situation where a proponent is seeking votes solely with respect to registrant nominees. See Rule 14a-4(d)(4).

proponent's proxy card also to vote in the election of directors, the bona fide nominee rule currently would not permit the proponent to include the names of registrant nominees and solicit votes "for" those individuals.[77]

In cases such as those described above, the proposed amendments to Rule 14a-4(d) would permit a proponent to solicit authority to vote on some or all of the named registrant nominees by providing that a person is a bona fide nominee as long as he or she consents to being named in "a" proxy statement for the next meeting at which directors are to be elected. We are not proposing to require proponents conducting a solicitation without a competing slate to include the names of all registrant nominees on their proxy cards. These campaigns do not implicate our rationale for requiring the use of universal proxy cards in contested elections since shareholders can fully exercise their vote for the director nominees they prefer by using the registrant's proxy card. In addition, we believe that permitting proponents to solicit authority to vote on some, but not all, of the registrant nominees is appropriate because such campaigns do not implicate concerns that have been raised about allowing the parties in an election contest to include the other party's nominees on their proxy card. Commenters on the short slate rule proposed in 1992 raised concerns that modification of the bona fide nominee rule to permit inclusion of registrant nominees on a dissident's proxy card would force a registrant nominee to lend his or her name, stature, or reputation to the election campaign of a person with whom he or she does not choose to run; create an implication that the registrant nominees support a proponent's solicitation and would serve alongside proponent nominees if

[77] While the proponent currently could include a proposal for the election of all of the registrant's nominees as a group without naming such nominees, the proponent still would have limited options in the way it could present this group on its proxy card without running afoul of the bona fide nominee rule (e.g., the proponent would not have the ability to present individual voting boxes for each of the registrant's nominees).

elected; and potentially confuse shareholders.[78] These concerns do not arise in the context of solicitations without a competing slate.[79] In this situation, there is no solicitation that will result in a registrant nominee serving alongside proponent nominees and shareholders can fully exercise their vote for the director nominees that they prefer by using the registrant's proxy card. We also do not believe that there is a potential for shareholder confusion in this situation because there is only one set of names for persons nominated to the board of directors; however, we solicit comment on this point below.[80]

Request for Comment

12. The proposed amendments to the bona fide nominee definition would permit proponents to include the names of some or all of the registrant's nominees on its proxy card even when the proponent is not nominating its own candidates. Should this be permitted? Why or why not? Are there additional or different changes that we should make to our rules that apply to a situation in which the proponent is not nominating its own candidates? For example, should we instead require those proponents to include the names of all registrant nominees? Why or why not?

13. Would the inclusion of registrant nominees on a proponent's proxy card when the proponent is not nominating its own candidates imply that the registrant nominees support the proponent's proposal? Would the inclusion cause shareholder

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78 See Short Slate Rule Adopting Release, at 48288.

79 But see supra Section II.A.1 and infra Section II.B.6 for a discussion of these concerns in the context of contested elections that would trigger proposed Rule 14a-19 and mandatory universal proxies.

80 We also believe that these concerns could be less acute with the implementation of our proposed rules for mandatory use of universal proxies in all contested elections. If mandatory use of universal proxies is implemented, we believe it would be increasingly unlikely that shareholders could reasonably draw any implication that a registrant nominee supports a proponent's campaign with respect to the proponent's non-election proposal simply because the names of registrant nominees appear on the proponent's proxy card.

confusion? If so, does the ability to provide disclosure in a party's soliciting materials sufficiently address this implication or possible confusion? Are there additional disclosures or are there other changes that would avoid or mitigate this implication or confusion? Please provide specific suggestions.

B. Use of Universal Proxies

To update our proxy system to better facilitate shareholders' ability to vote for their choice of nominees, we also are proposing amendments to the federal proxy rules that would require each soliciting party in a contested election to distribute a universal proxy that includes the names of all candidates for election to the board of directors. The dissident in a contested election would be required to provide notice to the registrant of its intent to solicit proxies in support of director nominees, other than the registrant's nominees, and the names of those nominees, no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date.[81] Similarly, the registrant in a contested election would be required to notify the dissident of the names of the registrant's nominees no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date.[82]

In a contested election, after the dissident provides the above notice, it would be required to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors.[83] We are additionally proposing that the dissident be required to file its definitive proxy statement with the

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81 See proposed Rule 14a-19(a) and (b); infra Section II.B.2. In order to make shareholders aware of the notice deadline, we also are proposing to require registrants to disclose in their proxy statement the deadline for providing such notice for the registrant's next annual meeting. See proposed Rule 14a-5(e)(4).

82 See proposed Rule 14a-19(d); infra Section II.B.3.

83 See proposed Rule 14a-19(a)(3); infra Section II.B.4.

Commission by the later of 25 calendar days prior to the meeting date or five calendar days after the date the registrant files its definitive proxy statement.[84] To ensure that each party's nominees are presented in a clear and impartial manner, the proposed rules also would impose specific presentation and formatting requirements for all director election proposals on universal proxy cards.[85]

1. Mandatory Use of Universal Proxies in Non-Exempt Solicitations in Contested Elections

We are proposing new Rule 14a-19(e) to require that proxy cards used in a non-exempt solicitation in connection with a contested election include the names of all duly nominated candidates for election to the board.[86] Rule 14a-4(b)(2) currently requires that a form of proxy providing for the election of directors shall set forth the names of the persons nominated for election as directors, including certain shareholder nominees. Proposed Rule 14a-19(e), in conjunction with the proposed change to the consent required of a bona fide nominee discussed above, would require proxy cards used in contested elections to include the names of all nominees of the registrant, certain shareholders, and any dissident that has complied with proposed Rule 14a-19. We believe this change would better enable shareholders to vote for their preferred combination of nominees in a contested election of directors and would allow the proxy process to more closely replicate the voting choices available at a shareholder meeting.

a. Mandatory Use of Universal Proxies

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84 See proposed Rule 14a-19(a)(2); infra Section II.B.5.

85 See proposed Rule 14a-19(e); infra Section II.B.6.

86 Proposed Rule 14a-19(e) would require that the proxy card include the names of all persons nominated for election by the registrant, any person or group of persons that has complied with Rule 14a-19, and any person whose nomination by a shareholder or shareholder group satisfies the requirements of an applicable state or foreign law provision or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

We considered whether to propose the mandatory use of universal proxies or to allow each party to decide whether to use a universal proxy. We have received divergent recommendations on this issue and, as discussed below, in order to more effectively address the problem of shareholders' inability to vote by proxy for the combination of nominees of their choice, we have decided to propose a mandatory rule.

The Rulemaking Petition recommended that the Commission require all duly nominated candidates be named in the universal proxy, noting that such requirement would ensure shareholders' ability to use either party's proxy card to vote for the combination of board candidates they prefer. The Rulemaking Petition also contended that simply repealing the consent required of a bona fide nominee might encourage parties to circulate semi-universal proxy cards featuring more, but not all, candidates.[87]

In contrast, the IAC recommended a rule in which proxy contestants would have the option (but not the obligation) to use a universal proxy,[88] allowing one or both parties in an election contest to choose whether to use a universal proxy card that includes the names of the other party's nominees. The IAC noted that such a rule could allow a party to decide which bona fide nominees to include on its proxy card to accompany its own nominees, particularly when parties found all or certain individuals on a competing slate to be particularly objectionable. The approach recommended by the IAC could also give the parties in an election contest latitude to use a universal proxy card if and when it suits their strategic needs.[89]

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87 See Rulemaking Petition.

88 See IAC Recommendation.

89 For example, if the registrant is concerned about a possible split recommendation from a proxy advisory firm, the registrant may opt to use a universal proxy to avoid the unintended consequences of a split vote recommendation. If a dissident is soliciting proxies in support of a full slate of nominees, a proxy advisory firm may decide that change is necessary on the board of

We are proposing a mandatory system for universal proxies in contested elections because it best replicates how a shareholder could vote by attending a shareholder meeting in person and leaves all discretion in the voting decision to the shareholder. Requiring universal proxies in contested elections would permit shareholders to select the combination of nominees that best aligns with their interests instead of limiting shareholders' choice to a slate of candidates chosen by a party in the contest.

A mandatory system for universal proxies also would mitigate potential shareholder confusion and logistical issues that may result from allowing the parties in a contested election to choose whether to use a universal proxy. For example, under the proposed mandatory system, shareholders would receive proxy cards that include the names of all nominees rather than proxy cards with only some of the nominees from which to choose. The inclusion of all nominees on all proxy cards should reduce the confusion of competing and differing cards and mitigate concerns that including one party's nominees on an opposing party's card could imply that those nominees support the opposing party.

Further, a mandatory system would reduce the likelihood that the proxy card would be used as a tactical tool in the proxy contest. In contrast, under an optional system, if a soliciting person believed that it could receive more support for its slate by adding just one or two nominees from the other slate, it might solicit with a proxy card

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directors, but not a change in the majority of directors, and recommend a split vote on the dissident's proxy card (e.g., vote "for" three of the dissident nominees and "withhold" on six). Since shareholders following this recommendation would use the dissident proxy card to cast their votes on the election of directors, this could result in more dissident nominees being elected, a consequence the registrant might seek to avoid by opting to use a universal proxy. Additionally, if a registrant is at risk of losing a majority of the seats on the board of directors, the registrant might opt to use a universal proxy to garner more votes for the registrant's nominees than would have been achieved if the shareholders were forced to choose between voting for the dissident's slate on the dissident's proxy card or the registrant's slate on the registrant's proxy card.

that only included those nominees. Similarly, a soliciting person under an optional system might decide not to use a universal card if it perceived an advantage in forcing a choice between the two competing slates. Both of these situations would limit shareholder voting options, which would be counter to the intended purpose of this rulemaking to facilitate shareholders' ability to vote for their preferred combination of director nominees as they could in person at a meeting. The mandatory system we are proposing would apply uniformly to all soliciting parties and to all election contests[90] to prevent soliciting parties from selectively using universal proxies for tactical purposes.

Shareholders seeking to have director nominees included in a registrant's proxy materials pursuant to state or foreign law provisions or a registrant's governing documents, such as the "proxy access" bylaws that some registrants have recently adopted,[91] must comply with those requirements. Nominees included in a registrant's proxy materials in this way are commonly referred to as "proxy access nominees." Because a mandatory universal proxy system may provide a less costly means for shareholders or their nominees to gain a form of access to a registrant's proxy card, some may view a universal proxy system as a substitute for proxy access bylaw provisions. However, we believe that the proposed mandatory universal proxy system differs in significant respects from proxy access because it would not provide shareholders or their

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90 As discussed in Section II.D infra, the amendments we are proposing today to implement a mandatory universal proxy system would not apply to funds or BDCs.

91 See Sullivan & Cromwell LLP, Proxy Access: Developments in Market Practice, at 2 (Apr. 8, 2016), available at https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Proxy_Access__Developments_in_Market_Practice.pdf ("S&C April Report") (stating that 200 public companies had adopted some form of proxy access since the 2015 proxy season, compared to 15 companies prior to 2015).

nominees with access to a registrant's proxy materials in the same manner and extent provided by proxy access bylaws.

Proxy access bylaws commonly require the registrant to include in its proxy statement the names of the nominating shareholder's nominees, disclosure required by Schedule 14A about the nominating shareholder and its nominees, and a statement provided by the nominating shareholder in support of its nominees' election to the board.[92] Nominating shareholders complying with proxy access bylaws are not required to prepare and file their own preliminary and definitive proxy statements, disseminate any proxy material or solicit any shareholders, while information about their nominees, including in many cases the nominating shareholder's own statement about its nominees, is included in the registrant's proxy materials and provided to shareholders along with the registrant's proxy card listing the names of the nominating shareholder's nominees.

In contrast, the proposed mandatory universal proxy system would require only that the registrant include the names of the dissident nominees on its proxy card.[93] The registrant's proxy card would clearly distinguish those nominees from the registrant's nominees.[94] No other disclosure about the dissident's nominees would be required by the registrant. For example, the registrant's proxy materials would not be required to include

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92 See, e.g., S&C April Report, at A-1 to A-8 (including a sample form of proxy access bylaw that reflects recent developments in market practice). If a registrant is required to include a proxy access nominee in its proxy materials pursuant to a proxy access bylaw, Item 7(f) of Schedule 14A would require the registrant to include in its proxy statement the disclosure required from the nominating shareholder under Item 6 of Schedule 14N about the nominating shareholder and the proxy access nominee. Nominating shareholders complying with proxy access bylaws must provide notice to the registrant on a Schedule 14N of their intent to have a nominee included in the registrant's proxy materials pursuant to the registrant's proxy access bylaw by the deadline set forth in Rule 14a-18 and file that notice with the Commission on the date first transmitted to the registrant. 17 CFR 240.14a-18.

93 See proposed Rule 14a-19(e)(1); infra Section II.B.6.

94 See proposed Rule 14a-19(e)(3); infra Section II.B.6.

detailed information about the dissident or its nominees. Nor would the registrant be required to include any statements by the dissident in support of its nominees' election. Rather, the registrant would only be required to include a statement in its proxy statement directing shareholders to refer to the dissident's proxy statement for information required by Schedule 14A about the dissident's nominees.[95] The dissident would be wholly responsible for disseminating information about its nominees to shareholders and soliciting proxies in support of its nominees. As a result, the dissident would need to undertake the time, effort and cost of preparing and filing a preliminary proxy statement, completing the staff review process, preparing and filing a definitive proxy statement by the deadline imposed by proposed Rule 14a-19,[96] and soliciting the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors.[97] Thus, the dissident's "access" in the proposed mandatory universal proxy system would be limited to the listing of nominee names on the proxy card and would be accompanied by the obligation to solicit on behalf of its own nominees.

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95 See proposed Item 7(h) of Regulation 14A. As discussed in more detail in Section II.B.5.b infra, to provide shareholders with access to information about all nominees when they receive a universal proxy card, we are proposing a requirement that each party in a contested election refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement for free on the Commission's website. Registrants subject to election contests today routinely refer to the dissident, the dissident's nominees and the dissident's proxy materials in their proxy statements likely on the basis that the existence of alternative nominees is a material fact. See 17 CFR 240.14a-9. For example, based on a review of 72 proxy contests that the staff identified as involving competing slates of director nominees in calendar years 2014 and 2015, see infra note 115, the staff found that in 68 contests (or 94 percent of the contests), registrants identified the dissident in their proxy statements. As for the four contests where the registrants did not identify the dissidents, either the parties reached a settlement before the annual meeting or the registrant did not file a proxy statement for the annual meeting because it was acquired in an intervening transaction. As a result, we do not expect the proposed requirement to result in meaningfully new disclosure for registrants.

96 See proposed Rule 14a-19(a)(2); infra Section II.B.5.a.

97 See proposed Rule 14a-19(a)(3); infra Section II.B.4.

Request for Comment

14. Should we mandate the use of universal proxies in contested elections, as proposed? Does such a requirement more effectively replicate in-person attendance at a shareholder meeting than the current proxy system? Are there additional changes we should make to our proxy rules to facilitate shareholders' ability to vote by proxy in the same manner they could vote in person at a meeting?

15. Our proposal applies to all companies with a class of securities registered under Section 12 of the Exchange Act but would not apply to funds and BDCs. Should we exclude any other types of registrants, such as smaller reporting companies and/or emerging growth companies? Why or why not?

16. Would mandatory use of universal proxies impose additional costs on dissidents and/or registrants? If yes, please identify the costs and quantify them to the extent practicable. Would some of these costs be avoided under an optional system? If so, which ones and why? Would some of the benefits attributable to a mandatory system be reduced or eliminated under an optional system? If so, which ones and why?

17. Would a mandatory universal proxy system result in investor confusion, such as confusion regarding which party a nominee supports? Would the proposed requirement to clearly distinguish between registrant and dissident nominees on the proxy card avoid or mitigate that confusion? Are there additional rule changes that we should make in this regard?

18. Should we make the use of universal proxies optional rather than mandatory? Why or why not? Would an optional system further the goal of effectively facilitating shareholders' ability to vote by proxy for director nominees as they could vote in person at a meeting? If universal proxies were optional, we are interested in the views

of both registrants and dissidents as to how frequently they would choose to use a universal proxy and why. Under what circumstances would one party choose to include the names of an opponent's nominees? Under an optional system, if one party opts to use a universal proxy, is the other party likely to follow suit? Would allowing for optional use of universal proxies result in confusion?

19. If we were to adopt an optional system, should we require a party opting to use a universal proxy to include all of the other party's nominees on its card or should we allow each party to select which nominees to include? If we do not require all nominees to be listed, would shareholders be confused by the contrasting proxy cards? Would such a system lead to the parties utilizing universal proxies only when it offers them a strategic advantage?

20. If we were to adopt an optional system, should both parties be permitted to decide whether to use a universal proxy card? If so, should this decision be made at the beginning of the contest before any proxy cards are distributed, or should a party be able to opt to use a universal proxy in the midst of a contest after it or the other party has distributed a conventional (non-universal) card? What, if any, of the other proposed amendments should we maintain in an optional system? For example, should we retain the proposed notice requirements and the dissident's definitive proxy statement filing deadline for universal proxy or some other variation of these proposed requirements? Should we retain the proposed amendments to the form of the universal proxy card?

21. Should we instead adopt a hybrid system in which the use of universal proxies in contested elections is mandatory for one party but optional for the other? Would such a system effectively facilitate shareholders' ability to vote by proxy for director nominees as they could vote in person at a meeting? Under a hybrid system,

which party should be required to use the universal proxy? For example, should we require the use of a universal proxy by dissidents but make it optional for registrants? This type of hybrid system would permit shareholders to select their preferred combination of dissident and registrant nominees on the dissident's proxy card while still requiring a dissident to conduct an independent solicitation. However, only those shareholders that a dissident elects to solicit would receive a universal proxy unless the registrant opted to use a universal proxy. Should we require the party using the universal proxy in a hybrid system to furnish a proxy statement to all shareholders to ensure that every shareholder receives a universal proxy and can vote for their preferred combination of nominees as they could if attending the shareholder meeting in person? In a hybrid system, would it be necessary or helpful to require dissidents to provide notice of the names of their nominees to registrants as we have proposed for the mandatory universal proxy system? What other requirements would be needed in a hybrid system? Under a hybrid system in which one party is required to use a universal proxy, is the other party likely to follow suit and elect to provide a universal proxy as well? Would a hybrid system provide advantages to one party or the other in an election contest? If so, which party would it benefit and why?

22. If we do not adopt a mandatory system for universal proxies, how else could we enable shareholders to vote by proxy for their choice of nominees in a contested election?

23. Would mandatory use of universal proxies increase the frequency of contested elections? Why or why not? Would the optional use of universal proxies have a similar impact? Why or why not?

24. Would shareholders use mandatory universal proxy instead of a registrant's proxy access bylaw? Why or why not? What would be the implications of such use and should any additional rule changes be made in this regard?

b. Use in Contested Elections

We are proposing to apply the requirement to use universal proxies to all non-exempt solicitations in connection with contested elections where a person or group of persons is soliciting proxies in support of director nominees other than the registrant's nominees.[98] We are proposing this approach because our rationale for requiring the use of universal proxies – that the proxy voting process should mirror as much as possible the vote that a shareholder could make by attending the meeting and voting in person – applies equally to all types of contested elections. We believe our rules should permit shareholders to select the combination of nominees that best aligns with their interests in any contested election, whether a dissident is soliciting proxies in support of a number of nominees that would constitute a minority or a majority of the board of directors.

We recognize that there are differing views on the types of contests that warrant the use of universal proxies. For example, the IAC recommended the use of universal proxies only in connection with short slate director nominations, while the Rulemaking Petition recommended the use of universal proxies in all contested elections.[99] We considered limiting the requirement to use universal proxies to contests where the election could not result in a change in a majority of the board of directors. We are aware that where a contest results in a change in a majority or all of the directors, there may be

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98 As discussed in Section II.D infra, the amendments we are proposing today to implement a mandatory universal proxy system would not apply to funds or BDCs.

99 See IAC Recommendation; Rulemaking Petition.

consequences beyond the resulting change in the board of directors. These may include triggering provisions in debt covenants and other material contracts and agreements. We also recognize that those who believe the use of universal proxies would increase the success of dissidents may contend that requiring universal proxies in all contests (including contests in which the election of a dissident's nominees would result in a change in a majority of the directors) would likely increase the occurrence of these change-in-control consequences. However, we believe these change-in-control implications and any associated risks are better addressed through disclosure in the proxy statement (as is currently the case) rather than through federal proxy rules applicable to the solicitation process.[100]

The mandatory universal proxy system, as proposed, would not apply to an election of directors involving only registrant and proxy access nominees. Where proxy access nominees are included on the registrant's proxy card and there is no competing slate of dissident nominees, shareholders will already have access to a proxy that reflects all of their voting options for the election of directors. Therefore, we are not proposing that the requirements of the proposed universal proxy system would apply to such nominating shareholders.[101]

We are proposing to apply the requirement to use a universal proxy only to solicitations that involve a contested election. In solicitations that do not involve a contested election, such as a "vote no" campaign (i.e., where a soliciting person is only

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100 We are unaware of any empirical studies providing direct evidence that requiring universal proxy cards would increase the incidence of the change-in-control consequences discussed here.

101 We are, however, proposing to require that the form of universal proxy to be used by registrants and dissidents also include any proxy access nominees. See proposed Rule 14a-19(e); infra Section II.B.6.

soliciting "withhold" or "against" votes with respect to one or more of the registrant's nominees) or where a shareholder is only soliciting proxies in support of a shareholder proposal, there are no alternative director nominees. Those solicitations would not raise the same concerns that mandatory universal proxy is intended to address because the registrant's proxy card already provides shareholders with the ability to select their choice of nominees from all director candidates. Where the solicitation does not involve a contested election, a proponent's form of proxy would be governed by Rule 14a-4(b)(2), as it is today. We note, however, that Rule 14a-4(b)(2), in conjunction with the proposed change to the consent required of a bona fide nominee discussed above,[102] would allow a proponent to include the names of some or all registrant nominees on the proponent's proxy card, which is not explicitly contemplated by the current proxy rules.

Similarly, the mandatory universal proxy system, as proposed, would not apply to a dissident's consent solicitation[103] to remove existing registrant directors and replace them with dissident nominees.[104] We do not believe that universal proxy is needed for consent solicitations because a registrant contesting such a solicitation typically does so by soliciting revocations of the consents and not by presenting a competing slate.[105] These solicitations, although related to the election of directors, do not raise the same concerns that mandatory universal proxy is intended to address because shareholders would have access to a consent card that reflects all of their voting options for the

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102 See proposed Rule 14a-4(d)(1)(i).

103 A consent solicitation involves the solicitation of written consents from shareholders to take action without a meeting.

104 See proposed Rule 14a-19(g).

105 We acknowledge that a registrant could solicit consents for a competing slate of nominees (e.g., the incumbent directors) when soliciting for revocations of consents in the event the dissident's removal proposal is successful. Based on the staff's observations, registrants rarely, if ever, do so.

removal and appointment of directors to fill the vacancies, if any, created by the removal of directors.

Request for Comment

25. Should we require the use of universal proxies in all contested elections, as proposed? Should we instead limit the use of universal proxies to contested elections in which a dissident is soliciting proxies in support of a slate that, if elected, would constitute a minority of the board of directors? If so, why should we differentiate between such contests? Should we instead limit the use of universal proxies in a different way?

26. As proposed, a universal proxy would be permitted, but not required, for other types of solicitations. Should we instead require the use of a universal proxy in solicitations that do not involve a contested election, such as a "vote no" campaign or where a shareholder is only soliciting proxies in support of a shareholder proposal? Why or why not?

27. Should we expressly exclude consent solicitations from the application of Rule 14a-19, as proposed? Are there any reasons why a universal proxy requirement should apply to consent solicitations? If so, please describe.

c. Exempt Solicitations

We are proposing that universal proxies be required only in non-exempt solicitations. Current Rule 14a-2(b) provides that certain provisions of Regulation 14A, including Rules 14a-3, 14a-4, 14a-5 and 14a-6,[106] do not apply to the exempt solicitations

[106] Rules 14a-3 through 14a-6 set forth the filing, delivery, information and presentation requirements for the proxy statement and form of proxy for solicitations subject to Regulation 14A. 17 CFR 240.14a-3 – 14a-6.

described in Rule 14a-2(b).[107] Our proposed amendments would revise Rule 14a-2(b) to specify that the requirements of proposed Rule 14a-19 similarly do not apply to exempt solicitations under Rule 14a-2(b).

We propose that universal proxies be required only in contested elections where the dissident conducts a non-exempt solicitation that is subject to Rule 14a-12(c)[108] through the use of a proxy statement and proxy card pursuant to Regulation 14A. Thus, the proposed amendments would not apply to solicitations in which a person does not seek authority to act as proxy and does not furnish or request a form of revocation, abstention, consent or revocation, which are exempt under Rule 14a-2(b)(1). Similarly, the proposed amendments would not apply to solicitations in which the person is not acting on behalf of the registrant and the aggregate number of persons solicited is not more than ten, which are exempt under Rule 14a-2(b)(2).

We are not proposing to require universal proxies in exempt solicitations because we do not believe exempt solicitations are an appropriate context for the universal proxy process. In a non-exempt solicitation in connection with a contested election, the parties may expend considerable time and effort and incur significant costs. This includes filing a proxy statement with the Commission that contains all required information about the

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107 Rule 14a-2(b) exempts certain solicitations from most of the proxy rules other than the antifraud provisions. 17 CFR 240.14a-2(b). For example, Rule 14a-2(b)(1) exempts solicitations by any person who does not directly or indirectly seek authority to act as proxy and does not furnish or request a form of revocation, abstention, consent or revocation. Rule 14a-2(b)(2) exempts solicitations, other than on behalf of the registrant, where the aggregate number of persons solicited is not more than ten. These solicitations are exempted from the proxy rules because "the best protection for shareholders and the marketplace is to identify those classes of solicitations that warrant application of the proxy statement disclosure requirement, and to foster the free and unrestrained expression of views by all other parties." See Short Slate Rule Adopting Release, at 48280.

108 Rule 14a-12(c) applies to "[s]olicitations by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders."

director nominees and obtaining consent of the nominees to be named in the proxy statement and to serve if elected. In contrast, soliciting persons conducting exempt solicitations are not required to file their proxy materials with the Commission and may expend little time and effort and incur limited costs. Accordingly, if we were to mandate the use of universal proxies when a dissident is conducting an exempt solicitation, the dissident could potentially capitalize on the registrant's solicitation while expending very little time and effort and incurring no costs itself. Moreover, shareholders would not be assured of having the benefit of the robust disclosure required under Regulation 14A, including disclosure about the dissident's nominees, when casting their vote using a universal proxy.

Request for Comment

28. Should we limit the requirement to use universal proxies to non-exempt solicitations, as proposed? Should we instead require that universal proxies also be used in some or all exempt solicitations? For example, should universal proxies be required in contested elections where a dissident is conducting an exempt solicitation under Rule 14a-2(b)(2)? If so, should the proposed rules be applied differently in the context of an exempt solicitation, such as requiring the dissident to use a universal proxy in its exempt solicitation while giving the registrant the option to use a universal proxy in its non-exempt solicitation?

2. Dissident's Notice of Intent to Solicit Proxies in Support of Nominees other than the Registrant's Nominees

We are proposing to require the dissident to provide notice to the registrant of its intent to solicit proxies in support of director nominees other than the registrant's

nominees.[109] We believe that establishing a notice requirement is necessary to provide a definitive date by which the parties in a contested election will know that use of universal proxies has been triggered. For that reason, we are proposing a new notice requirement that would apply to any dissident who intends to conduct a non-exempt solicitation and solicit proxies in support of director nominees other than the registrant's nominees using its own proxy card.

Proposed Rule 14a-19 would require a dissident to provide the registrant with the names of the nominees for whom it intends to solicit proxies no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date.[110] If the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, proposed Rule 14a-19 would require that the dissident provide notice by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant. Proposed Rule 14a-19 would also require a dissident to indicate its intent to comply with the minimum solicitation threshold in proposed Rule 14a-19[111] by including in this notice a statement that it intends to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of

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109 See proposed Rule 14a-19(a) and (b).

110 The proposed rule also would require that a dissident promptly notify the registrant if any change occurs with respect to its intent to solicit proxies in support of its director nominees. See proposed Rule 14a-19(c).

111 See infra Section II.B.4 for a discussion of the minimum solicitation requirement in proposed Rule 14a-19.

directors.[112] This statement would also serve to distinguish the notice under Rule 14a-19 from advance notice provided pursuant to the registrant's governing documents and to put the registrant on notice that the dissident intends to comply with the requirements of Rule 14a-19. Proposed Rule 14a-19 would not require a dissident to provide this notice to the registrant if the information required in the notice has been provided in a preliminary or definitive proxy statement filed by the dissident by the deadline imposed by proposed Rule 14a-19. Proposed Rule 14a-19 also would not require a dissident to file the notice with the Commission.

We are proposing 60 calendar days prior to the anniversary of the previous year's annual meeting date as the notice deadline because we believe it provides a definitive date far enough in advance of the meeting to give the parties sufficient time after the notice is provided to prepare a proxy statement and form of proxy in accordance with the universal proxy requirements.[113] In addition, we believe 60 calendar days prior to the anniversary of the previous year's annual meeting date is not too far in advance of the meeting so as to impose a significant additional burden for most dissidents. Our proposed deadline for the notice is 30 calendar days later than the deadline found in most advance notice bylaws, which typically require notice to be delivered no earlier than 120 days and no later than 90 days prior to the first anniversary of the prior year's annual meeting.[114] In fact, based on a review of the filings for the 72 contested elections

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112 We are also proposing to require similar disclosure in a dissident's proxy statement, which would be subject to the antifraud provisions in Rule 14a-9. See infra Section II.B.4.

113 For many registrants, the record date for determining shareholders entitled to notice of the meeting cannot be more than 60 days before the date of such meeting. See, e.g., Del. Code Ann. tit. 8, § 213. Thus, as a practical matter, registrants very rarely file their definitive proxy statement prior to such date.

114 See Sullivan & Cromwell LLP, Proxy Access Bylaw Developments and Trends, at 4 (Aug. 18, 2015), available at

initiated in 2014 and 2015, we estimate that dissidents provided some form of notice of their intent to nominate candidates for election to the board of directors 60 or more calendar days prior to the shareholder meeting date in 89 percent of the contests.[115]

A dissident's obligation to comply with the notice requirement under proposed Rule 14a-19 would be in addition to its obligation to comply with any applicable advance notice provision in the registrant's governing documents. In most cases, we do not anticipate that proposed Rule 14a-19 would impose a meaningful additional burden on a dissident since a dissident would generally have provided the names of its nominees by the proposed deadline to comply with a typical advance notice provision in a registrant's governing documents.[116] While we acknowledge that proposed Rule 14a-19 would impose a notice requirement even in the case of registrants that do not have an advance notice provision in their governing documents, we believe the requirement is necessary so those registrants receive notice of the names of a dissident's nominees in time to prepare a universal proxy card and file it with their preliminary proxy statement.

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https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Proxy_Access_Bylaw_Developments_and_Trends.pdf ("S&C August Report"); Wachtell, Lipton, Rosen & Katz, Nominating and Corporate Governance Committee Guide, at 22 (2015), available at http://www.wlrk.com/files/2015/NominatingandCorporateGovernanceCommitteeGuide2015.pdf.

115 The sample ("contested elections sample") is based on staff analysis of EDGAR filings for election contests with preliminary proxy statements filed in calendar years 2014 and 2015 other than election contests involving funds or BDCs. Staff has identified 72 proxy contests involving competing slates of director nominees during this time period. For calculations in relation to the meeting date, the data is based on 70 out of 72 identified proxy contests since the registrant did not hold an annual meeting for the election of directors in two cases. For purposes of determining the earliest date the dissident provided some form of notice of its intent to nominate candidates for election to the board, staff considered disclosure in the dissident's definitive additional soliciting materials filed under Rule 14a-12, disclosure in amendments to the dissident's Schedule 13D and disclosure in both the registrant's and dissident's proxy statements.

116 According to a law firm report, 95 percent of the S&P 500 and 90 percent of the Russell 3000 had advance notice provisions at 2014 year-end. See WilmerHale, 2015 M&A Report, at 5 (2015), available at https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2015-WilmerHale-MA-Report.pdf (citing www.SharkRepellent.net).

In most instances,[117] Rule 14a-19 would effectively preclude a dissident from launching an election contest less than 60 calendar days prior to the annual meeting even if the registrant's governing documents do not require advance notice by that date.[118] We believe such late-breaking contests are infrequent[119] and usually precluded by the prevalence of advance notice requirements in registrants' governing documents. Proposed Rule 14a-19 would not, however, preclude dissidents who are unable to meet the notice deadline from taking other actions to attempt to effectuate changes to the board, such as initiating a "vote no" campaign, conducting an exempt solicitation, or calling a special meeting (to the extent permitted under the registrant's bylaws) to remove existing directors and appoint their own nominees to fill the vacancies.

It is possible that a dissident will provide notice of the names of its nominees under proposed Rule 14a-19 and later change its nominees. It is also possible that a dissident will provide the notice required under proposed Rule 14a-19 but take no further steps in the solicitation of proxies in support of director nominees, or take some additional steps but later change or abandon its solicitation efforts. As proposed, Rule 14a-19 would require a dissident to promptly notify the registrant of any change to the

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117 Proposed Rule 14a-19 would not operate to preclude a dissident from launching an election contest less than 60 calendar days prior to the annual meeting date if the registrant did not hold an annual meeting during the previous year and announced the date of the upcoming annual meeting fewer than 70 calendar days prior to the meeting date. In that instance, a dissident could launch an election contest at any time prior to the tenth calendar day following the registrant's public announcement of the meeting date (e.g., if the registrant announced the date of the upcoming annual meeting 65 calendar days prior to the meeting date, the dissident could launch an election contest as late as the 55th calendar day prior to the meeting date). See proposed Rule 14a-19(b)(1).

118 Proposed Rule 14a-19 would also effectively preclude a dissident from launching an election contest less than 60 calendar days prior to the annual meeting even if the registrant's board of directors has waived the advance notice deadline in the registrant's governing documents.

119 Based on a review of the contested elections sample, see supra note 115, the staff found that dissidents provided notice of their intent to nominate director candidates fewer than 60 calendar days prior to the shareholder meeting date in 11 percent of the contests.

dissident's intent to comply with the minimum solicitation threshold in proposed Rule 14a-19 or with respect to the names of the dissident's nominees.[120] Because a registrant may have disseminated a universal proxy card before discovering that the dissident has abandoned its solicitation,[121] we are proposing to require the registrant to include disclosure in its proxy statement advising shareholders how it intends to treat proxy authority granted in favor of a dissident's nominees in the event the dissident abandons its solicitation or fails to comply with proposed Rule 14a-19.[122] In those instances, the registrant could elect to disseminate a new, non-universal proxy card including only the names of the registrant's nominees. If there is a change in the dissident's nominees after the registrant has disseminated a universal proxy card, the registrant could elect, but would not be required, to disseminate a new universal proxy card reflecting the change in dissident nominees.

Request for Comment

29. Should we require a dissident to provide notice of its intent to solicit in advance of a shareholder meeting, as proposed? Would this requirement significantly hinder a dissident's ability to initiate a proxy contest? Why or why not? Does proposed Rule 14a-19 create logistical or timing issues not addressed in this release?

30. What percentage of companies with Section 12 registered securities have an advance notice provision in their governing documents today? What percentage of

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120 See proposed Rule 14a-19(c).

121 This could occur because a dissident is required to provide notice of its intent to solicit proxies to the registrant 60 days prior to the anniversary date of the previous year's annual meeting. If a registrant disseminates its proxy statement during the period of time between receiving the dissident's Rule 14a-19 notice and the dissident filing a preliminary proxy statement, a registrant would be required to include the names of the dissident's nominees on a universal proxy card.

122 See proposed Item 21(c) to Schedule 14A.

those companies that have an advance notice provision have a deadline of, or a submission window that ends, 90 days, 60 days, or another specified number of days prior to the upcoming annual meeting date or the first anniversary of the prior year's annual meeting?

31. Does the proposed requirement to identify a dissident's nominees 60 days in advance of a meeting sufficiently accommodate the interests of both dissidents and registrants? Should the notice be required more or fewer days in advance? Alternatively, would some other triggering event for filing the notice, such as within five days of the registrant filing its preliminary proxy statement, better provide appropriate notice? Would some other period of time be more appropriate?

32. If a registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, should we require a dissident to provide notice by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of such meeting is first made by the registrant, as proposed? Should we instead require registrants to file a Form 8-K within four business days of determining the anticipated meeting date to disclose the date by which a dissident must submit the required notice and require that such date be a reasonable time or a specified number of days before the registrant first files proxy materials with the Commission? Is there a more appropriate notice deadline we should use in situations in which a registrant did not hold an annual meeting during the previous year or the date of the meeting has changed by more than 30 calendar days from the previous year?

33. The proposed notice requirement would effectively prevent a dissident from launching an election contest less than 60 days before a meeting. Would some

shorter or longer period be preferable? Should the proposed rule include an exception mechanism similar to Rule 14a-6(a) to allow a dissident to provide the notice required by proposed Rule 14a-19 after the 60 calendar day deadline in exceptional circumstances (e.g., where a court of competent jurisdiction enjoins the advance notice bylaws of the registrant)? Should we instead have the notice requirement be a condition of the use of universal proxies but also permit dissidents to launch a contest as they could today, without the ability to use universal proxy if they do not comply with the notice requirements? Why or why not?

34. What information should be required in a dissident's notice? Should any other information besides the names of a dissident's nominees and a dissident's statement that it intends to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors be required? For example, should a dissident be required to include biographical or other information that is required of director nominees under Regulation 14A for its nominees in the notice?

35. Should we require a dissident to file the notice with the Commission? Should we require a dissident to file the notice with each national securities exchange upon which any class of securities of the registrant is listed and registered? Why or why not?

3. Registrant's Notice of Its Nominees

We are proposing to require the registrant to notify the dissident of the names of its nominees unless the names have already been provided in a preliminary or definitive proxy statement filed by the registrant.[123] Proposed Rule 14a-19(d) would require a

[123] See proposed Rule 14a-19(d).

registrant to provide the dissident with the names of the nominees for whom the registrant intends to solicit proxies no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date. If the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, proposed Rule 14a-19(d) would require that the registrant provide notice no later than 50 calendar days prior to the date of the meeting. Proposed Rule 14a-19 would not require a registrant to file the notice with the Commission.

We believe it is appropriate to include notification deadlines in a mandatory universal proxy system to provide the parties with a definitive date by which they will have the names of all nominees to be included on the universal proxy card. Without the names of all nominees, the parties could not file their definitive proxy statements and universal proxy cards to begin soliciting shareholders. Absent such a requirement for registrants, dissidents could face an informational and timing disadvantage in the proposed universal proxy system. Registrants would know the names of dissident nominees no later than 60 days prior to the meeting[124] while dissidents would not necessarily know the names of the registrant nominees until the registrant files its preliminary proxy statement, which is only required to be filed at least 10 calendar days prior to the date the definitive proxy statement is first sent to shareholders and may be filed much closer to the meeting date.[125] In that case, dissidents would have to wait to

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124 Because the deadline under proposed Rule 14a-19(b)(1) is tied to the anniversary of the previous year's annual meeting date, 60 calendar days prior to the meeting date approximates the latest date on which registrants would know the names of dissident nominees.

125 See proposed Rule 14a-19(b)(1); 17 CFR 240.14a-6(a).

file their definitive proxy statement and proxy card until the registrant filed its preliminary proxy statement with the names of the registrant nominees.

We believe a deadline that is 10 calendar days after the latest date the registrant would have received dissident's notice of nominees is appropriate because it provides a sufficient period of time for the registrant to consider the dissident's notice, finalize its nominees and respond with its own notice of nominees. Moreover, we believe the 50 calendar day deadline is appropriate for providing dissidents with timely access to the names of registrant nominees for purposes of preparing a universal proxy card.

We acknowledge that a dissident could not file its definitive proxy statement and universal proxy card until the registrant has provided notice of the names of its nominees or otherwise filed a preliminary or definitive proxy statement including such names. Given the filing practices of soliciting parties in contested elections today, we do not believe this will be a practical hardship for dissidents because dissidents almost always file their definitive proxy statement after the registrant has filed a preliminary proxy statement and usually after the registrant has filed a definitive proxy statement.[126] If the names of the registrant's nominees are not known when a dissident plans to file its preliminary proxy statement, the dissident could file its preliminary proxy statement, as planned, and include blank spaces for the names of the registrant's nominees on its preliminary universal proxy card. The dissident could not file its definitive proxy statement until at least 10 calendar days elapsed after the preliminary proxy statement

[126] Based on the staff's review of the contested elections sample, see supra note 115, we estimate that dissidents filed their definitive proxy statement before the registrant filed its definitive proxy statement in 11 percent of the contests. We also estimate that a dissident filed its definitive proxy statement before the registrant filed its preliminary proxy statement (or definitive proxy statement in the instances where the registrant did not file a preliminary proxy statement) in just one instance (or 1 percent of the contests).

filing.[127] If the names of the registrant's nominees were still not known at that time, the dissident would have to wait until the names of the registrant's nominees were known before finalizing and filing its definitive proxy statement and universal proxy card. Based on a review of recent contested elections and the staff's experience, dissidents rarely file their definitive proxy statement more than 50 calendar days prior to the meeting date, which approximates the latest date on which registrants would be required to notify the dissident of the names of the registrant's nominees under the proposed rules.[128] Thus, unless soliciting parties in contested elections alter their filing practices as a result of using the proposed universal proxy system, we would expect those circumstances to arise infrequently. We solicit comment on this point below.

It is possible that a registrant could provide notice of the names of its nominees under proposed Rule 14a-19 and later change its nominees. As with the notice requirement for dissidents, proposed Rule 14a-19(d) would require a registrant to promptly notify the dissident of any change with respect to the names of the registrant's nominees. If there is a change in the registrant's nominees after the dissident has disseminated a universal proxy card, the dissident could elect, but would not be required, to disseminate a new universal proxy card reflecting the change in registrant nominees.

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127 See Rule 14a-6(a). In the staff's experience, a soliciting party will typically wait until it receives notice that the staff has no comments on the preliminary proxy statement before filing its definitive proxy statement.

128 Because the deadline under proposed Rule 14a-19(d) is tied to the anniversary of the previous year's annual meeting date, 50 calendar days prior to the meeting date approximates the latest date on which registrants would be required to notify the dissident of the names of the registrant's nominees. Based on a review of the contested elections sample, see supra note 115, we estimate that dissidents filed their definitive proxy statement more than 50 calendar days prior to the shareholder meeting date in 7 percent of the contests.

Request for Comment

36. Should we require a registrant to notify the dissident of the names of registrant nominees, as proposed? Would the proposed notice requirement for registrants affect the process by which a board of directors nominates candidates? If so, how? Is the proposed notice requirement for registrants inconsistent with any state or foreign law provision?

37. Should any other information besides the names of the registrant's nominees be required?

38. Is 50 calendar days prior to the anniversary of the previous year's annual meeting date an appropriate deadline for the notice of the registrant's director nominees? Should we require a longer or shorter period of time? Why or why not? Should the deadline for registrants be tied to the registrant's receipt of the dissident's notice? For example, should we instead adopt a deadline for registrants that is the later of 60 calendar days prior to the meeting or 10 calendar days following registrant's receipt of dissident's notice pursuant to proposed Rule 14a-19? Why or why not?

39. Would the proposed mandatory universal proxy system alter the filing practices of soliciting parties in contested elections? If so, how? Are there any changes that we should make to the proposed rules as a result?

40. Should we require registrants to file the notice with the Commission? For example, should a registrant be required to file a Form 8-K to disclose the names of its nominees when they are determined? Should we require registrants to file the notice with each national securities exchange upon which any class of securities of the registrant is listed and registered? Why or why not?

4. Minimum Solicitation Requirement for Dissidents

Our current rules do not require a registrant or a dissident to solicit, or furnish a proxy statement to, a certain number or percentage of shareholders. Instead, our rules only require the parties to furnish a proxy statement to each person solicited.[129] Proposed Rule 14a-19 would require dissidents in a contested election subject to Rule 14a-19 to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors.[130] We estimate that in approximately 97 percent of recent proxy contests the dissident solicited a number of shareholders greater than would be required under the proposed minimum solicitation requirement.[131]

Without a minimum solicitation requirement, mandatory universal proxy could enable dissidents to capitalize on the registrant's solicitation efforts and relieve dissidents of the time and expense necessary to solicit sufficient support for its nominees to win a seat on the board of directors. The minimum solicitation requirement would preclude a dissident from triggering mandatory universal proxy for both parties unless the dissident intends to conduct an independent solicitation by distributing its own proxy statement and form of proxy. We are mindful of concerns that have been raised about the possibility that universal proxies would allow dissidents to have their nominees included on

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129 See 17 CFR 240.14a-3.

130 We understand that proxy service providers can provide sufficient information for a dissident to determine how to meet the minimum threshold. The notion that a proponent's solicitation of a certain percentage of shareholders impacts the treatment of a proponent's proposal in the proxy voting process is not new. Rule 14a-4(c)(1) addresses a registrant's ability to exercise discretionary voting authority after it has received notice of a non-Rule 14a-8 proposal within the timeframe established by Rule 14a-4(c)(1). Rule 14a-4(c)(2) precludes a registrant from exercising discretionary authority on matters as to which it has received timely advance notice if the proponent provides the registrant, as part of that notice, with a statement that it intends to solicit the percentage of shareholder votes required to carry the proposal, followed with specified evidence that the stated percentage had actually been solicited.

131 See infra Section IV.D.2.a.

registrants' proxy cards, which would likely be disseminated to all shareholders of the company, without expending any of their own resources to get the names of their nominees in front of all shareholders of the company. We believe that the proposed minimum solicitation requirement would help address these concerns. We also believe that the nature of contested elections today, particularly when share ownership is widely dispersed, is such that dissidents would still need to engage in meaningful solicitation efforts in order to actually win a seat on the board of directors.

We determined to propose a minimum solicitation requirement for dissidents to ensure that the registrant is required to include dissident nominees on its proxy card only when the dissident engages in a meaningful, non-exempt solicitation. We believe the threshold we are proposing – a majority of the voting power entitled to vote on the election of directors – strikes an appropriate balance of providing the utility of the mandatory universal proxy system for shareholders while precluding dissidents from capitalizing on the inclusion of dissident nominees on the registrant's universal proxy card without undertaking meaningful solicitation efforts. We also believe the threshold we are proposing would be easily measurable regardless of the applicable voting standard.[132]

Proposed Rule 14a-19 would also require a dissident to state in its proxy materials that it will solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors.[133] Like any other statement made in the dissident's proxy materials, this statement would be subject to Rule 14a-9.

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[132] While a plurality voting standard would apply in almost all contested elections, we understand that for a small percentage of registrants, a majority voting standard would apply in contested elections.

[133] See proposed Rule 14a-19(a)(3).

A registrant is not required to solicit, or furnish a proxy statement to, a certain number or percentage of shareholders under our current rules. Consistent with our current rules, a registrant would be required only to furnish a proxy statement to each person solicited. Because Rule 14c-2 requires registrants to provide to all shareholders not solicited in connection with a shareholder meeting an information statement with the same information required in a proxy statement, registrants routinely satisfy their obligation under Rule 14c-2 by furnishing a proxy statement to all shareholders.[134] For that reason, we are not proposing a minimum solicitation requirement for registrants in a contested election subject to proposed Rule 14a-19.

Request for Comment

41. Should we require a dissident to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors, as proposed? Should we instead require a dissident to solicit the holders of shares representing at least a majority of the outstanding voting power? Why or why not? Should we instead require a dissident to solicit all shareholders? Why or why not? Should we consider alternative solicitation or other requirements for dissidents? If so, what other requirements should we consider? For example, should dissidents be required to make all proxy materials publicly accessible, free of charge, at an Internet web site other than the Commission's EDGAR system?

42. We are not proposing amendments that would require a registrant to solicit a certain number or percentage of shareholders when a solicitation in connection with a contested election is made in accordance with proposed Rule 14a-19 because we

[134] 17 CFR 240.14c-2. Other requirements may result in a registrant's decision to furnish a proxy statement to all shareholders, such as national securities exchange listing requirements and meeting notice requirements under state law.

understand that currently registrants generally disseminate the proxy statement to all shareholders. Would mandatory universal proxy alter a registrant's practice of generally disseminating the proxy statement to all shareholders? Should we include a minimum solicitation requirement for registrants? If so, what should the solicitation requirement be for registrants?

43. Should we include any additional requirements in the rules for dissidents concerning compliance with the minimum solicitation requirement? If so, what requirements should we include? For example, should we require a dissident to provide the registrant with a statement from the solicitor or other person with knowledge indicating that the dissident has taken the steps necessary to solicit the holders of at least a majority of the voting power of shares entitled to vote on the election of directors?[135] Why or why not?

44. Would dissidents have access to sufficient information to determine how to meet the minimum solicitation threshold? Why or why not? Could proxy service providers provide sufficient information for dissidents to determine how to meet the minimum threshold? Why or why not?

45. Under the proposed rules, a dissident could provide notice to the registrant pursuant to Rule 14a-19 intending to conduct a non-exempt solicitation under Regulation 14A and later determine to instead proceed with an exempt solicitation in support of the nominee(s) named in the Rule 14a-19 notice. Should we consider preventing a dissident that has provided notice to a registrant pursuant to proposed Rule 14a-19 from later

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[135] See, e.g., 17 CFR 240.14a-4(c)(2)(iii) (providing for notification to the registrant that the proponent took the steps necessary to deliver proxy materials to a sufficient number of holders to carry the proposal.).

relying on the exemption set forth in Rule 14a-2(b)(2) to solicit in support of the nominee(s) named in the Rule 14a-19 notice? Why or why not?

5. Dissemination of Proxy Materials

Under current proxy rules, the soliciting parties in a contested election are required to provide information about their nominees in a proxy statement on Schedule 14A. For example, Item 7 of Schedule 14A requires detailed disclosure about director nominees, including their names, ages, business experience for the last five years, and involvement during the past 10 years in certain types of judicial and administrative proceedings.[136] Rule 14a-5(c) permits one soliciting party to refer to information in the other party's proxy statement to satisfy its own disclosure obligations under Schedule 14A, including those set forth in Item 7. With universal proxies, shareholders would have the ability to vote for their preferred nominees among all of the director candidates in a contested election upon receiving one party's proxy materials. In these circumstances, we believe it is important that shareholders have the ability to access disclosure about all nominees for whom they are asked to make a voting decision at that time.

a. Dissident's Requirement to File Definitive Proxy Statement 25 Calendar Days Prior to Meeting

Proposed Rule 14a-19 would require a dissident in a contested election to file its definitive proxy statement with the Commission by the later of 25 calendar days prior to the meeting date or five calendar days after the registrant files its definitive proxy statement, regardless of the proxy delivery method. As proposed, the five calendar day deadline would be triggered if the registrant files its definitive proxy statement fewer than

[136] See 17 CFR 240.14a-101, Item 7.

30 calendar days prior to the meeting date, in which case the dissident would be required to file its definitive proxy statement no later than five calendar days after the registrant files its definitive proxy statement.

Proposed Rule 14a-19(e) would require the registrant and the dissident to include all director nominees on their proxy cards.[137] Because shareholders may not otherwise have access to information about the dissident's nominees when they receive a universal proxy card from the registrant, we believe requiring the dissident to file its definitive proxy statement by the later of 25 calendar days prior to the meeting or five calendar days after the registrant files its definitive proxy statement is appropriate to help ensure that shareholders who receive a universal proxy will have access to information about all nominees a sufficient amount of time prior to the meeting.[138] We recognize, however, that some shareholders could receive the registrant's proxy statement and submit their votes on the registrant's universal proxy card before the dissident's proxy statement is available. We believe the 25 calendar day deadline would provide those shareholders with sufficient time to access the dissident's proxy statement, once available, and submit a later-dated proxy to change their votes if preferred.

We acknowledge that dissidents that elect full set delivery in a contested election are not currently subject to a filing deadline for their proxy statement, and thus the

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137 See supra Section II.B.1.

138 Since the dissident would only be required to solicit a majority of the voting power of shares entitled to vote on the election of directors, it is possible that some shareholders would not receive the dissident's proxy materials containing information about the dissident's nominees. However, as discussed in Section II.B.5.b infra, we are proposing to require that each party in a contested election include a statement in its proxy materials referring shareholders to the other party's proxy statement for information about the other party's nominees and explaining that shareholders can access the other party's proxy statement on the Commission's website. Because this required disclosure would be included in the registrant's proxy materials, which all shareholders would likely receive, the proposed rules would ensure that even those shareholders that do not receive the dissident's proxy materials would have access to information about the dissident's nominees.

proposed requirement would impose a new filing deadline for all such dissidents.[139] While we do not believe the proposed filing deadline would impose a significant additional burden for most dissidents, some dissidents may be required to prepare their proxy statements earlier than they would otherwise. Based on a review of the contested elections initiated in 2014 and 2015, the staff found that dissidents filed their definitive proxy statement 25 or more calendar days prior to the shareholder meeting date in 75 percent of the contests.[140]

We are not proposing to require registrants to file definitive proxy statements by a specified deadline, because unlike dissidents, registrants have an incentive to file the definitive proxy statement and proxy card[141] well in advance of the meeting date to ensure there is sufficient time to obtain proxies from the requisite number of shares to achieve a quorum for the meeting. We also note that where the registrant nominees are incumbent directors, shareholders will have access to information about those nominees from prior Commission filings before the registrant files and disseminates its definitive proxy statement. In addition, we note that based on a review of the 72 contested elections initiated in 2014 and 2015, the staff found that registrants filed their definitive proxy

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139 We understand from a proxy services provider that in the 35 proxy contests from June 30, 2015 through April 15, 2016, dissidents sent full sets of proxy materials to each of the shareholders solicited. Dissidents that elect notice-only delivery are currently required to make their proxy statement available by the later of 40 calendar days prior to the meeting date or 10 calendar days after the registrant files its definitive proxy statement. For such dissidents, the proposed filing deadline would provide five fewer days to furnish a proxy statement in cases in which the registrant files its definitive proxy statement within fewer than 30 calendar days of the meeting date, which we estimate occurred in 18 percent of recent contested elections. Based on the information provided by, and conversations with, a proxy services provider, we would not expect a dissident to elect notice-only delivery in a contested election.

140 Based on staff analysis of the contested elections sample. See supra note 115. The data is based on 57 out of 72 identified proxy contests since the dissident did not file a definitive proxy statement in 15 cases.

141 The definitive proxy statement, form of proxy and all other soliciting materials must be filed with the Commission no later than the date they are first sent or given to shareholders. 17 CFR 240.14a-6(b).

statement 25 or more calendar days prior to the shareholder meeting date in over 95 percent of the contests.[142]

We recognize that it is possible that a registrant would have prepared and disseminated its definitive proxy statement, including a universal proxy card, prior to the 25th calendar day before the meeting (i.e., the general deadline under proposed Rule 14a-19 for a dissident to file its definitive proxy statement with the Commission). If a registrant discovers after disseminating its definitive proxy statement with a universal proxy card that a dissident failed to file its definitive proxy statement 25 calendar days prior to the meeting (or five calendar days after the registrant files its definitive proxy statement),[143] the registrant could elect to disseminate a new, non-universal proxy card including only the names of the registrant's nominees. Where a dissident fails to comply with Rule 14a-19, the proposed rules would not permit the dissident to continue with its solicitation under Regulation 14A. Because a registrant may disseminate a universal proxy card before discovering that a dissident is not proceeding with its solicitation, we are proposing to require the registrant to include disclosure in its proxy statement advising shareholders how it intends to treat proxy authority granted in favor of a dissident's nominees in the event the dissident abandons its solicitation or fails to comply with Regulation 14A.[144]

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142 Based on staff analysis of the contested elections sample. See supra note 115.

143 A dissident could meet the deadline for director nominations under the company's governing documents and the deadline for providing notice to the registrant under proposed Rule 14a-19 but fail to proceed with or later abandon its solicitation. This could happen for a number of reasons. For example, the dissident and the registrant may enter into a settlement agreement, the dissident may elect to discontinue its solicitation for another reason or the dissident may fail to comply with some aspect of proposed Rule 14a-19.

144 See proposed Item 21(c) to Schedule 14A.

Request for Comment

46. Should we require dissidents to file their definitive proxy statement by the later of the 25th calendar day before the meeting or five calendar days after the registrant files its definitive proxy statement where the registrant files its definitive proxy statement fewer than 30 calendar days prior to the meeting date, as proposed? Why or why not? Does the proposed deadline provide sufficient time before the meeting for shareholders who are not solicited by the dissident to access information about the dissident's nominees in the dissident's definitive proxy statement through the Commission's website?

47. We are not proposing to require registrants to file definitive proxy statements by a specified deadline because we understand that, unlike dissidents, registrants have an incentive to file their definitive proxy statements well in advance of the meeting date to allow sufficient time to obtain proxies from the requisite number of shares to achieve a quorum for the meeting. Would mandatory universal proxy alter a registrant's practice regarding the timing of the filing of its definitive proxy statement? If so, how? Should we impose a definitive proxy statement filing deadline for registrants in contested elections? If so, what filing deadline would be appropriate for registrants?

b. Access to Information about all Nominees

Under our current rules, a registrant's or dissident's proxy statement on Schedule 14A is generally not required to include information about the other party's nominees and may be disseminated before the other party disseminates its proxy statement. As a result, shareholders presented with a universal proxy card would be asked to vote for nominees without necessarily having access to disclosure about those nominees. Mindful of the potential lack of information upon which shareholders may make a voting decision in

such circumstances, we have considered how and from whom shareholders should receive information about the other party's nominees when faced with a voting decision in a contested election subject to mandatory universal proxy.

We believe that each party should provide the information required by Schedule 14A for its nominees in its proxy materials as is done today. We also believe that Rule 14a-5(c) should continue to operate to permit parties to refer to the other party's proxy statement to satisfy its disclosure obligations about the other party's nominees. We are proposing changes to the proxy rules to require dissidents in a contested election to file a definitive proxy statement by the later of 25 calendar days prior to the meeting date or five calendar days after the registrant files its definitive proxy statement and to solicit at least a majority of the voting power of shares entitled to vote on the election of directors.[145] Since the dissident would not be required to solicit all shareholders, it is possible that some shareholders would not receive the dissident's proxy materials containing information about the dissident's nominees. As a result, we are proposing a new Item 7(h) of Schedule 14A to require that each party in a contested election refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement for free on the Commission's website. Because this required disclosure would be included in the registrant's proxy materials, which all shareholders would likely receive, even those shareholders that do not receive the dissident's proxy materials would have access to information about the dissident's nominees. We are also proposing to revise Rule 14a-5(c) to permit the parties to refer to information that would be furnished in a filing of the

[145] See supra Sections II.B.4 and II.B.5.a.

other party to satisfy their disclosure obligations.[146] Taken together, these proposed changes are intended to enable shareholders to access information with respect to all nominees when they receive a universal proxy card.

We are also proposing changes to the definition of "participant" in Instruction 3 to Items 4 and 5 of Schedule 14A. Currently, Instruction 3(a)(ii) to Items 4 and 5 of Schedule 14A provides that any director nominee "for whose election as a director proxies are solicited" is a "participant" for purposes of the disclosure requirements of Schedule 14A. Without a revision, the Instruction would require that the nominees on a universal proxy card be considered "participants" in the opposing party's solicitation. As proposed, revised Instruction 3 would define "participant" separately for solicitations made by registrants and solicitations made by dissidents. As a result, even though all nominees would be included on the form of proxy, only the party's nominees would be considered "participants" in that party's solicitation.

We are proposing this change because Item 5 of Schedule 14A requires specific disclosure about all "participants" in a contested election, including information about the existence of a criminal record, employment history, and securities holdings, information which the opposing party in a proxy contest is unlikely to have. In addition, revising the definition of "participant" as proposed may help avoid the implication that nominees are responsible for information contained in the opposing party's proxy materials.

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[146] Currently, Rule 14a-5(c) permits parties to refer to information that has already been furnished in a filing of another party. We recognize one concern with permitting a future filing to satisfy a disclosure obligation is that it is possible that the information to be provided in the future filing would never be made available to shareholders. However, the definitive proxy statement filing deadline for dissidents in proposed Rule 14a-19 and the practical considerations that incentivize registrants to file their definitive proxy statements well in advance of the meeting date should help ensure that appropriate information about both parties' nominees is available to shareholders in a timely manner.

Request for Comment

48. Should we adopt proposed Item 7(h) of Regulation 14A to require that each soliciting person in a contested election refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement for free on the Commission's website, as proposed? Is this statement sufficient to inform shareholders how to access information about the parties' nominees such that shareholders can make an informed voting decision when they have only received a proxy statement and universal proxy card from one party? Should we require any additional information, such as instructions as to how to access proxy statements on the Commission's website or a hyperlink to that website?

49. Should we amend Rule 14a-5(c) to permit soliciting parties to refer to information that would be furnished in a filing of another soliciting party in order to satisfy their disclosure obligations, as proposed? Should we limit the ability to refer to a future filing of another soliciting person to solicitations in connection with contested elections?

50. Should we amend Instruction 3 to define "participant," as proposed? Are there additional categories of people that should be included in the definition of "participant" for registrants or dissidents? Would the amendment to Instruction 3, as proposed, make it sufficiently clear that nominees are not responsible for information contained in the opposing party's proxy materials? Are there other steps we should take to make this clear?

6. Form of the Universal Proxy

We are proposing the use of separate universal proxy cards in which each party in a contested election distributes its own proxy card that includes the names of both parties'

nominees and designates its own representatives as proxy holders to exercise the vote pursuant to the proxy.[147] The use of separate proxy cards would not represent a change from how proxies are solicited in contested elections today. We are proposing to retain this aspect of the proxy rules and process because we believe parties prefer to design their own proxy cards (subject to the proposed presentation and formatting requirements in proposed Rule 14a-19) in a manner they deem appropriate. Additionally, separate proxy cards also give each party control over the dissemination of its proxy card and insight into the preliminary results of the solicitation before the meeting.[148] Finally, permitting each party to control its own proxies avoids empowering only one party to exercise discretionary authority on those matters for which a choice is not specified and on any of the matters specified in Rule 14a-4(c).[149] The proposed presentation and formatting requirements would require that universal proxy cards provide clear instructions to permit shareholders to effectively vote their shares for the director nominees they prefer through the proxy process and to help ensure that proxies are exercised in accordance with the choices specified by the shareholders on the proxy cards.

Rule 14a-4 governs the form of the proxy card and requires, among other things, that the proxy card:

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147 The Rulemaking Petition recommended that we preserve the current practice of each party circulating its own proxy card and proxy statement. See supra note 45.

148 When each party disseminates its own proxy card, each party has insight into the preliminary results of the solicitation prior to the meeting, as each party is in possession of the proxies it has received from shareholders solicited.

149 Discretionary voting authority may be conferred under Rule 14a-4(c) for certain ministerial acts such as approving the minutes of a prior meeting, voting on certain shareholder proposals unknown to the registrant before circulation of the proxy statement, and voting on shareholder proposals properly omitted from the proxy statement.

- indicate in bold-face type whether or not it is solicited on behalf of the registrant's board of directors or, if solicited on behalf of some other person, the identity of such person;[150]
- provide a basis for shareholders to instruct separately[151] and with specificity how the proxy holders must vote on the election of directors[152] and on non-election proposals;[153] and
- if providing for the election of directors, set forth the names of the nominees[154] and permit shareholders to withhold voting authority from each nominee.[155]

The proxy card may confer discretionary proxy voting authority on matters as to which the shareholder does not specify a choice provided that the card states in bold-face type how the proxy holder intends to vote the shares represented by the proxy in each such case.[156] The proxy card may also confer discretionary proxy voting authority on matters not included on the registrant's proxy card.[157]

To help ensure that universal proxies clearly and fairly present information so that shareholders can effectively exercise their voting rights, proposed Rule 14a-19(e) would include the following presentation and formatting requirements for all universal proxy cards used in contested elections:

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150 See 17 CFR 240.14a-4(a)(1).

151 See 17 CFR 240.14a-4(a)(3).

152 See 17 CFR 240.14a-4(b)(2)

153 See 17 CFR 240.14a-4(b)(1).

154 See supra Section II.A and discussion of the bona fide nominee rule for an explanation as to why the named nominees rarely include the dissident nominees.

155 See 17 CFR 240.14a-4(b)(2).

156 See 17 CFR 240.14a-4(b)(1).

157 See 17 CFR 240.14a-4(c).

- The proxy card must clearly distinguish between registrant nominees, dissident nominees, and any proxy access nominees;[158]
- Within each group of nominees, the nominees must be listed in alphabetical order by last name on the proxy card;[159]
- The same font type, style and size must be used to present all nominees on the proxy card;[160]
- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted;[161] and
- The proxy card must prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected, in a manner that grants authority to vote for fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.[162]

Where both parties have proposed a full slate of nominees and there are no proxy access nominees, we are also proposing that the proxy card may provide the ability to vote for all dissident nominees as a group and all registrant nominees as a group.[163] Where proxy access nominees will be included on the proxy card or where a dissident or a registrant is

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158 See proposed Rule 14a-19(e)(3).

159 See proposed Rule 14a-19(e)(4). Although the order must be alphabetical by last name, the format need not be last name first.

160 See proposed Rule 14a-19(e)(5).

161 See proposed Rule 14a-19(e)(6).

162 See proposed Rule 14a-19(e)(7). The requirements we are proposing would not limit a party's ability to include its voting recommendation with respect to some or all of the nominees on the proxy card. Any such language would, however, be subject to Rule 14a-9.

163 See proposed Rule 14a-19(f). We anticipate, and the proposed rules would not prohibit, that registrants and dissidents will continue the practice of distinguishing their respective proxy cards by distributing them with a distinctive color.

proposing a partial slate, neither proxy card would be permitted to provide the option to vote for any nominees as a group.[164] When there are proxy access nominees included on the card, we believe it is not appropriate to provide the ability to vote for nominees as a group because it may make it easier to vote for all registrant nominees or for all dissident nominees than to vote for the proxy access nominee in addition to some registrant or some dissident nominees.[165] When the dissident or the registrant is nominating anything less than a full slate of candidates, we also believe it is not appropriate to provide the ability to vote for nominees as a group because providing the ability to vote for a partial slate of nominees as a group could result in shareholders inadvertently voting for less than the number of seats up for election or in possible over voting. Finally, proposed Rule 14a-19 would require that universal proxy cards provide a means for shareholders to grant authority to vote "for" the nominees set forth on the card.[166]

A proxy card must present the names so that shareholders are able to distinguish the registrant's and the dissident's nominees on the face of the proxy card. For example, a proxy card could list each party's nominees in a separate column. In that circumstance, a proxy access nominee also would have to be clearly distinguished, such as by listing in a separate column. Similarly, if multiple dissidents are soliciting proxies in support of

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164 See proposed Rule 14a-19(f).

165 See also Facilitating Shareholder Director Nominations, Release No. 33-9046 (June 10, 2009)[74 FR 29024 (June 18, 2009)] at 29049 (proposing the group voting provision in Rule 14a-4(b) and stating that providing shareholders with the option to vote for the registrant's nominees as a group where the registrant's proxy card includes shareholder nominees "would not be appropriate . . . as grouping the company's nominees may make it easier to vote for all of the company's nominees than to vote for the shareholder nominees in addition to some of the company nominees."); Facilitating Shareholder Director Nominations, Release No. 33-9136 (Aug. 25, 2010) [75 FR 56668 (Sept. 16, 2010)] at 56724 (indicating that doing so "would result in an advantage to the management nominees and would be inconsistent with an impartial approach").

166 See proposed Rule 14a-19(e)(2). Currently, Rule 14a-4(b) does not require that a soliciting person include a means to vote "for" director nominees on the proxy card.

separate slates of director nominees, each slate must be clearly distinguished, such as by having its own designated column. While we are proposing to require that the nominees are clearly distinguished, we are not proposing to direct where to place the groups of nominees on the card or to prohibit the parties from listing their group of nominees first.

We considered providing more flexibility in the proposed rule about font type, style and size and the order in which nominees should be listed. However, we were concerned that without specific guidance, some presentations of nominees on a universal proxy card could be confusing or misleading. We also are sensitive to concerns that have been raised about the possibility that a universal proxy card would cause shareholders to be confused as to whether a particular nominee supports the opposing party.[167] In order to address these concerns, we are proposing certain limitations on the presentation and format of the card and requiring that certain information be prominently disclosed.

We considered proposing that the registrant distribute a single universal proxy card that would include the names of the registrant's nominees and the dissident's nominees, as well as all other proposals to be considered at the meeting. However, a single universal proxy card would grant proxy authority solely to representatives designated by the registrant. While a single universal proxy card could result in a more streamlined and potentially less confusing process, a universal proxy card solely in the control of the registrant could potentially provide the registrant with an advantage over procedural issues surrounding the vote.[168] Additionally, the distribution of a proxy

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167 See Short Slate Rule Adopting Release, at 48288.

168 Rule 14a-4(e) provides that the proxy statement or form of proxy shall provide that the shares represented by the proxy will be voted in accordance with the specifications made by the person solicited. As a result of the grant of proxy authority, the registrant-designated proxy holders would be entitled to exercise any discretionary authority conferred with respect to matters for

statement by a dissident without an associated proxy card could place the dissident at a disadvantage.

Finally, we considered proposing that the registrant and dissident distribute an identical card, with the only difference being the persons given proxy authority on the card. An identical card providing proxy authority to different parties could be confusing to shareholders, who might think it did not matter which card was signed and returned. Additionally, the practical issue of having a dissident and a registrant agree on the presentation of nominees on a single card could make this alternative problematic. For example, the parties may disagree on whose nominees should be listed first. This disagreement could be addressed by simply requiring that all nominees be placed in alphabetical order, but that approach would make it more difficult for a shareholder who wished to vote for the entire slate of one party. Based on these considerations, we determined to propose the use of separate universal proxy cards subject to the additional proposed rules on the form of proxy discussed above.

Request for Comment

51. We are proposing presentation and formatting requirements for all universal proxy cards used in contested elections, including requiring that the card clearly distinguish between registrant, dissident and proxy access nominees, that such nominees be listed alphabetically by last name, and that the same font type, style and size be used. Are these requirements for the proxy card appropriate or should we permit greater flexibility for parties to tailor the format of the card as they choose? Should we impose additional presentation and formatting requirements, such as requiring that nominees be

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which a choice is not specified by the shareholders pursuant to Rule 14a-4(b)(1) and with respect to the matters specified in Rule 14a-4(c).

grouped in columns to more clearly distinguish between groups of nominees? Is it sufficient to simply require that the proxy card clearly distinguish between nominees without specifying additional requirements? Should we permit, within the proposed categories of nominees, further sub-categorization of nominees?

52. Should we require that nominees be listed alphabetically by last name, as proposed? Why or why not? Should we instead permit or require nominees to be listed in a random order within the groups of nominees? Should we instead permit or require the parties to specify in their notice of nominees to the other party how they prefer their own nominees to be listed within their group of nominees?

53. Should we require that the proxy card prominently disclose the maximum number of nominees that can be voted upon and the effect of over-voting or under-voting, as proposed? Is this disclosure sufficient for shareholders to understand the implications? How else can we address these issues, including mitigating any risk of over-voting with universal proxies?

54. Should the universal proxy card provide the ability for a shareholder to vote for all of a soliciting person's nominees as a group only where both parties have proposed a full slate of nominees, as proposed? Should group voting be permitted where one party has proposed a partial slate? Should we additionally permit group voting where a shareholder director nominee is included in the registrant's proxy material pursuant to proxy access provisions in the registrant's governing documents or applicable state or foreign law? Would group voting in such circumstances create an unfair advantage for the registrant or other party providing a full slate?

55. Could the use of a universal proxy card lead to shareholder confusion? If so, do the proposed formatting requirements help to reduce any shareholder confusion?

Are there other requirements the proxy rules should include or other steps we should take to help reduce such confusion?

56. Are there any concerns with the ability of proxy service providers to effectively implement the choices made on universal proxies? Are there any concerns with the ability of proxy service providers to prepare and distribute universal proxy cards or the associated voting instruction forms? For example, would the proposed rules lengthen proxy cards in contested elections such that placing all nominees on one card would be impracticable? Are there ways that our proxy rules can address such concerns? For example, should the proxy rules require that director nominees be listed in columns on universal proxies?

57. Should the proposed rules be more prescriptive? For example, should we require both parties' universal proxy cards to be mirror images of each other, except for the individuals to whom proxy authority is granted?

58. Should we instead mandate the use of a single universal proxy card? If so, who should be responsible for compiling and disseminating the single proxy card?

59. Under the current proxy rules, each party in a contested election determines whether and how to include the other party's non-election proposal(s) on its proxy card and the proposed amendments would not change this practice. Should we make any changes in how matters other than the election of directors are presented on a universal proxy card? For example, should the revised rules address how shareholder proposals and other matters to be voted on at the meeting should be presented on a universal proxy card as well? If a universal proxy card is used for the election of directors, should the parties be permitted to exclude other proposals to be voted on at the meeting?

60. Would it be helpful if we included a sample universal proxy card in the adopting release? Why or why not?

7. Timing of Universal Proxy Solicitation Process

The timing of the process for soliciting universal proxies generally would operate as follows:

Due Date	Action Required
No later than 60 calendar days before the anniversary of the previous year's annual meeting date or, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant. [proposed Rule 14a-19(b)(1)]	Dissident must provide notice to the registrant of its intent to solicit the holders of at least a majority of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees and include the names of those nominees.
No later than 50 calendar days before the anniversary of the previous year's annual meeting date or, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, no later than 50 calendar days prior to the date of the annual meeting. [proposed Rule 14a-19(d)]	Registrant must notify the dissident of the names of the registrant's nominees.
No later than 20 business days before the record date for the meeting. [current Rule 14a-13]	Registrant must conduct broker searches to determine the number of copies of proxy materials necessary to supply such material to beneficial owners.
By the later of 25 calendar days before the meeting date or five calendar days after the registrant files its definitive proxy statement. [proposed Rule 14a-19(a)(2)]	Dissident must file its definitive proxy statement with the Commission.

C. Additional Revisions

1. Director Election Voting Standards Disclosure and Voting Options

We are proposing additional amendments to the form of proxy and disclosure requirements with respect to voting options and voting standards that would apply to all director elections.[169] First, we are proposing to amend Rule 14a-4(b) to: (1) mandate the inclusion of an "against" voting option in lieu of a "withhold authority to vote" option on the form of proxy for the election of directors where there is a legal effect to such a vote; and (2) provide shareholders that neither support nor oppose a director nominee an opportunity to "abstain" (rather than "withhold authority to vote") in a director election governed by a majority voting standard.[170] Second, we are proposing amendments to Item 21(b) of Schedule 14A to expressly require the disclosure of the effect of a "withhold" vote.

The voting standard for director elections is established under state law and a registrant's governing documents. Director nominees are generally elected under either a plurality voting standard or a majority voting standard. Under the plurality voting standard, the director nominee receiving the highest number of votes for a given seat is elected. As a result, a director nominee in an uncontested election only needs a single vote in favor of his or her election to be elected. In recent years, however, many public companies have moved toward two other voting standards in director elections –

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169 The proposed amendments to the form of proxy and disclosure requirements with respect to voting options discussed in this section would apply to funds and BDCs.

170 See proposed Rule 14a-4(b)(4).

"plurality plus" and majority voting.[171] Under a "plurality plus" voting standard, an incumbent director agrees in advance to resign if he or she receives more votes withheld than votes in favor of his or her re-election. The remaining directors then determine, in their discretion, whether to accept or reject an incumbent director's resignation. Under a majority voting standard, director nominees are elected only if, depending on the specific version of the standard used by the registrant, they receive affirmative votes from: (i) a majority of the votes cast; or (ii) a majority of shares present and entitled to vote.[172]

While the federal proxy rules do not govern the voting standard used in director elections, they do set forth the requirements for the form of proxy used in the election and the disclosure of the voting procedures for the election. Notably, Rule 14a-4(b)(2) requires the form of proxy to provide a means to withhold authority to vote for each nominee. Accordingly, the voting options under a plurality voting standard are "for" and "withhold," with no "against" voting option. If applicable state law gives legal effect to votes cast against a director nominee (i.e., under a majority voting standard), then the rule currently provides that the registrant should provide a means for shareholders to vote against a nominee "in lieu of, or in addition to," providing a means to withhold authority to vote. Item 21(b) of Schedule 14A currently calls for disclosure of the "method" by which votes will be counted, including "the treatment and effect of abstentions and

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171 See, e.g., Institutional Shareholder Services, Preliminary 2015 U.S. Postseason Review, at 4 (July 30, 2015), available at http://www.issgovernance.com/file/publications/1_preliminary-2015-proxy-season-review-united-states.pdf (noting that only seven percent of S&P 500 firms had a majority voting standard in 2004, as compared to almost 90 percent of S&P 500 firms having a majority voting standard for uncontested director elections in 2015).

172 Companies often couple the use of a majority voting standard with a director resignation policy to address the "holdover" director rule found in state law. Under that rule, an incumbent director who does not receive the requisite votes may remain in office until the earlier of the successor's election or the incumbent director's resignation or removal. See e.g., Del. Code Ann. tit. 8, § 141(b).

broker non-votes"[173] under applicable state law and the registrant's governing documents.[174]

Recently, the Commission became aware of concerns that some company proxy statements had ambiguities and inaccuracies in their disclosures about voting standards in director elections.[175] In light of these concerns, staff in the Division of Corporation Finance and the Division of Economic and Risk Analysis assessed the proxy statement voting standard disclosure provided by a broad set of companies. The staff found some ambiguities or inaccuracies, including:

- the failure to include an "against" option on the form of proxy when a majority voting standard is used;
- the mistaken use of the "against" option on a form of proxy when there was a plurality voting standard, where the only appropriate alternative for voting was "withhold"; and
- incorrect statements that "withhold" votes are counted in determining election outcomes.

In light of these observations, we are proposing to amend Rule 14a-4(b) to mandate the inclusion of an "against" voting option on the form of proxy used in

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173 A "broker non-vote" occurs when a broker, bank, or another intermediary holding shares in "street name" for a client returns a proxy card, but provides no instructions as to how the shares should be voted on a particular matter due to the lack of voting instructions from the client and the inability to exercise discretionary voting authority on the matter.

174 See 17 CFR 240.14a-101, Item 21(b).

175 The Commission received two rulemaking petitions in which, among other things, the petitioners expressed concerns about the voting options in director elections and suggested that the Commission revise Rule 14a-4(b)(2) to reflect the growing use of majority voting standards in director elections. See Letter from United Brotherhood of Carpenters and Joiners of America (Mar. 10, 2015), available at https://www.sec.gov/rules/petitions/2015/petn4-630-supp.pdf ("Carpenters letter"); Letter from the Council of Institutional Investors (June 12, 2015), available at https://www.sec.gov/rules/petitions/2015/petn4-686.pdf ("CII letter").

elections where such votes have a legal effect.[176] Under the proposal, if state law gives legal effect to votes cast against a nominee (which is the case under a majority voting standard), the form of proxy must include the options to vote "against" the nominee and to "abstain" from voting. As these voting options would be "in lieu" of a "withhold" voting option, the proposed amendment would eliminate the current ability to provide a "withhold" voting option on the form of proxy when an "against" vote has legal effect. Further, we are proposing to amend Item 21(b) of Schedule 14A so that it expressly requires disclosure in the proxy statement about the treatment and effect of a "withhold" vote in a director election. We believe that these proposed changes, if adopted, would provide shareholders with a better understanding of the effect of their "withhold" votes on the outcome of the election. In addition, some have recommended that the Commission amend Rule 14a-4(b)(2) to eliminate the "withhold" option under a plurality voting standard and replace it with an "abstain" option so that shareholders are aware that such votes do not legally affect the outcome of the election.[177] While we are not proposing such a change, we are soliciting comment on this recommendation.

Finally, we are proposing to delete the phrase "the method by which votes will be counted" from Item 21(b) of Schedule 14A. In light of the existing language contained in the Item, combined with the proposed amendment discussed above, we believe such phrase would be superfluous as the effect and treatment of all the possible voting options presented to shareholders for each matter would be disclosed in the proxy statement. However, we are soliciting comment as to whether such language is still needed for a specific purpose or scenario not covered by the proposed changes to Item 21(b).

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176 See proposed Rule 14a-4(b)(4).

177 See Carpenters letter, supra note 175.

Request for Comment

61. We are proposing to amend Rule 14a-4(b) to require the form of proxy for a director election governed by a majority voting standard to include a means for shareholders to vote "against" each nominee and a means for shareholders to "abstain" from voting in lieu of providing a means to "withhold authority to vote." Should we eliminate the "withhold" voting option under a majority voting standard for director elections, as proposed? Should we eliminate the "withhold" voting option for contested elections subject to proposed Rule 14a-19 (i.e., where universal proxies are required)? Why or why not? If we do not adopt a mandatory system for universal proxies, as proposed, should we prohibit the "withhold" voting option for contested elections? Why or why not?

62. Some commenters have expressed concerns that shareholders may not understand that a "withhold" vote has no legal effect under a plurality voting standard. Should the Commission replace the "withhold" voting option under a plurality voting standard with "abstain?" Do parties view an "abstention" differently than a "withhold" vote? Is there any relevant legal effect under state law of an abstention as compared to a vote withholding proxy authority when directors are elected by plurality vote? Would there be other consequences under state law or a registrant's governing documents if we were to implement such a change (e.g., would this change affect quorum requirements)?

63. We are proposing to delete the phrase "the method by which votes will be counted" from Item 21 of Schedule 14A. Is the language needed for a specific purpose or scenario that is not covered by the proposed amendment to Item 21(b)? Is there any other reason to retain it?

D. Investment Companies

Investment companies registered under Section 8 of the Investment Company Act of 1940 ("funds") and business development companies ("BDCs")[178] are typically organized as trusts, corporations or limited partnerships under state laws, and like operating companies, have boards of directors that are elected by shareholders.[179] Although these entities are subject to the federal proxy rules,[180] the amendments that we are proposing today relating to the use of a universal proxy would not apply to funds and BDCs. Rather, funds and BDCs would remain subject to the federal proxy rules currently in effect.[181]

Based upon information available to us, shareholders generally have not sought split-ticket voting in contested elections involving funds and BDCs.[182] Most investment

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178 BDCs are a category of closed-end investment companies that are not registered under the Investment Company Act, but are subject to certain provisions of that Act. See Sections 2(a)(48) and 54-65 of the Investment Company Act.

179 In addition to state law provisions applicable to funds, BDCs and operating companies, the Investment Company Act provides a number of requirements with respect to the election, composition, and duties of a fund's and BDC's board of directors. For example, Section 16(a) provides that at least a majority of a fund's board must have been elected by shareholders at any given time and that existing directors may fill a vacancy without calling a shareholders' meeting, provided that immediately after the vacancy is filled at least two-thirds of the directors have been elected by shareholders. See also Sections 10(a) and 56(a) of the Investment Company Act (requiring at least 40 percent of a fund's (and a majority of a BDC's) board to not be "interested persons" as such term is defined in Section 2(a)(19) of the Investment Company Act).

180 Funds are required to comply with the proxy rules under the Exchange Act when soliciting proxies, including proxies relating to the election of directors. See 17 CFR 270.20a-1 (requiring funds to comply with regulations adopted pursuant to Section 14(a) of the Exchange Act that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to Section 12 of the Exchange Act). See also Section 20(a) of the Investment Company Act. BDCs are subject to the federal proxy rules because such companies have a class of securities registered under Section 12 of Exchange Act. See Section 14(a) of the Exchange Act and Section 54(a) of the Investment Company Act.

181 For purposes of the rules that apply to funds and BDCs, the definition of a bona fide nominee and the short slate rule in current Rule 14a-4(d)(4) would be retained in proposed Rule 14a-4(d)(1)(ii).

182 We note that to date only operating company shareholders, and not fund or BDC shareholders, have called for the use of a universal proxy. See supra Section I.C. (describing recent feedback regarding the proxy voting process, particularly the Rulemaking Petition and Commission roundtable). As we discuss below in the Economic Analysis, staff is not aware of any director

companies are structured as open-end management investment companies, or "open-end funds,"[183] and contested elections at open-end funds are rare.[184] Open-end funds are generally not required to hold annual shareholder meetings pursuant to the state laws under which they are organized.[185] Furthermore, there is no opportunity to potentially profit from a difference in the market price of open-end fund shares and net asset value ("NAV") because open-end fund shares (other than those issued by exchange-traded funds) are not traded (i.e., there is no market price) and may be redeemed at NAV.[186] Shares issued by exchange-traded funds organized as open-end funds generally trade at or near NAV due to the arbitrage activities of market participants.[187]

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election contests involving open-end management investment companies since the year 2000. Of the 11 director election contests identified by staff that involved closed-end management investment companies and BDCs in calendar years 2014 and 2015, 10 involved dissidents who sought a majority of the board or ran a full slate of nominees, while the remaining contest was a short-slate contest. See infra Section IV, notes 366-367 and accompanying text.

183 At the end of 2015, over 98 percent of investment company aggregate net assets were held by mutual funds and exchange-traded funds ("ETFs"), the two predominant forms of open-end funds. See Investment Company Institute, 2016 Investment Company Institute Fact Book, at 9, Fig. 1.1 (56th ed. 2016) ("2016 ICI Fact Book"), available at https://www.ici.org/pdf/2016_factbook.pdf. An open-end management investment company is an investment company, other than a unit investment trust or face-amount certificate company, that offers for sale or has outstanding any redeemable security of which it is the issuer. See Sections 4 and 5(a)(1) of the Investment Company Act.

184 See supra note 182.

185 The three most common forms of organization for investment companies are Delaware statutory trusts, Massachusetts business trusts, and Maryland corporations. See 2016 ICI Fact Book, at 246, Fig. A.1 (finding that 91 percent of mutual funds use one of these three forms of organization). The respective Delaware and Maryland state statutes, and Massachusetts common law relating to business trusts, do not require annual shareholder meetings. See, e.g., Delaware Statutory Trust Act, Del. Code Ann. title 12, §§ 3801-3826.

186 See Section 2(a)(32) of the Investment Company Act (defining "redeemable security" as "any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof").

187 These market participants include authorized participants, market makers and institutional investors.

Registered closed-end management investment companies ("closed-end funds")[188] and BDCs, on the other hand, are typically required by the rules of the securities exchanges on which their shares are listed to hold annual shareholder meetings.[189] Contested director elections are more common for exchange-listed closed-end funds and BDCs (compared to open-end funds) because their shares often trade at prices that are less than, or at a "discount" to, the fund or BDC's NAV per share, thereby providing an incentive for dissidents to pursue actions that reduce or eliminate this difference.[190] Historically, dissidents in election contests for exchange-listed closed-end funds and BDCs generally have not sought split-ticket voting.[191] Instead, they have sought to reduce or eliminate the discount to NAV either by gaining control of the board of directors or terminating the fund's advisory contract and subsequently replacing the fund's investment adviser.[192]

The Investment Company Act supplements state law by providing specific rights to shareholders to approve certain fundamental features of the fund, which also could impact shareholders' current use of split-ticket voting and the potential impact of the proposed amendments if required for funds and BDCs. For example, the Investment Company Act requires that shareholders approve certain operational matters relating to

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188 A closed-end management investment company is a management company other than an open-end management company. See Sections 4 and 5(a)(2) of the Investment Company Act.

189 See, e.g., NYSE Listed Company Manual § 302.00, available at http://nysemanual.nyse.com/LCM/Sections/.

190 See Matthew E. Souther, The Effects of Takeover Defenses: Evidence from Closed-End Funds, J. of Fin. Econ., at 4 (forthcoming), available at http://ssrn.com/abstract=2729874 (discussing recent closed-end fund proxy contests); Michael Bradley et al., Activist Arbitrage: A Study of Open-Ending Attempts of Closed-End Funds, 95 J. Fin. Econ. 1, 2 (2010).

191 See supra note 182.

192 A dissident can profit from the discount if the fund or BDC is converted to an open-end format or liquidated, or if the fund or BDC purchases the dissident's shares at a price equal to or near NAV.

funds and BDCs.[193] Shareholders of funds and BDCs also must approve advisory contracts and material amendments to such contracts,[194] and ratify or reject the selection of the independent public accountant.[195]

We also acknowledge that investment companies that are part of larger complexes generally have board governance structures that may be disrupted by split-ticket voting. Investment companies sharing the same investment adviser and other service providers are typically part of complexes that utilize either a "unitary" board structure where a single board oversees every fund in the complex, or "cluster" boards consisting of two or more separate boards that each oversee a different set of funds in the complex.[196] This

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193 Fund shareholders are required to approve: (1) a change to the fund's sub-classification as an open-end or closed-end fund, or a change from a diversified company to a non-diversified company; (2) a change in policies contained in the registration statement related to borrowing money, issuing senior securities, underwriting securities issued by other persons, purchasing or selling real estate or commodities or making loans to other persons, except in accordance with the policy in its registration statement; (3) a deviation from a stated policy with respect to concentration of investments in an industry or industries, from any investment policy which is changeable only by shareholder vote, or from any stated fundamental policy pursuant to Section 8(b)(3) of the Investment Company Act; and (4) a change in the nature of the fund's business so as to cease to be an investment company. See Sections 8(b)(3) and 13(a) of the Investment Company Act. BDC shareholders are required to approve a change in the nature of the BDC's business that would cause it to cease to be, or withdraw its election as, a BDC. See Section 58 of the Investment Company Act. In addition, a BDC may issue shares priced below NAV if such sale is approved by both holders of a majority of its voting securities and holders of a majority of its voting securities who are not affiliated persons of the BDC. See Section 63(2) of the Investment Company Act.

194 See Sections 15(a) and 59 of the Investment Company Act. A shareholder may also bring an action against the fund's investment adviser for breach of fiduciary duty with respect to receipt of compensation for services or payments of a material nature paid by such company. See Section 36(b) of the Investment Company Act.

195 See Sections 32(a)(2) and 59 of the Investment Company Act. But see Rule 32a-4 under the Investment Company Act (providing a conditional exemption from the requirement in Section 32(a)(2)).

196 In a survey conducted by the ICI, as of 2014, 86 percent of fund complexes employed a unitary board structure and 14 percent of fund complexes employed a cluster board structure. See Investment Company Institute, Overview of Fund Governance Practices, 1994-2014, at 5 (2015), available at https://www.idc.org/pdf/pub_15_fund_governance.pdf. We are also aware that among fund complexes that use cluster boards there are different reasons for particular clusters of funds with their own set of directors. For example, in some cases, the cluster or grouping of funds may be the deliberate result of investment or distribution considerations. In others, the clusters may be the result of previous mergers of different fund complexes. Independent Directors Council Task

structure enables a set of directors to, for example, oversee common operational matters across multiple funds in the complex (e.g., hiring and retention of service providers, valuation of portfolio investments, and general compliance).[197] To the extent that split-ticket voting results in a disruption to a complex's unitary or cluster board structure (i.e., a dissident nominee is elected to a particular board but would not also serve on other boards in the complex), the efficiencies of such board structure may be reduced.

We recognize, however, that the boards of such entities, like the boards of operating companies, have significant responsibilities in protecting shareholder interests, such as the approval of advisory contracts and fees, and that shareholders have an interest in the governance of these entities. We also recognize that the considerations discussed above do not diminish the importance of the rights that are granted to fund and BDC shareholders under state law and the Investment Company Act, which generally distinguish them from operating companies.[198] Nevertheless, we are not proposing to extend the universal proxy requirements to funds and BDCs at this time. We are, instead, requesting comment and data in this release to further inform us as we consider whether

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Force Report, Director Oversight of Multiple Funds, at 2 (May 2005), available at https://www.idc.org/pdf/ppr_idc_multiple_funds.pdf.

197 See, e.g., Independent Directors Council Task Force Report, Director Oversight of Multiple Funds, at 3-6 (May 2005), available at https://www.idc.org/pdf/ppr_idc_multiple_funds.pdf (stating that board oversight of multiple funds provides efficiencies relating to (1) issues faced by directors under the common regulatory structure that applies to all funds, (2) the complex's common personnel and service providers, (3) complex-wide oversight mechanisms applicable across the complex, and (4) enhanced board knowledge and expertise, along with increased authority and influence).

198 In addition to voting rights provided under state law, the Investment Company Act provides specific rights to shareholders to approve certain fundamental features of the fund or BDC. See, e.g., Sections 8(b)(3), 13(a), 58, and 63(2) (approval of certain operational matters); 15(a) and 59 (approval of advisory contracts and amendments thereto); and 32(a)(2) and 59 (ratification or rejection of the selection of the independent public accountant).

the use of universal proxies should be required in proxy contests for the election of directors at funds or BDCs in the future.

Request for Comment

64. To what extent do investment companies generally, and open-end funds, closed-end funds and BDCs in particular, experience contested elections under the current proxy rules? Please provide any data to the extent available. To what extent do shareholders of investment companies engage in split-ticket voting? To what extent is split-ticket voting by certain shareholders facilitated by proxy solicitors and parties to the contested election? Please provide any data to the extent available.

65. We are not proposing to require investment companies to use universal proxies at this time. Should the use of universal proxies be mandatory as applied to investment companies generally, or should their use be mandatory only with respect to certain types of investment companies (e.g., only to open-end funds or only to closed-end funds or only BDCs)? Why or why not? Should any aspects of the proposed universal proxy system be modified to account for the unique characteristics of investment companies? If so, what modifications should be made? Would a universal proxy system affect funds and BDCs differently than operating companies? If so, how? How would a universal proxy system affect unitary or cluster boards?

66. Alternatively, should the use of universal proxies be optional as applied to investment companies generally, or should their use be optional only with respect to certain types of investment companies (e.g., only to open-end funds or only to closed-end funds or only BDCs)? Why or why not? Instead, should a hybrid system be applied to investment companies generally, or only with respect to certain types of investment companies (e.g., only to open-end funds or only to closed-end funds or only to BDCs)

where the use of universal proxies in contested elections is mandatory for one party but optional for another? Why or why not? We are interested in the views of both investment companies and shareholders as to how frequently they would choose to use a universal proxy under a mandatory, optional or hybrid approach and why.

67. Would the frequency of contested elections increase or decrease for investment companies under a universal proxy system and why? Please provide any data to the extent available. Would the frequency of contested elections vary depending on whether an investment company is an open-end fund, closed-end fund, or BDC, and why? Would the frequency vary depending on whether the use of universal proxies is under a mandatory, optional, or hybrid approach? Why or why not?

68. To what extent do investment companies generally, and open-end funds, closed-end funds and BDCs in particular, experience exempt solicitations under the current proxy rules? Please provide any data to the extent available. Should investment companies generally, and open-end funds, closed-end funds and BDCs in particular, be required to use universal proxies in non-exempt solicitations only, or in some or all exempt solicitations? Why or why not?

69. To what extent do investment companies generally, and open-end funds, closed-end funds and BDCs in particular, have bylaws that contain advance notice provisions? Please provide any data to the extent available. Should special rules regarding notice apply for investment companies that do not regularly hold annual meetings (i.e., open-end funds)? For example, should such investment companies be required to provide a specific date by which a dissident must provide the investment company with the names of the nominees for whom it intends to solicit proxies? If so, how should such date be provided to investors? For example, should an investment

company be required to disclose the date via disclosure on its website or via a press release? Would that disclosure be sufficient, or should such date also be provided in a filing made with the Commission (e.g., in the investment company's annual or semi-annual report to shareholders, a report on Form N-CSR, etc.)? Although funds generally are not required to file reports on Form 8-K, should they be required to file a report on Form 8-K providing the notice date? Should funds instead be permitted to provide this disclosure in a different manner? If so, what manner of disclosure would be appropriate?

III. GENERAL REQUEST FOR COMMENT

We request and encourage any interested person to submit comments regarding the proposed rule amendments, specific issues discussed in this release, and other matters that may have an effect on the proposed rules. We request comment from the point of view of registrants, shareholders and other market participants. We note that comments are of particular assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments, particularly quantitative information as to the costs and benefits. If alternatives to the proposals are suggested, supporting data and analysis and quantitative information as to the costs and benefits of those alternatives are of particular assistance. Commenters are urged to be as specific as possible.

Request for Comment

70. We preliminarily believe that universal proxy cards are not needed for special meetings of shareholders because historically shareholders have not been presented with an opportunity to vote on competing slates of nominees at special meetings. Therefore, we are not proposing to require universal proxy cards at a special meeting of shareholders. Should they be required at a special meeting? Why or why not?

71. We are proposing to mandate the use of universal proxy cards to allow shareholders to vote by proxy in a manner that more closely resembles how they can vote in person at a shareholders' meeting based on our belief that replicating the vote that could be achieved at the meeting facilitates the "fair corporate suffrage" that Congress intended our proxy rules to effectuate. Are there reasons our rules should not seek to replicate the vote that could be achieved at a shareholder meeting in this manner? Would replicating the vote that could be achieved at a shareholder meeting appropriately ensure that shareholders using the proxy process are able to fully and consistently exercise their state law voting rights? Are there other means to achieve this objective?

72. If a dissident provides a notice of intent to solicit proxies in support of nominees other than the registrant's nominees but fails to fulfill other requirements, such as filing a definitive proxy statement or the minimum solicitation requirement, should there be consequences for the dissident? If so, what should those consequences be and in what circumstances should they apply? Should the dissident be deemed ineligible to use universal proxy for a period of time in the future?

73. Would our proposed rules affect retail investors differently than institutional investors?[199] If so, how?

74. Does mandating a universal proxy card give rise to any conflicts or other concerns under state law? Would those concerns exist if we were instead to permit but not mandate a universal proxy card? For example, many state laws permit cumulative voting for directors. Are there any concerns relating to cumulative voting under the proposed universal proxy system?

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[199] See infra notes 289-290.

75. Does the proposed universal proxy system give rise to any conflicts or other concerns under existing stock exchange rules?

IV. ECONOMIC ANALYSIS

A. Background

As discussed above, we are proposing amendments to our proxy rules to address concerns over the inability of shareholders using the proxy system to vote for the combination of candidates of their choice in a contested election. The amendments would apply to contested elections at registrants that are subject to our proxy rules other than funds and BDCs. To allow for the inclusion of all candidates on a proxy card, we are proposing to amend Rule 14a-4(d)(4) such that each party to a contest need not seek consent from the nominees of the other party to include them on its card. The proposed amendments would also require the use of a universal proxy in all contested elections with competing slates of director nominees. Under these amendments, each party in such a contest would continue to use its own proxy card to solicit[200] votes for its director candidates. However, in contrast to current requirements, each proxy card would be required to include all candidates nominated by the registrant, by a dissident in the proxy contest, or by another party under a provision of state or foreign law or a company's governing documents.

We are proposing these amendments to allow shareholders voting by proxy to choose among director nominees in an election contest in a manner that more closely reflects the choice that could be made by voting in person at a shareholder meeting. Shareholders voting in person in a contested election with competing slates of nominees

[200] See 17 CFR 240.14a-1(l) for definitions of the terms "solicit" and "solicitation." Parties to a contested election may use a variety of approaches to request that a shareholder authorize them to cast the shareholder's votes at the shareholder meeting.

are able to choose among all of the duly nominated candidates. In contrast, because of the bona fide nominee rule and state law provisions regarding the submission of multiple proxies,[201] currently shareholders voting by proxy are typically limited to voting only for registrant nominees or voting only for the dissident's nominees (or, in the case of certain short slate elections, for the dissident's nominees and certain registrant nominees chosen by the dissident).[202] If shareholders wish to vote for a combination of nominees across the two slates, they generally must do so in person by attending or sending a representative to the shareholder meeting and incurring the costs of doing so. In some cases, parties such as proxy solicitors may make arrangements for one or more individuals to attend a meeting on behalf of certain shareholders in order to facilitate split-ticket voting. However, many shareholders, particularly retail shareholders or those who do not hold a large stake in the registrant, might not be willing or able to bear the costs of voting in person and may not have access to other arrangements. These shareholders may, therefore, not be able to vote for their preferred selection of candidates.

Universal proxies would allow shareholders to vote for any combination of nominees when voting their shares by proxy in advance of the meeting, which we

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201 As discussed above, the bona fide nominee rule currently only allows a party to include a nominee of its opponent on its own proxy card if that nominee has consented to being named on that party's proxy card, which, in practice, generally prevents either party from including nominees of its opponent on its proxy card. Also, under state law, a later-dated proxy card generally invalidates any earlier-dated proxy card, effectively limiting a shareholder to voting on a single proxy card.

202 Though our economic analysis focuses on contests between a registrant and a single dissident for ease of exposition, we believe that the economic effects discussed below would also apply to contests involving more than one dissident. Election contests with more than one soliciting dissident are uncommon. For example, the staff has identified only one initiated proxy contest in 2015 that involved more than one dissident with separate slates of nominees.

understand is generally the way in which the vast majority of shares are voted.[203] For shareholders who would otherwise incur incremental costs to vote for a combination of candidates that could not be voted for by proxy, such as by attending the meeting in person, universal proxies would result in direct cost savings. Universal proxies would also enable shareholders who want to split their vote but would not choose to incur additional costs to be able to vote for their preferred combination of nominees to do so without incurring additional costs.

The proposed amendments would require each party soliciting for a competing slate in an election of directors to provide shareholders with a universal proxy card that includes the names of all duly-nominated candidates. Though the parties would be required to include the names of all parties' nominees on their proxy cards, they would not be required to provide background information about their opponents' nominees in their proxy statements.[204] Under the proposal, registrants and dissidents would be required to use universal proxies in all contested elections with competing slates of nominees.[205] Universal proxies would not be required in the case of exempt solicitations[206] or in cases in which shareholders would not have the ability to affirmatively vote for both dissident and registrant nominees at the meeting.[207] In the

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203 We do not have data that would allow us to quantify the proportion of votes submitted by proxy relative to the proportion submitted in person at a shareholder meeting. We request such data below.

204 The proposed mandatory universal proxy system differs in this and other respects from proxy access. See supra Section II.B.1.a.

205 See supra note 20.

206 Exempt solicitations, such as solicitations in which the person is not acting on behalf of the registrant and the aggregate number of persons solicited is not more than ten, are discussed in Section IV.B.3 infra.

207 For example, the proposed amendments would not require universal proxies in cases where shareholders are presented with proposals to remove incumbent directors and replace them with dissident nominees (rather than the ability to affirmatively vote for dissident or registrant

case of solicitations that do not present competing director nominees, such as those that involve the solicitation of votes against certain nominees or for proposals that do not relate to director nominees, the proposed amendments would provide proponents with the flexibility to include the names of some or all of the registrant nominees on their proxy cards and solicit votes for (or against) those individuals but would not require them to do so.

The nomination and election of directors by shareholders represents a fundamental governance mechanism that can mitigate conflicts of interest between shareholders and management. While the most direct effect of the proposed amendments would be to permit shareholders greater choice when voting by proxy in contested director elections, the proposed amendments may also have broader impacts on corporate governance and the relationship between shareholders and management. For reasons discussed below,[208] it is difficult to predict the likely extent or direction of these broader potential effects, but we cannot rule out the possibility that they could be significant.[209] For example, enabling split-ticket voting could lead to a greater number of boards that are

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nominees), as is generally the case when a dissident uses a special meeting to try to obtain board seats for its candidates. The proposed amendments would also not require universal proxies in the case of "vote no" campaigns (the solicitation of votes against certain registrant nominees) or for proposals that do not relate to director nominees. Special meeting contests and "vote no" campaigns are discussed further in Section IV.B.3. infra.

208 See Section IV.D.

209 We are unaware of any empirical studies that find that universal proxies would have significant effects on corporate governance and the relationship between shareholders and management. One study finds that a universal proxy is unlikely to lead to more proxy contests or to greater success by special interest groups. See Scott Hirst, Universal Proxies, working paper (Aug. 24, 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805136 ("Hirst study"). However, we note that this study relies on several critical assumptions that might not be reliable. See infra note 317.

composed of a mix of registrant-nominated[210] and dissident-nominated directors, which may affect the effectiveness of boards, either positively or negatively. Additionally, mandating the use of universal proxies by registrants as well as dissidents—which, in practice, would likely result in the names of dissident nominees being disseminated via registrant proxy cards to all shareholders—may provide potential dissidents with a new means of generating publicity for alternative nominees or for the broader concerns behind a contest at a relatively low cost, which could change the nature of interactions between potential dissidents and management. These and other potential effects, as well as possible mitigating factors, are discussed in detail below.

The proposed amendments would impose certain other related requirements in the case of contested elections with competing slates of nominees. In order to provide advance notice of the requirement to use a universal proxy, the proposed amendments would require that dissidents in all such contested elections provide the names of the nominees for whom they intend to solicit proxies to registrants no later than 60 days before the anniversary of the previous year's annual meeting date, and that registrants provide notice of their nominees to dissidents no later than 50 days before that anniversary date. To provide shareholders timely access to information about all nominees, a dissident would also be required to file its definitive proxy statement by the later of 25 days prior to the meeting or five days after the registrant files its definitive proxy statement. Additionally, under the proposed approach, dissidents in all contested elections with competing slates of nominees would be required to solicit the holders of

[210] For ease of exposition, we refer throughout this economic analysis to the nominees of the board or its nominating committee as the nominees of the registrant and, in total, as the registrant slate. See supra note 28.

shares representing at least a majority of the voting power of shares entitled to vote on the election of directors.[211]

Finally, the proposed amendments would impose certain presentation and formatting requirements for universal proxy cards to help ensure that the names of all parties' nominees and the total number of nominees for whom a shareholder can vote are clearly and fairly presented on the universal proxy card. Further, to address concerns about inaccuracies and ambiguous language in proxy statements and on proxy cards with respect to director elections in general, specifically with regard to how certain kinds of votes will be counted and the standards by which outcomes will be determined, we are proposing amendments that would specify how such information must be presented in proxy statements and on proxy cards.[212]

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

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211 Because a soliciting party is required to disseminate a definitive proxy statement to the shareholders being solicited (except in the case of an exempt solicitation), the proposed minimum solicitation requirement may affect the costs of engaging in contests for dissidents that would not otherwise have solicited the holders of shares representing a majority of the voting power in the election, as discussed in Section IV.D.2 infra. Proxy statement dissemination methods are discussed in Section IV.B.2. infra.

212 Two rulemaking petitions received by the Commission raised concerns about the quality of voting standard disclosure. See CII letter and Carpenters letter, supra note175.

The discussion below addresses the economic effects of the proposed amendments, including their anticipated costs and benefits, as well as the likely effects of the proposed amendments on efficiency, competition, and capital formation. We also analyze the potential costs and benefits of the principal alternatives to what is proposed. We request comment on all aspects of the costs and benefits of the proposed approach and of possible alternatives. We also request comment on any effects the proposed amendments or possible alternatives may have on efficiency, competition and capital formation.

B. Baseline

To assess the economic impact of the proposed amendments, we are using as our baseline the current state of the proxy process. Our baseline includes existing Commission rules, state laws, and corporate governing documents that jointly govern the ability to solicit proxies in support of director nominees other than the registrant nominees and the manner in which contested elections are conducted. This section discusses the parties involved in director election contests under the current legal framework, current proxy voting practices, and the means available to shareholders to influence the composition of boards of directors.

1. Affected Parties

We consider the impact of the proposed amendments on shareholders, registrants, dissidents in contested elections (who are typically also shareholders), and directors.

a. Shareholders

Different types of shareholders exhibit different degrees of involvement in the proxy process. In particular, there are, on average, large differences in involvement by

institutional investors compared to retail investors.[213] Institutional and retail investors also face different levels of difficulty and resource constraints to vote for their preferred choices of nominees in contested director elections under current rules.[214] As a result, the proposed amendments are likely to have a differential impact with respect to the costs of voting and feasible voting choices for these two types of shareholders.

We estimate that the average (median) number of beneficial shareholder accounts for U.S. public companies is 30,011 (4,404).[215] The number of accounts varies significantly by company market capitalization: the average (median) number of beneficial shareholder accounts is 3,208 (1,369) for companies with less than $300 million in market capitalization, 9,764 (5,678) for companies with between $300 million and $2 billion in market capitalization, 28,206 (15,530) for companies with between $2 billion and $10 billion in market capitalization, and 188,176 (63,607) for companies with market capitalization above $10 billion.[216] Among all companies, we estimate that 91 percent of account holders are retail investors.[217] For U.S. public companies that held their annual meetings in the main 2015 proxy season (i.e., between January 2015 and June 2015), a study by a proxy services provider found that retail investors held

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213 See Broadridge et al., Proxy Pulse 2015 Proxy Season Wrap-up (3d ed. 2015) ("Broadridge Proxy Pulse"), available at http://media.broadridge.com/documents/ProxyPulse-Third-Edition-2015.pdf.

214 See infra Section IV.B.2.d for a discussion on different shareholders' current ability to arrange split-ticket voting.

215 Based on industry data provided by a proxy services provider. Note that an individual shareholder may have more than one account, so the number of beneficial shareholders likely is lower than the number of beneficial shareholder accounts. For the purpose of estimating costs related to distribution of proxy materials, the number of accounts is the more relevant number because dissemination costs such as intermediary and processing fees apply on a per account basis per NYSE Rule 451. The data is based on domestic companies that held shareholder meetings between July 1, 2014 and June 30, 2015, excluding meetings that involved proxy contests.

216 Id.

217 Id.

approximately 32 percent of shares held in brokerage accounts and institutional investors held 68 percent.[218] The study also finds that the percentage of ownership by retail investors varies significantly with company size, and was estimated to be 72 percent in companies with less than $300 million in market capitalization, 35 percent in companies with between $300 million and $2 billion in market capitalization, 24 percent in companies with between $2 billion and $10 billion in market capitalization, and 28 percent in companies with market capitalization above $10 billion.

Retail and institutional shareholders exhibit very different voting behavior. In the main 2015 proxy season, while institutional investors voted 91 percent of their shares, retail investors only voted 28 percent of their shares.[219] The voting propensity of retail investors does not vary significantly by the size of the registrant.[220] In contrast, institutional investors vote a significantly smaller portion of their shares in registrants with less than $300 million in market capitalization (72 percent) than in larger registrants (91 to 93 percent),[221] which may be a function of the types of institutions that invest in companies of different sizes.

Retail and institutional investors may also have differential access to resources that can be expended in order to cast a vote, and may have different levels of incentive to expend such resources. In general, we expect retail investors to face greater resource constraints than institutional investors. Differences across shareholders in the ability to

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218 See Broadridge Proxy Pulse, at 2.

219 Id at 4. We acknowledge that the voting participation of retail shareholders in particular could increase in the case of a contested election, because of greater media coverage and expanded outreach efforts, but we do not currently have data that would allow us to separately estimate the degree of retail participation in contested elections.

220 Id.

221 Id.

take advantage of different approaches to voting and in the resources expended on voting are discussed in more detail in Sections IV.B.2.d and IV.D.1 below.

b. Registrants

The proposed amendments would apply to all registrants that have a class of equity securities registered under Section 12 of the Exchange Act and are thereby subject to the federal proxy rules, but would not apply to funds and BDCs. The proposed amendments would not apply to foreign private issuers or companies with reporting obligations only under Section 15(d) of the Exchange Act, which are not subject to the federal proxy rules. We estimate that approximately 6,265 registrants would be subject to the proposed amendments (including approximately 4,198 Section 12(b) registrants and 2,067 Section 12(g) registrants).[222]

There is substantial variation across registrants in characteristics such as director ownership, bylaws pertaining to director elections, and use of a dual-class share structure, that may affect the degree to which different registrants are affected by the proposed amendments.

Incumbent Management Ownership

We would expect that incumbent managers (senior executives and directors) would support the slate of directors nominated by the registrant rather than a slate nominated by outside dissidents, and vote accordingly either at the annual meeting or by proxy using the registrant's card.[223] The proposed amendments to the proxy rules are unlikely to change incumbent managers voting behavior in this regard. We therefore

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222 These estimates are based on staff review of EDGAR filings in calendar year 2015.

223 Note that in the case of a dissident who is also an insider (such as an incumbent director), this may not be the case.

think the percentage of total voting power held by a registrant's incumbent management is likely to have an important effect on the potential impact of these amendments.

Table 1 below reports estimates of the average combined vote ownership by incumbent managers for a broad sample of 3,911 potentially affected registrants, as well as for several size-related sub-samples of registrants: those included in the S&P 500 index ("large-cap stocks"), in the S&P 400 index ("mid-cap stocks"), in the S&P 600 index ("small-cap stocks"), and outside the S&P 1500 index that is composed of these three indices (and which tend to be smaller than those registrants in the S&P 1500). The average (median) percentage is 15.1 percent (6.9 percent) for all registrants, and this percentage is greatest for registrants outside the S&P 1500 index. We also estimate the percentage of registrants for which incumbent managers hold a majority of the voting power. Overall, incumbent managers hold a majority of votes in 7.7 percent of registrants. This percentage ranges from 1.4 percent for S&P 500 registrants to 10.9 percent for non-S&P 1500 registrants.

The data in Table 1 indicates that to the extent incumbent managers tend to vote for the registrant's slate of director nominees in contested elections, the impact of such votes is likely to be significant especially in the non-S&P 1500 category of smaller registrants.

Table 1. Incumbent Management Vote Ownership of Registrants Subject to Proxy Rules[224]

	Incumbent management vote ownership (% of total voting power)				
	Mean	25th percentile	Median	75th percentile	Percentage with majority ownership
All registrants	15.1	2.4	6.9	20.3	7.7
S&P 500 registrants	4.4	0.5	1.1	2.9	1.4
S&P 400 registrants	6.9	1.4	2.5	5.4	3.2
S&P 600 registrants	9.7	2.6	4.9	10.4	2.7
Non-S&P 1500 registrants	19.7	4.5	11.6	27.9	10.9

Governance Structure

Registrants' governance characteristics may affect the incidence and outcomes of proxy contests currently as well as the effects, if any, of potential changes in the proxy rules on the incidence and outcomes of proxy contests. For example, some registrants have adopted a staggered board structure, in which only some directors are up for re-election in any given year. Because in the typical staggered board each director is only up for election once every three years, a staggered board prevents a majority of directors from being replaced via a shareholder vote in a single year. In addition, a staggered board makes it harder to replace a particular director in the years he or she is not up for election. Therefore, the presence of a staggered board would mitigate the impact on board composition of any proposed amendments to the proxy rules by prolonging the

[224] Estimates based on staff analysis of director and senior executive vote ownership data from Institutional Shareholder Services Inc. ("ISS") as of calendar year 2014. This data is available for 3,911 of the potentially affected registrants and may include ownership through options exercisable within 60 days. The sample represents approximately two-thirds of potentially affected registrants. It is our understanding that the registrants for which data is missing in the ISS database tend to be the smallest registrants in terms of market capitalization, and therefore the data presented may not be representative for these registrants. In particular, we believe it is likely that incumbent management ownership for this group of registrants is on average even greater than for the non-S&P 1500 registrants listed in Table 1.

time over which any changes in board composition would occur. We estimate that approximately 43 percent of registrants have a staggered board. [225] Similar to incumbent management ownership, this percentage varies substantially across market capitalization categories: approximately 18 percent for S&P 500 registrants, 44 percent for S&P 400 registrants, 48 percent for S&P 600 registrants, and 47 percent for non-S&P 1500 registrants.[226]

Cumulative voting may increase the ability of minority shareholders to elect a director and may therefore also be important to consider when evaluating the potential effects of the proposed amendments on proxy contests. Shareholders with cumulative voting rights are permitted to cast all of their votes for a single nominee for the board of directors when the company has multiple openings on its board.[227] For this reason, in a contested election, cumulative voting would generally make it easier for at least one of the dissident's nominees to gather enough votes to be elected.[228] We estimate that 4.9 percent of registrants have cumulative voting. This percentage also varies across market capitalization categories: approximately 2.9 percent for S&P 500 registrants, 7.1 percent

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225 Estimates based on staff analysis of board characteristics data from ISS as of calendar year 2014. This data is available for 3,918 of the potentially affected registrants.

226 Id.

227 For example, if the election is for four directors and a shareholder holds 500 shares (with one vote per share), under the straight voting method she could vote a maximum of 500 shares for each candidate. With cumulative voting, she could choose to allocate all 2,000 votes for one candidate, 1,000 each to two candidates, or otherwise divide the votes however she desired.

228 See, e.g., David Ikenberry & Josef Lakonishok, Corporate Governance through the Proxy Contest: Evidence and Implications, 66 J. Bus. 405, 413 (1993), (finding that dissidents are successful in obtaining at least one seat in 41.3 percent of contests held under straight voting and that this increases to 71.9 percent in contests using cumulative voting).

for S&P 400 registrants, 5.8 percent for S&P 600 registrants, and 4.7 percent for non-S&P 1500 registrants.[229]

Registrants' governing documents generally provide that one of two main standards be applied to the election of directors: either a majority voting standard or a plurality voting standard. Under a majority voting standard, directors are elected only if they receive affirmative votes from a majority of the shares voting or present at the meeting, and shareholders can vote "for" each nominee, "against" each nominee, or "abstain" from voting their shares. In contrast, under a plurality voting standard, the nominees receiving the greatest number of "for" votes are elected, and shareholders can withhold votes from specific nominees but cannot vote "against" any of them. We understand that even in those cases in which a majority standard is in place in director elections, registrants tend to have a carve-out in the bylaws (or charter) that applies a plurality standard in contested director elections. In the case of a majority voting standard in a contested election, there is a risk that some or all of the nominees receiving the highest relative shareholder support may still not win a majority of votes cast. This risk is especially high when nominees only appear on either the registrant's or the dissident's card, which is generally the case under the current proxy rules. Based on data that we have available for potentially affected S&P 1500 registrants, we estimate that approximately 55 percent have a majority standard in director elections, but also that in

[229] Estimates based on staff analysis of board characteristics data from ISS as of calendar year 2014. This data is available for 3,965 of the potentially affected registrants. We do not have ready access to this data for other registrants.

approximately 87 percent of cases in which a majority voting standard is in place, a plurality standard applies in the case of a contested election.[230]

Another governance characteristic that can affect the impact of changes to the proxy system is the presence of multiple share classes. Some registrants have adopted a dual-class share structure, where one class of shares has greater voting rights than the other. In these regimes, insiders tend to hold shares with greater voting rights, effectively entrenching the control of the company in the hands of these insiders and reducing other shareholders' influence in matters formally put to a vote, including director elections.[231] Thus, the proposed amendments to the proxy rules would be less likely to have an effect on voting outcomes in registrants with a dual-class share structure. We have access to data on the use of a dual-class structure for potentially affected S&P 1500 registrants and estimate that approximately 6 percent of these registrants have a dual-class share structure.[232]

c. Dissidents in Contested Elections

The dissidents in contested elections are typically shareholders of the registrant, but may fit into one of several categories. A common category of dissidents is activist hedge funds that take a proactive approach to the companies in their investment portfolios by trying to influence the management and decision-making through various

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230 Estimates based on staff analysis of governance data for S&P 1500 companies from ISS as of calendar year 2014.

231 See, e.g., Paul A. Gompers, Joy L. Ishii & Andrew Metrick, Extreme Governance: An Analysis of Dual-Class Firms in the United States, 23 Rev. Fin. Stud. 1051, 1056 (2009) (finding that for a sample of public U.S. dual-class companies between 1995-2002, 85 percent tend to have at least one untraded class of common stock, and that insiders on average own approximately 60 percent of the voting rights in dual-class companies, primarily through ownership of the class with superior voting rights).

232 Estimates based on staff analysis of governance data for S&P 1500 companies from ISS as of calendar year 2014. We do not have ready access to this data for other registrants.

means, such as proxy contests. Dissidents may also be former insiders or employees of the registrant. A corporation may also contest the election of directors at a registrant when, for example, it is seeking to acquire the registrant but the registrant's current board does not approve of the transaction. In some cases, a group of dissatisfied shareholders other than activist hedge funds jointly contests an election. Section IV.B.2.a below provides further information about the relative frequency of different types of dissidents.

d. Directors

We note that reputational concerns may be an important consideration for directors and potential directors.[233] Research has found that proxy contests may affect the reputation of incumbent directors, in that such contests appear to have a significant adverse effect on the number of other directorships they hold.[234] Therefore, any changes to the proxy rules that would increase the likelihood of proxy contests at any given registrant could reduce the willingness of current and potential directors to be nominated to serve on the board in the future.

2. Contested Director Elections

A shareholder voting by proxy is generally limited to voting for either the registrant slate or the dissident slate (and, when used to round out a slate, certain

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233 See, e.g., Ronald Masulis & Shawn Mobbs, Independent Director Incentives: Where Do Talented Directors Spend Their Limited Time and Energy?, 111 J. Fin. Econ 406, 426 (Feb. 2014) (concluding that director reputation is a powerful incentive for independent directors).

234 See Vyacheslav Fos & Margarita Tsoutsoura, Shareholder Democracy in Play: Career Consequences of Proxy Contests, 114 J. Fin. Econ. 316, 326 (2014) (finding that, following a proxy contest, all directors in the targeted company experience on average a significant decline in the number of their directorships, not only in the targeted company, but also in other, non-targeted companies).

registrant nominees chosen by the dissident).[235] In contrast, a shareholder that attends an annual meeting may vote for any combination of registrant and dissident nominees.

a. Data Regarding Proxy Contests

We identify 102 proxy contests[236] that were initiated through the filing of preliminary proxy statements by dissidents in calendar years 2014 and 2015 (51 in 2014 and 51 in 2015) across all registrants subject to the proxy rules other than funds and BDCs.[237] On a yearly basis, this number of contests is similar to the average yearly number of proxy contests since the middle of the 1990s that has been reported in past studies.[238] Of the proxy contests identified in 2014 and 2015, we estimate that 72 (37 in 2014 and 35 in 2015) involved an election contest with competing slates of director nominees at an annual meeting of shareholders.[239] In one case, there were two dissidents

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235 While it may be possible for a registrant to require a dissident's nominees to consent to be named on the registrant's card pursuant to the director questionnaires required under a registrant's advance notice bylaw provisions, the staff has seen this tactic used only in two contests in recent years, one of which did not ultimately proceed to a vote. This option is not available to the dissident. In addition, we are not aware of any recent cases where one party's nominees were included on the opposing party's proxy card based on their voluntary consent.

236 This total number of proxy contests includes all cases in which a proponent or dissident initiated a "solicitation in opposition" to the registrant, whether in relation to an election of directors or with respect to another issue. A solicitation in opposition includes (i) any solicitation opposing a proposal supported by the registrant; and (ii) any solicitation supporting a proposal that the registrant does not expressly support, other than a shareholder proposal included in the registrant's proxy material pursuant to Rule 14a-8. See 17 CFR 240.14a-6(a), Note 3. This total number of proxy contests does not include exempt solicitations which are discussed in Section IV.B.3. infra.

237 Based on staff review of EDGAR filings in calendar years 2014 and 2015.

238 See, e.g., Vyacheslav Fos, The Disciplinary Effects of Proxy Contests, Manag. Sci., at 1 (July 2015), (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705707 ("Fos Study") (estimating that the average number of proxy contests was 56 per year from 1994 through 2012). This rate of proxy contests is higher than in earlier years. See, e.g., Harold Mulherin & Annette Poulsen, Proxy Contests and Corporate Change: Implications for Shareholder Wealth, 47 J. Fin. Econ. 279, 287 (1998) ("Mulherin & Poulsen Study") (estimating an average of 17 proxy contests per year from 1979 through 1994).

239 The 30 proxy contests identified in 2014 and 2015 that did not represent election contests with competing slates of candidates at an annual meeting of shareholders include consent solicitations for the removal and election of directors at a special meeting, contests involving "vote no" campaigns, and proposals on issues other than director nominees. Special meeting elections and "vote no" campaigns are discussed in Section IV.B.3 infra.

with separate slates of nominees. Approximately 26 percent (19 cases out of 72) of the contests with competing slates were contests for majority control of the board. This percentage is somewhat larger than the percentage documented by a study of contested elections from 1994 to 2012, which found that approximately 22 percent of contested elections were for majority control.[240] Most of the contests with competing slates were in smaller to midsize companies: only four were S&P 500 companies and 46 were outside the S&P 1500.

A study of U.S. proxy contests from 1994-2012 found that targets of proxy contests have smaller market capitalization relative to other publicly traded companies, have lower ratios of market value to book value, and have had poor stock performance. Importantly for understanding the implications of the proposed amendments, companies subject to proxy contests were also found to have higher percentages of institutional and activist hedge fund ownership in comparison to non-targets.[241] The same study also found that dissidents in proxy contests are most often activist hedge funds, followed by groups of shareholders, other corporations, and former insiders or employees.[242] In particular, the study notes that the proportion of contests sponsored by activist hedge funds has increased from 38 percent in the 1994-2002 period to 70 percent in the 2003-

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240 See Fos Study, at 11.

241 Id. at 19. We note that the sample in this study includes proxy contests concerning all issues and not just those involving contested director elections. However, director election contests constitute 88 percent of the sample. Id. at 37.

242 Id. at 38 (finding that, for proxy contests including contested elections as well as a much smaller number of issue contests from 1994 to 2012, 57 percent of dissidents were activist hedge funds, 20 percent were groups of shareholders, 11 percent were corporations, and 11 percent were prior insiders and employees).

2012 period.[243] Our staff's review of the filings for the 72 proxy contests involving elections initiated in 2014 and 2015 found that activist investors (mainly hedge funds) were dissidents in more than 86 percent of the contests, whereas former or current insiders and employees or groups of shareholders made up the remainder of the dissidents.

b. Notice, Solicitation, and Costs of Proxy Contests

The Commission's proxy rules do not currently require dissidents to provide notice to registrants of their intention to solicit votes for their nominees. However, many registrants have advance notice bylaws that apply in proxy contests.[244] For example, one common form of advance notice bylaw provision requires dissidents to provide notice of their intent to nominate candidates during the 30-day period ending no later than 90 days before the anniversary of the previous year's meeting date.[245] Further, we understand that the latest date on which notice may be provided under advance notice bylaws generally ranges from 60 to 120 days before the anniversary of the meeting date.[246]

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243 Id. at 13. The study also notes that all the other categories of sponsors declined over the same time. In particular, corporations sponsored 20 percent of contests in the 1994-2002 period but only 5 percent in the 2003-2012 period.

244 An advance notice bylaw can generally be waived by a registrant's board of directors at their discretion, though we do not have data that would allow us to determine the frequency with which such bylaws are waived. If not waived, such bylaws may also be challenged in court (such as in the case of "inequitable circumstances"). See, e.g., AB Value Partners, L.P. v. Kreisler Mfg. Corp., No 10434-VCP, 2014 WL 7150465 (Del Ch. Dec. 16, 2015).

245 See supra note 114.

246 See, e.g., Kevin Douglas, Stephen Hinton & Eric Knox, Advance Notice Bylaws: The Current State of Second Generation Provisions, Deal Lawyers (July-Aug. 2011), at 15, 19 (finding that, in a review of 100 Delaware corporations that had amended their advance notice bylaws since 2008, including large-cap, mid-cap and small-cap companies, 80 percent of the surveyed bylaws had a window period of 30 days and, among those that had a window period of 30 days tied to the date of the previous year's meeting, 84 percent of those provide for a notice period of 90-120 days prior to the meeting, 9 percent provide for a notice period 60-90 days prior to the meeting and 7 percent provide for a notice period of 120-150 days prior to the meeting).

Advance notice bylaws are common among registrants. For example, at the end of 2014, 95 percent of S&P 500 registrants had advance notice provisions, and 90 percent of the Russell 3000 had such provisions.[247] Our staff's review of filings related to director election contests initiated in 2014 and 2015 found that approximately 88 percent of dissidents either announced or preliminarily communicated their intent to nominate directors at least 60 days before the annual meeting date. Further statistics on the distribution of the timing for initial announcements and filing of preliminary proxy statements are shown in Table 2 below.

Table 2. Timing of initiation of election contests and filing of preliminary proxy statements relative to meeting dates, in 2014-2015[248]

	Percentage						
	at least 45 days	at least 60 days	at least 90 days	Mean	Median	Min	Max
Days between first announcement or communication of election contest intent and annual meeting date	94.3%	88.6%	62.9%	107	93	29	213
Days between dissident filing preliminary proxy statement and annual meeting date	71.4 %	44.3%	10.0%	60	56	23	203

While dissidents in proxy contests are required to make their proxy statements publicly available via the EDGAR system, they are not currently subject to any requirements as to how many shareholders they must solicit. When dissidents actively solicit shareholders they have the choice of sending shareholders a full package of proxy

247 See supra note116.

248 Based on staff analysis of the contested elections sample. See supra note 115.

materials ("full set") or sending only a one-page notice informing them of the online availability of proxy materials ("notice and access" or "notice-only"). We estimate that approximately 60 percent of dissidents solicited all shareholders in a sample of recent proxy contests.[249] Among those recent contests in which dissidents did not solicit all shareholders, the median percentage of shares held by solicited shareholders was approximately 95 percent of the outstanding voting shares of the registrant.[250] We estimate that in approximately 97 percent of these proxy contests the dissident solicited shareholders representing more than 50 percent of the outstanding voting shares.[251] Furthermore, dissidents in the contests discussed above sent full sets of proxy materials to each of the shareholders solicited.[252] The use of the full set delivery method may be driven by findings that such solicitations are associated with a higher rate of voting than notice-only access solicitations.[253]

In proxy contests, both registrants and dissidents incur costs of solicitation.[254] These costs may include, for example, fees paid to proxy solicitors, expenditures for attorneys and public relations advisors, and printing and mailing costs. We understand that for registrants the costs of solicitation generally exceed the costs associated with a

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249 Based on industry data provided by a proxy services provider for a sample of 35 proxy contests from June 30, 2015, through April 15, 2016.

250 Id.

251 Id.

252 Id.

253 See, e.g., Broadridge, Analysis of Traditional and Notice & Access Issuers: Issuer Adoption, Distribution and Voting for Fiscal Year Ending June 30, 2013 (Oct. 2013), available at http://media.broadridge.com/documents/Broadridge-6-Yr-NA-Stats-Report-2013.pdf.

254 In some cases, dissidents may seek reimbursement of their expenses from registrants. Such potential reimbursement is governed by state law and is more likely in the case of a successful proxy contest. The proxy rules require dissidents to disclose whether reimbursement will be sought from the registrant, and, if so, whether the question of such reimbursement will be submitted to a vote of shareholders. See 17 CFR 240.14a-101, Item 4(b)(5).

shareholder meeting in the absence of a contested election. Both dissidents and registrants are required to provide estimates of the costs of solicitation in their proxy statements. As shown in Table 3 below, based on a review of proxy contests initiated in 2014 and 2015, the median reported estimated total costs were approximately $800,000 for registrants and approximately $250,000 for dissidents.

Table 3 Reported estimates of solicitation expenses in election contests in 2014 and 2015[255]

	Mean	Median	Minimum	Maximum
Estimated Total Costs:				
Registrant (beyond usual costs)	$2,092,096	$800,000	$25,000	$15,400,000
Dissident	$741,733	$250,000	$25,000	$8,000,000
Estimated Fees Paid to Proxy Solicitor:				
Registrant (beyond usual costs)	$296,016	$100,000	$6,500	$2,000,000
Dissident	$188,687	$100,000	$10,000	$1,485,895

A study of the solicitation costs in proxy contests from 2006 to 2012 found that the total estimated solicitation costs reported by registrants ranged from approximately $20,000 to approximately $20 million, and that the estimated costs reported by registrants tended to increase with their market capitalization. In contests where costs were disclosed by both parties, the study found that the median estimates of total solicitation costs was $477,500 for registrants and $275,000 for dissidents.[256] The largest recorded estimate of total solicitation costs for a dissident in this period was approximately $9 million.[257]

Beyond these estimated solicitation expenses, proxy contests may be associated with other indirect costs, such as the cost of management or dissident time spent in the

255 Based on staff analysis of EDGAR filings in calendar years 2014 and 2015.

256 See Adam Kommel, Proxy Fight Fees and Costs Now Collected by SharkRepellent: MacKenzie Partners and Carl Icahn Involved in Largest Fights, SharkRepellent.net (Feb. 20, 2013), available at https://www.sharkrepellent.net/request?an=dt.getPage&st=undefined&pg=/pub/rs_20130220.html

257 Id.

process of conducting the contest and expenses associated with any discussions held between management and the dissident(s). We do not have data on these indirect costs. One study that considers the cost of earlier as well as later stages of engagement between management and activist hedge fund dissidents, which eventually culminate in a proxy contest, estimates that a campaign ending in a proxy contest has a total (direct and indirect) average cost to the dissident of approximately $10 million over the full period of engagement.[258]

In addition to the typical proxy contests[259] discussed above, on rare occasions, there have also been nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest. In particular, a dissident engaging in a nominal proxy contest would have to bear the cost of drafting proxy statements and undergoing the staff review and comment process for that filing. However, a dissident in a nominal contest would not be likely to expend resources on substantial solicitation, such as to disseminate its proxy materials through full set delivery to a substantial percentage of shareholders versus only to select shareholders, to hire the services of a proxy solicitor, or to engage in other broad outreach efforts, as would be the case in a typical proxy contest. Based on staff experience in administering the proxy rules, nominal contests are very rare, and the staff is unaware of any nominal contest that has resulted in the dissident gaining seats for its nominees. We do not have data that is well-suited for empirically identifying nominal contests, in part because dissidents do not always report estimates of their solicitation expenses in their proxy materials.

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258 See Nickolay Gantchev, The Costs of Shareholder Activism: Evidence from a Sequential Decision Model, 107 J. Fin. Econ. 610, 624 (2013).

259 For ease of reference, we use "typical proxy contests" to refer to contested elections of directors other than the nominal contests described below.

c. Results of Proxy Contests

A proxy contest may result in several possible outcomes. Our staff's review of 72 proxy contests initiated in 2014 and 2015 found that approximately 33 percent (24 contests) did not make it to a vote. In these cases, registrants may have settled by agreeing to nominate or appoint some number of the dissident's candidates to the board of directors or by making other concessions, the dissident may have chosen to withdraw in the absence of any concessions, or other events may have precluded a vote.[260] Among the 48 proxy contests initiated in 2014 and 2015 that proceeded to a vote, dissidents were at least partially successful (i.e., achieved some board representation) in about 52 percent (25) of these contests.[261] In 21 of these contests, the end results was a "mixed-board" with directors elected from both slates. In four contests, the dissident's nominees were elected to fill all positions of the board. Between settlements and voted contests, dissidents achieved at least some board representation in half of the director election contests (36 out of 72).

Contests differ in the closeness of voting outcomes. Staff has analyzed the difference in votes between the elected director with the lowest number of votes and the nominee who came closest to being elected. Out of the 48 contests initiated in 2014 and 2015 that proceeded to a vote, registrants disclosed full voting results in Form 8-K filings

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260 The percentage of director election contests initiated in 2014 and 2015 not proceeding to a vote is lower than what has been reported in previous research for earlier years. See, e.g., Fos Study, at 39 (finding that, for proxy contests including contested elections as well as a much smaller number of issue contests from 1994 to 2012, about 53 percent did not make it to a vote, where 25 percent were settled, 15 percent were withdrawn, 6 percent ended with a delisting or a takeover, and 7 percent did not make it to a vote for other reasons).

261 The estimated percentage of voted director election proxy contests that lead to dissident board representation is consistent with previous research. See, e.g., Fos Study, at 13 (finding that for voted proxy contests including contested elections as well as a much smaller number of issue contests from 1994 to 2012, dissidents achieved at least one of their formal goals (i.e., obtaining board seats or passing proposals) in about half of the cases).

in 38 contests. In these contests, the median director elected with the fewest votes received 57 percent more votes compared to the nominee with the next highest number of votes. The median difference in votes received between the director elected with the fewest votes and the nominee with the next highest number of votes as a percentage of total outstanding voting shares was approximately 16 percent, and more than 26 percent of the contests (10 out of 38) had a difference in votes received as a percentage of outstanding shares of five percent or less. In these same contests, the elected director who received the fewest votes received no more than 11.5 percent more votes than the non-elected nominee who received the greatest votes. We consider these to be close contests, in which a relatively small number of shareholders could have been determinative of the outcome.

We are unaware of any nominal contest that has resulted in the dissident gaining seats for their nominees. Dissidents may nevertheless choose to initiate nominal contests to pursue goals other than changes in board composition, such as to publicize a particular issue or to encourage management to engage with the dissident. However, we do not have data that would allow us to measure success along those other dimensions.

d. Split-ticket Voting

Shareholders have the option of voting a split ticket but can only do so by attending the shareholder meeting in person and voting their shares at that meeting. In practice, however, in-person meeting attendance may be limited due to cost and other logistical constraints, which is especially likely to be the case for small shareholders and retail investors.[262] We understand that in certain elections, the parties to the contest and

[262] See, e.g., Rulemaking Petition (describing in-person attendance as "generally an expensive and impractical proposition"). The burden of attending a meeting for the purpose of voting a split

their agents (e.g., proxy solicitors) will help some shareholders "split their ticket" by arranging for an in-person representative to vote these shareholders' shares at the meeting on the ballots used for in-person voting. We do not have data on the number or characteristics of shareholders that are arranging to vote a split ticket through current practices, but our understanding is that these practices are more available to large shareholders than small ones. We solicit comment on the prevalence, availability, costs and benefits of these practices below.

For shareholders that do not have ready access to other arrangements, the decision of whether or not to attend a meeting or seek other arrangements for splitting their ticket is likely to depend on having the ability and resources to do so as well as having the incentive to incur the associated costs. To the extent an individual investor believes vote splitting is beneficial, the larger its ownership stake is, the greater the financial incentives to incur the current costs of arranging a split-ticket vote. However, beyond the direct financial incentives from a larger ownership stake, a large investor also has a voting impact commensurate with that stake, which increases the likelihood that its votes are determinative. This in turn, increases the large investor's incentives to arrange for vote splitting when deemed beneficial. We believe institutions are more likely than retail shareholders to have both the resources and the incentives to currently vote a split ticket (if they have the preference to do so).

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ticket may be significantly lower in the case of a virtual shareholder meeting but such online meetings are still relatively rare. Moreover, we are unaware of any proxy contest that has culminated in a virtual shareholder meeting. See, e.g., Jena McGregor, More Companies are Going Virtual for Their Annual Shareholder Meetings, Wash. Post (Mar. 17, 2015), available at https://www.washingtonpost.com/news/on-leadership/wp/2015/03/17/more-companies-are-going-virtual-for-their-annual-shareholder-meetings/ (finding that in 2011, 21 companies held virtual-only meetings using the primary provider of online shareholder meeting technology, and that this number grew to 53 in 2014.)

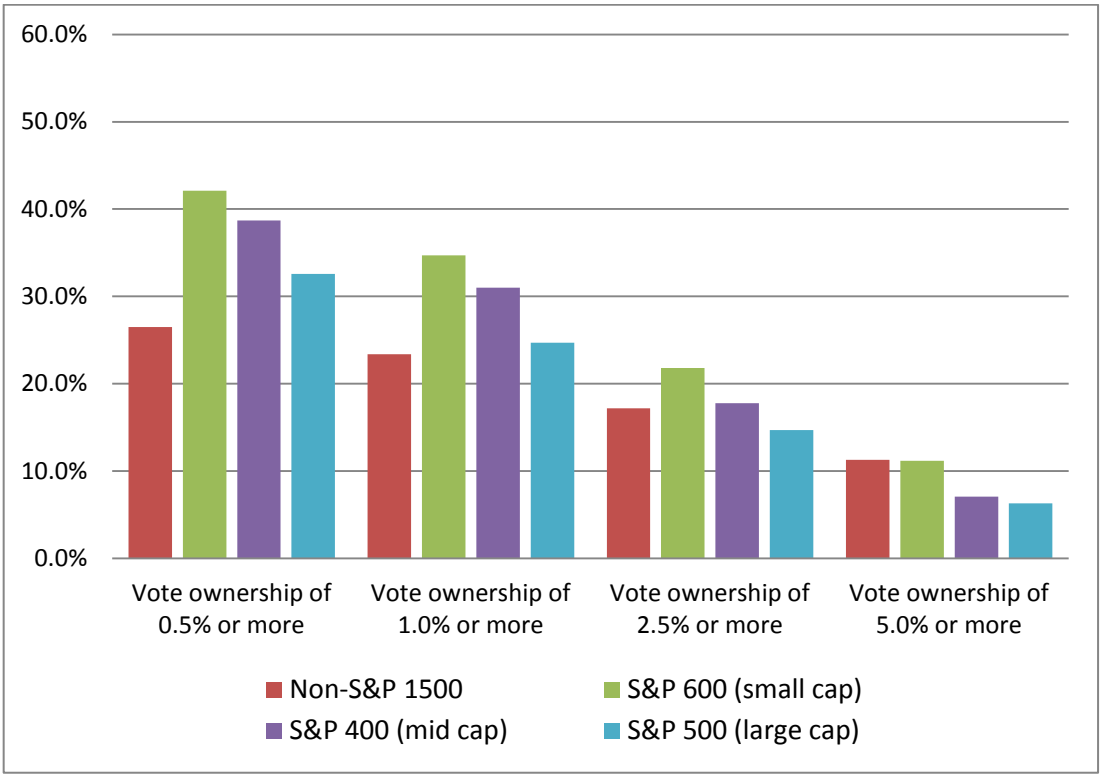
Because the incentive to arrange a split-ticket vote when such a vote is preferred is dependent on having both a sizable financial stake, in dollar terms, as well as significant voting influence, in percentage terms, we consider the distribution of both of these factors for institutional shareholders. We use data from Form 13F filings to estimate these distributions, which limits us to considering institutions required to report their holdings on Form 13F.[263] Moreover, we only consider shares over which these institutions have voting authority in contested director elections. We do not have comparable data for other institutional shareholders or for retail shareholders.

Figure 1 shows the average percentage, across registrants, of the total outstanding shares held by institutions that each meet a given threshold of minimum voting power. The average percentage of the total outstanding shares is calculated across all registrants within different size categories. As in previous analyses, registrant size is approximated by reference to the S&P index. The data suggest that there is currently a substantial portion of outstanding shares for which the institutional holders may have enough voting power to give them the incentive to arrange split-ticket voting if preferred. For example, the average percentage of the total outstanding shares held by institutions that each have 0.5 percent or more of the total votes is around 27 percent for non-S&P 1500 registrants, 42 percent for S&P 600 registrants, 39 percent for S&P 400 registrants, and 33 percent for S&P 500 registrants. The large difference in ownership between S&P 600 and non-S&P 1500 registrants despite both groups being relatively small registrants is due to a smaller number of institutions holding stock (of any amount) in the non-S&P 1500 registrants. If we consider average total ownership by institutions that are larger block

[263] Non-exempt institutional investment managers that exercise investment discretion over $100 million or more in Section 13(f) securities are required to report their holdings on Form 13F with the Commission.

holders (individually owning 5 percent or more of shares) and therefore are more likely to be pivotal voters, the average percentage of the total outstanding shares held by these institutions is approximately 11 percent for both non-S&P 1500 and S&P 600 registrants, 7 percent for S&P 400 registrants, and 6 percent for S&P 500 registrants. Because we are only able to consider ownership by institutions required to report their holdings on Form 13F and that have voting authority over these holdings, these statistics represent an estimate of the lower bound of the percentage of outstanding shares held by owners with possible incentives to currently arrange split-ticket voting.

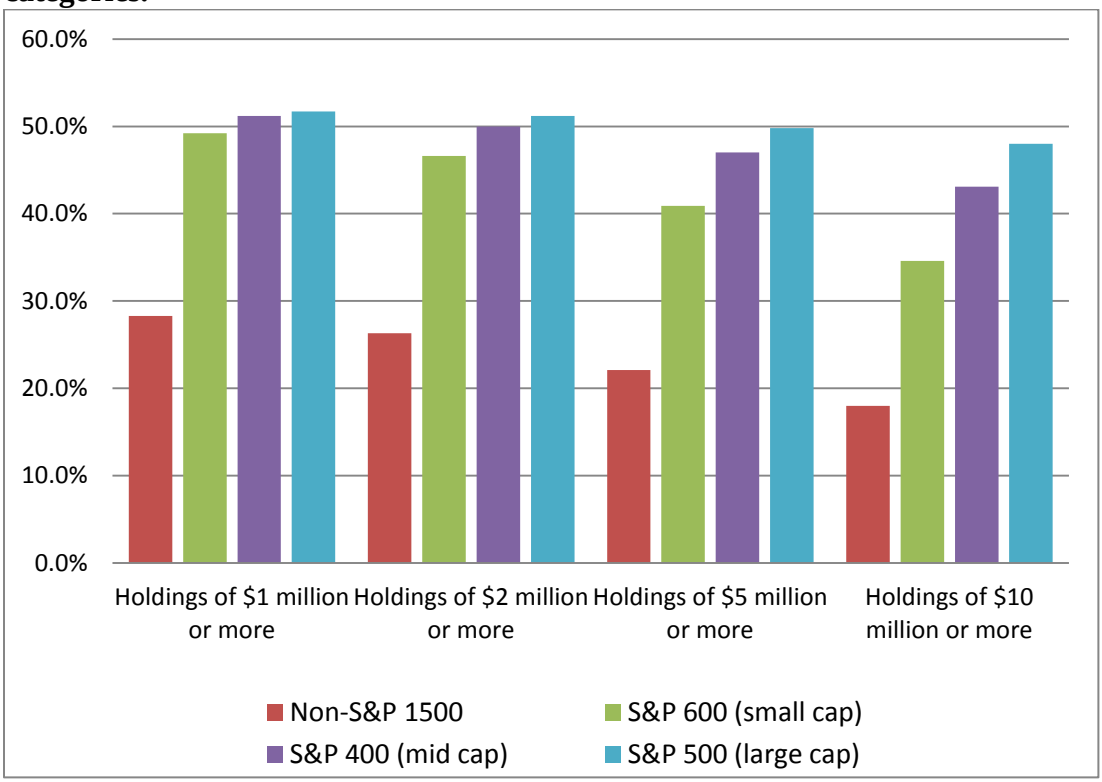
Figure 1: Average percentage of outstanding shares held by institutions with different levels of minimum individual vote ownership, across registrants in different size categories.[264]



[264] The estimates in the figure are based on staff analysis of Form 13F filings related to potentially affected registrants (excluding registered investment companies) from the last available quarter of 2015 in the Thomson Reuters Form 13F database. The analysis reflects only holdings for which institutions have voting authority in contested director elections.

Even a large voting stake in a company may not currently be enough to incent a shareholder to incur the costs of attending the annual meeting to vote a split ticket if the investment is low in dollar terms. Therefore we also consider the combined voting power by institutions that individually have a substantial dollar investment in a registrant. In particular, Figure 2 shows the average percentage, across registrants, of the total outstanding shares held by institutions that each meet a given threshold of minimum dollar stake in the registrant. For example, for institutional owners that hold stock worth $1 million or more in a given registrant, the average percentage of the total outstanding shares held by these institutions is around 50 percent for all registrants belonging to one of the S&P 1500 component indexes. By contrast, the corresponding average percentage of outstanding shares among non-S&P 1500 registrants is approximately 28 percent. If we instead consider only institutional owners that each hold stock worth $10 million or more, the average percentage of outstanding shares held by these institutions is 48 percent for S&P 500 registrants, 43 percent for S&P 400 registrants, 35 percent for S&P 600 registrants, and 18 percent for non-S&P 1500 registrants. Overall, the estimates in Figure 2 suggest that a substantial portion of shares in registrants are held by institutions that have a significant financial interest. This is particularly so for relatively larger registrants.

Figure 2: Average percentage of outstanding shares held by institutions with different levels of minimum financial interest, across registrants in different size categories.[265]



3. Other Methods to Seek Change in Board Representation

Beyond typical proxy contests culminating at annual meetings, we note that under the baseline there are a number of other methods shareholders currently can use to potentially affect changes to the composition of a board of directors. We broadly refer to these methods throughout this economic analysis as shareholder interventions.

First, a shareholder could make recommendations for director candidates directly to the nominating committee of the board. It is then generally left to the board's discretion whether or not such candidates are accepted for nomination. While we do not

[265] Id. Financial interest is estimated as the market value of all shares held by the individual institution in a specific registrant. For the average percentage of outstanding shares, we only considered holdings for which institutions had voting authority in contested director elections

have direct evidence about the extent to which this approach is used or is effective, a board may be relatively more likely to nominate candidates recommended by a shareholder with a large stake in the registrant than candidates recommended by smaller shareholders because a large shareholder would have a greater interest in the oversight and strategic direction of the registrant and because a large shareholder might be perceived to be more likely to run a proxy contest absent registrant cooperation.

Second, a dissident could call for a special meeting to try to replace all or some of a registrant's directors with the dissident's own candidates, to the extent permitted under the registrant's bylaws. Such an intervention would typically require a two-step process. Initially, the dissident would generally need to obtain the consent of shareholders representing a certain threshold of shares outstanding to call the meeting.[266] Next, the dissident would put to a vote, either by proxy or in person at the special meeting, a proposal to remove certain directors and elect certain other nominees. Attempting to change the board in this manner at a special meeting is different from a contested election at an annual meeting because the issue put to a shareholder vote is the removal of specific incumbent directors and their replacement by specific dissident director candidates. This means that regardless of whether a shareholder votes by proxy or in person, there is no possibility for a shareholder to vote "for" a combination of dissident and registrant nominees because only the dissident proposes nominees (to fill the vacancies that would result from the removal of certain incumbent directors if the dissident's removal proposal is successful). In addition, because attempting to replace directors through a special meeting is subject to registrant bylaws and, if such bylaws are available, requires the

[266] The criteria for how and when a special meeting can be called vary both by state law and corporate bylaws.

dissident to first gather enough shareholder support to call the meeting, this alternative may be either unavailable or more burdensome for the dissident compared to initiating a proxy contest at an annual meeting.

Third, if the shareholder base of a registrant is significantly concentrated, a dissident may be able to pursue the election of alternative director nominees at the annual meeting through an exempt solicitation. Rule 14a-2(b)(2) provides that the rules generally applicable to dissident proxy solicitations do not apply where the total number of persons solicited is not more than ten. Thus, dissidents using this approach would be able to obtain proxies from up to 10 persons in support of their candidates, and may receive additional support for their candidates from shareholders attending the meeting in person. Based on staff experience, we understand that this approach is used only infrequently.

Fourth, some registrants have recently adopted proxy access bylaws that would allow certain qualifying shareholders to nominate a limited number of director candidates for inclusion in the registrant's proxy statement.[267] We are unaware of any cases to date in which a proxy access bylaw has been used to nominate a candidate for the board. Using a proxy access bylaw differs from engaging in a proxy contest in several ways. In particular, while proponents of proxy access nominees could engage in some forms of shareholder outreach efforts, current proxy access bylaws typically restrict the proponents from soliciting votes on a separate proxy card.[268] Proxy access candidates would be

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267 See, e.g., S&C April Report, supra note 91 (stating that 200 public companies had adopted some form of proxy access since the 2015 proxy season, compared to 15 companies prior to 2015).

268 See, e.g., Sidley Austin LLP, Proxy Access Momentum in 2016, at 19 (June 27, 2016), available at http://www.sidley.com/~/media/update-pdfs/2016/06/final-proxy-access-client-update-june-2016.pdf.

included on the registrant's proxy card, and information about those candidates would be included in the registrant's proxy statement. In contrast, dissidents engaged in proxy contests produce their own proxy materials and bear the cost of any solicitation in support of their nominees. Additionally, current bylaws generally limit the number of proxy access candidates to 20 or 25 percent of the board.[269] Also, a proxy access bylaw generally only provides access to the proxy for shareholders meeting certain criteria.[270] Thus, while relying on the provisions of a proxy access bylaw to nominate candidates is likely to involve lower solicitation costs than proxy contests (because, for example, the proxy access shareholder proponent does not produce or disseminate its own separate proxy statement), it also is more limited in its potential to change the composition of the board. We expect similar distinctions to apply in the case of state or foreign law provisions that provide shareholders a form of proxy access.

Other shareholder actions targeted at changes in board composition include withholding votes from (or voting against) directors in uncontested elections as well as waging formal "vote no" campaigns to encourage other shareholders to do so. Such campaigns are relatively low in cost but may have a more limited direct effect on boards than proxy contests or the use of proxy access bylaws because, while they can express shareholder dissatisfaction, such campaigns do not directly put forth alternative candidates for election. Nonetheless, such campaigns may have an effect on some registrants. One study of 112 formal "vote no" campaigns found that about 20 percent of

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269 See, e.g., S&C April Report, supra note 91.

270 Under most current proxy access bylaws, the shareholder generally has to meet a passive holder requirement as well as specific share ownership thresholds and holding period requirements in order to qualify to use proxy access, with most bylaws requiring the shareholder using proxy access to have held either a three percent or five percent ownership stake for a three-year holding period. See, e.g., S&C April Report, supra note 91; S&C August Report, supra note 114.

"vote no" campaigns have achieved substantial voting support and "vote no" campaigns are associated with a CEO turnover rate of about 25 percent in the year after the campaign, or over three times the turnover rate for a sample of comparable registrants.[271]

Finally, shareholders may also seek a change in board composition by making nominations from the floor of a meeting, without soliciting proxies. However, we understand that such nominations are rare, [272] and generally unlikely to succeed, given the applicability of advance notice bylaws and our understanding that most shareholders vote in advance of meetings via the proxy process.

C. Broad Economic Considerations

The proposed amendments would change the proxy solicitation and voting process at registrants other than funds and BDCs to allow all shareholders of the company to use the proxy system to vote for their preferred combination of director candidates in a contested election. These changes are likely to improve the efficiency of the voting process in certain contested elections. It is possible that the proposed amendments could also affect the cost to registrants and dissidents of contested elections, and the outcomes and incidence of these elections. To the extent that such effects, if any, change the degree to which the risk of attracting a future proxy contest provides either discipline or a distraction to boards, the proposed amendments may affect managerial decision-making and the relationship between shareholders and management. Although the likelihood as well as the direction and extent of these effects is difficult to predict for reasons discussed below, we cannot rule out the possibility that any such effects could be significant.

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271 See Diane Del Guercio, Laura Seery & Tracie Woidtke, Do Boards Pay Attention When Institutional Investor Activists ''Just Vote No''?, 90 J. Fin. Econ. 84, 85 (2008).

272 Based on the staff's discussions with independent inspectors of elections.

Our economic analysis of the proposed amendments reflects our consideration of a number of broad issues related to corporate governance and the proxy system. First, the design of the voting process, as a primary mechanism through which shareholders provide input into the composition of boards, can affect the amount of influence that shareholders exercise over the firms they own. Second, it is difficult to predict how the various parties involved in contested elections are likely to respond to any changes to the proxy process, complicating the evaluation of whether such changes would enhance or detract from board effectiveness and registrants' efficiency and competitiveness. Third, corporate governance involves a number of closely interrelated mechanisms, so any effects of contested elections may be either mitigated or magnified by changes in the use or effectiveness of other mechanisms. This section describes these issues in more detail and provides context for the discussion of potential economic effects that follows.

The proposed amendments involve a fundamental aspect of corporate governance: the process by which directors for the boards of registrants are elected. Appropriate mechanisms to allow shareholder input into the nomination and election of directors can be important to maintaining the accountability of directors to shareholders.[273] In turn, the accountability of directors to shareholders can play an important role in addressing the agency problems that arise from the separation of registrant ownership and control, especially when share ownership is widely dispersed. In particular, boards of directors can monitor, discipline and replace the officers of registrants, who have control over registrants' operations, on behalf of dispersed shareholders. Boards of directors can thereby play a key role in managing potential conflicts that may result from divergent

[273] The nature of the mechanisms by which shareholders vote is affected by a number of different sources, including state law and a registrant's governing documents as well as Commission rules regarding the proxy process.

interests between these officers and shareholders.[274] The effectiveness of a board can be judged by its ability to adequately perform this monitoring role, and also by its performance across other dimensions, such as its ability to provide valuable advice to the officers of the registrant.[275]

The selection of board members generally involves input from existing board members and from shareholders. Under most circumstances, the incumbent board nominates a slate of candidates to fill upcoming vacancies and shareholders vote on each of these candidates. The board's choice of nominees may reflect a number of factors, including board member preferences, information board members have learned about the registrant, board members' past experience, and recommendations from shareholders. In the case of a contested election, dissidents may nominate directors for shareholder consideration in addition to those nominated by the board. Shareholders then vote to determine which nominees are elected.

The proxy system is the principal means by which shareholders in public companies exercise their voting rights. It is therefore important that this system functions efficiently and in a manner that adequately protects the interests of shareholders and does not impede them from exercising their rights under state law. Researchers have noted that details of the proxy process may affect the amount of influence that shareholders can exercise over the firms they own.[276] Under current rules, and as discussed in Section

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274 See, e.g., Adolf Berle & Gardiner Means, The Modern Corporation and Private Property (1932).

275 See, e.g., Renee Adams & Daniel Ferreira, A Theory of Friendly Boards, 62 J. Fin. 217 (2007) (theoretically exploring the interaction between the monitoring and the advisory role of boards, and how effectiveness in monitoring may or may not be related to effectiveness in advising).

276 See, e.g., Stuart L. Gillan & Jennifer E. Bethel, The Impact of the Institutional and Regulatory Environment on Shareholder Voting, 31 Fin. Manage. 29 (2002); Lucian A. Bebchuk, The Myth of the Shareholder Franchise, 93 Va. L. Rev. 675 (2007).

IV.A above, shareholders who vote by proxy in a contested election often have a more constrained set of voting choices than shareholders who vote in person at the meeting. Alleviating these constraints could enhance the influence of shareholders on board composition by allowing all shareholders to cast votes in contested director elections that best reflect their preferences, thus facilitating the exercise of the rights that state law provides to shareholders. Furthermore, any changes in shareholder voting behavior, or other changes in the nature of the proxy process, could also have indirect effects on the nature of the relationship among shareholders, directors, and managers.

It is difficult to predict whether any such changes would enhance or detract from board effectiveness and registrants' efficiency and competitiveness. Strong shareholder rights have been associated with higher firm valuations and better-developed equity markets.[277] However, there are trade-offs between the degree of shareholder oversight and the level of director autonomy in managing the affairs of a registrant. For example, sufficient autonomy of the board and management may be important for fostering an environment focused on initiative, innovation and the registrant's long-term interests.[278] Increasing the influence of shareholders may also empower specific groups of shareholders, who may use their increased influence to advance their own interests at the expense of other shareholders or who may advocate for changes for the benefit of all

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277 See, e.g., Paul A. Gompers, Joy L. Ishii & Andrew Metrick, Corporate Governance and Equity Prices, 118 Q. J. Econ. 107, 128 (2003); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, Investor Protection and Corporate Governance, 58 J. Fin. Econ. 3, 15 (2000).

278 See, e.g., Jonathan Karpoff & Edward Rice, Organizational Form, Share Transferability, and Firm Performance, 24 J. Fin. Econ. 69 (1989); Philippe Aghion & Jean Tirole, Formal and Real Authority in Organizations, 105 J. Polit. Econ. 1 (1997).

shareholders.[279] It is therefore unclear what level of shareholder influence would maximize the efficiency and competiveness of registrants, and this optimal level of shareholder influence is likely to vary across registrants. Similarly, research is inconclusive as to what board structure and what combination of director types would maximize the effectiveness of a board, and the ideal board and governance structure likely varies across registrants.[280]

It is also difficult to predict how the various participants involved in director elections may alter their behavior in reaction to any changes in the process by which directors are selected. Shareholders could change their voting behavior along many dimensions – for example, they could become more or less likely to support registrant candidates, more or less likely to support dissident candidates, or more or less likely to support a combination of registrant and dissident candidates without consistently favoring either type of candidate. Director candidates may react by becoming more or less willing to be nominated based on reputational concerns. If the nature of elections were expected to change, registrants and dissidents may change the amount of resources they invest in elections or change their approach to negotiations. Because of the range of actions that any of the involved parties could choose, and the fact that other parties could change their own behavior in reaction to any such actions, the outcome of any changes to the election

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279 See, e.g., Jonathan B. Cohn, Stuart L. Gillan & Jay C. Hartzell, On Enhancing Shareholder Control: A (Dodd-) Frank Assessment of Proxy Access, 71 J. Fin. 1623, 1624 (2016), available at http://onlinelibrary.wiley.com/doi/10.1111/jofi.12402/full (providing evidence that proxy access, which the authors use as a measure of increased shareholder control, may be relatively more valuable at companies with activist shareholders but relatively less valuable at companies with greater ownership by labor-friendly shareholders).

280 For a discussion of the inconclusiveness of existing research on what constitutes an optimal board structure, as well as how the observed variation in the structure and function of boards may be an appropriate response to the specific governance and operational issues faced by different companies, see, e.g., Renée B. Adams, Benjamin E. Hermalin & Michael S. Weisbach, The Role of Boards of Directors in Corporate Governance: a Conceptual Framework and Survey, 48 J. Econ. Lit. 58 (2010).

process is difficult to predict, although we have attempted to assess them to the extent possible in the discussion below.

Finally, it is important to note that proxy contests represent one particular corporate governance mechanism that may substitute for or complement other governance mechanisms. In the case of substitute mechanisms, increasing the usefulness of one mechanism is likely to reduce the use of its substitute. For example, increasing the frequency of buses may reduce the likelihood that commuters drive. In the case of complementary mechanisms, increasing the usefulness of one mechanism is likely to increase the use of complementary mechanisms. For example, improving the quality of roads may increase the likelihood that commuters drive. Similarly, researchers have found that some governance mechanisms are substitutes for or complements to each other.[281] As a result, changes affecting proxy contests may affect the efficacy and use of governance mechanisms that can substitute for or complement such contests. Adjustments in the degree to which different governance mechanisms are used are likely to reflect a new equilibrium in the relationship between shareholders and management.[282] Such changes may either magnify or mitigate any potential effects of changes in the nature of proxy contests.

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281 See, e.g., Stuart Gillan, Jay Hartzell & Laura Starks, Tradeoffs in Corporate Governance: Evidence from Board Structures and Charter Provisions, 1 Q. J. Fin. 667 ("Gillan, Hartzell & Starks Study") (finding that certain governance mechanisms are substitutes); Martijn Cremers & Vinay Nair, Governance Mechanisms and Equity Prices, 60 J. Fin. 2859, 2862 (2005) (finding that certain governance mechanisms are complements).

282 See, e.g., Gillan, Hartzell & Starks Study (discussing substitute and complementary governance mechanisms and how equilibrium governance choices may be determined given the interrelation among mechanisms).

D. Discussion of Economic Effects

The economic benefits and costs of the proposed amendments, including impacts on efficiency, competition and capital formation, are discussed below. For purpose of this economic analysis, we first address the effects of the proposed changes to the proxy process together as a package, including both benefits and costs. In particular, we discuss the anticipated effects of the proposed amendments on shareholder voting and then consider anticipated effects with respect to the costs, outcomes, incidence, and perceived threat of contested elections at registrants other than funds and BDCs. We then discuss the economic effects that can be attributed to specific implementation choices in the proposed amendments, to the extent possible, and the relative benefits and costs of the principal reasonable alternatives to these implementation choices.

1. Effects on Shareholder Voting

By mandating the use of a universal proxy in contested elections, the proposed amendments would allow all shareholders to vote through the proxy system for the combination of director nominees of their choice. This change is expected to increase the efficiency with which shareholders vote in contested elections. In particular, universal proxies would result in benefits in the form of cost savings for shareholders who would otherwise expend time and resources to attend a shareholder meeting or otherwise arrange to vote for a combination of candidates that could not be voted for by proxy. Other shareholders may be newly able to vote for their most preferred candidates. That is, there may be shareholders who would vote for a combination of management and dissident candidates if a universal proxy were available but who do not currently do so because it is not feasible (and in particular cost-effective) to undertake such a vote. Also, with a universal proxy, some shareholders would be able to vote for dissident nominees

despite not being solicited by the dissident or receiving the dissident's proxy card because they would be able to vote for those nominees using the registrant's proxy card.

Shareholders voting by proxy are typically restricted to voting only for nominees chosen by one or the other of the parties to the contest. At least some investors have expressed dissatisfaction with these constraints on their ability to vote by proxy.[283] We also note that proxy advisory services have often recommended voting for candidates that have appeared on different proxy cards in contested elections, leading to additional concern among shareholders as to how to cast such votes.[284] Finally, we are aware that registrants and dissidents have creatively (but imperfectly) sought to facilitate vote-splitting in recent years, further demonstrating demand for a generally-applicable solution that would permit split-ticket voting by proxy.[285]

Under the proposed amendments, shareholders who want to vote by proxy for a full complement of directors would no longer be limited to voting only for nominees chosen by the registrant or only for nominees chosen by the dissident.[286] Also, the ability

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283 See, e.g., Rulemaking Petition; Roundtable Transcript, comments of Anne Simpson, Senior Portfolio Manager and Director of Global Governance, CalPERS, at 35-36.

284 See, e.g., John Wilcox, Shareholder Nominations of Corporate Directors: Unintended Consequences and the Case for Reform of the U.S. Proxy System, Shareholder Access to the Corporate Ballot (Lucian Bebchuk ed. 2005).

285 See, e.g., Richard J. Grossman & J. Russel Denton, Never Mind Equal Access: Just Let Shareholders "Split Their Ticket", The M&A Lawyer (Jan. 2009) (discussing a contest in which shareholders interested in splitting their votes were instructed to vote on both proxy cards, dating them with the same date, and adding a special notation that neither card was intended to invalidate the other, and noting a concern that such split votes could be challenged in court); Liz Hoffman, Tessera Proxy's Write-In Option Draws SEC's Eye, Law360 (May 20, 2013), available at http://www.law360.com/articles/442878/tessera-proxy-s-write-in-option-draws-sec-s-eye (discussing a contest in which the registrant included a write-in slot on its proxy card and instructed shareholders interested in splitting their votes to vote on its card and write in the names of dissident nominees, and noting that Commission staff objected to this approach on the basis that it would violate the bona fide nominee rule).

286 Nominees "chosen" by the dissident may include certain registrant nominees. The short slate rule permits a dissident in certain circumstances to solicit votes for some of the registrant's nominees through the use of its proxy card where the dissident is not nominating enough director candidates

to vote for dissident nominees by proxy would no longer be limited to shareholders solicited by the dissident.[287] Instead, all shareholders could use a universal proxy to vote for the combination of directors of their choice, as they are able to do in person at a shareholder meeting.

Although some shareholders are able to use existing approaches to implement split-ticket votes, such as by attending a shareholder meeting in person, these existing approaches are generally associated with costs beyond the usual costs of voting by proxy. These costs may include the time and expense required to obtain a legal proxy from one's broker (if required) and travel to and attend (or send a representative to attend) a meeting.[288] Even when alternatives besides in-person voting are made available to some shareholders, taking advantage of such accommodations may entail costs. For example, in the case in which a proxy solicitor acting on behalf of a party to the contest arranges for an in-person representative for a large shareholder, this shareholder is likely to spend some incremental time contacting and coordinating with the proxy solicitor. While these costs may be minimal in some cases, any of the incremental time and resources currently expended to implement split-ticket votes would no longer be required in the case of

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to gain majority control of the board in the contest, thereby allowing shareholders using the dissident's proxy card to split their vote. However, shareholders voting on the dissident's proxy card would still be limited to voting for those registrant nominees selected by the dissident, rather than any registrant nominee of their choice.

287 For shareholders not solicited by the dissident, while the registrant's universal proxy card would allow them to support dissident nominees, they would still need to seek out the dissident's proxy statement in the EDGAR system (as directed by the registrant's proxy statement) to obtain information about the dissident nominees.

288 Shareholders with many different holdings may also face logistical constraints, in that annual meetings for different companies often overlap and it may therefore not be feasible to attend all such meetings in person. These logistical constraints can potentially be overcome at a cost. In particular, while proxy contests are relatively infrequent, to the extent that two registrants subject to proxy contests have meetings on the same date, or a shareholder has other reasons to prefer attending a conflicting meeting in person, shareholders may be able to arrange for a representative to attend one of these meetings on their behalf.

universal proxies, resulting in greater efficiency in vote submission. We do not currently have data regarding how many shareholders implement split-ticket voting, to what extent the different approaches are used, and the degree of incremental costs borne to implement such votes, in order to estimate the potential cost savings. We request comment below on current voting practices, including data about costs to implement split-ticket voting.

We expect that institutional shareholders and large shareholders are relatively more likely than other shareholders to be able to implement a split-ticket vote using one of the existing approaches and would thus be more likely to experience cost savings under the proposed amendments. As discussed above, institutional shareholders hold a majority of the shares in U.S. public companies and are much more likely to vote than retail shareholders.[289] We expect that shareholders with large stakes in the registrant[290] would also generally be more likely to vote than smaller shareholders because of the greater influence they may have on the outcome of the election and their greater economic interest in this outcome. For these same reasons, we expect that large shareholders that prefer to vote a split-ticket would have a particularly strong incentive to find a way to implement such a vote. Institutional and large shareholders may also be more likely to have access to the existing approaches for split-ticket voting. That is, they are more likely than other shareholders to have the resources required to vote in person, and may also be more likely to have access to any accommodations made to facilitate split-ticket voting, as when a party to the contest arranges for an in-person representative to attend a meeting on behalf of a shareholder.

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289 See infra Section IV.B.1.

290 See Figure 1 and Figure 2 in Section IV.B.2 for the distribution of institutional holders by the size of their stakes in potentially affected registrants for which this data is available.

The availability of universal proxies would also expand the voting alternatives of shareholders for whom it would not otherwise be practical or feasible to vote for their preferred combination of candidates. The existing approaches to implementing a split-ticket vote discussed above are likely to be cost prohibitive or unavailable to many shareholders, particularly retail shareholders and small shareholders. That is, shareholders that have a limited economic interest and voting power in the registrant may not have a sufficiently high financial incentive to bear the costs required to attend or send a representative to a meeting. Retail and small shareholders may be unable or unwilling to bear these costs, and may be unlikely to be proactively offered alternative accommodations (such as an in-person representative being arranged by a proxy solicitor). To the extent that such shareholders are interested in splitting their ticket, the availability of universal proxies would enable them to vote for the combination of directors of their choice and thus may result in a greater number of split-ticket votes than under the current system.

In addition, because dissidents are not required to solicit all shareholders, many shareholders might not receive the dissident's proxy card and thus be able to vote for dissident candidates in a substantial fraction of proxy contests.[291] In particular, smaller shareholders, such as those holding fewer than 1,000 shares in the registrant, are less likely to be solicited by dissidents.[292] The proposed requirement that registrants, as well

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[291] Based on industry data provided by a proxy services provider for a sample of proxy contests from June 30, 2015 through April 15, 2016, we estimate that there are some shareholders that dissidents do not solicit in approximately 40 percent of contested elections, while all shareholders are solicited by dissidents in the remainder of contested elections. In contests in which fewer than all shareholders were solicited, only those accounts holding a number of shares of the registrant that exceeded a minimum threshold of shares were subject to solicitation by the dissident.

[292] Based on industry data provided by a proxy services provider for a sample of proxy contests from June 30, 2015 through April 15, 2016, in contests in which fewer than all shareholders were solicited, the shareholders to be solicited were chosen based on the size of their shareholdings.

as dissidents, use universal proxies would allow shareholders who are not solicited by dissidents to nonetheless vote for some or all of the dissident nominees through the proxy process, by using the registrant's universal proxy card.

Thus, the proposed amendments would allow shareholders who would not currently find it practical or feasible to vote for their preferred candidates, by using a universal proxy, to split their ticket or support the dissident slate. We expect that retail and small shareholders are more likely than other shareholders to change the votes they would submit upon the availability of universal proxies because they currently have limited access to other means of voting a split-ticket and a lower likelihood of being solicited by dissidents. However, we also note that such shareholders may be less likely to vote in general.[293] For these shareholders, the proposed amendments are not likely to result in direct cost savings, but would allow them to submit votes that better reflect their preferences. The indirect benefits or costs of their expanded voting options depend on whether such changes in voting behavior are widespread enough to change actual or expected election outcomes, and the nature of these changes in outcomes, as discussed below.[294]

There is also a possibility that universal proxies could lead some shareholders to be confused about their voting options and how to properly mark the proxy cards to accurately reflect their choices. This may give rise to minor costs to some shareholders

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Specifically, only those accounts holding a number of shares of the registrant equal to or exceeding a minimum threshold were subject to solicitation by the dissident. The minimum threshold in these cases ranged from 100 to 1 million shares, but was most often between 500 and 1,000 shares.

293 Retail shareholders vote 28 percent of their shares on average, though their participation rate could be higher in the case of a contested election, because of factors such as increased media coverage, expanded outreach efforts, and greater shareholder interest in the contest. See supra Section IV.B.1.

294 See infra Sections IV.D.3 and IV.D.4.

in contested elections, particularly less sophisticated shareholders, if it increases the time required by these shareholders to mark and submit a proxy card. It may also increase the risk that some shareholders submit proxy cards that do not accurately reflect their intentions or that could be invalidated because they are improperly marked. However, we believe that the risk of any such confusion would be mitigated by the presentation and formatting requirements of the proposed amendments, as discussed in Section IV.D.5 below.

2. Potential Effects on Costs of Contested Elections

The proposed amendments may directly impose minor costs on registrants and dissidents that engage in proxy contests, relative to the current costs that these parties bear in proxy contests. [295] The proposed amendments may also have effects on the expected outcomes of contested elections that could result in either a net increase or net decrease in the total costs that either registrants or dissidents incur in contested elections, primarily because of strategic changes in discretionary solicitation expenditures. The extent and direction of such indirect changes in costs incurred are difficult to predict. We also consider the proposal's cost implications in the context of nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest, which are currently rare but could become more or less frequent under the proposed amendments.

a. Typical proxy contests

The total cost borne by a registrant or dissident in a typical proxy contest would generally include solicitation costs, such as basic proxy distribution and postage costs, expenditures on proxy solicitors, attorneys and public relations advisors, and any time

[295] The potential direct cost savings resulting from the proposed amendments for certain shareholders are discussed in Section IV.D.1 supra.

spent by the parties or their staff on outreach efforts. The total cost to registrants would also reflect items such as any additional time spent by staff on determining and implementing a strategy in response to the contest and any costs of revising their proxy materials given the proxy contest. The total cost to dissidents would also reflect time spent by the dissident to pursue a contest, the cost to seek nominees and gain their consent to be nominated, and the cost of drafting a preliminary and definitive proxy statement and undergoing the staff's review and comment process for those filings. These total costs are difficult to estimate because the components of these costs (other than estimated solicitation expenditures) are not specifically required to be disclosed and may vary significantly across contests. However, we note that many of the components of these costs are not likely to be affected by the proposed amendments. In much of the discussion that follows, we focus primarily on solicitation costs because we believe that these costs are most likely to be affected by the proposed amendments.

We first consider the direct cost implications of the proposed amendments. For dissidents that would have engaged in typical proxy contests even in the absence of the proposed amendments, the proposed requirement to solicit shareholders representing at least a majority of the voting power entitled to vote on the election of directors may impose a small incremental cost in some infrequent cases. In most cases, however, we expect that this requirement should not result in a change in costs to dissidents or require any further action on their part. In particular, as noted in Section IV.B.2. above, we estimate that in approximately 97 percent of recent proxy contests the dissident solicited a number of shareholders that exceeded the threshold that would be required under the

proposed solicitation requirement.[296] For this reason, we believe that any dissidents who would not otherwise have initiated a contest but may decide to engage in a typical proxy contest as a result of the proposed amendments would also generally not bear any incremental costs as a direct result of the proposed solicitation requirement, though they likely would bear total solicitation costs comparable to those borne in other typical proxy contests (for which the median total solicitation cost was, as discussed above, $250,000 for dissidents initiating contests in 2015).[297] Below, we separately discuss the potential cost implications for nominal proxy contests, which are different from typical proxy contests in that the dissidents incur little more than the minimum required cost to contest an election.

Even in the infrequent cases in which dissidents in a typical proxy contest may currently not solicit shareholders holding a majority of the shares eligible to vote in the registrant, dissidents are likely to solicit shareholders holding a significant fraction of these shares in order to have a chance of winning any board seats.[298] Within a sample of recent proxy contests, we estimate the number of accounts that one would have to solicit in order to meet the proposed solicitation requirement ranges from about 0.1 percent to 10 percent of the outstanding shareholder accounts, with the median number of accounts required equaling about one percent of the total shareholder accounts.[299] Given that even those dissidents that would not currently meet the proposed solicitation requirement have

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296 See supra note 251 and accompanying text.

297 See supra Section IV.B.2.

298 Based on industry data provided by a proxy services provider for a sample of proxy contests from June 30, 2015 through April 15, 2016, the sole dissident in the sample of 35 contests that solicited less than a majority of the shareholders solicited accounts representing 31.5 percent of the outstanding shares.

299 Based on industry data provided by a proxy services provider for a sample of proxy contests from June 30, 2015 through April 15, 2016.

still solicited shareholders representing a large fraction (though less than 50 percent) of the shares eligible to vote, as well as our understanding that the number of accounts required to reach a majority of the shares eligible to vote is generally expected to be a small fraction of the total accounts outstanding, we expect that the incremental cost of the solicitation requirement to a dissident, if any, should be minor relative to the total costs incurred by dissidents in proxy contests.

Specifically, in the infrequent case in which a dissident would otherwise have solicited shareholders representing a substantial fraction, but not a majority, of the shares eligible to vote, we preliminarily estimate that such a dissident would bear an incremental cost of approximately $1,000 if using the least expensive approach[300] to expand solicitation to meet the proposed minimum solicitation requirement.[301] The level of any

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300 Staff assumed that the dissident would use the least expensive approach (i.e., notice and access delivery) to solicit additional accounts given that the dissident would not have chosen to solicit these accounts but for the proposed minimum solicitation requirement. To the extent that dissidents were to use an approach other than the least expensive approach to solicit additional shareholders to meet this requirement, their incremental costs would likely be higher than estimated here. Such approaches may include using full set rather than notice and access delivery, soliciting more than the minimum required number of shareholders, or incurring additional solicitation expenditures on phone calls or other forms of outreach. It is difficult to estimate how much more these approaches would cost than the least expensive approach because of the variety of approaches that could be used and because of the degree of variation in expenses such as postage and printing costs depending on the total size of the dissident's proxy materials.

301 This estimate was derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. In particular, staff based this estimate on the single case out of the 35 contests from June 30, 2015 through April 15, 2016 for which information was provided in which less than a majority of shareholders was solicited by the dissident. The required increase in expenses to solicit a majority of shareholders was estimated based on the number of additional accounts that would have to be solicited and the applicable fees under NYSE Rule 451 and postage costs for notice and access delivery. For the purpose of the nominee coordination fee, staff used information from other proxy contests for which information was provided (specifically focusing on those in which less than all shareholders were solicited) to interpolate the increase in the number of banks or brokers considered "nominees" under NYSE Rule 451 that might be involved at the higher solicitation level. The estimated incremental solicitation cost of approximately $1,000 includes nominee coordination fees of $22 for each of the additional nominees expected to be involved, plus basic processing fees, notice and access and preference management fees and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.70 (for other accounts) per additional account to be solicited. Staff assumed that half of the additional accounts to be solicited are suppressed and that none of these accounts requested full set delivery by prior consent or upon receipt of the

such incremental cost would be driven by any shortfall in the number of shareholders that would otherwise be solicited compared to the number that would be required to be solicited to meet the proposed majority voting threshold. Factors that may affect this shortfall include the size of the dissident's own voting stake in the registrant and the demographics of the shareholder base, such as whether share ownership is widely dispersed or more concentrated in a given registrant.

In sum, we do not expect the proposed solicitation requirement to impose a large incremental cost burden on dissidents in typical proxy contests in which the dissident engages in substantial solicitation efforts. In the vast majority of cases, we expect dissidents that would have engaged in proxy contests even in the absence of the proposed amendments not to bear any incremental direct costs due to the solicitation requirement. Similarly, for dissidents that newly decide to engage in a typical proxy contest (as opposed to a nominal contest, discussed below) as a result of the proposed amendments, we do not expect the solicitation requirement to change the costs that they would expect to bear relative to the costs of any other typical proxy contest. In the infrequent cases in which dissidents may be required to expand their solicitation in order to meet the proposed requirement, our estimate of an incremental cost of approximately $1,000 represents less than one percent of the median total solicitation cost reported in proxy statements by dissidents (which may include expenditures for proxy solicitors, attorneys

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notice (because such delivery requirements may apply to only a small fraction of accounts and is not expected to significantly affect the overall estimate of costs). Additional notice and access fees of $0.25 per account were assumed to be required for each account that was solicited prior to increasing the level of solicitation because of the use of notice and access delivery for some accounts. Given the number of accounts involved, no additional intermediary unit fees were expected to apply. This estimate does not include printing costs for the notice, for which we do not have relevant data to estimate these costs. We request comment on this estimate and data that could allow staff to obtain a more precise estimate below.

and public relations advisors as well as the more basic proxy distribution fees and postage costs).[302]

Registrants may also incur minor incremental costs in typical proxy contests as a direct result of the proposed amendments in order to implement the required changes to their proxy cards. For example, under the proposed amendments registrants must list dissident nominees on their proxy cards and provide disclosure about the consequences of voting for a greater or lesser number of nominees than available director positions. In addition, both registrants and dissidents may incur costs to make additional changes to their proxy statements in reaction to the proposed amendments, such as additional disclosures urging shareholders not to support their opponent's candidates using their card and expressing their views as to the importance of a unified, rather than a mixed, board. These costs are expected to be minimal in comparison to the total costs that registrants and dissidents bear in a typical proxy contest.[303]

We next consider indirect effects of the proposed amendments on the costs of proxy contests. For both registrants and dissidents in typical proxy contests, other effects of the proposed amendments have the potential to result in more significant changes in costs than the effects related to revising proxy materials or the proposed solicitation requirement. This is because the greatest potential impact on the cost of proxy contests is likely related to strategic increases or decreases in discretionary solicitation efforts in response to any changes that the proposed amendments may bring about in the likelihood

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302 The median total solicitation cost reported in proxy statements by dissidents in proxy contests in 2014 and 2015 is approximately $250,000, in line with the estimates in a study of such costs over a longer horizon. See supra Section IV.B.2.

303 See infra Section V for estimates for purposes of the Paperwork Reduction Act ("PRA") of the incremental burden that may be required to prepare proxy materials under the proposed amendments.

of the different potential outcomes of the contest. Changes in discretionary solicitation efforts may include increases or decreases in expenditures on proxy solicitors or the degree of outreach through phone calls or mailings to convince shareholders to vote for a party's candidates. In particular, while we estimate that the median total solicitation cost for dissidents in 2015 was approximately $250,000, we estimate that the median basic cost of soliciting shareholders, namely the proxy distribution fees and postage costs for the first mailing, was approximately $11,000.[304] The large expenditures on solicitation beyond the basic costs of soliciting shareholders (a median incremental expenditure of over $239,000), demonstrate the potential for substantial increases or decreases in costs if a party were to change their approach to discretionary solicitation activities. However, it is difficult to predict the extent or direction of this potential effect because any changes in discretionary solicitation expenditures are highly dependent on the particular situation and the parties' own views as to how the proposed amendments would affect their likelihood of gaining or retaining seats and the potential impact of solicitation efforts.[305]

For example, registrants that expect that a universal proxy may otherwise result in more dissident nominees being elected may incur additional costs to increase outreach to shareholders in an effort to limit support for dissident nominees. Similarly, dissidents may increase solicitation expenditures in cases where they expect the use of universal proxies and any corresponding increase in split-ticket voting to result in more registrant

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304 Our estimate of total solicitation costs is based on costs reported in proxy statements in 2014 and 2015. See supra Section IV.B.2. Our estimate of proxy distribution fees and postage costs is based on industry data provided by a proxy services provider for a sample of 35 proxy contests from June 30, 2015 through April 15, 2016, and excludes dissident printing costs (for which we do not have relevant data to estimate these costs).

305 Effects on strategic discretionary expenditures, whether increases or decreases, are more likely in the case of what would otherwise be close contests. We estimate that approximately 26 percent of proxy contests in 2014 and 2015 were close. See supra Section IV.B.2.

nominees retaining seats than otherwise expected. At the same time, registrants or dissidents may reduce solicitation expenditures in cases in which they believe that any increased split-ticket voting related to universal proxies would result on average in more support for their own nominees, given that they may therefore be able to achieve the same expected outcome at a lower cost than in the absence of universal proxies. That said, such registrants or dissidents could alternatively decide to increase solicitation expenditures relative to what they would otherwise have spent if they think that they may actually be able to gain or retain more seats than would otherwise have been feasible. We solicit comment below from registrants and dissidents as to whether they anticipate that their solicitation costs would likely increase or decrease under the proposed amendments and why, including specific cost estimates.

b. Nominal proxy contests

The proposed amendments may also have implications for nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest. Despite the fact that there may be a low chance of succeeding in obtaining a board seat if a dissident does not undertake substantial solicitation efforts, such as through full set delivery, use of a proxy solicitor, and other outreach, as they would in a typical proxy contest, dissidents may nevertheless choose to initiate nominal contests to pursue goals other than changes in board composition. Such contests are currently rare[306] but could become more or less attractive as a result of the proposed amendments, as discussed in Section IV.D.4.b. below.

[306] Based on staff experience. See supra Section IV.B.2.b.

A dissident engaging in a nominal proxy contest currently must bear the cost of drafting a preliminary proxy statement and undergoing the staff's review and comment process for that filing. Under the proposed amendments, such a dissident would also be required to bear the cost of meeting the solicitation requirements of the proposed amendments. We preliminarily estimate that it may cost approximately $6,000 at a median-sized (based on the number of accounts in which its shares are held) registrant using the least expensive approach[307] to meet the proposed minimum solicitation requirements through an intermediary,[308] which is significantly less than the total solicitation expenses incurred by a dissident in a typical proxy contest. As noted above in Section IV.B.2, reported proxy solicitation expenses for dissidents in recent contests range from $25,000 to $8 million, with a median of $250,000. These expenses substantially exceed the estimated cost of a nominal contest in part because a dissident in

307 See supra note 300.

308 The median-sized registrant was determined based on the number of beneficial accounts in which shares in the registrant are held. The cost estimate was derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. The required cost to meet the proposed solicitation requirement was estimated based on the number of accounts that would have to be solicited and the applicable fees under NYSE Rule 451 and postage costs for notice and access delivery. Specifically, industry data provided by a proxy services provider indicates that there are approximately 4,500 total accounts at the median registrant. Since the shareholder base is likely composed of some large shareholders and many more small shareholders, staff assumed that two percent of these accounts, or a total of 90 accounts, would have to be solicited to reach a majority of the voting power. This assumption is consistent with the average shareholder concentration at the seven registrants with a total number of accounts between 3,000 and 5,000 that are included in the sample of contests for which we were provided industry data by a proxy services provider. Staff also assumed that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee is equal to 45. The estimated solicitation cost of approximately $6,000 includes intermediary unit fees, which apply with a minimum of $5,000, plus nominee coordination fees of $22 per bank or broker considered a "nominee" under NYSE Rule 451, plus basic processing fees, notice and access and preference management fees and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.70 (for other accounts) per account. Staff assumed that half of the accounts in question are suppressed and that none of these accounts requested full set delivery by prior consent or upon receipt of the notice (because such delivery requirements may apply to only a small fraction of accounts and is not expected to significantly affect the overall estimate of costs). This estimate does not include printing costs for the notice, for which we do not have relevant data to estimate these costs. We request comment on this estimate and data that could allow staff to obtain a more precise estimate below.

a typical proxy contest would generally incur higher proxy dissemination costs because of the use of full set delivery and the solicitation of a larger fraction of the shareholders entitled to vote, but also because of substantial additional expenditures on solicitation beyond the cost of proxy dissemination, such as the expense to hire a proxy solicitor to perform additional outreach.

The basic required cost to contest an election at a given registrant may also be affected by the dissident's own voting stake in the registrant and the characteristics of the shareholder base, such as whether share ownership is widely dispersed or more concentrated in a given registrant. In particular, these costs may be substantially lower in cases where a dissident can meet the proposed solicitation requirement by disseminating materials on its own, without hiring a proxy services provider or similar intermediary, as in the case of a registrant with a very concentrated shareholder base and majority owners that are known and easily contacted. These costs would be substantially higher at registrants at which the total number of shareholder accounts that would be required to reach a majority of the shares entitled to vote is very high, as at registrants with highly dispersed ownership.

To the extent that the proposed amendments may result in an increased incidence of nominal contests, we expect that registrants that are the subject of such additional contests would bear incremental costs. We expect these costs to be higher than in the case of current nominal contests, for which we believe that the costs borne by registrants are minimal, but significantly lower than in the case of a typical proxy contest. In particular, registrants may revise their proxy materials and increase their solicitation expenditures to explain the appearance of the names of dissident nominees on their proxy cards and urge shareholders not to support the dissident's nominees. However, we do not

expect solicitation expenditures to rise as much as they would in the average typical proxy contest because the registrant, in its solicitation efforts, would not be competing with a dissident that is spending significant resources on solicitation. For these reasons, we estimate that the cost borne by a registrant facing a nominal proxy contest may be approximately $25,000, based on the lowest incremental solicitation cost reported by registrants in recent proxy contests.[309]

3. Potential Effects on Outcomes of Contested Elections

By mandating the use of a universal proxy in contested elections, the proposed amendments would allow every shareholder to vote by proxy for the combination of directors of their choice. In addition to reducing costs for certain shareholders who would submit split ticket votes even in the absence of universal proxies, universal proxies may result in additional shareholders submitting split-ticket votes or, for those not solicited by dissidents, supporting the dissident slate or some dissident nominees. Such changes in voting behavior could be significant enough to affect election outcomes in the contests that would have occurred even in the absence of the proposed amendments, as well as to change the incentive to initiate contests.[310] In particular, either more registrant nominees or more dissident nominees might be elected than under the baseline, where vote splitting is harder to achieve and some shareholders do not receive a proxy card that includes the dissident slate. Any resulting changes in board composition or changes in control of the board may impose costs and yield benefits for shareholders, registrants, and dissidents. However, these effects are uncertain because it is difficult to predict the

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309 See supra Section IV.B.2. We request comment on this estimate below.

310 The potential incidence of additional contests that would not have occurred in the absence of the proposed amendments is discussed in Section IV.D.4 infra.

extent or direction of any changes in voting behavior as a result of the proposed amendments and to evaluate whether any resulting changes in the members of the board will lead to more or less effective board oversight.

There may be elections in which universal proxies would result in changes to the percentage of the vote obtained by each director candidate, but in which the changes in vote totals would not be sufficient to change the ultimate election results. We preliminarily believe that this would be the likely outcome for the majority of contested elections that would have taken place in the absence of the proposed amendments. We estimate that approximately three-quarters of recent contests were not very close and would require shareholders holding significant voting power (greater than five percent) to change their voting behavior in order to lead to a different election result.[311] We also note that the voting power represented by shareholders that may potentially change their voting behavior is limited due to the fact that some shareholders, particularly large shareholders, are currently able to send representatives to shareholder meetings or use other mechanisms to implement split-ticket votes when desired. We do not expect the votes submitted by these shareholders to change as a result of the proposed amendments. The extent to which other shareholders are interested in splitting their tickets or, for those not solicited by dissidents, in voting for the dissident slate, is unclear, particularly as the

[311] Based on staff review of contested elections initiated in 2014 and 2015, votes representing greater than 5 percent of the total outstanding voting power would have to change in order to change the result in about 74 percent of the elections. Within that 74 percent, almost two-thirds of the elections would have required a change in votes representing greater than 20 percent of the outstanding voting power to result in a change in the election outcome.

option has not generally been available to them (without additional cost) under the current rules.[312] We solicit comment on this point below.

However, there may be contests in which universal proxies, by allowing additional shareholders to vote split tickets or vote the dissident slate, affect which director nominees are elected. In general, any changes in voting behavior due to universal proxies are most likely to affect election outcomes in those contests that would otherwise have been very close. In close contests, changes in even a small number of votes may affect which director nominees are elected. We estimate that in about one-fourth of recent election contests, the director elected with the fewest votes received no more than 11.5 percent more votes than the non-elected nominee with the most votes, and that the vote differential in these cases represented no more than five percent of the total outstanding voting power.[313] In such cases, universal proxies may be more likely to affect the election outcome. We note that close contests may be more likely to occur at registrants with cumulative voting.[314]

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312 For example, it has been asserted that retail shareholders, when they vote, tend to support management. See, e.g., Neil Stewart, Retail Shareholders: Looking out for the Little Guy, IR Magazine (May 15, 2012), available at http://www.irmagazine.com/articles/shareholder-targeting-id/18761/retail-shareholders-looking-out-little-guy/ (stating that "as a rule, retail investors tend to support management"); Mary Ann Cloyd, How Well Do You Know Your Shareholders?, Harvard Law School Forum on Corporate Governance and Financial Regulation Blog, June 18, 2013, available at https://corpgov.law.harvard.edu/2013/06/18/how-well-do-you-know-your-shareholders/ (stating that "retail shareholders support management's voting recommendations at high rates"). In contrast, a recent survey of 801 retail investors found that the majority of these retail investors believe activists add long-term value, and may thus be more likely to support activists than generally thought. See Brunswick Group, A look at Retail Investors' Views of Shareholder Activism and Why it Matters (July 2015), available at https://www.brunswickgroup.com/media/597919/Brunswick-Group-Retail-Investors-Views-of-Shareholder-Activism-Summary-of-Results.pdf.

313 See supra Section IV.B.2.c.

314 Under cumulative voting, each shareholder is generally allowed to cast as many votes as there are nominees and may allocate more than one vote to certain nominees, which may lead to a more concentrated distribution of votes. In contrast, close contests may be relatively less likely at registrants with majority voting standards that do not revert to a plurality standard in the case of a contested election, or with high levels of incumbent board ownership. We estimate that

A recent study uses an alternative approach to estimate the percentage of contests in which universal proxies may be more likely to affect the election outcome.[315] This study estimates that it is possible that universal proxies would have led to different election outcomes in up to 22 percent of cases in a sample of proxy contests from 2008 through 2015.[316] This statistic is comparable to our estimate that close contests may represent approximately one-fourth of recent contests. However, we note that the study makes several assumptions in arriving at this statistic, and it is unclear whether these assumptions can be relied upon.[317]

To the extent that changes in voting behavior lead to different election outcomes, it is not clear how this would affect the composition of directors elected to the board. There may be either more registrant nominees or more dissident nominees elected to boards, or there may be no change, on average, in the types of nominees elected.[318] Also,

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approximately 5 percent of registrants have cumulative voting, approximately 7 percent of registrants have majority voting standards that do not revert to a plurality standard in a proxy contest, and approximately 8 percent of registrants have incumbent directors who together own a majority of the outstanding shares. See supra Section IV.B.1.

315 See Hirst study.

316 See Hirst study, at 48 (finding that 17 out of 77 proxy contests examined may have had outcomes that were distorted as a result of barriers to split-ticket voting).

317 For example, the estimates in this study are based on an assumption that facilitating split-ticket voting through the availability of universal proxies could only result in changes in votes that were otherwise marked as "withheld" from a candidate, while votes "for" any candidate would be assumed not to change. Also, the study assumes that the degree of increase in "for" votes for any given candidate upon facilitating split-ticket voting would be limited to the number of votes withheld from a single opposing candidate, while votes withheld from a different opposing candidate would be assumed not to switch to be in favor of this candidate. See Hirst study, at 35 n.96, 39 n. 105. We are unable to test the reliability of these assumptions because we do not have data that would allow us to predict how voting behavior might change with the availability of a universal proxy.

318 One study finds that universal proxies are unlikely to overwhelmingly favor one side over the other, in that they may result in dissident nominees being elected in place of management nominees and management nominees being elected in place of dissident nominees at similar rates. See Hirst study. However, this conclusion is based on several critical assumptions about how shareholder behavior may change upon the availability of universal proxy, and we are unable to test the reliability of these assumptions. See supra note 317.

there may be either fewer changes in control or more changes in control, or there may be the same frequency of changes in control as under the baseline. The impact of forcing shareholders to choose between one proxy card or the other in an election contest depends on the dynamics of the particular contest. On the one hand, where dissatisfaction with current management is greater, shareholders who would otherwise prefer to split their vote may be more likely under the current proxy system to utilize the dissident's card and forego the opportunity to vote for some registrant nominees, to send the message that board change is needed. This choice will no longer be necessary under the proposed amendments, which may lead to a greater likelihood that one or more registrant nominees retain their seats. On the other hand, there also may be cases in which the registrant nominees would, in the absence of the proposed amendments, have retained all of their seats. Currently, we observe that registrant nominees retain all of the seats up for election in half of the contests that proceed to a vote.[319] In such cases, an increase in split-ticket voting, as well as any incremental votes for the full dissident slate by shareholders not solicited by the dissident, may increase the likelihood of dissident nominees gaining one or more of those seats.

Given some of these possible dynamics, we preliminarily believe that the election of mixed boards, or boards including registrant as well as dissident nominees, would be somewhat more likely under the proposed amendments than under the current proxy system. We estimate that approximately 40 percent of recent contests that proceeded to a vote resulted in a mixed board being elected.[320] However, we cannot predict whether any increase in mixed boards would be the result of one or more registrant nominees retaining

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319 See supra Section IV.B.2.c.

320 Id.

seats when a board composed of only dissident nominees would otherwise have been elected or one or more dissident nominees gaining seats when all registrant nominees would have retained their seats, nor can we predict how frequently such a mixed board would occur compared with under the current system.[321] Also, we note that it is not necessarily the case that any such changes in outcomes would more accurately reflect shareholder preferences, even though these outcomes may be the product of removing constraints on the combination of nominees that shareholders can vote for, because of limitations in the way that voting rules can communicate preferences.[322]

Universal proxies may therefore result in either an increase or decrease in changes in control of a board, and in either dissidents or management winning more seats on the board, or a change in voting percentages without a change in the board composition. We expect that dissidents and registrants would take these potential impacts into consideration in their approach to potential proxy contests. For example, as discussed in more detail in the following section, if the parties to a contest anticipate that changes in voting behavior associated with universal proxies may change the number of seats that they expect to win, these expectations may affect the likelihood that they enter into a

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321 One study questions whether universal proxies would result in a substantial increase in mixed board outcomes, based on an analysis indicating that mixed board outcomes could increase by no more than approximately three percent of the contests studied. See Hirst study. However, this analysis and conclusion is based on several critical assumptions about how shareholder behavior may change upon the availability of universal proxies, and we are unable to test the reliability of these assumptions. See supra note 317.

322 For example, consider a registrant with 100 voting shareholders, three director seats up for election, and a dissident with two nominees. Assume that 54 of the shareholders prefer to elect the dissident nominees but are indifferent about which registrant nominee retains the third seat. On a universal proxy, each of these shareholders therefore votes for one registrant nominee, with equal probability across the three registrant nominees. The remaining 46 prefer the full registrant slate. In this case, with a universal proxy, 54 votes would be earned by each of the dissident nominees, but 64 votes (46 plus one-third of 54 votes) would be earned by each of the registrant nominees, leading to the registrant slate winning the election even though a majority of shareholders prefer that the dissidents gain two seats. For further discussion of the limitations of voting rules, see, e.g., Kenneth Arrow, Social Choice and Individual Values (1st ed. 1951).

settlement agreement that results in changes to the board or other concessions. Such changes to board composition and concessions may either enhance or reduce, or have no significant effect on, the efficiency and the competitiveness of registrants.

It is also possible that parties would take measures to reduce the likelihood of changes in election outcomes. For example, proxy statements and other related communications could include additional disclosures intended to deter shareholders from voting split-tickets, such as emphasizing the importance of a unified board and clarifying whether some or all of one party's nominees might not agree to serve if their party does not hold a majority of board seats. Such disclosures might reduce the likelihood of split-ticket voting and limit any potential increase in mixed boards. Another potential tactical response may involve the adoption by registrants of additional defenses to shareholder interventions. For example, registrants might adopt director qualification bylaws or might limit the indemnification or committee membership of dissident-nominated directors.[323] Such changes could limit the likelihood of dissident nominees being elected or limit their impact if they are elected. Similarly, if dissidents anticipate that the proposed amendments could result in fewer dissident nominees being elected, they may choose to rely more heavily on other types of interventions, such as soliciting consents to replace some board members with their own nominees at a special meeting. Also, dissidents interested in minority representation may nonetheless choose to run longer slates of candidates, to the extent it could increase the likelihood that at least some of their nominees are elected.

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[323] See, e.g., J.W. Verret, Defending Against Shareholder Proxy Access: Delaware's Future Reviewing Company Defenses in the Era of Dodd-Frank, 36 J. Corp. Law 391, 404-06 (2011).

While the measures discussed above would serve to blunt the effect of the proposed amendments on election outcomes, the effect of other potential responses may serve to magnify these effects. For example, the parties to a contested election may change what they spend on solicitation. Some parties may increase these expenditures in order to further capitalize on an advantage that they anticipate the proposed amendments would give them, or to mitigate a disadvantage they perceive. If so, that may result in a greater likelihood of the parties' candidates being selected.

The composition of boards may also be affected by changes in the set of potential nominees that may result from effects that the proposed amendments could have on the incentives of directors. As discussed above, reputational concerns may be an important consideration for directors and potential directors, and research has found that proxy contests may have an adverse effect on a director's reputation.[324] For this reason, some potential directors may be relatively less willing to be nominated if they believe that universal proxies would reduce the likelihood that they are elected to a seat or retain their seat on a board. While we do not have specific data that suggests the proposed amendments would result in an increase in the reluctance of directors to serve, and it is unclear whether any such reluctance would be more likely to affect more qualified or less qualified candidates, any incremental increase in the reluctance of directors to serve may affect the ability of registrants to recruit individuals with the different skill sets needed to compose an effective board.

Overall, the proposed amendments may have some effect on the composition or control of boards. The effects of any such changes on board effectiveness or on registrant

[324] See supra Section IV.B.1.d.

performance are difficult to predict. On the one hand, if more dissident nominees are elected or dissidents are more likely to gain control, it could result in greater efficiency and competitiveness to the extent dissident-nominated directors may be more effective monitors.[325] On the other hand, if more registrant nominees retain their seats or are more likely to retain control, the board may be better able to focus on long-term value creation, because a lower risk of board turnover may reduce the risk that directors unduly focus on short-term metrics.[326] Also, a lower chance of changes in control may reduce the risk that expensive change in control provisions in debt covenants and other material contracts and agreements are triggered.[327] Universal proxies may lead to more mixed boards with directors from both parties than under the current proxy system, but it is unclear whether such boards would be more or less effective than more homogenous boards. Mixed boards may increase the effectiveness of boards, such as through a reduction of

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325 See, e.g., Ian Gow, Sa-Pyung Sean Shin & Suraj Srinivasan, Activist Directors: Determinants and Consequences, Harv. Bus. Sch. Working Paper No. 14-120 (June 2014), available at http://www.hbs.edu/faculty/Pages/item.aspx?num=47599 (finding that activist interventions that result in new directors being appointed to the board are associated with significant strategic and operational actions by firms, as well as with positive stock reactions and improved operating performance).

326 See, e.g., Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, Staggered Boards and Long-Term Firm Value, Revisited, working paper (Mar. 14, 2016), available at SSRN: http://ssrn.com/abstract=2364165 (providing evidence suggesting that a greater likelihood of longer director tenure can serve as a longer-term commitment device with positive effects on longer-term value creation).

327 For example, one study found in its sample of debt issues that over half of the debt issued in 2012 contained change in control covenants that gave bondholders an option to require the issuer to offer to purchase all of the bonds (typically at 101 percent of their par value) if, at any time, the majority of the board of directors ceased to be those who were directors at the time of issuance or those whose election was approved by a majority of the continuing directors. See Frederick Bereskin & Helen Bowers, Poison Puts: Corporate Governance Structure or Mechanism for Shifting Risk?, working paper (Sept. 8, 2015), available at http://irrcinstitute.org/wp-content/uploads/2015/09/FINAL-Poison-Puts-Research-Sept-2015.pdf. Triggering such covenants, often referred to as "proxy puts," can result in companies repurchasing their own debt at a loss as well as having to incur expenses to refinance with a new debt issue. Such covenants are more binding when they are of the "dead hand" variety, which prevents the board from approving dissident-nominated directors in order to avoid triggering the covenant. See F. William Reindel, Dead Hand Proxy Puts – What You Need To Know, Harvard Law School Forum on Corporate Governance and Financial Regulation Blog, June 10, 2015, available at https://corpgov.law.harvard.edu/2015/06/10/dead-hand-proxy-puts-what-you-need-to-know/.

"groupthink" and benefits stemming from inclusion of directors with diverse backgrounds,[328] particularly because shareholders voting on universal proxies would have the ability to vote for the combination of directors that they believe provides the best mix of backgrounds given the specific circumstances of the registrant. However, mixed boards may also lead to more frequent internal conflicts and result in less efficient decision-making within boards.[329]

4. Potential Effects on Incidence and Threat of Contested Elections

As discussed in Sections IV.D.2 and IV.D.3 above, the effects of the proposed amendments on the outcomes and costs to registrants and dissidents of contested elections are uncertain, but could be significant. In this section, we consider how any such effects of the proposed amendments may change the incentives of dissidents to initiate proxy contests and the manner in which registrants react to the possibility of a contested election (the perceived "threat" of a contest), even in the absence of a contest.

We first consider the incidence and perceived threat of typical proxy contests, in which the dissident expends significant resources on solicitation. Then we consider the potential incidence or perceived threat of nominal contests in which dissidents, taking advantage of the proposed mandatory use of universal proxies, may engage in a proxy contest in which they invest significantly fewer resources than in a typical proxy

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328 See, e.g., Jeffrey Coles, Naveen Daniel & Lalitha Naveen, Board Groupthink, working paper (2015), available at https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=AFA2016&paper_id=1137; David Carter, Betty Simkins & Gary Simpson, Corporate Governance, Board Diversity, and Firm Value, 38 Fin. Rev. 33 (2003).

329 See, e.g., Anup Agrawal & Mark Chen, Boardroom Brawls: An Empirical Analysis of Disputes Involving Directors, working paper (2011), available at http://ssrn.com/abstract=1362143 (studying boardroom disputes that are disclosed upon directors resigning or declining to stand for re-election and finding that directors who are likely to be more independent of management are more likely to be involved in the dispute).

contest.[330] Any changes in the incidence of contested elections of these different types, or, even in the absence of a contest, in managerial decision-making or the relationship between shareholders and management as a result of the threat of such contests, may result in costs and benefits for shareholders, registrants, and dissidents. However, any such effects are uncertain because the extent and direction of the effects of the proposed amendments on the outcomes and costs of contested elections are unclear, because it is difficult to predict how different parties will respond to such effects, and because it is difficult to evaluate whether changes in the incidence or perceived threat of contests would have positive or negative effects on board or registrant performance.

a. Typical proxy contests

Effects related to anticipated changes in outcomes

Any effects on the expected outcomes of typical proxy contests may affect the incidence of such contests as well as the likelihood that a registrant makes changes (whether in board composition or with respect to other decisions) even in the absence of actual contests. The likely effects of universal proxies on the outcome of a typical contest depend on the dynamics of the particular contest. Thus, it is not clear whether, on average, the proposed amendments would increase or decrease the likelihood of changes in control or the number of board seats won by either party.

On the one hand, a dissident who expects to gain more seats under the proposed amendments than under the baseline may have an increased incentive to initiate a typical proxy contest. This would particularly be the case for a dissident that expects a greater

330 We also note that there may be effects on the incidence and threat of "late-breaking" proxy contests, or contests initiated close to the meeting date, because of the notice requirement and the proxy statement filing deadline prescribed by the proposed amendments. These timing requirements and their potential effects are discussed in more detail in Section IV.D.5 infra.

likelihood of gaining control of the board, and for whom majority control of the board would be required to institute the changes the dissident desires. On the other hand, a dissident who expects, under the proposed amendments, to gain fewer seats or face a lower likelihood of gaining control than under the baseline may have a decreased incentive to initiate a typical contest.

If, under the proposed amendments, a registrant is expected to face a higher risk of losing seats or control of the board to dissident nominees, it is likely that a potential dissident could exercise greater influence over that registrant. Conversely, it is likely that the influence of potential dissidents would be reduced where a lower risk of losing seats or control to dissident nominees is expected under the proposed amendments. These changes in influence may derive from the outcomes of election contests or from negotiations with registrants in the course of, or in the absence of, a contest. In particular, registrants facing a greater threat of contests or a higher chance of losing seats (or control) if a contest were initiated may be more likely to enter into a settlement agreement with the dissident and may also be more likely to concede at earlier stages of engagement or to make changes in response to alternative interventions (such as "vote no" campaigns).[331] Registrants facing a reduced threat of contests or a lower chance of losing seats (or control) if a contest were initiated may be less likely to enter into settlement agreements, to engage in negotiations at earlier stages, or to make changes in response to alternative interventions.

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[331] See e.g., Roundtable Transcript, comment of Michelle Lowry, Professor, Drexel University at 60 and Lisa M. Fairfax, Professor, George Washington University Law School, at 48 (noting that universal proxies could facilitate settlements with or accommodations to dissidents before a contest arose).

Thus, it is likely that any changes in expectations regarding the outcome of a potential contest would affect the degree of a dissident's influence relative to that of a registrant's incumbent board and management. It is difficult to generalize about the effects of the proposed amendments as they are very likely to depend on the dynamics of a particular contest (or potential contest). Also, it is not clear whether the actual incidence of contested elections would increase or decrease, because any change in a dissident's incentive to initiate contests may be accompanied by a change in the likelihood that a registrant makes earlier concessions to prevent a disagreement from proceeding to the stage of a proxy contest.

Effects related to anticipated changes in costs

While it is unclear whether the proposed amendments are likely to change the expected costs of typical proxy contests to registrants and dissidents, any such changes in the expected costs may also affect the incidence and perceived threat of such contests. In particular, a dissident that expects to achieve a similar outcome at a lower cost may have a greater incentive to initiate a typical proxy contest.[332] Registrants that expect dissidents to face lower costs, or those registrants that expect to bear additional costs in the form of increased solicitation expenditures in a contested election, may have greater incentive to make concessions. In contrast, a dissident that expects to incur additional solicitation

[332] It is possible that a significant reduction in the average cost to dissidents in typical proxy contests could have effects that reduce the incentive to initiate some contests. In particular, some studies have found that a high required cost of proxy contests may serve as a credible signal to other shareholders that the value that the dissident's slate of directors can bring to the registrant is high, or else the dissident would not be bearing the cost of a proxy contest. In an environment in which the average cost of a typical proxy contest is very low, the ability of dissidents to get support for their nominees may be decreased, as it may be more difficult and potentially more costly than otherwise for a dissident whose contest has strong merit to differentiate their contest from less worthy contests. See, e.g., John Pound, Proxy contests and the Efficiency of Shareholder Oversight, 20 J. Fin. Econ. 237 (1988); Utpal Bhattacharya, Communication Costs, Information Acquisition, and Voting Decisions in Proxy Contests, 10 Rev. Fin. Stud. 1065 (1997).

expenses to achieve the same outcome may have a lower incentive to initiate a typical proxy contest, while registrants that expect dissidents to face higher costs, or registrants that expect to face lower costs in a contested election, may have a lower incentive to make concessions.

Differential effects across registrants

To the extent that the incidence and perceived threat of typical proxy contests may change, certain registrants may be affected more than others. For example, relatively smaller to midsize registrants may be more affected because they are currently the most likely to be involved in proxy contests.[333] Any marginal changes may therefore have the greatest impact on this group of registrants. However, more significant changes in the nature of proxy contests could also make it more attractive to target types of registrants that were infrequently the subject of proxy contests in the past. For example, to the extent that large registrants may currently be less likely to be targeted because of the greater resources they can expend to counter a dissident's solicitation efforts, a significant decrease in dissidents' costs or a large increase in their likelihood of success could lead to a higher threat or incidence of contests at such registrants. The governance structures of registrants are also likely to play a role in the impact of the proposed amendments. On the one hand, registrants with governance characteristics that may increase the potential impact of proxy contests, such as cumulative voting, may be more affected than others. [334] On the other hand, registrants with governance characteristics

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333 For example, staff estimates that only four of the 72 registrants involved in proxy contests in 2014 and 2015 were in the S&P 500 index. See supra Section IV.B.2.a.

334 See supra note 228.

that make them more difficult to target with certain kinds of election contests, such as those with high insider control, may be less affected by the proposed amendments. [335]

b. Nominal proxy contests

The proposed amendments may also affect the incidence or perceived threat of nominal proxy contests, in which the dissidents incur little more than the basic costs required to engage in a contest and which are currently rare.[336] The nature of nominal proxy contests may be affected by the proposed amendments in two key ways. First, the proposed solicitation requirement may increase the costs to dissidents of pursuing such contests. Dissidents in nominal contests would have to bear the cost required to draft a proxy statement and undergo staff review and comment process for that filing, as in the case of current nominal contests. However, under the proposal, such dissidents would also have to bear the costs required to meet the proposed solicitation requirement. We estimate that meeting the proposed solicitation requirement would cost approximately $6,000 at the median-sized (based on the number of accounts in which its shares are held) registrant, though this cost could be lower in cases in which the services of an intermediary are not required to meet the solicitation requirement (as in the case of registrants with highly concentrated ownership) or higher at registrants with a more dispersed shareholder base.[337] As discussed above, while this required solicitation cost would be greater than the expenditure currently required in a nominal contest, the costs

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335 See supra note 231.

336 See supra note 306.

337 See supra Section IV.D.2.b.

would remain substantially lower than the solicitation costs dissidents bear in typical proxy contests.[338]

Second, requiring that registrants use universal proxies would, in practice, allow dissidents in nominal contests to put the names of their director candidates in front of all shareholders, via the registrant's proxy card, without additional expense. This change could somewhat increase the likelihood that a dissident in a nominal contest succeeds in gaining seats for their nominees, though, as in the case of current nominal contests, dissidents may have a very limited chance of succeeding in gaining seats if they do not engage in meaningful independent soliciting efforts. Dissidents engaging in a nominal contest would not be required to meet the eligibility criteria that apply to other alternatives that would allow dissidents to include some form of information on the registrant's proxy card, such as the requirements of a proxy access bylaw, where available. Dissidents may therefore consider engaging in a nominal contest when they would not qualify to use alternatives such as proxy access or when these alternatives are not available. However, the information included in the registrant's proxy materials would likely be more limited in the case of a nominal contest (just a list of names) than these other alternatives.

Based on staff experience, we expect that a dissident that solicits holders that represent at least a majority of voting power and files a preliminary and definitive proxy statement, without engaging in any other soliciting efforts, would generally have a very limited chance of having any of its nominees elected to the board despite their names being included on the registrant proxy card. The likelihood that a nominal contest results

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338 Id.

in dissident nominees winning seats may depend on many factors including the identity of dissident's nominees, their backgrounds and name recognition, the shareholders' level of dissatisfaction with the registrant, and the efforts of the registrant to dissuade shareholders from supporting dissidents' nominees.[339] In general, we expect that engaging in a nominal contest would not be an attractive alternative for most potential dissidents that are truly interested in gaining board representation,[340] particularly if other alternatives are feasible.[341]

Even if the chance of obtaining board representation through a nominal contest may be low, dissidents may be interested in other possible effects of such contests. In particular, introducing the names of alternative candidates onto the registrant's proxy card may attract attention to the dissident and its agenda as shareholders, other market participants, proxy advisory services, analysts and journalists seek to understand why

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339 While the registrant's universal proxy card would permit a vote for dissident nominees, its proxy statement can and likely would include disclosure arguing against such a vote. If the dissident does not counter with positive information about its nominees disseminated in a meaningful way to a significant percentage of shareholders, we expect that the dissident's odds of success in the solicitation would be low.

340 We note that the Commission's 2007 amendments to the proxy rules allowing notice and access delivery of proxy statements decreased the minimum cost at which a proxy contest could be conducted through potentially reduced mailing costs, but did not seem to cause an increase in contested elections, which may be evidence of the importance of full set delivery and other solicitation expenditures in gathering support for dissident nominees. See, e.g., Fabio Saccone, E-Proxy Reform, Activism, and the Decline in Retail Shareholder Voting, The Conference Board Director Notes Working Paper No. DN-021 (Dec. 26, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1731362. For details on the 2007 amendments to the proxy rules, see Shareholder Choice Regarding Proxy Materials, Release No. 34-56135 (July 26, 2007) [72 FR 42222 (Aug. 1, 2007)].

341 These alternatives may include a typical proxy contest (with additional solicitation expenditures but also, potentially, with a higher chance of success) or use of a proxy access bylaw (if available and if the dissident is eligible to use proxy access). We are unaware of any cases in which such bylaws have been used to nominate directors to date. However, most proxy access bylaws would require a registrant to include information about the dissident nominees and a supporting statement from the dissident in its proxy materials and would not require the dissident to bear the costs and meet the requirements described above. That said, it is possible that dissidents interested in board representation but for whom additional expenditures are not feasible or justified, and for whom proxy access is unavailable, may consider a nominal proxy contest.

these candidates have been put forth and whether they deserve consideration. For example, shareholders who see the names may look up the dissident's proxy materials online to learn more about the candidates and why they are being nominated. Such attention could be used by the dissident to publicize a desired change or a particular issue,[342] or to encourage management to engage with the dissident. However, it is unclear whether the inclusion of dissident nominees on the registrant's proxy card would significantly increase the publicity surrounding a nominal proxy contest.

It is difficult to say whether and to what extent the possibility of such publicity would lead dissidents to more frequently initiate nominal contests, and similarly, whether the ability of dissidents to run such contests would influence the incentives of management to pursue changes in response to such dissidents. Preliminarily, we believe the likelihood of a significant increase in nominal contests would be mitigated by the new costs associated with the proposed solicitation requirements and the current availability to dissidents of other (potentially lower-cost) routes to obtaining publicity.[343] Also, while nominal contests are currently rare, it is also possible that their incidence could decline further under the proposed amendments given the new costs imposed on such contests. In particular, dissidents that would otherwise pursue nominal contests might consider alternatives that would not trigger the proposed solicitation requirement, such as an

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342 While the shareholder proposal process may be used to raise some such concerns, and would allow these concerns to be expressed more directly in the registrant's proxy statement, such proposals would also need to meet the requirements of Rule 14a-8. For example, proposals on certain topics, such as those pertaining to ordinary business matters, may be properly excluded by registrants from their proxy materials. See 17 CFR 240.Rule 14a-8(i)(7).

343 For example, for a much lower cost, a dissident could send a letter to the board detailing its desired changes and file it as an attachment to a voluntary or required Schedule 13D filing, making it available to the public (though, unlike a registrant's universal proxy card, it would not be disseminated to shareholders).

exempt solicitation, or could choose not to take any such actions due to the higher costs imposed on nominal contests by the proposed amendments.

c. Effects of any changes in incidence or threat of proxy contests

Overall, it is unclear whether the proposed amendments would result in an increase or decrease in the incidence or perceived threat of proxy contests, and thus a change in the level of engagement with and the influence of dissidents. However, to the extent that any of these factors is significantly affected, we cannot rule out the possibility that there may be significant effects on the efficiency and competitiveness of registrants. In particular, a change in the incidence or perceived threat of proxy contests either could result in more effective boards and improved registrant performance, or could interfere with the working of boards and managerial decision-making.

There is some evidence that proxy contests may be beneficial to shareholders. For example, studies have found proxy contests to be associated with positive share price reactions.[344] In this vein, some observers have argued that the low incidence of proxy contests is due to collective action problems related to the high costs of proxy contests[345] and that a higher rate of proxy contests may be optimal.[346] Any increase in engagement

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344 See, e.g., Yair Listokin, Corporate voting versus market price setting, 11 Am. L. & Econ. Rev. 608 (2009) (finding that, in a sample of proxy contests, close dissident victories were related to positive stock price impacts, while close management victories were related to negative stock price impacts); Mulherin & Poulsen Study, at 307 (finding that their sample of proxy contests was associated with shareholder value increases, particularly when the contests led to management turnover or acquisitions). See also Matthew Denes, Jonathan M. Karpoff & Victoria McWilliams, Thirty Years of Shareholder Activism: A Survey of Empirical Research, J. Corp. Fin. (forthcoming 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2608085.

345 That is, when a small group of shareholders must bear all of the costs of proxy contests while sharing in only a fraction of any benefits, with other shareholders absorbing the rest, the small group may be discouraged from initiating potentially value-enhancing proxy contests.

346 See, e.g., Lucian A. Bebchuk, The Myth of the Shareholder Franchise, 93 Va. L. Rev. 675, 712 (2007) ; Bernard S. Black, Shareholder Passivity Reexamined, 89 Mich. L. Rev. 520 (1990).

between management, dissidents, and shareholders that may result because of changes in the threat of proxy contests, such as discussions at earlier stages of a campaign or reactions to other types of shareholder interventions, could similarly be beneficial. Such engagement may improve the effectiveness of boards, may lead to value-enhancing changes, and may perhaps be a more efficient means to achieve such changes than expensive proxy contests. For example, one study found that an increased likelihood of being targeted with a proxy contest (even if an actual proxy contest does not materialize) is associated with changes in corporate policies that are followed by improved operating performance.[347] In these ways, an increase in the incidence or perceived threat of proxy contests could represent a valuable disciplinary force for some boards.

Conversely, an increase in the incidence and perceived threat of contests could also have a negative impact on the efficiency and competitiveness of registrants. For example, studies have found that proxy contests in which dissidents win one or more seats but there is no change in the incumbent management team and the registrant is not acquired are associated with underperformance in the years after the contest.[348] These results are consistent with the idea that conflicts in the boardroom may have detrimental effects for shareholders. An increase in the perceived threat of proxy contests or in engagement with dissidents could also have negative implications. For example, some studies have found that boards that face a lower threat of being replaced because of poor short-term results may be better able to focus on long-term value creation.[349] Studies

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347 See Fos Study, at 24-26.

348 See, e.g., Mulherin & Poulsen Study, at 305-08; David Ikenberry & Josef Lakonishok, Corporate Governance Through the Proxy Contest: Evidence and Implications, 66 J. of Bus. 405, 424-25 (1993).

349 See Martijn Cremers, Lubomir Litov & Simone Sepe, Staggered Boards and Long-Term Firm Value, Revisited, working paper (2016), available at

have also found that increased dissident influence may be detrimental to the extent that managers make concessions or policy changes that are value-decreasing in order to deter activists.[350] Thus, in some cases, an increase in the incidence or perceived threat of proxy contests could represent a costly distraction for boards and corporate officers. It is also possible that any increased incentive for companies to stay or go private rather than bear the threat of proxy contests could negatively affect capital formation.[351]

Given these competing factors, to the extent there is any change in the incidence and perceived threat of typical proxy contests, the effects are likely to vary from registrant to registrant, and it is difficult to predict the average effects of changes in the nature of proxy contests across all registrants. The possible effects of changes in the incidence or threat of nominal proxy contests are similarly unclear. To the extent that such contests have the potential to affect the results of director elections, the actual incidence or perceived threat of such contests may either increase director discipline or create a distraction for boards, as in the case of typical proxy contests. However, such

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364165; Martijn Cremers, Erasmo Giambona, Simone Sepe & Ye Wang, Hedge Fund Activism and Long-Term Firm Value, 17-20, working paper (Nov. 19, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693231.

350 See, e.g., John Matsusaka & Oguzhan Ozbas, A Theory of Shareholder Approval and Proposal Rights, USC CLEO, Working Paper No. C12-1 (Mar. 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984606.

351 See, e.g., Geoff Colvin, Going Private: Take this Market and Shove it, Fortune Magazine (May 29, 2016), available at http://fortune.com/going-private/ (citing the avoidance of proxy contests as motivation for firms to go private). While it is possible that companies could have some incremental incentive to stay or go private, we believe it is unlikely that the proposed amendments would result in an increased incentive for registrants to relist or redomicile overseas, given that these changes alone would not be sufficient to avoid being subject to the U.S. proxy rules. For example, foreign issuers may be subject to the U.S. proxy rules unless they qualify as foreign private issuers under Exchange Act Rule 3b-4(c). In particular, a foreign registrant cannot qualify as a foreign private issuer if more than 50 percent of its securities are held by U.S. residents and at least one of the following applies: (i) a majority of the officers and directors are U.S. citizens or residents; (ii) more than 50 percent of the issuer's assets are located in the U.S.; or (iii) the issuer's business is principally administered in the U.S.

contests may be used to attract attention in the interest of pursuing other changes. In some cases, drawing attention to particular issues in this way could lead to value-enhancing changes. In other cases, dissidents may use such contests to pursue idiosyncratic interests which may not be shared by other shareholders, in which case the average shareholder may be unlikely to benefit and yet likely bear the costs of registrants expending additional resources on solicitation in such contests. In these cases, the negotiations related to such contests or the perceived threat of such contests could also result in registrants making concessions to dissidents that may not be in the best interest of the average shareholder in order to reduce the costs of contending with such contests.

Finally, the effects of any changes in proxy contests may be affected by managers and market participants altering their behavior in reaction to the proposed amendments. In particular, changes in the nature of proxy contests may increase or decrease the use of complementary or substitute governance mechanisms.[352] For example, studies have found that a historical increase in proxy contests was associated with a decrease in hostile takeovers, in which an entity acquires control of a company against the wishes of the incumbent board by purchasing its stock, suggesting proxy contests and hostile takeovers may be substitute mechanisms for control challenges.[353] In contrast, activist shareholders with large holdings in a particular registrant (or activist blockholders) who may be able to directly monitor and communicate with management, may represent a type of governance mechanism that can be a complement to proxy contests.[354] For example, if activist

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352 The concepts of complementary and substitute governance mechanisms are discussed in Section IV.C. supra.

353 See, e.g., Fos Study, at 5-6, 26.

354 See Section IV.B.1.b. for the frequency and size of institutional blockholdings among potentially affected registrants for which this data is available.

blockholders are present, it may be easier to overcome collective action problems and initiate and win a proxy contest. Thus, any increase in the potential impact of proxy contests may be enhanced by the presence of activist blockholders. At the same time, if the potential impact of proxy contests increases, the incentive of registrants to engage with activist blockholders and make suggested improvements may increase, enhancing the monitoring value of activist blockholders.[355]

Any effects that follow from increasing the incidence or perceived threat of proxy contests may be either mitigated or magnified by indirect effects on these substitute and complementary mechanisms. For example, any increase in the incidence of proxy contests could be offset by reductions in the use of substitute mechanisms such as takeovers.[356] Alternatively, such an increase could be magnified by complementary mechanisms whose effectiveness and therefore usage may increase (such as by activists being more likely to acquire blockholdings) in an environment in which proxy contests are more frequent. Such interactions may have significant effects on the overall economic effects of the proposed amendments. However, because so many different governance mechanisms are closely interrelated, it is difficult to predict the extent and impact of such interactions. We solicit comment below on the likelihood of changes in the incidence and threats of proxy contests as a result of the proposed amendments and any corresponding effects, including effects on efficiency, competition, and capital formation.

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355 For a broader review of issues concerning the role of blockholders in corporate governance, see Alex Edmans, Blockholders and Corporate Governance, 6 Ann. Rev. Fin. Econ. 23 (2014).

356 We note that proxy contests may also be a complementary mechanism for certain types of takeovers. In particular, proxy contests can facilitate some hostile takeovers by removing directors who oppose the transaction in question. See Mulherin & Poulsen Study, at 309.

5. Specific Implementation Choices

In this section, we discuss, to the extent possible, any costs and benefits specifically attributable to individual aspects of the proposed amendments. We also discuss changes to the proxy voting process we considered that present significant implementation alternatives and their benefits and costs compared to the amendments as proposed.

a. Bona Fide Nominees and the Short Slate Rule

Revision to the Consent Required of a Bona Fide Nominee

We propose to amend the definition of a bona fide nominee under Rule 14a-4(d)(4) for registrants other than funds and BDCs to include all director nominees that have consented to being named in any proxy statement, whether that of the registrant or that of a dissident, relating to the registrant's next meeting of shareholders at which directors are to be elected.

The proposed amendment to the definition of a bona fide nominee would remove the impediment imposed by the current rule to including other parties' nominees on one's own proxy card. We preliminarily believe that this proposed amendment would, in and of itself, likely impose no direct cost on parties to contested elections because it would not require parties to change their slates of nominees or their proxy materials. However, revising Rule 14a-4(d)(4) is a prerequisite to any rule that would allow or require universal proxies. As such, all of the other costs and benefits discussed above, the details of which depend on the other implementation choices in this proposal, are conditional on this proposed amendment. Additionally, revising 14a-4(d)(4) alone, without the other amendments we are proposing, would permit the optional use of universal proxies, an alternative we discuss below.

Elimination of the Short Slate Rule

We propose to eliminate the short slate rule, which currently permits a dissident seeking to elect a minority of the board and running a slate of nominees that is less than the number of directors being elected to round out its slate by soliciting authority to also vote for certain registrant nominees, for registrants other than funds and BDCs. The proposed elimination of the short slate rule potentially would impose costs on certain dissidents. Under the existing proxy rules, dissidents qualifying to use the short slate rule can select the set of registrant nominees that they prefer to round out their slate. Eliminating this rule, and imposing a mandatory universal proxy, would take away this choice on the part of the dissident, reducing any related strategic advantage that the dissident may expect to gain, and would instead allow shareholders voting on the dissident proxy card to select the registrant nominees, if any, that they prefer.

We have considered whether, as an alternative to the proposed approach, the proxy rules should instead be revised to treat contests that do not involve a potential change in the majority of the board differently from contests in which control of the board is at stake, as in the current short slate rule and as recommended by some observers.[357] For example, we have considered an alternative approach that would not require the use of universal proxies in contests that may involve a potential change in a majority of the board. When a dissident is seeking a majority of seats on the board, electing a mixed board where a minority of seats would be held by dissident nominees may be inconsistent with the intentions and goals of both the dissident and the registrant.

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357 The IAC recommended that the Commission consider providing proxy contestants with the option to provide universal proxies in connection with short slate director nominations. The IAC did not make such a recommendation in the case of elections in which majority control of the board is at stake. See IAC Recommendation, at 2.

Not requiring universal proxy cards in such cases could reduce the likelihood of electing a mixed board when such an outcome is undesirable to both parties to the contest and could be disruptive. However, under this alternative, shareholders would continue to have more limited voting options when voting by proxy than when voting in person in contests that involve a potential change in a majority of the board. Furthermore, the risk of electing a mixed board when it would be disruptive or contrary to the goals of both parties to the contest could also be mitigated through disclosure emphasizing the importance of achieving (or retaining) majority control of the board and clarifying the willingness of each nominee to serve in the case control is not achieved.

Solicitations Without a Competing Slate

Under existing rules, a party may solicit proxies without presenting a competing slate, such as when soliciting proxies against some or all of the registrant nominees (a "vote no" campaign) or when soliciting proxies in favor of one or more proposals on matters other than the current election of directors. The proposed amendments would permit, but not require, proponents conducting solicitations without a competing slate to also solicit authority with respect to some or all registrant nominees in their proxy statements and proxy cards. To the extent that the ability to include these candidates would allow shareholders to vote on the proponent's proxy card while still exercising their full voting rights, this change may result in somewhat increased support for proponents in solicitations without a competing slate.

This potential increase in support may increase proponents' incentive to initiate such campaigns. As in the other contexts discussed above, it is difficult to predict to what extent proponents may increase the incidence of such campaigns, or to what degree the involved parties may react in other ways to the potential for somewhat higher support

in solicitations without a competing slate. For example, any resulting increase in the frequency of such campaigns may be partially offset by accompanying changes in incentives for registrants to engage with proponents. Such interventions could also substitute, in some cases, for contested elections. It is unclear whether increased support for, or an increased incidence of, proponent initiatives would generally enhance or detract from the effectiveness of boards and the efficiency and competitiveness of registrants.

An alternative to the proposed approach would be to require proponents conducting solicitations without a competing slate to include the names of all duly nominated director candidates on their proxy cards (unless they are soliciting votes against all registrant nominees). This approach may have limited effect in the case of a "vote no" campaign, because shareholders would already be able to vote "for" and "against" their choice of any registrant nominees by using the registrant proxy card. In contrast, in the case of a proponent that solicits in favor of a particular proposal, the registrant may choose to not include the proposal on its proxy card, in which case, shareholders voting on the proponent's proxy card would be disenfranchised under the baseline and similarly may be disenfranchised under the proposed approach unless the proponent chooses to include all director nominees on its proxy card. This alternative would remove the risk of such disenfranchisement with respect to voting for directors. However, the risk of such disenfranchisement under the proposed amendments is likely mitigated because we expect that such proponents would have the incentive to include the registrant nominees on their proxy card in order to increase the incentive for shareholders to use their card and would generally not have strategic reasons to exclude registrant nominees from their proxy card because of the lack of a competing slate.

b. Use of Universal Proxies

Mandatory Use of Universal Proxies in Non-Exempt Solicitations in Contested Elections

The proposed amendments would require that universal proxies be used by each party—the registrant as well as the dissident—in any contested election with competing slates, regardless of the number of director seats being contested. This requirement would apply to all registrants that are subject to the proxy rules other than registered investment companies and BDCs.

Mandatory vs. optional use of universal proxies

Requiring both the registrant and the dissident in any contested election with competing slates to use universal proxies would enable all shareholders to vote for the combination of candidates of their choice in all such elections, whether they vote by proxy or in person at the meeting. Imposing this mandate on the registrant as well as the dissident may impose minor direct costs on both parties and may result in potentially significant, but uncertain, strategic advantages or disadvantages for these parties, leading to further costs and benefits for these parties and either benefits or costs for shareholders at large. Indeed, many of the potential effects discussed throughout this economic analysis are conditional on a mandatory universal proxy requirement.

Mandating the use of universal proxies by registrants in particular may have certain significant implications. Specifically, this approach would make it possible for all shareholders voting by proxy, even those not solicited by the dissident, to vote for dissident nominees. Requiring registrants to use universal proxies would likely result in all shareholders receiving a proxy card that would allow them to vote for any combination of the full set of director nominees, more accurately reflecting the voting

options available to shareholders at the meeting. However, requiring the names of the dissident nominees to appear on the registrant's proxy card would allow a form of access to the registrant's proxy materials without the eligibility criteria that accompany other forms of access,[358] and could result in an increased incidence of nominal contests that capitalize on this new channel for such access. As discussed in Section IV.D.4.b above, it is unclear to what extent any dissidents would choose such an approach and whether any such contests would be beneficial or detrimental.

We considered mandating the availability of universal proxy cards while allowing registrants and dissidents to initially disseminate a non-universal proxy card if they so choose. In particular, anyone soliciting a proxy in a contested election using a non-universal proxy card would be required to provide disclosure about the availability of a universal proxy card and to provide a universal proxy card upon request to any shareholder it solicited. Registrants and dissidents would still be subject to other requirements similar to the proposed amendments, such as the notice and filing requirements, in order to facilitate the effective use of universal proxies. Allowing the names of opponent nominees to be excluded from a party's original dissemination may allow both parties to the contest to reduce the degree of publicity that they provide to their opponent's nominees. This approach may therefore reduce the possibility of nominal contests that seek to capitalize on such publicity while still providing shareholders the ability to vote for their preferred combination of nominees by electing to receive a universal proxy card. This approach may also involve additional costs and logistical difficulties associated with maintaining multiple types of proxy cards and

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[358] For example, proxy access bylaws, where available, apply certain eligibility criteria including an ownership threshold.

fulfilling shareholder requests for universal proxy cards in an efficient and equitable way. Further, we note that this approach would place some burden, although perhaps not particularly heavy, on shareholders to request a universal proxy card.

There are two main alternatives to mandating that universal proxies be used by both parties to a contested election with competing slates. First, the use of universal proxies could be optional for all parties rather than mandatory. Second, there are hybrid approaches in which universal proxies would be mandatory for one party to the contest and optional for the other.

Under an optional approach, which has been recommended by certain observers,[359] whether or not a party chose to provide a universal proxy would depend on strategic considerations. Having the option rather than a requirement to use a universal proxy may benefit either registrants or dissidents, depending on the nature of individual contests. Optional universal proxies likely would be used by a contesting party, to the possible detriment of its opponent, when the party believes that including the names of the opponent's nominees on its own card would be in its best interest, but not otherwise. For example, a party that expects strong support for its opponent's nominees may prefer to include those nominees on its proxy card in order to increase the likelihood that shareholders use its card, since they would be able to do so without giving up the ability to support at least some of the opponent's nominees. Optional universal proxies may also mitigate the risk, relative to that under the proposed amendments, of electing a mixed board when such an outcome is inconsistent with the intentions of both the dissident and the registrant, because both parties may be less likely to use a universal proxy in such

[359] See IAC Recommendation, at 2.

cases. This alternative may also reduce the likelihood of an increase in nominal contests because the registrant would control whether or not the names of dissident candidates were included on its proxy card. Finally, because allowing the optional use of universal proxy cards would necessarily entail removing the impediments to such proxies in the existing proxy rules, such an approach might facilitate the "private ordering" of a universal proxy requirement—that is, the ability of shareholders to request that individual registrants commit to a policy of using universal proxies in future contests through changes to their corporate governing documents—at only those registrants where shareholders believe mandatory universal proxies would be beneficial.[360]

However, under an optional approach it is likely that in many cases neither registrants nor dissidents would include their opponent's nominees on their proxies, in order to avoid diluting the potential support for their own nominees among those shareholders that use their proxy card. To the extent that contesting parties were further given the option to determine how many and which of their opponent's nominees to include, it is likely that the contesting parties would often include fewer than all of the duly-nominated candidates on their proxy cards, even when they did include some of their opponent's nominees. In any such cases, shareholders would continue to have more limited voting options when voting by proxy than when voting in person. Thus, we expect that an optional approach would result in inconsistent application and not fully achieve the goal of allowing shareholders the ability to vote by proxy for their preferred combination of director candidates, as they could at a shareholder meeting.

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[360] The availability of such private ordering may depend on developments in state law. Also, if only a minority of shareholders is interested in splitting their votes, it may be difficult to obtain the support required to revise bylaws or other corporate governing documents to require universal proxies.

Canada's system of optional universal proxies illustrates the potential limitations of an optional system. In Canada, a party to a contested election has the option, but is not required, to include some or all of its opponent's nominees on its own proxy card. There have been roughly 10 to 20 election-related proxy contests per year in Canada over the last decade,[361] representing a significant fraction of the annual number of contests in the United States. However, we are aware of only five cases in which at least one party to a Canadian proxy contest that proceeded to a vote used a universal proxy,[362] and one additional case in which at least one party to the contest included some, but not all, of its opponent's nominees on its proxy card.[363]

In contrast, hybrid alternatives would require at least one party to a contest to use a universal proxy, potentially allowing a greater number of shareholders to split their ticket using a proxy compared to an optional approach. One hybrid alternative would be to require the dissident to use a universal proxy and allow registrants the option, but not the obligation, to include the dissident's nominees on its proxy card. This hybrid approach could be implemented with or without a notice requirement or a minimum solicitation requirement. In this case, shareholders solicited by the dissident would be able to cast their votes by proxy for their choice of any combination of candidates. If the

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361 See Fasken Martineau DuMoulin LLP, Canadian Proxy Contest Study – 2016 Update (2016), available at http://www.fasken.com/canadian-proxy-contest-study-2016-update/.

362 This estimate includes only those cases that we are aware of in which at least one party included all of the registrant nominees and all of the dissident nominees on its proxy card. See, e.g., Boyd Erman, CP Vote Broke New Ground for Democracy, The Globe and Mail (May 30, 2012), available at http://www.theglobeandmail.com/report-on-business/streetwise/cp-vote-broke-new-ground-for-democracy/article4217586/ (reporting on one such case).

363 We note that differences in rules and practices in Canada as compared to the United States limit our ability to draw direct inferences from the experience of Canada. See, e.g., Patricia Olasker & Alex Moore, Debunking the Myth: Why Activism is Tough in Canada, David Ward Philips & Vineberg (Mar. 2015), available at https://www.dwpv.com/~/media/Files/PDF_EN/2015/2015-04-14-Debunking-the-Myth-Why-Activism-is-Tough-in-Canada.ashx.

registrant chose not to use a universal proxy, those not solicited by the dissident would not be able to vote for dissident nominees or to split their vote across registrant and dissident nominees unless they attended the meeting or specifically requested the dissident's proxy card.[364]

In comparison to the proposed amendments, this hybrid approach would prevent the incidence of nominal contests that seek to capitalize on the ability of dissidents to include the names of alternative director candidates in the registrant's proxy materials. Additionally, this approach may confer an advantage to the registrant in some cases. For example, if the dissident would otherwise have had a high chance of winning many seats in the election, requiring a universal proxy for the dissident but not the registrant could dilute support for the dissident nominees among those voting on the dissident's card, by providing other alternative candidates on the same card. The dissident would not have a corresponding opportunity to gain potential votes from the registrant's proxy card unless the registrant chose also to use a universal proxy. This effect may be mitigated to the extent that registrants may have a stronger incentive to use a universal proxy to attract more shareholders to use their card in situations in which the dissident is likely to draw high levels of support. It may also be mitigated by the possibility that shareholders prefer the dissident's universal card over the registrant's non-universal proxy card, which may result in some additional votes for dissident nominees. Finally, we note that the ability of dissidents to select whom they solicit may provide an advantage that could help to balance any advantage that registrants would gain under this approach.

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[364] Existing rules do not require the dissident in an election contest to solicit all shareholders; rather, the incentive to solicit comes from the dissident's motivation to run a successful election campaign.

Another hybrid approach we considered would be to require registrants to use a universal proxy, while dissidents would be given the option, but not the obligation, to do so.[365] This hybrid approach may more fully achieve the goal of allowing all shareholders to vote by proxy for their choice of candidates because, as a practical matter, the registrant likely would distribute a universal proxy card to all shareholders. However, in addition to the risk of conferring a slight advantage to one party in certain cases, as under the other hybrid alternative, this approach would also present a similar likelihood of increased nominal contests as under the proposed amendments due to the exposure gained by the dissident via the registrant's proxy card.

Applicability of mandatory universal proxies to registered investment companies and business development companies

Because the proposed amendments would not apply to funds or BDCs, these registrants would remain subject to the federal proxy rules currently in effect. Therefore, we do not expect the proposed amendments to affect the current nature of director election contests among funds and BDCs.

We currently observe very few director election proxy contests at open-end funds.[366] By contrast, proxy contests do sometimes occur among closed-end funds and BDCs. As discussed previously in Section II.D, contests at closed-end funds and BDCs are generally driven by dissidents seeking to profit from reducing the discount of the

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365 Registrants with certain advance notice bylaw provisions may have the option of using a universal proxy card if they so choose. In particular, we are aware of two cases in which dissident nominees were required to consent to being included on the registrant's proxy card as part of the director questionnaire required under the registrant's advance notice bylaw provision. The dissident does not have such leverage over registrant nominees and in both cases, the registrant nominees did not consent to being named on the dissident's proxy card.

366 Staff is not aware of any director election contests in open end funds from the year 2000 to July 2016.

fund's or BDC's share price relative to NAV.[367] Staff analysis of proxy statement filings by dissidents in calendar years 2014 and 2015 found 11 contests at closed-end funds and BDCs and in only one contest did the dissident seek fewer seats than were up for election.[368] In three out of the four cases where the dissidents successfully achieved board representation, all the dissidents' nominees were elected to the board.[369]

We have considered, as an alternative, applying the proposed amendments to funds and BDCs, which would also enable shareholders of funds and BDCs to vote a split ticket in director election contests through the use of universal proxies. In principle, the same general types of potential costs savings and increase in voting alternatives could apply to shareholders of funds and BDCs as those we discussed previously in Section IV.D.1 for shareholders of operating companies. Nevertheless, we recognize that funds and BDCs have particular characteristics that could impact the economic effects of the proposed amendments. Below, we highlight differences between funds and BDCs on the one hand, and operating companies on the other, that suggest the economic effects of the proposed mandatory universal proxy system could be different for funds and BDCs.

First, it is unclear whether there is a current demand for split-ticket voting among shareholders of funds and BDCs. In this regard, we note that petitioners seeking a universal proxy requirement have not specifically expressed a need for universal proxy

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367 See supra note 190 and accompanying text.

368 Our analysis found three contests in 2014 and eight in 2015. Of those 11 contests, nine were at closed-end funds and two at BDCs. At 10 of the 11 contests dissidents were either seeking a majority of the board or seeking all of the board seats up for election.

369 In the one case where the dissident did not get all its nominees appointed to the board, there was never a contested vote at the annual meeting as the dissident and the registrant negotiated a settlement prior to the meeting. In the settlement, the registrant agreed to add two of the dissident's four nominees to its own slate of nominees for a non-contested election at the annual meeting.

cards at these types of registrants.[370] Additionally, based on the observation above that contests for fewer than all seats up for election, or the election of some but not all dissident nominees, have been rare at funds and BDCs, we believe that shareholders in these registrants may have been less likely to seek split-ticket voting in contested elections. In addition, particular characteristics of funds and BDCs that they do not share with operating companies may affect the demand for split-ticket voting. For example, the types of changes pursued by dissidents at such registrants, such as converting a closed-end fund to an open-end fund, have tended to be binary in nature. As a result, we generally infer that shareholders siding with the dissident's view on one of these binary choices would be expected to vote the dissident's slate on the dissident's proxy card, as this would maximize the probability of the dissidents being able to carry out their proposed change. This is particularly true where the dissident nominates directors representing all of the seats up for election or a majority of the board—which occurs in the vast majority of cases—as this would give the dissident the power to enact the preferred fundamental change. This contrasts with our understanding of proxy contests for operating companies, where the types of changes pursued by dissidents are often less binary in nature and may therefore cause dissidents to seek a minority of board seats. In particular, shareholders may in this case desire to vote a split ticket to express support for intermediate or compromise approaches between affecting the full scope of changes sought by the dissident and the status quo favored by the registrant. Thus, the effect of the proposed amendments for funds and BDCs could be different from the effect for

370 See supra note 45.

operating companies, because funds and BDCs may experience a smaller number of non-binary contests where shareholders would desire to split their votes.

Second, the effects of the proposed amendments on the costs of contested elections may be different for funds and BDCs to the extent their shareholder base is different from that of operating companies. For example, a recent industry report shows that retail investors held approximately 89 percent of mutual fund assets in the United States, [371] which is significantly larger than the corresponding ownership percentage that has been reported for operating companies.[372] This data may indicate that ownership of funds and BDCs is more dispersed than ownership of operating companies, in which case any increase in solicitation costs from the proposed amendments may be greater for funds and BDCs. However, to the extent this is not the case and instead ownership is more concentrated at funds and BDCs than in operating companies, any increase in solicitation costs may be lower for funds and BDCs.

Third, the effect of the proposed amendments on voting outcomes may differ to the extent funds and BDCs have a different shareholder base than operating companies. For example, on the one hand, if funds and BDCs have a higher portion of shareholders who do not tend to vote their shares in proxy contests, there may be a more limited impact of universal proxy cards on voting outcomes. On the other hand, to the extent funds and BDCs have a higher portion of shareholders participating in voting that are currently unable to vote a split ticket, there may be a greater impact on voting outcomes.

Fourth, specific features of the governance environment could make the effects of the proposed amendments on the outcomes of director election contests different for

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371 See 2016 ICI Fact Book, at 29.

372 See supra note 213.

funds and BDCs compared to their effects for operating companies. For example, funds and BDCs that are part of larger complexes generally have unitary or cluster board structures that are not observed in operating companies. To the extent that an increase in split-ticket voting results in a greater rate of mixed boards, where some dissident nominees are elected together with some registrant nominees, such outcomes may impose more significant costs on funds and BDCs with unitary or cluster board structures. These companies could be required to make costly and potentially disruptive changes in the logistics of board meetings and the discussions held in such meetings to accommodate a mixed board in one fund out of the larger complex. We note, however, that an increased likelihood of mixed board outcomes could be beneficial for funds and BDCs to the extent a mixed board would result in more effective monitoring and less potential for conflicts of interests.[373]

Finally, the effects of universal proxies on the incidence of contested director elections could be different for funds and BDCs. Shareholders of funds and BDCs have rights under the federal securities laws that are not available to shareholders of operating companies that could affect the incidence of contested director elections. Shareholders of funds and BDCs must vote to approve changes in certain operational matters and to approve advisory contracts and material amendments to such contracts.[374] To the extent

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[373] Concerns related to the monitoring effectiveness of unitary board structures have been raised by industry observers. See, e.g., James Sterngold, Is Your Fund's Board Watching Out for You?, Wall St. J. (June 9, 2012) (stating that "it's not uncommon for a board member to oversee 100 funds or more," and that "for many critics, that's a prescription for overwhelmed and passive boards"). But, on the other hand, studies have found that unitary boards can be an effective governance mechanism. See, e.g., Sophie Xiaofei Kong & Dragon Yongjun Tang, Unitary Boards and Mutual fund Governance, 31 J. Fin. Res. 193 (2008) (finding that mutual funds with unitary boards are associated with lower fees, are more likely to pass the economies of scale benefits to investors, are less likely to be involved in trading scandals, and rank higher on stewardship).

[374] See supra notes 193-194.

these shareholder rights enable shareholders to participate effectively in the governance of the entity, there may be lower incentives for potential dissidents to initiate director election contests at funds and BDCs compared to operating companies. As a consequence, depending on how the proposed amendments would change the relative attractiveness of contested elections for potential dissidents at funds and BDCs, there may be either a greater or lesser effect of the proposed amendments on the incidence of contests at these entities compared to operating companies.

We also note that differences across open-end funds, closed-end funds, and BDCs, could lead to differential economic effects of universal proxies across these different types of investment companies. Historically, director elections generally happen less frequently among open-end funds compared to other registrants, including closed-end funds and BDCs,[375] and therefore these types of funds provide dissidents with fewer opportunities to launch director election contests. In addition, dissatisfied shareholders of open-end funds can sell their shares at NAV and invest elsewhere, such as another open-end fund that is a close substitute in terms of its portfolio holdings.

In contrast, dissatisfied shareholders of closed-end funds and BDCs that are trading at a discount to NAV may be interested in encouraging actions that could move the share price closer to NAV, including actions that may be sought by dissidents in a proxy contest.

We request comments in this release on whether, and if so, the extent to which investment companies, or different types of investment companies, would be differentially affected by a universal proxy requirement as well the other changes to the

375 One reason for this is that many open-end funds are not required to hold annual meetings. See supra note 185 and accompanying text.

proxy rules contemplated in this release. We also request information and data that would help us understand and quantify differences in the likely economic effects of applying the proposed amendments to investment companies as compared to operating companies and to the different types of investment companies.

Notice Requirements

The proposed amendments would require that dissidents in all contested elections provide notice to registrants of their intention to solicit proxies in favor of other nominees, and the names of those nominees, no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date.[376] A notice to the registrant is necessary for the registrant to be able to include the names on the universal proxy card it prepares and distributes to shareholders. Without providing such notice, a dissident would not be permitted to run a non-exempt solicitation in support of its director nominees. The proposed amendments would also require registrants to provide similar notice to dissidents no later than 50 days before the anniversary of the previous year's annual meeting date, in order to allow dissidents sufficient time to include the names of registrant nominees on the universal proxy card that they prepare and disseminate to shareholders.

Because advance notice bylaws commonly require a similar amount of notice by dissidents seeking to nominate alternative candidates, the effect of the proposed notice

[376] If the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then the proposed amendments would require that notice must be provided no later than 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant, whichever is later.

requirement for dissidents may be limited.[377] As discussed above, we understand that advance notice bylaws generally have deadlines ranging from 60 to 120 days before the meeting anniversary date.[378] However, it is possible that some registrants have advance notice bylaws with later deadlines. Also, some registrants do not currently have such bylaws and it is possible that boards may waive the applicability of such bylaws.[379] Further, relatively smaller registrants are somewhat less likely to have advance notice provisions than larger registrants, and proxy contests are more common among these relatively smaller registrants.[380] The proposal would, in effect, replicate the primary effects of an advance notice bylaw applying to contested elections even at registrants that currently have no advance notice bylaw (or bylaws with later deadlines, to the extent these exist).

Although we believe that only a small fraction of registrants do not already have a comparable or stricter notice requirement, because the bylaws at different registrants may have been designed to reflect their individual circumstances, imposing this new requirement on all registrants may not be optimal. In particular, the proposal's notice requirements would impose a new constraint on dissidents in cases in which the same degree of notice was not otherwise required, potentially imposing some incremental costs on such dissidents. The proposal would also prevent the incidence (and eliminate the threat) of contests initiated later than the proposed notice deadline ("late-breaking" proxy contests) at all registrants. As in the case of other potential effects of the proposed

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377 It has been estimated that 95 percent of S&P 500 firms and 90 percent of Russell 3000 firms had an advance notice bylaw at the end of 2014. See supra Section IV.B.2.

378 See supra note 246.

379 See supra note 244.

380 See supra Section IV.B.2.

amendments on the incidence and perceived threat of contested elections, these effects of the proposed notice requirements may reduce either the degree of discipline or the risk of unproductive distraction for boards.[381]

To consider potential effects on late-breaking proxy contests, we reviewed the timing of recent proxy contests. As shown in Table 2 above, we estimate that dissidents filed their initial preliminary proxy statements on average 60 days before the annual meeting for contested elections initiated in 2014 and 2015.[382] We also estimate that approximately 56 percent of these contested elections had an initial preliminary proxy statement filed by the dissident within 60 days of the meeting, which may represent late-breaking contests.[383] While the filing of a preliminary proxy statement does not mark the earliest point at which a dissident initiates a proxy contest and finalizes a slate of nominees, it does provide a threshold date before which these actions must have occurred. We also considered the earliest date at which a dissident announced its intent to pursue a proxy contest in a regulatory filing. For those contests for which we have such information, we estimate that in approximately 11 percent of these contested elections the dissident announced its intent to pursue a proxy contest within 60 days of the meeting, which is another measure of potential late-breaking contests.[384] Disclosing the intent to pursue a proxy contest is not the same as providing notice of the names of the dissident nominees, but it may mark a threshold date after which such notice could have been provided.

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381 See Section IV.D.4.

382 See Section IV.B.2.b.

383 Id.

384 Id.

We therefore cannot rule out that the proposed notice requirement may prevent some proxy contests that would otherwise have occurred. However, dissidents who might have initiated late-breaking contests may simply adjust their timetable to be compatible with the proposed notice requirement. Also, any effects of the proposed notice requirements on the incidence or threat of late-breaking contested elections may be offset somewhat by the ability of dissidents who are unable to meet the notice deadline to take other actions, such as initiating a "vote no" campaign, using an exempt solicitation,[385] or calling a special meeting (to the extent possible under the bylaws) to remove existing directors and elect their own nominees, which may allow them to achieve similar goals with respect to changes to the board.

While advance notice bylaws currently apply to dissidents at many registrants, registrants are not currently subject to a requirement that they provide notice of their nominees to dissidents. Thus, the proposed notice requirement for registrants would represent a new obligation for registrants in contested elections. We estimate that 68 percent of registrants filed a preliminary proxy statement at least 50 days before the annual meeting for contested elections initiated in 2014 and 2015,[386] so we expect that the majority of registrants will have a list of nominees ready by the proposed notice deadline. However, the proposed notice requirement may require some registrants to finalize their list of nominees somewhat earlier than they would otherwise.

Also, to the extent that a registrant might consider changing its selected nominees after providing notice and after the dissident thereby disseminates its definitive proxy materials (but perhaps before the registrant does so), the proposed notice requirement

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385 In this case, the total number of persons solicited could be no more than 10. See Section IV.B.3.

386 Based on staff review of EDGAR filings.

may provide registrants with an increased incentive not to make such changes because of the risk that votes for registrant nominees on the dissident card could be invalidated. Because the proposed notice requirement may require some registrants to finalize their nominees earlier than they would otherwise and may increase registrants' incentives not to change their nominees, there is a possibility that this requirement could have a detrimental effect on the quality of candidates that registrants nominate. However, the majority of registrants in recent contests filed a preliminary proxy statement at least 50 days before the meeting date, so the proposed notice deadline is close to the date by which registrants typically disclose their nominees. We therefore expect any such effects to generally be minor.

We have also considered alternatives to the notice requirements included in the proposed amendments, such as earlier as well as later potential notice deadlines for dissidents. In these alternatives, we have assumed that the notice deadline for registrants would also be revised to be 10 days after the revised deadline for the dissident, to allow the registrant sufficient time to prepare its notice and list of nominees in reaction to the receipt of a notice from a dissident. Under a later notice deadline, the risk of preventing late-breaking proxy contests that would otherwise have occurred, particularly at registrants without advance notice bylaws, would be reduced. For example, when considering a deadline of no later than 45 calendar days (as opposed to 60 calendar days, as proposed) prior to the anniversary of the previous year's annual meeting date, we found that in approximately 6 percent of contested elections initiated in 2014 and 2015 the dissident announced its intent to pursue a proxy contest within 45 days of the meeting (as compared to 11 percent within 60 days), and in 29 percent of these contests the dissident filed a preliminary proxy statement within 45 days of the meeting (as compared

to 56 percent within 60 days). Additionally, a later deadline for registrants would reduce the likelihood that some registrants may have to finalize their nominees earlier than they would otherwise. For example, we estimate that in approximately 2 percent of contested elections initiated in 2014 and 2015, the registrant filed its preliminary proxy statement within the 35 days before the meeting (as compared to 32 percent within 50 days).

However, a later deadline may increase the risk of confusion among shareholders and impose additional solicitation costs if the registrant's non-universal proxy card has already been disseminated and requires revision. In particular, we estimate that in 22 percent of contests initiated in 2014 and 2015, registrants filed a definitive proxy statement at least 45 days before the meeting.[387] In contrast, we found no cases in this sample in which a registrant filed a definitive proxy statement earlier than 60 days before the meeting.[388]

An earlier deadline, such as 90 days prior to the anniversary of the prior year's meeting, would reduce the risk, relative to the proposal, of the potential confusion or costs related to notice being received after non-universal registrant proxy cards have already been disseminated. However, the risk that registrants will have distributed their proxy cards prior to the proposed 60-day deadline seems relatively low, and an earlier deadline may further preclude late-breaking contests beyond those prevented by the proposed deadline. For example, when considering a deadline of no later than 90 calendar days (as opposed to 60 calendar days, as proposed) prior to the anniversary of the previous year's annual meeting date, we found that in a significant percentage of contested elections initiated in 2014 and 2015, the dissident announced its intent to

387 Based on staff analysis of EDGAR filings.

388 Id.

pursue a proxy contest or filed its preliminary proxy statement between 60 and 90 days prior to the meeting. Some of these contests may have been permitted under a 60-day deadline but excluded in the case of a 90-day deadline.[389] Additionally, an earlier deadline for registrants would increase the likelihood that some registrants may have to finalize their nominees earlier than they would otherwise. For example, we estimate that in approximately 63 percent of contested elections initiated in 2014 and 2015, the registrant filed its preliminary proxy statement between 80 and 50 days before the meeting.[390]

A further alternative would be to require universal proxies in cases where the dissident provides notice to the registrant, and not require them in cases where the dissident does not meet the notice deadline. Under this alternative, the dissident would be permitted to initiate a late-breaking proxy contest but, because of the risk of confusion if proxies have already been disseminated, would not trigger the use of universal proxies, while other contests (in which notice was provided) would require universal proxies. This alternative may raise similar concerns to those discussed above with respect to the optional use of universal proxies, in that there would still be some elections without universal proxies, and the dissident could strategically time its actions to avoid triggering universal proxies when it believes there is an advantage to doing so.

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389 Staff estimates that in 26 percent of contested elections initiated in 2014 and 2015, the dissident announced (in an EDGAR filing) its intent to pursue a proxy contest between 60 and 90 days prior to the meeting, and that in 34 percent of these contests the dissident filed a preliminary proxy statement between 60 and 90 days prior to the meeting. See Section IV.B.2.b. Neither the date on which intent to pursue a contest is announced nor that on which a preliminary proxy statement is filed need correspond to the date on which notice could have been provided in these contests, though they may provide some indication of the universe of contests that might have been affected by a particular notice deadline.

390 Based on staff analysis of EDGAR filings.

We have also considered not requiring registrants to provide notice to dissidents of their nominees. In this case, dissidents would generally become aware of the registrant nominees when the registrant files its preliminary proxy statement, which is required to be filed at least 10 calendar days prior to the date the registrant's definitive proxy statement is first sent to shareholders, and would have to finalize their own proxy cards thereafter. This alternative would avoid imposing a new notice obligation on registrants, and may reduce the risk that such an obligation could marginally reduce the quality of registrant nominees in some cases. However, requiring that notice be provided by both parties to the contest would limit the possibility that registrants may gain a strategic advantage by learning about and being able to react to the dissident's slate of nominees significantly earlier than when the dissident may be informed of the registrant's slate.

Minimum Solicitation Requirement for Dissidents

The proposed amendments would apply certain solicitation requirements to all contested elections. In particular, dissidents would be required to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors. Currently, dissidents in an election contest can solicit as many or as few shareholders as they choose, while registrants routinely furnish a proxy statement to all shareholders.

As discussed in detail above, we do not expect the minimum solicitation requirements to significantly increase the costs borne by dissidents in a typical proxy contest.[391] In the majority of contests, dissidents already solicit all shareholders; in other contests, while dissidents do not solicit all shareholders, they generally solicit a number

[391] See Section IV.D.2.

of shareholders beyond the required threshold.[392] To the extent that there are some infrequent cases in which a dissident may not otherwise have solicited shareholders that represented a majority of the voting power of the registrant, we preliminarily estimate that the incremental costs of the proposed solicitation requirement beyond what such a dissident would be expected to spend in the absence of this requirement to be approximately $1,000, which represents a minor fraction of the total estimated costs of solicitation in a typical proxy contest.[393] Because the vast majority of proxy contests would not be affected by the proposed solicitation requirement, and in the infrequent cases where there would be an effect this requirement would impose minor incremental costs to dissidents, we believe that the proposed solicitation requirement would not have significant effects on the costs of typical proxy contests.

Nevertheless, the proposed solicitation requirement would impose a cost on any dissidents that may try to capitalize on the ability to introduce the names of alternative candidates on the registrant's proxy card by running a nominal proxy contest, in which minimal resources are spent on solicitation. As discussed above, in addition to the existing cost of pursuing a nominal proxy contest, we estimate that it would cost approximately $6,000 at the median-sized (based on the number of accounts in which its shares are held) registrant to meet the proposed minimum solicitation requirements through an intermediary.[394] We note that this estimate is higher than the incremental cost of $1,000 that we estimate could apply in the case of certain typical proxy contests because dissidents in nominal proxy contests currently expend minimal resources on

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392 Id.

393 Id.

394 Id.

solicitation. Therefore, the additional cost required to comply with the minimum solicitation requirement, beyond current expenditures in contests, is likely to represent a relatively larger incremental cost in the case of nominal contests. We expect that the proposed minimum solicitation requirements may to some degree deter dissidents from initiating nominal contests, as discussed in Section IV.D.4.b. above.

An alternative to the proposed solicitation requirements would be to require universal proxies without imposing any minimum solicitation requirement on dissidents. This approach would eliminate the risk that such a requirement would increase the cost to dissidents of running a typical proxy contest in some cases, such as where cumulative voting or other registrant characteristics could allow dissidents to gain board representation with more limited solicitation. However, without a minimum solicitation requirement, requiring registrants to use a universal proxy may increase the likelihood that dissidents engage in more nominal proxy contests. In particular, a dissident would be able to obtain exposure for its nominees on the registrant's proxy card without engaging in any meaningful solicitation at its own expense and without facing the limitations (such as on the number of nominees put forth) as well as the eligibility and procedural requirements of proxy access bylaws, where available, or (to the extent the dissident is concerned about a particular issue) the shareholder proposal process. While this may enable some beneficial contests that could otherwise be cost-prohibitive, it would also increase the risk of detrimental contests. That is, the ability of dissidents to introduce an alternative set of nominees to all shareholders without incurring meaningful solicitation expenditures may result in an increase in contests that are frivolous or that could be initiated in pursuit of certain idiosyncratic interests rather than shareholder value enhancement. Such contests could lead registrants to incur significant disclosure and

solicitation expenses to advocate against the dissident's position and could distract management from critical business matters. There is also some chance that a frivolous contest could result in election outcomes which could disrupt the proper functioning of the board.

Another alternative would be to require a different minimum level of solicitation for dissidents than what we have proposed. For example, we could require that dissidents solicit all shareholders. This approach may reduce the incidence of nominal contests that might not be in the interests of shareholders at large. As discussed above, we estimate the cost of using the least expensive approach to meet the proposed minimum solicitation requirement through an intermediary at the median-sized (based on the number of accounts in which its shares are held) registrant to be approximately $6,000.[395] In contrast, we estimate that soliciting all shareholders at the median-sized registrant would cost approximately $14,500 when using the least expensive approach[396] to solicit through an intermediary.[397] However, a requirement that dissidents solicit all shareholders would also affect the cost to dissidents in more typical proxy contests. As discussed above, we understand that in 40 percent of recent proxy contests, dissidents solicited a number of

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395 Id.

396 See supra note 300.

397 This estimate was derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. See supra note 301 (providing assumptions for the estimation of the costs of solicitation at the median-sized registrant). In this case, staff estimated the costs of NYSE Rule 451 fees and postage for soliciting all 4,500 accounts at the median-sized registrant using notice and access delivery, and assumed that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee is equal to 90. The estimated solicitation cost of approximately $14,500 includes intermediary unit fees, which apply with a minimum of $5,000, plus nominee coordination fees of $22 per bank or broker considered a "nominee" under NYSE Rule 451, plus basic processing fees, notice and access and preference management fees and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.70 (for other accounts) per account. We request comment on this estimate and data that could allow staff to obtain a more precise estimate below.

shareholders fewer than all of the shareholders eligible to vote.[398] We estimate that it would have cost dissidents in these contests approximately an additional $3,000 to $2.5 million, with a median of approximately $11,500 beyond the costs they already incurred, to increase their level of solicitation to include all shareholders if using the least expensive approach[399] to expand solicitation.[400] Thus, requiring dissidents to solicit all shareholders would increase the costs borne by dissidents in a large fraction of typical proxy contests and may prevent some value-enhancing contests from taking place.

We also considered requiring other possible levels of solicitation. In general, any solicitation requirement that imposes a very low cost on the dissident may increase the risks discussed above that are associated with permitting the dissident to obtain exposure for its nominees on the registrant's card with minimal expenditure of its own resources in

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398 See Section IV.B.2.

399 See supra note 300.

400 These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. In particular, the required increase in expenses to solicit all shareholders was estimated based on the number of additional accounts that would have to be solicited and the applicable fees under NYSE Rule 451 and postage costs for notice and access delivery. For the purpose of the nominee coordination fee, staff used information from other proxy contests for which information was provided (specifically focusing on those in which less than all shareholders were solicited) to interpolate the increase in the number of banks or brokers considered "nominees" under NYSE Rule 451 that might be involved at the higher solicitation level. The estimated incremental solicitation cost for each contest includes nominee coordination fees of $22 for each of the additional nominees expected to be involved, plus basic processing fees, notice and access and preference management fees and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.70 (for other accounts) per account for additional accounts solicited within the first 10,000 accounts solicited, and on a declining scale for additional accounts thereafter. Staff assumed that half of the additional accounts to be solicited are suppressed and that none of these accounts requested full set delivery by prior consent or upon receipt of the notice (because such delivery requirements may apply to only a small fraction of accounts and is not expected to significantly affect the overall estimate of costs). Additional notice and access fees of $0.25 per account for the first 10,000 accounts, and on a declining scale thereafter, were assumed to be required for each account that was solicited prior to increasing the level of solicitation because of the use of notice and access delivery for some accounts. The estimates also include incremental intermediary unit fees of $0.25 per account for each additional account above 20,000 accounts solicited. This estimate does not include printing costs for the notice, for which we do not have relevant data to estimate these costs. We request comment on these estimates and data that could allow staff to obtain more precise estimates below.

the solicitation, while a solicitation requirement that imposes a very high cost may deter value-enhancing proxy contests. Also, in any approach that requires the dissident to solicit less than all of the shareholders entitled to vote (such as under the proposed amendments) we note that any shareholders not solicited by the dissident would still see the names of the dissident's nominees on the registrant's proxy card but would have to seek out the dissident's proxy statement in the EDGAR system (as directed by the registrant's proxy statement) in order to learn about those nominees and make an informed voting decision.

Dissemination of Proxy Materials

We are proposing amendments to Rule 14a-19 that would require any dissident in a contested election to file a proxy statement by the later of 25 calendar days prior to the meeting date, or five calendar days after the date that the registrant files its definitive proxy statement, regardless of the choice of proxy delivery method. This requirement would help to ensure that all shareholders who receive a universal proxy, which will not be required to include complete information about the opposing party's nominees, will have access to information about all nominees. We do not expect this requirement to impose a substantial burden or constraint on dissidents given existing requirements and the notice requirement of the proposed amendments.

In particular, dissidents that elect notice-only delivery are currently required to make their proxy statement available at the later of 40 calendar days prior to the meeting date or 10 calendar days after the registrant files its definitive proxy statement. For such dissidents, the proposed filing deadline would provide five fewer days to furnish a proxy statement in cases in which the registrant files its definitive proxy statement within fewer than 30 calendar days of the meeting date, which we estimate occurred in 20 percent of

recent contested elections, and would not otherwise present an incremental timing constraint.[401] Dissidents that elect full set delivery are not currently subject to any such requirement, and thus the proposed dissemination requirement would impose a new filing deadline for all such dissidents. Some dissidents may therefore be required to prepare their proxy statements earlier than they would otherwise. In particular, we estimate that dissidents filed a definitive proxy statement within 25 days of the meeting in 25 percent of recent contested elections.[402]

In the absence of other requirements, the proposed filing deadline might prevent late-breaking proxy contests. However, because the proposed amendments separately require dissidents to provide notice of the contest and the names of their nominees by the 60th calendar day before the anniversary of the prior year's meeting (with alternative treatment for cases in which the meeting date has changed significantly since the prior year), we do not expect this requirement to impose a significant further limitation on late-breaking contests. Also, while the proposed filing deadline would require some dissidents to prepare their proxy statements earlier than they would otherwise, we do not expect this requirement to impose a substantial incremental constraint or burden in most cases. In particular, because of the proposed notice requirement, dissidents would generally have approximately one month to furnish a definitive proxy statement after having provided the names of their nominees to the registrant. We request comment on the effect of the proposed filing deadline on dissidents below.

Alternatively, we have considered proposing an earlier filing deadline for dissidents. While an earlier filing deadline may reduce the risk that some shareholders

401 Based on staff review of contested elections initiated in 2014 and 2015.

402 Id.

receive the registrant's proxy statement and make their voting decisions before the dissident's proxy statement is available, such a deadline may also impose an incremental burden on dissidents and could prevent some late-breaking proxy contests beyond those prevented by the proposed notice requirement.

Form of the Universal Proxy

The proposed amendments specify certain presentation requirements for universal proxies, including that each party's slate of nominees be clearly distinguishable and that, within each slate, the names be listed in alphabetical order. Also, the form of the universal proxy would be required to prominently disclose the maximum number of candidates for whom a shareholder can properly grant authority to vote and the treatment of any proxy cards that indicate a greater or lesser number of "for" votes than this permitted number. We do not expect the presentation and formatting requirements to impose any significant direct costs on registrants or dissidents, though they may bear some indirect costs in the form of reduced flexibility to strategically design their proxy card.

These presentation and formatting requirements are expected to mitigate the risk that shareholders receiving universal proxies may be confused about their voting choices and how to properly mark their card. For example, shareholders could otherwise be unsure about the total number of candidates for which they can grant authority to vote, or about which candidates are nominated by which party. Such confusion could increase the likelihood that some shareholders submit invalid proxies or submit proxies that do not reflect their intentions. This may be exacerbated in the case of nominees being put forth

by multiple dissidents or when there are proxy access nominees as well as dissident and registrant nominees.[403]

In addition to preventing confusion, these presentation and formatting requirements may also promote the fair and equal presentation of all nominees on the proxy cards. In particular, these requirements would prevent registrants and dissidents from strategically choosing the font, style, sizing, and order of candidate names in ways that could create an advantage for their slate. For example, political science research has found that the order of placement of candidates' names on ballots can affect voting outcomes.[404]

Alternatively, we could permit some additional flexibility with respect to how universal proxies are presented. For example, each party to the contest could be allowed to choose how to order the nominees, but only within its own slate. This approach may allow registrants and dissidents to order their own candidates in a way they believe would be most informative to shareholders, such as separately listing independent director nominees or by listing the nominees based on their skill sets. However, this approach runs the risk of generating some (perhaps limited) degree of confusion on the part of a shareholder who receives two proxy cards with candidates in different orders. While this risk could be mitigated by requiring that each party to the contest inform the other party as to how to order its slate of candidates, such a requirement would introduce some

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403 See, e.g., Roundtable Transcript, comment of David Katz, Partner, Wachtell, Lipton, Rosen and Katz, at 42.

404 See, e.g., Joanne Miller & Jon Krosnick, The Impact of Candidate Name Order on Election Outcomes, 62 Pub. Opinion Q. 291 (1998); David Brockington, A Low Information Theory of Ballot Position Effect, 25 Pol. Behav. 1 (2003); Jonathan G.S. Koppell & Jennifer A. Steen, The Effects of Ballot Placement on Election Outcomes, 66 J. Pol. 267 (2004).

incremental coordination costs to create consistent ordering across the registrant and dissident proxy cards.

Another approach would be to allow all parties to the contest complete flexibility in the presentation of nominees on their universal proxy cards. This approach may benefit registrants or dissidents that would prefer to strategically design their proxy card to better inform shareholders or to increase their chances of success, regardless of whether such strategic formatting of proxy cards may represent an inefficient use of resources from the perspective of shareholders. For example, presenting the candidates from both parties in a single, alphabetically ordered list may increase the possibility of split-ticket votes.[405] However, such an approach could be confusing for shareholders to the extent that each party's nominees were not readily identifiable as part of a particular slate or opponent nominees were de-emphasized (such as through font and sizing choices).

c. Additional Revisions

The proposed amendments require certain disclosures with respect to voting options and voting standards in proxy statements. We expect that the costs to registrants of such additional disclosures would be minimal. To the extent that such disclosures reduce shareholder uncertainty or confusion as to the effect of their votes, the efficiency of the voting process may be improved. However, we do not anticipate significant changes in voting outcomes or corporate decisions as a result of these disclosures.

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405 See R. Darcy & Michael Marsh, Decision Heuristics: Ticket-Splitting and the Irish Voter, 13 Electoral Stud. 38 (1994) (concluding that the alphabetic ordering of candidates in Irish elections results in more split tickets relative to comparable elections in Malta and Australia, where candidates are grouped by parties).

Request for Comment

Throughout this release, we have discussed the anticipated costs and benefits of the proposed amendments. We request and encourage any interested person to submit comments regarding the proposed amendments and all aspects of our analysis of the potential effects of the amendments. We request comment from the point of view of shareholders, registrants, dissidents, and other market participants. With regard to any comments, we note that such comments are particularly helpful to us if accompanied by quantified estimates or other detailed analysis and supporting data regarding the issues addressed in those comments. We also are interested in comments on the alternatives presented in this release as well as any additional alternatives to the proposed amendments that should be considered.

76. We request comment on the prevalence, availability, costs, and benefits of split-ticket voting. We request specific estimates of costs borne by shareholders to implement split-ticket votes in recent proxy contests, itemized by the source of the cost. In particular, please provide information about the costs involved in attending a shareholder meeting in person, arranging for an in-person representative at the meeting, and any other methods of voting a split ticket. We also request information about the number of instances in a year in which shareholders choose to vote a split ticket.

77. We request comment on the prevalence, availability, costs, and benefits of certain accommodations currently made to facilitate split-ticket voting, such as a party to a contest arranging for an in-person representative to cast votes for a shareholder at the shareholder meeting. Alternatively, are there changes that could more effectively facilitate alternative means of split-ticket voting (without attending the meeting) consistently being made available to shareholders?

78. We request specific estimates of costs experienced in recent proxy contests, for dissidents as well as registrants, itemized by the source of the cost.

79. We request specific statistics regarding the extent to which shares are currently voted in person at annual meetings rather than voted by proxy in advance of such meetings, and how this varies in the case of contested elections versus uncontested elections.

80. We request specific statistics regarding the frequency of proxy contests in which the dissident does not solicit at least a majority of the shares eligible to vote.

81. We request comment on our estimate of the cost to engage in a nominal proxy contest, the potential incremental cost imposed by the proposed solicitation requirement on certain other proxy contests, and other estimates made in this release. We also request data that would allow us to make more precise estimates, such as data identifying the share ownership structure (including beneficial shareholders as well as holders of record) at registrants of different sizes and data on printing costs (for notices and for full set proxy materials) for dissidents.

82. Would split-ticket voting increase as a result of the proposed amendments? Would the proposed amendments reduce the cost and inconvenience currently faced by shareholders who choose to vote a split-ticket, while not changing the rate of split-ticket voting? Or are there shareholders who would choose to vote a split-ticket in some cases but do not because of the current impediments to doing so?

83. To what extent are votes for the full dissident slate likely to increase as a result of including the dissident nominees on registrant proxy cards, as proposed? Would dissidents change the number of shareholders they solicit as a result of the proposed amendments?

84. Are some kinds of voting choices more likely to be affected by adoption of universal proxy? For example, are either full-slate votes for the registrant or full-slate votes for the dissident more likely to switch to a split-ticket vote?

85. Would removing constraints on shareholder voting choices through universal proxies result in election outcomes that better reflect shareholder preferences, or could there be unintended outcomes? That is, would changes in shareholder voting behavior due to the availability of universal ballots result in election outcomes that do not reflect overall shareholder preferences as well as the outcomes that would have occurred without universal ballots? If so, please explain.

86. Would the use of universal proxy cards lead to more mixed boards, including both management and dissident nominees? How and to what extent? What would be the effect of any such change, including any effects on efficiency, competition, and capital formation? Would any such increase in mixed boards be beneficial or detrimental, and why is that the case?

87. Would the use of universal proxy cards lead to an increase or decrease in the incidence of typical proxy contests (as opposed to the nominal contests discussed above)? How and to what extent? What would be the effects of any such change, including any effects on efficiency, competition, and capital formation? Would any such change in the incidence of proxy contests be beneficial or detrimental, and why is that the case?

88. Would requiring the use of universal proxies provide advantages or disadvantages to one party or the other in an election contest? Would the expected effects of mandating universal proxies lead to an increase or decrease in the threat of proxy contests or otherwise change the nature of the relationship between registrants,

dissidents, and shareholders, resulting in changes in managerial decision-making or registrant performance? How and to what extent? What would be the effects of any such change, including any effects on efficiency, competition, and capital formation? Would any such changes be beneficial or detrimental, and why is that the case?

89. Would the proposed amendments shift burdens to registrants in proxy contests? Would the proposed amendments result in nominal contests where the dissident does not expend resources on solicitation beyond the minimum required by the proposed amendments? Would dissidents be deterred from nominal contests by the cost of the proposed minimum solicitation requirement? Or is the magnitude of the cost such that it would not serve as a deterrent? What would be the effects of such contests, including any costs to registrants and any effects on efficiency, competition, and capital formation? Would nominal contests be beneficial or detrimental, and why is that the case? If we changed the proposed minimum solicitation requirements, such as to require solicitation of all shareholders, how would that affect the frequency of nominal contests? What would be the effect if instead we were to eliminate the proposed minimum solicitation requirements?

90. Would dissidents have a reasonable likelihood of gaining board representation under the proposed amendments if they did no more than the minimum required under the proposed amendments (i.e., solicitation, such as by notice and access, of holders of shares representing at least a majority of the voting power of shares entitled to vote)? If so, is this due to the ability of shareholders to vote for dissident nominees on the registrant's universal proxy card? Are there other reasons why dissidents may be likely to initiate nominal contests?

91. Would dissidents in typical proxy contests bear any incremental costs in order to comply with the minimum solicitation requirements of the proposed amendments? If so, please provide estimates of such costs. Would those incremental costs unduly deter proxy contests, and if so, to what extent?

92. What is the current prevalence and distribution of different types of advance notice bylaws? Would the proposed notice deadline of 60 calendar days prior to the anniversary of the previous year's annual meeting date create a new constraint on dissidents, relative to existing advance notice bylaws? If so, how and to what extent? What would the effect be if we were instead to adopt a different notice deadline, such as 90 or 45 days prior to the anniversary of the previous year's annual meeting date?

93. Would the proposed proxy statement filing deadline for dissidents of 25 calendar days prior to the meeting date or five days after the registrant files its definitive proxy statement be sufficient to provide shareholders with the information needed to submit an informed vote? Would the proposed filing deadline create a new constraint on dissidents? If so, how and to what extent? Would a different filing deadline be more appropriate? If so, what deadline should apply and why?

94. Are dissidents or registrants likely to change their solicitation expenditures under the proposed amendments? If so, how and to what extent?

95. Are dissidents or registrants likely to incur incremental costs other than solicitation expenditures under the proposed amendments? If so, please describe and quantify those costs, if possible. For example, would registrants or dissidents incur costs to add disclosures to their proxy statements in reaction to the proposed amendments, such as disclosures urging shareholders not to support their opponent's candidates using their

card and expressing their views as to the importance of a homogenous, rather than a mixed, board? What would it cost to prepare such disclosures?

96. Would there be advantages or disadvantages to shareholders, registrants, or dissidents if registrants and dissidents were required to make universal proxy cards available on request, but were allowed to initially disseminate either a standard or a universal proxy card at their option? Would requiring shareholders to request a universal proxy card impose a burden on their ability to vote for the combination of director nominees of their choice? Would this approach be logistically feasible and cost-effective? In particular, how would the process of fulfilling shareholder requests be managed to ensure that shareholders electing a universal proxy card are provided with one in a timely manner? How would the cost of this process be borne by the different parties to the contest? Would electronic and logistical systems need to be changed to accommodate such an approach? Please provide detail on how this approach could be implemented and estimates of the associated costs where possible.

97. Would dissidents and registrants take actions in response to the proposed amendments to lessen or capitalize on any potential effects of the proposed amendments? If so, what actions would they take and why?

98. If registrants and dissidents were permitted, but not required, to use universal proxies, would registrants and/or dissidents choose to use universal proxies? To what extent? In what circumstances would universal proxies be likely to be used by registrants? In what circumstances would universal proxies be likely to be used by dissidents? If one party were to choose to use a universal proxy, would that decision prompt the opposing party also to use a universal proxy?

99. If registrants and dissidents were permitted, but not required, to include opponent nominees on their proxy cards, should we require that all duly-nominated candidates be included, or should we allow registrants and dissidents to select which opponent nominees they include? What would be the effects of allowing only some of the opponent's nominees to be included on a card? Would that give rise to confusion in the voting process?

100. If dissidents were required to use universal proxies, while registrants were permitted, but not required, to do so, would such an approach provide an advantage to registrants in proxy contests? How and to what extent? Would any such advantage be offset by the ability of dissidents to choose which and how many shareholders they solicit, in contrast to the general practice that registrants solicit all shareholders? Would such an approach provide an advantage to dissidents? How and why?

101. We request statistics on the governance characteristics of investment companies and data with respect to proxy contests at investment companies, including their stated goals and outcomes. We also request comment on the prevalence, availability, costs, and benefits of split-ticket voting in the case of proxy contests at investment companies, including information about the number of instances in which shareholders choose to vote a split ticket at such contests.

102. We request statistics on characteristics of the shareholder base for different types of investment companies, including the dispersion in ownership and the distribution of shareholders of different types (e.g., retail vs. institutional). We also request statistics regarding the costs of soliciting shareholders in different types of investment companies, including the estimated cost of soliciting all shareholders or shareholders that represent a majority of the voting rights.

103. What effect would the proposed amendments have on competition? Would the proposed amendments put registrants subject to the proxy rules or particular types of registrants subject to the proxy rules at a competitive advantage or disadvantage? If so, what changes to the proposed requirements could mitigate any such impact?

104. What effect would the proposed amendments have on efficiency? Are there any positive or negative effects of the proposed amendments on efficiency that we have overlooked? How could the proposed amendments be changed to promote any positive effect or to mitigate any negative effect on efficiency?

105. What effect would the proposed amendments have on capital formation? How could the proposed amendments be changed to promote capital formation or to mitigate any negative effect on capital formation resulting from the amendments?

V. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of our disclosure rules and forms applicable to registrants contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[406] The Commission is submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[407] The hours and costs associated with preparing, filing, and sending the schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information requirement unless it displays a currently valid OMB control number. The titles for the affected collections of information are:

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406 44 U.S.C. 3501 et seq.

407 44 U.S.C. 3507(d); 5 CFR 1320.11.

(1) Regulation 14A (Commission Rules 14a-1 through 14a-21 and Schedule 14A) (OMB Control No. 3235-0059); and

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

We adopted Regulation 14A pursuant to the Exchange Act and Rule 20a-1 pursuant to the Investment Company Act. These rules set forth disclosure requirements for proxy statements filed by soliciting parties to help investors make informed investment and voting decisions. Compliance with the information collection is mandatory. Responses to the information collection are not kept confidential and there is no mandatory retention period for the collections of information.

B. Summary of Proposed Amendments' Impact on Collection of Information

We are proposing to amend the proxy rules as they apply to operating companies to revise the consent required of a bona fide nominee, eliminate the short slate rule and add Rule 14a-19 to establish new procedures for the solicitation of proxies, the preparation and use of proxy cards and the dissemination of information about all director nominees in contested elections.[408] The proposed amendments would affect the collection of information requirements of soliciting parties by requiring the use of a universal proxy card in all non-exempt solicitations in connection with contested elections, prescribing requirements for universal proxy cards, and requiring all parties to add a reference to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy

[408] We are not proposing to amend the proxy rules for investment companies and BDCs and the discussion in this section does not relate to those entities. See supra Section II.D.

statement on the Commission's website. The proposed amendments would additionally require dissidents in such election contests to provide a notice of intent to solicit and a list of their nominees to the registrant and eliminate the ability of dissidents to round out their slate with registrant nominees through use of the short slate rule. The proposed amendments would additionally prescribe filing deadlines for a dissident's definitive proxy statement and require dissidents to solicit at least a majority of the voting power of shares entitled to vote on the election of directors; however, we do not believe that these requirements will affect the reporting and cost burden associated with the collection of information.[409]

We are also proposing amendments to the proxy rules relating to all director elections to:

- specify that the proxy card must include an "against" voting option when applicable state law gives effect to a vote "against";

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409 Our current proxy rules do not prescribe minimum solicitation requirements for either registrants or dissidents; however, as discussed in Section II.B.4 supra, customary practice has been for soliciting parties to solicit more than a majority of shareholders because either, in the case of a registrant, they wish to meet notice, informational and quorum requirements for the annual meeting, or, in the case of a dissident, such solicitation is necessary in order to successfully wage a proxy contest. Based on staff analysis of the industry data provided by a proxy services provider for 35 proxy contests between June 30, 2015 and April 15, 2016, less than a majority of shareholders was solicited by a dissident in only a single proxy contest in that sample. In that instance, we estimate that the proposed amendments would have resulted in incremental solicitation expenses (exclusive of printing costs) to the dissident of approximately $1,000 if the least expensive approach to soliciting through an intermediary had been used to solicit the required additional number of shareholders. See supra notes 300-301. It is possible that the proposed amendments may change the number and type of proxy contests, including a possible increase in nominal contests in which dissidents spend little more than the basic required costs to pursue a contest. We preliminarily estimate that, for a nominal proxy contest, it may cost approximately $6,000 at a median-sized registrant using the least expensive approach to meet the proposed minimum solicitation requirements through an intermediary. See supra notes 307-308. Because we are unable to predict how the proposed amendments may impact the number and type of election contests, and in light of current solicitation practices, for PRA purposes, we are not estimating that the majority solicitation requirement for dissidents would increase the reporting and cost burden associated with Regulation 14A. However, we solicit comment on this point and request data to help us estimate any such increase for PRA purposes.

- require proxy cards to give shareholders the ability to "abstain" in an election where a majority voting standard is in effect; and
- mandate disclosure about the effect of a "withhold" vote in an election.

The proposed amendments requiring the appropriate use of an "against," "abstain" or "withhold" voting option should better enable soliciting parties to properly seek and authorize the appropriate voting option for shareholders.

We arrived at the estimates discussed below by reviewing our burden estimates for similar disclosure. We believe that the proposed amendments regarding the use of a universal proxy card, required notices and related disclosure would result in only a small amount of additional required disclosure and the addition of only a limited amount of material (the names of duly nominated director candidates for which the soliciting party has complied with Rule 14a-19 on proxy cards). The application of these amendments would be limited to contested elections. In addition, we believe that the additional disclosure and changes to the proxy card relating to the appropriate use of "against," "abstain" or "withhold" voting options would similarly result in only a small incremental increase in the required disclosure; however, the changes would apply to proxy materials in all director elections, not just contested elections.

C. Estimate of Burdens

We derived our new burden hour and cost estimates by estimating the total amount of time it would take to prepare and review the required disclosures called for by the proposed rules. This estimate represents the average burden for all soliciting parties, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among soliciting parties. We believe that some soliciting parties will experience

costs in excess of this average in the first year of compliance with the amendments and some parties may experience less than the average costs.

As discussed more fully in Section IV.D.4. above, it is unclear whether the proposed amendments would result in an increase or decrease in the number of election contests, and we therefore estimate no change in the number of proxy statement filings as a result of the proposed amendments. We estimate that the average incremental burden for a registrant to prepare a universal proxy card in a contested election and include the required disclosure would be two hours. We similarly estimate that the average incremental burden for a dissident to prepare a universal proxy card in a contested election and include the required disclosure would be two hours. We additionally estimate that the average incremental burden for a dissident and registrant to prepare the notice to the opposing party containing the names of its nominees in a contested election would be approximately one hour. Thus, we estimate that the total incremental burden for Schedule 14A would increase by three hours per election contest for registrants and three hours per election contest for other soliciting parties.[410] For purposes of the PRA, we estimate there would be 36 annual election contests per year,[411] resulting in 216 additional total incremental burden hours (6 hours x 36 election contests) under Schedule 14A as a result of proposed Rule 14a-19 and the related amendments.

We estimate that the additional disclosure and changes to the proxy card relating to the appropriate use of "against," "abstain" or "withhold" voting options in proxy

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410 There may be a range of burdens by soliciting parties as they determine exactly how to present the proxy card and the language of the required disclosure; however, we estimate the burdens described above as the average burden for soliciting parties.

411 We do not estimate that there would be additional election contests as a result of the proposed amendments. We estimate approximately 36 election contests per year based on the average of actual proxy contests for elections of directors in 2014 (37) and 2015 (35).

materials for all director elections would be considerably less than one hour for each proxy statement and card relating to an election of directors. Unlike the proposed amendments relating to election contests, these proposed amendments would apply to all director elections, including director elections for funds and BDCs. The disclosure and changes to the proxy card are being proposed to require registrants to clarify existing standards, and many of the descriptions and standards, once revised, are not likely to require significant revision from year to year. We estimate that these changes would result in an average of 10 minutes of additional burden per response. [412] For purposes of the PRA, we estimate the proposed changes would result in 931 hours of additional total incremental burden under Schedule 14A (10 minutes x 5586 proxy statements) and 185 hours of total incremental burden under Rule 20a-1 (10 minutes x 1,108 filings).

These estimates include the time and cost of preparing disclosure that has been appropriately reviewed, including, as applicable, by management, in-house counsel, outside counsel and members of the board of directors. This burden would be added to the current burden for Regulation 14A and Rule 20a-1, as applicable. For proxy statements under Regulation 14A, we estimate that 75 percent of the burden of preparation is carried internally and that 25 percent of the burden of preparation is carried by outside professionals retained at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried internally is reflected in hours. We estimate a similar allocation between internal burden hours and outside professional costs with respect to the PRA burden for Rule 20a-1.

[412] We estimate that the incremental burden for the proposed disclosure and changes to the proxy card would increase by 20 minutes in the first year and then be reduced to five minutes in years two and three, resulting in a three year average of an increased 10 minute burden per response.

As a result of the estimates discussed above, we estimate for purposes of the PRA that the total incremental burden on all soliciting parties of the proposed amendments under Regulation 14A would be 860 hours for internal time (1147 total incremental burden hours x 75 percent) and $114,700 (1147 total incremental burden hours x 25 percent x $400) for the services of outside professionals. We further estimate for purposes of the PRA that the total incremental burden on all soliciting parties of the proposed amendments under Rule 20a-1 would be 138.75 hours for internal time (185 total incremental burden hours x 75 percent) and $18,500 (185 total incremental burden hours x 25 percent x $400) for the services of outside professionals.

A summary of the proposed changes is included in the table below.

Table 1: Calculation of Incremental PRA Burden Estimates

	Current Annual Responses (A)	Proposed Annual Responses (B)	Current Burden Hours (C)	Increase in Burden Hours (D)	Proposed Burden Hours (E) =C+D	Current Professional Costs (F)	Increase in Professional Costs (G)	Proposed Professional Costs =F+G
Schedule 14A	5,586	5,586	546,814	860	547,674	$72,908,472	$114,700	$73,023,172
Rule 20a-1	1,108	1,108	94,180	139	94,319	$33,240,000	$18,500	$33,258,500

D. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our assumptions and estimate of the burden of the proposed collections of information;

- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments about the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-24-16. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7-24-16, and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this proposed rule. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[413] the Commission must advise OMB as to whether a proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- an annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending congressional review.

We request comment on whether our proposed amendments would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- the potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment or innovation.

We request those submitting comments to provide empirical data and other factual support for their views to the extent possible.

VII. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

The Regulatory Flexibility Act[414] requires us, in promulgating rules under Section

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413 Pub. L. No. 104-121, Tit. II, 110 Stat. 857 (1996).

414 5 U.S.C. 601 et seq.

553 of the Administrative Procedure Act,[415] to consider the impact of those rules on small entities. The Commission has prepared this Initial Regulatory Flexibility Act Analysis in accordance with 5 U.S.C. 603. This Initial Regulatory Flexibility Act Analysis relates to proposed amendments to Exchange Act Rules 14a-2, 14a-3, 14a-4, 14a-5, 14a-6, and 14a-101 and proposed new Exchange Act Rule 14a-19.

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

In a contested election today, the choices available to shareholders voting for directors through the proxy process are not the same as those available to shareholders voting in person at a shareholder meeting. Shareholders voting in person at a meeting may select among all of the duly nominated director candidates proposed for election by any party in an election contest and vote for any combination of those candidates. Shareholders voting by proxy, however, generally are limited to the selection of candidates provided by the party soliciting the shareholder's proxy.

In 2013, the IAC recommended that we explore revising our proxy rules to provide proxy contestants with the option to use a universal proxy card in connection with short slate director nominations.[416] A 2014 rulemaking petition requested that we require the use of a universal proxy to allow shareholders to vote for their preferred combination of registrant and dissident nominees in contested director elections.[417] The Commission held a roundtable in February 2015 to explore ways to improve proxy voting, including through the adoption of universal proxies. As a result of these recommendations and our review of the proxy rules, we are proposing amendments that

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415 5 U.S.C. 553.

416 See IAC Recommendation.

417 See Rulemaking Petition.

would allow a shareholder voting by proxy to choose among director nominees in an election contest in a manner that more closely reflects the choice that could be made by voting in person at a shareholder meeting. To this end, we are proposing to amend the proxy rules to:

- revise the consent required of a bona fide nominee;
- eliminate the short slate rule; and
- require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections and prescribe requirements for universal proxy cards including notice, filing and solicitation requirements.

We have also considered and are proposing additional improvements to the proxy voting process by making changes to the form of proxy. These changes would apply to all director elections and would require disclosure regarding the effect of shareholder action to vote "against," "withhold" or "abstain" and that the appropriate voting option be listed on the proxy card.

B. Legal Basis

We are proposing the rule amendments pursuant to Sections 14 and 23(a) of the Exchange Act.

C. Small Entities Subject to the Proposed Rules

The proposed amendments would affect small entities that file proxy statements under the Exchange Act. For purposes of the Regulatory Flexibility Act, under our rules, an issuer of securities, other than an investment company,[418] is a "small business" or

[418] An investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year. 17 CFR 270.0-10(a). The staff estimates that, as of December 2015, approximately 129 funds and approximately 34 BDCs are small entities. As discussed in Section

"small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year.[419] We estimate that there are approximately 692 issuers that are required to file with the Commission, other than investment companies, that may be considered small entities.[420]

The proposed amendments to the federal proxy rules establishing new procedures for use of a universal proxy card only would affect small entities engaged in a contested election. Based on a review of contested elections from 2014 and 2015, we are not aware of any[421] contested elections involving small entities during that time period. While we anticipate that these proposed amendments may affect some small entities in the future, due to the small size of the entities and the higher concentration of ownership in smaller entities,[422] we do not expect many such entities would be affected. Additionally, we are proposing to amend the procedures and disclosure applicable to director elections generally requiring clear disclosure about the effect of shareholder action to vote "against," "withhold" or "abstain" and require that the appropriate voting option be listed on the proxy card. We expect these changes would affect small entities

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II.D. supra, we are not proposing that the amendments to change the consent required of a bona fide nominee, to eliminate the short slate rule or to require the use of a universal proxy card apply to investment companies. The only proposed amendments that would potentially affect small entities that are investment companies are the amendments that would apply to all director elections and require disclosure regarding the effect of shareholder action to vote "against," "withhold" or "abstain."

419 17 CFR 240.0-10(a). The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction." 5 U.S.C. 601(6).

420 The estimate is based on staff review of Form 10-K filings in 2015 by registrants that have a class of equity securities registered under Section 12 of the Exchange Act.

421 A staff review of 72 Form 10-K filings for registrants involved in director election contests that were initiated through the filing of preliminary proxy statements by dissidents in calendar years 2014 and 2015 revealed that none of these registrants had total assets of $5 million or less on the last day of the fiscal year prior to the contest.

422 See supra Table 1 in Section VI.B.1.b. showing increasing concentration of ownership by management as registrant market capitalization decreases.

when those entities solicit proxies in a director election contest and when drafting applicable disclosure relating to voting standards in all director elections.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments to the proxy rules would:

- revise the consent required of a bona fide nominee;
- eliminate the short slate rule;
- require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections and prescribe requirements for universal proxy cards including notice, filing and solicitation requirements; and
- require disclosure regarding the effect of shareholder action to vote "against," "withhold" or "abstain" and that the appropriate voting option be listed on the proxy card.

The proposed changes in reporting requirements for soliciting parties are outlined in detail above. We do not believe the proposed amendments would impose significant recordkeeping requirements.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no federal rules that duplicate, overlap or conflict with the proposed amendments.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on

small entities. Pursuant to Section 3(a) of the Regulatory Flexibility Act,[423] we considered certain types of alternatives, including: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

We considered a variety of alternatives to achieve our regulatory objective to allow a shareholder voting by proxy to choose among director nominees in an election contest in a manner that reflects as closely as possible the choice that could be made by voting in person at a shareholder meeting. In the alternative, we considered making the use of universal proxies optional for all parties or establishing a hybrid approach where use of a universal proxy would be mandatory for only one party.[424] We have not proposed these alternative approaches in this rulemaking because we do not believe they meet the regulatory objective as well as the proposal; they do not replicate the choice that could be made by voting in person at a shareholder meeting as effectively as the proposed amendments.

The current proxy rules relating to election contests and the proxy rules generally do not impose different standards or requirements based on the size of the registrant or dissident. These rules contain both performance and design standards in order to achieve

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423 5 U.S.C. 603(c).

424 See supra Section IV.D.5.b.

appropriate disclosure in the proxy voting process under the Exchange Act.[425] The proposed amendments require very limited additional disclosure by either the registrant or the dissident, but do impose additional filing and solicitation requirements on dissidents and an obligation on both parties in an election contest to include the other side's nominees on their respective proxy cards and to notify the other party of the names of their respective director nominees. We believe that the proposed amendments effectively meet the regulatory objective to permit shareholders voting by proxy in an election contest to reflect their choices as they could if voting in person at a shareholder meeting. We believe the proposed amendments are equally appropriate for parties of all sizes seeking to engage in an election contest because they are intended to facilitate shareholder enfranchisement, which does not depend on the size of the soliciting party. For that reason, we are not proposing differing compliance or reporting requirements or timetables for small entities, or an exception for small entities. However we seek comment on whether and how the proposed amendments could be modified to provide differing compliance or reporting requirements or timetables for small entities and whether such separate requirements would be appropriate. Additionally, we request comment on whether we should exempt small entities (either registrants or dissidents) from the proposed amendments.

Similarly, we believe that the proposed amendments do not need further clarification, consolidation, or simplification for small entities, although we solicit comment on how the proposed amendments could be revised to reduce the burden on small entities. We also note that, as with the current proxy rules, the proposed

[425] For example, the proxy rules include filing deadlines and some required specific disclosure. However, Schedule 14A generally permits parties to craft their disclosure as they deem appropriate.

requirements include both performance and design standards. In particular, the proposed universal proxy card is subject to certain presentation and formatting requirements but there is flexibility as to the exact design of the card within those parameters. We solicit comment as to whether there are additional aspects of the proposed amendments for which performance standards would be appropriate.

G. Solicitation of Comment

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- how the proposed amendments can achieve their objective while lowering the burden on small entities;
- the number of small entities that may be affected by the proposed amendments;
- the existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and
- how to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. We will consider such comments in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will place those comments in the same public file as comments on the proposed amendments themselves.

VIII. STATUTORY AUTHORITY AND TEXT OF PROPOSED RULE AMENDMENTS

The amendments contained in this release are being proposed under the authority set forth in Sections 14 and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

TEXT OF THE PROPOSED AMENDMENTS

For the reasons set out above, the Commission proposes to amend 17 CFR Part 240 as follows:

PART 240 - GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. No. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

2. Amend § 240.14a-2 by revising paragraph (b) introductory text to read as follows:

§ 240.14a-2 Solicitations to which § 240.14a-3 to § 240.14a-15 apply.

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(b) Sections 240.14a-3 to 240.14a-6 (other than paragraphs 14a-6(g) and 14a-6(p)), § 240.14a-8, § 240.14a-10, §§ 240.14a-12 to 240.14a-15 and § 240.14a-19 do not apply to the following:

* * * * *

3. Amend § 240.14a-3 as follows:

a. In paragraph (a)(3)(i) remove the period at the end of the paragraph and add in its place "; or";

b. In paragraph (a)(3)(ii) remove the semi-colon and add a period in its place.

4. Amend § 240.14a-4 as follows:

a. Revise paragraph (b)(2);

b. Redesignate paragraph (b)(3) as paragraph (b)(5);

c. Add new paragraph (b)(3) and paragraph (b)(4);

d. Revise the Instructions to paragraph (b)(2);

e. Revise paragraphs (c)(5) and (d)(1);

f. In paragraph (d)(3) add a comma before "or" at the end of the paragraph; and

g. Revise paragraph (d)(4).

The revisions and additions read as follows:

§ 240.14a-4 Requirements as to proxy.

* * * * *

(b) * * *

(2) A form of proxy that provides for the election of directors shall set forth the names of persons nominated for election as directors, including any person whose nomination by a shareholder or shareholder group satisfies the requirements of § 240.14a-11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

(3) Except as otherwise provided in § 240.14a-19, a form of proxy that provides for the election of directors may provide a means for the security holder to grant authority

to vote for the nominees set forth, as a group, provided that there is a similar means for the security holder to withhold authority to vote for such group of nominees. Any such form of proxy which is executed by the security holder in such manner as not to withhold authority to vote for the election of any nominee shall be deemed to grant such authority, provided that the form of proxy so states in bold-face type. Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with § 240.14a-11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

(4) When applicable state law gives legal effect to votes cast against a nominee, then in lieu of providing a means for security holders to withhold authority to vote, the form of proxy shall provide a means for security holders to vote against each nominee and a means for security holders to abstain from voting. When applicable state law does not give legal effect to votes cast against a nominee, such form of proxy shall clearly provide any of the following means for security holders to withhold authority to vote for each nominee:

(i) A box opposite the name of each nominee which may be marked to indicate that authority to vote for such nominee is withheld; or

(ii) An instruction in bold-face type which indicates that the security holder may withhold authority to vote for any nominee by lining through or otherwise striking out the name of any nominee; or

(iii) Designated blank spaces in which the security holder may enter the names of nominees with respect to whom the security holder chooses to withhold authority to vote; or

(iv) Any other similar means, provided that clear instructions are furnished indicating how the security holder may withhold authority to vote for any nominee.

INSTRUCTION TO PARAGRAPHS (b)(2), (3), and (4). These paragraphs do not apply in the case of a merger, consolidation or other plan if the election of directors is an integral part of the plan.

* * * * *

(c) * * *

(5) The election of any person to any office for which a bona fide nominee is named in a proxy statement and such nominee is unable to serve or for good cause will not serve.

* * * * *

(d) * * *

(1) To vote for the election of any person to any office for which a bona fide nominee is not named in the proxy statement,

(i) A person shall not be deemed to be a bona fide nominee and shall not be named as such unless the person has consented to being named in a proxy statement relating to the registrant's next annual meeting of shareholders at which directors are to be elected (or a special meeting in lieu of such meeting) and to serve if elected.

(ii) Notwithstanding paragraph (d)(1)(i) of this section, if the registrant is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined by section 2(a)(48) of the

Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)), a person shall not be deemed to be a bona fide nominee and shall not be named as such unless the person has consented to being named in the proxy statement and to serve if elected. Provided, however, that nothing in this § 240.14a-4 shall prevent any person soliciting in support of nominees who, if elected, would constitute a minority of the board of directors of an investment company registered under the Investment Company Act of 1940 or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940, from seeking authority to vote for nominees named in the registrant's proxy statement, so long as the soliciting party:

(A) Seeks authority to vote in the aggregate for the number of director positions then subject to election;

(B) Represents that it will vote for all the registrant nominees, other than those registrant nominees specified by the soliciting party;

(C) Provides the security holder an opportunity to withhold authority with respect to any other registrant nominee by writing the name of that nominee on the form of proxy; and

(D) States on the form of proxy and in the proxy statement that there is no assurance that the registrant's nominees will serve if elected with any of the soliciting party's nominees.

(2) * * *

(4) To consent to or authorize any action other than the action proposed to be taken in the proxy statement, or matters referred to in paragraph (c) of this section.

* * * * *

5. Amend § 240.14a-5 as follows:

a. Revise paragraph (c);

b. In paragraph (e)(2) remove the “and” at the end of the paragraph;

c. In paragraph (e)(3) remove the period and add “; and” in its place; and

d. Add paragraph (e)(4).

The revisions and addition read as follows:

§ 240.14a-5 Presentation of information in proxy statement.

* * * * *

(c) Any information contained in any other proxy soliciting material which has been or will be furnished to each person solicited in connection with the same meeting or subject matter may be omitted from the proxy statement, if a clear reference is made to the particular document containing such information.

* * * * *

(e) * * *

(4) The deadline for providing notice of a solicitation of proxies in support of director nominees other than the registrant’s nominees pursuant to § 240.14a-19 for the registrant’s next annual meeting unless the registrant is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

* * * * *

6. Amend § 240.14a-6 by revising NOTE 3 TO PARAGRAPH (a) to read as follows:

§ 240.14a-6 Filing requirements.

* * * * *

(a) * * *

NOTE 3 TO PARAGRAPH (a): Solicitation in Opposition. For purposes of the exclusion from filing preliminary proxy material, a "solicitation in opposition" includes: (a) Any solicitation opposing a proposal supported by the registrant; (b) any solicitation supporting a proposal that the registrant does not expressly support, other than a security holder proposal included in the registrant's proxy material pursuant to § 240.14a-8; and (c) any solicitation subject to § 240.14a-19. The inclusion of a security holder proposal in the registrant's proxy material pursuant to § 240.14a-8 does not constitute a "solicitation in opposition," even if the registrant opposes the proposal and/or includes a statement in opposition to the proposal. The inclusion of a shareholder nominee in the registrant's proxy materials pursuant to § 240.14a-11, an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials does not constitute a "solicitation in opposition" for purposes of § 240.14a-6(a), even if the registrant opposes the shareholder nominee and solicits against the shareholder nominee and in favor of a registrant nominee.

* * * * *

7. Add § 240.14a-19 to read as follows:

§ 240.14a-19 Solicitation of proxies in support of director nominees other than the registrant's nominees.

(a) No person may solicit proxies in support of director nominees other than the registrant's nominees unless such person:

(1) Provides notice to the registrant in accordance with paragraph (b) of this section unless the information required by paragraph (b) of this section has been provided in a preliminary or definitive proxy statement previously filed by such person;

(2) Files a definitive proxy statement with the Commission in accordance with § 240.14a-6(b) by the later of:

(i) 25 calendar days prior to the security holder meeting date; or

(ii) Five (5) calendar days after the date that the registrant files its definitive proxy statement; and

(3) Solicits the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors and includes a statement to that effect in the proxy statement or form of proxy.

(b) The notice shall:

(1) Be postmarked or transmitted electronically to the registrant at its principal executive office no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date, except that, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice must be provided by the later of 60 calendar days prior to the date of the annual meeting or the 10th calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant;

(2) Include the names of all nominees for whom such person intends to solicit proxies; and

(3) Include a statement that such person intends to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees.

(c) If any change occurs with respect to such person's intent to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees or with respect to the names of such person's nominees, such person shall notify the registrant promptly.

(d) A registrant shall notify the person conducting a proxy solicitation subject to this section of the names of all nominees for whom the registrant intends to solicit proxies unless the names have been provided in a preliminary or definitive proxy statement previously filed by the registrant. The notice shall be postmarked or transmitted electronically no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date, except that, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice must be provided no later than 50 calendar days prior to the date of the annual meeting. If any change occurs with respect to the names of the registrant's nominees, the registrant shall notify the person conducting a proxy solicitation subject to this section promptly.

(e) Notwithstanding the provisions of § 240.14a-4(b)(2), if any person is conducting a proxy solicitation subject to this section, the form of proxy of the registrant and the form of proxy of any person soliciting proxies pursuant to this section shall:

(1) Set forth the names of all persons nominated for election by the registrant and by any person or group of persons that has complied with this section and the name of

any person whose nomination by a shareholder or shareholder group satisfies the requirements of an applicable state or foreign law provision or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials;

(2) Provide a means for the security holder to grant authority to vote for the nominees set forth;

(3) Clearly distinguish between the nominees of the registrant, the nominees of the person or group of persons that has complied with this section and the nominees of any shareholder or shareholder group whose nominees are included in a registrant’s proxy materials pursuant to the requirements of an applicable state or foreign law provision or a registrant's governing documents;

(4) Within each group of nominees referred to in paragraph (e)(3) of this section, list nominees in alphabetical order by last name;

(5) Use the same font type, style and size for all nominees;

(6) Prominently disclose the maximum number of nominees for which authority to vote can be granted; and

(7) Prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for the election of fewer or more nominees than the number of directors being elected and the treatment and effect of a proxy executed in a manner that does not grant authority to vote with respect to any nominees.

(f) If any person is conducting a proxy solicitation subject to this section, the form of proxy of the registrant and the form of proxy of any person soliciting proxies pursuant to this section may provide a means for the security holder to grant authority to vote for the nominees of the registrant set forth, as a group, and a means for the security holder to

grant authority to vote for the nominees of any other soliciting person set forth, as a group, provided that there is a similar means for the security holder to withhold authority to vote for such groups of nominees unless the number of nominees of the registrant or of any other soliciting person is less than the number of directors being elected. Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with an applicable state or foreign law provision or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

(g) This section shall not apply to:

(1) A consent solicitation; or

(2) A solicitation in connection with an election of directors at an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

INSTRUCTION TO PARAGRAPHS (b)(1) and (d). Where the deadline falls on a Saturday, Sunday or holiday, the deadline will be treated as the first business day following the Saturday, Sunday or holiday.

9. Amend § 240.14a-101 as follows:

a. Revise Instruction 3(a)(i) and (ii) to Item 4;

b. Add Item 7(h); and

c. In Item 21, revise paragraph (b) and add paragraph (c).

The revisions and addition read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement..

* * * * *

Item 4. Persons Making the Solicitation * * *

Instructions. * * *

3. For purposes of this Item 4 and Item 5 of this Schedule 14A:

(a) * * *

(i) In the case of a solicitation made on behalf of the registrant, the registrant, each director of the registrant and each of the registrant's nominees for election as a director;

(ii) In the case of a solicitation made otherwise than on behalf of the registrant, each of the soliciting person's nominees for election as a director;

* * * * *

Item 7. Directors and executive officers. * * *

(a) * * *

(h) If a person is conducting a solicitation that is subject to § 240.14a-19, the registrant must include in its proxy statement a statement directing shareholders to refer to any other soliciting person's proxy statement for information required by Item 7 of this Schedule 14A with regard to such person's nominee or nominees and a soliciting person other than the registrant must include in its proxy statement a statement directing shareholders to refer to the registrant's or other soliciting person's proxy statement for information required by Item 7 of this Schedule 14A with regard to the registrant's or other soliciting person's nominee or nominees. The statement must explain to shareholders that they can access the other soliciting person's proxy statement, and any other relevant documents, for free on the Commission's website.

* * * * *

Item 21. Voting Procedures. * * *

(a) * * *

(b) Disclose the treatment and effect under applicable state law and registrant charter and bylaw provisions of abstentions, broker non-votes and, to the extent applicable, a security holder's withholding of authority to vote for a nominee in an election of directors.

(c) When applicable, disclose how the soliciting person intends to treat proxy authority granted in favor of any other soliciting person's nominees if such other soliciting person abandons its solicitation or fails to comply with § 240.14a-19.

* * * * *

By the Commission.

October 26, 2016

Brent J. Fields
Secretary