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October 2, 2007

Dear Ms. Morris:

We at The Race to the Bottom,[1] a faculty-student law blog addressing issues of corporate governance,[2] appreciate the opportunity to comment on the recent proposal by the Securities and Exchange Commission to allow shareholder access to the company proxy statement in connection with proposals related to the election and nomination of directors. We have previously commented on the proposal that would deny access.[3] We therefore limit our comments to Exchange Act Release No. 56160 (July 27, 2007), the so called "access" proposal.

I. Overview

The Commission has proposed to amend Rule 14a-8(i)(8) to bar the exclusion of proposals that would sometimes require the inclusion of shareholder nominees in the company's proxy statement ("the access proposal"). Specifically, Rule 14a-8(i)(8) would be altered to provide that a proposal could be excluded if it "relates to a nomination or an election for membership on the company's board of directors . . . or procedure for such nomination or election," but could not be excluded if it sought to "establish a procedure by which shareholder nominees for election of director would be included in the company's proxy materials." To avoid exclusion, however, those making an access proposal must own 5% or more of the company's voting stock and be eligible to file a Schedule 13G.

In addition, shareholders making an access proposal would have additional disclosure obligations and need to provide information about, among other things, their relationship with

[1] www.theracetothebottom.org
[2] http://www.theracetothebottom.org/teaching-materials/so-you-say-you-want-a-revolution-the-development-of-theracet.html
[3] A copy of the letter can be found at the DU Corporate Governance web site, http://law.du.edu/jbrown/corporateGovernance/secGovernance/shareholdersElection/index.cfm on the SEC's web site: http://www.sec.gov/comments/s7-17-07/s71707-16.pdf

the company. The Release also contains proposals regarding non-binding shareholder proposals and electronic shareholder forums.

We appreciate the Commission's effort to clarify the law in this area. We agree with the decision to permit shareholder access. We further agree with the philosophy behind proposed Rule 14a-17 that would require additional disclosure by shareholders inserting nominations into a company's proxy statement.

We have, however, serious concerns over the details of the proposal and urge that the Commission make substantial revisions. The proposal would set a very bad precedent and represent an extreme departure from the traditional approaches used in Rule 14a-8. Specifically, the proposal will impose unique ownership thresholds that are excessive in amount. It will impose a motivation test that will be difficult to administer. The approach will also effectively amount to federal preemption of an existing state law right.

II. The Ownership Threshold

The Commission's proposal would limit access proposals to shareholders or groups of shareholders owning 5% or more of the company's voting shares.

The requirement should not be adopted for several reasons. First, the proposal amounts to the imposition of a uniform federal standard for certain types of bylaws, effectively preempting state law. Second, the threshold is excessive, making these proposals all but impossible to make in many large public companies. Third, the requirement sets a bad precedent, creating unique ownership thresholds for particular types of proposals, an approach currently not present in Rule 14a-8. Finally, the practice to date does not justify the concerns that were apparently behind the high threshold.

A. Federal Preemption

The Commission noted in the Release that the proxy rules were designed to function "as nearly as possible, as a replacement for an actual, in-person gathering of security holders". Moreover, the rules were not intended to "supplant state law". Yet the 5% threshold is inconsistent with both pronouncements.

Most states do not impose ownership requirements as a precondition for a shareholder proposed bylaw.[4] Those that do usually permit the ownership thresholds to be changed or even

[4] While it is true that the ownership requirements in Rule 14a-8(b)(1) also impose uniform national standards, they are low enough that they do not interfere in a meaningful way with the requirements of state law.

eliminated in the articles of incorporation.[5] Thus, under state law, most shareholders have the right to propose an access bylaw.

The approach use by the Commission amounts to a national, uniform standard that would override the requirements of state law. In effect, shareholders making access proposals would need to meet this uniform requirement in order to participate in the proxy process. Without the ability to participate in the proxy process, the state law right becomes a meaningless formality.[6] The approach, therefore, effectively "supplants" state law, denying shareholders that do not meet this uniform federal standard an effective ability to make these types of proposals.

B. Excessive Threshold

The threshold will impose significant limits on the right of shareholders to make these proposals. The threshold in many companies will be very difficult to achieve.[7] It will impose additional costs, both in connection with the formation of a group and the verification of the mandatory holding period.

Of course, some companies have large shareholders that meet the 5% threshold.[8] Large shareholders, however, often do not have the same interests as shareholders with more modest holdings. Large shareholders may, for example, benefit uniquely from a strong relationship with management.[9] The close relationship will make it unlikely that they will propose bylaws opposed by management. An access proposal falls into this category. Thus, companies with shareholders meeting the proposed ownership threshold may be the least likely to put forth access proposals.

[5] *See* N.D. Cent. Code, § 10-19.1-31 (2007) ("Unless the articles or bylaws provide otherwise, a shareholder or shareholders holding five percent or more of the voting power of the shares entitled to vote may propose a resolution for action by the shareholders to adopt, amend, or repeal bylaws adopted, amended, or repealed by the board.").
[6] We discuss the importance of participation in the proxy process in our comment letter on the short proposal. See http://www.sec.gov/comments/s7-17-07/s71707-16.pdf
[7] Wal-Mart is the largest company in the Fortune 500, with Exxon-Mobile second. Wal Mart has, according to its most recent 10-K, had 4,124,451,341 shares of common stock, while Exxon-Mobile had 5,693,398,774 shares of common stock. To make a proposal under the draft rule would require shareholders to own more than 205 million shares of Wal Mart (at around $47 a share, this would require ownership of and more than $9 billion in shares), 280 million shares of Exxon-Mobile (at around $86 a share, this would require more than $24 billion). While shareholders can attempt to put together a group to meet the threshold, this will require a high degree of organization and some expense. Moreover, the requirement that shareholders own the stock for more than a year will place additional burdens on those seeking to form a 5% block from a large number of shareholders with relatively small holdings.
[8] The Commission has previously provided statistics in this area. *See* Exchange Act Release No. 48825 n. 83 (Nov. 24, 2003)("In this regard, information available to our Office of Economic Analysis indicates that, of the companies listed on the New York Stock Exchange, Nasdaq Stock Market and American Stock Exchange as of December 31, 2002, 57% had at least one institutional security holder that beneficially owned 5% of the common equity or similar securities and 1.4% had five or more such security holders."). Note, however, that there are approximately 10,000 companies trades in these markets (more if public companies traded in the Bulletin Board and Pink Sheets are counted). In other words, the data set studied by the Commission encompasses a large number of small public companies. The data does not, for example, isolate the impact of the 5% threshold on larger public companies.
[9] Some of these benefits are discussed in Deborah A. DeMott, Corporate Governance: Agency Principles and Large Block Shareholders, 19 Cardozo L. Rev. 321, 328-334 (1997).

C. Bad Precedent

The imposition of a share ownership threshold for a particular type of proposals sets a very bad precedent. The rule currently contains only uniform ownership requirements that apply to all shareholders and are *di minimus* in amount. The access proposal would impose a unique ownership threshold that depends upon the type of proposal at issue.[10] It would set a precedent for other types of proposals, adding an additional layer of complexity to an already complex rule.

Despite the substantial departure in the traditional approach under Rule 14a-8, the Release never adequately explains why a unique threshold is necessary here but not for other types of proposals that have the same potential impact. Perhaps the Commission was concerned about an increase in the number of election contests that could result from access proposals. As discussed later, this is an overstated concern. Moreover, other types of proposals raise the same potential concerns. Proposals seeking the adoption of cumulative voting, the nomination of multiple candidates for each position on the board, or the reimbursement for proxy expenses, all potentially raise the risk of an increase in the number of election contests.[11] Yet the staff has declined to allow such proposals to be excluded under Rule 14a-8, apparently without concern about the need for a unique ownership threshold by proposing shareholders.

This is a fundamental shift in Rule 14a-8. The change is being done on an ad hoc basis in a hurried fashion. Such a substantial departure from standard practices should be considered more systematically and in a less controversial setting.

D. Access Proposals and the Practice to Date

There has been some experience with access proposals. The actual practice belies the need for a high ownership threshold.

In the aftermath of the Second Circuit's decision in *AFSCME*, there have been only four proposals made by shareholders, with two failing, one passing, and one being withdrawn (Seneca Capital submitted a proposal to Reliant Energy but ultimately withdrew it).[12] Two additional companies, Apria Healthcare and Comverse, voluntarily adopted access bylaws. The case of Apria Healthcare is instructive. The provision was adopted in 2003.[13] It allowed 5% shareholders to make up to two nominations for inclusion in the company's proxy statement.

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[10] The Commission has in the past considered higher ownership thresholds that would apply to all proposals. See Exchange Act Release No. 19135 (Oct. 14, 1982). Moreover, the Commission has considered using higher ownership thresholds to override a company's right to delete proposals under some of the exclusions in Rule 14a-8. See Exchange Act Release No. 39093 (Sept. 19, 1997).

[11] We discuss these types of proposals in our comment letter on the short proposal. See http://www.sec.gov/comments/s7-17-07/s71707-16.pdf

[12] See http://sec.gov/divisions/corpfin/cf-noaction/2007/reliantenergy022307-14a-8.htm.

[13] For a post on this bylaw, go here: http://www.theracetothebottom.org/shareholder-rights/shareholder-non-access-corporate-governance-and-the-sec-the--4.html

Although three annual meetings have since come and gone, no shareholder nominees have been included in the proxy statement.

In other words, very few access proposals have actually been made, all contained reasonable standards, and only one was adopted. Two have been put in place voluntarily but apparently have yet to be used. This hardly seems to be an outpouring that will destabilize the carefully crafted proxy rules and requires provisions in Rule 14a-8 designed to severely limit the number of access proposals.

E. Possible Revision

We acknowledge the concerns expressed by Chairman Cox at the open meeting held on July 25, 2007. He noted that "changes to the existing system, even changes that everyone agrees are improvements, should be measured and incremental to ensure that first we do no harm."

In considering a possible incremental approach, we recommend that the Commission substantially lower the ownership threshold for access proposals. The Commission should then build into the rule a stair step reduction in the percentage, with the ownership requirement falling each year until becoming identical to the existing ownership threshold for all proposals. The gradual process will provide time for companies and shareholders to get used to the new regime and to accumulate more data.

III. Shareholder Motivations

The Commission would also limit access proposals to shareholders eligible to file a Schedule 13G. The Schedule can only be filed by those shareholders that do not have "a purpose or effect of changing or influencing the control of the issuer, or in connection with or as part of any transaction having that purpose or effect." Rule 13d-1(e), 17 CFR 240.13d-1(e).

The Release does not explain the reason for the limitation. The restriction apparently arises from the belief that a shareholder with a control motive will use the proposals as part of a campaign to acquire control. Yet other proposals have the same effect and the Release does not explain why the concern in this instance warrants a unique motivations test.[14]

It is, of course, possible that shareholders with a control purpose will want to make access proposals but it is highly unlikely that they will be used as part of an organized strategy to acquire control. For proposals to pass, they will need to be modest in reach and in general involve a short slate of directors.[15] They can only be proposed by long term owners.[16] Thus, an

[14] The Release does not, for example, explain why this restriction applies in the case of an access bylaw but does not apply in the case of proposal relating to poison pills or staggered boards, both of which presumably will be made by those with a motive to influence control.

[15] This has been the case with all of the access bylaws so far. The three proposals put before shareholders, the two voluntarily adopted by companies, and the one withdrawn, permitted eligible shareholders to submit only a short slate of directors (usually no more than one or two nominees).

access proposal, even if adopted, will not lead to a change of control. In any event, irrespective of the motive, it is shareholders not the Commission that should act as gatekeeper and decide whether to implement an access proposal.

Had the Commission's motivation restriction been in place, the one instance so far of shareholders approving an access proposal probably would not have occurred. It was submitted by a shareholder of Cryo Cell International who also stood for election to the board. Quite reasonable in approach, the proposal called for the inclusion of only one nominee (where the board had eight or fewer directors) by a 5% shareholder (or group) that owned the shares for at least two years.[17] Published reports indicate that the dissident directors lost but the access proposal passed.[18] Under the Commission's proposal, involvement in the proxy contest probably would have rendered the submitting shareholder ineligible to make the access proposal.

The limitation on those eligible to use a Schedule 13G also builds into Rule 14a-8 a Catch 22 of sorts. As noted, the form cannot be used by those seeking to influence control. The mere submission of an access proposal is some evidence of an intent to influence control.[19] Admittedly, the Release indicates that this will not be sufficient to render a shareholder ineligible to use the Schedule.[20] Nonetheless, the Commission has likewise acknowledged that "intent" to influence control is determined by "the specific facts and circumstances accompanying the activities of the proposing shareholder."[21] Any additional facts indicating a desire to influence control in addition to the submission of an access proposal could easily cause the loss of eligibility to file a Schedule 13G.

Thus, the same shareholders making an access proposal may predictably want to use the authority to nominate directors for inclusion in the company's proxy statement the following year. Yet any present desire to submit nominees, when coupled with the submission of an access proposal, could amount to an attempt to influence control. To avoid this, shareholders making an access proposal might need to disavow any desire to nominate directors should the bylaw be

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[16] The Commission's proposal would impose a one year holding period on anyone making an access proposal. Even if it passed, shareholders would need to wait another year to nominate directors.

[17] http://www.sec.gov/Archives/edgar/data/862692/000119312507131919/ddefc14a.htm The resolution read in toto: "*RESOLVED*, that the shareholders of the Company recommend the adoption of the Proposal. The Proposal would allow a shareholder or group of shareholders that have held continuously for at least two years, more than five percent of the Company's securities that are eligible to vote for the election of directors at an annual or special meeting of shareholders, to include within the Company's proxy statement and form of proxy, one nominee if the Board members is eight or fewer, two nominees if the Board members is greater than eight and less than twenty, or three nominees if the Board members are twenty or more."

[18] http://www.issproxy.com/governance_weekly/2007/086.html

[19] See Exchange Act Release No. 39538 (Jan. 12, 1988) ("most solicitations in support of a proposal specifically calling for a change of control of the company (e.g., a proposal to seek a buyer for the company or a contested election of directors or a sale of a significant amount of assets or a restructuring of a corporation) would clearly have that purpose and effect.").

[20] See Exchange Act Release No. 56160 (July 27, 2007) (noting that submission of an access proposal will not "on its own eliminate the ability to file a Schedule 13G").

[21] Exchange Act Release No. 56160 (July 27, 2007). *See also* Exchange Act Release No. 39538 (Jan. 12, 1988)("The eligibility to use Schedule 13G by a shareholder who submits, supports, or engages in exempt soliciting activity in favor of a shareholder proposal submitted pursuant to Rule 14a-8, will depend on whether that activity was engaged in with the purpose or effect of changing or influencing control of the company. That determination normally would be based upon the specific facts and circumstances accompanying the solicitation and the vote.").

adopted. This would essentially eliminate the very shareholders that meet the necessary ownership thresholds and are the most likely to submit nominees.

Finally, this sets a bad precedent. The requirement makes eligibility dependent upon the business motivation of the proposing shareholder. First, issues of motivation are particularly difficult to administer.[22] While there is some precedent in Rule 14a-8 for taking motivation into account, it only applies to personal motivations.[23] The proposed exclusion is this case is quite different. A desire to influence control is very much related to the operations of the company and the interests of shareholders. Thus, the Commission is proposing to build into the rule an ability to exclude proposals because of the business motive of the shareholder.

To the extent that the Commission wants to change fundamentally Rule 14a-8 to make some proposals subject to exclusion because of the particular business motive of a submitting shareholder, it should do so not in an ad hoc, hurried fashion but in a comprehensive manner after fully vetting the many issues raised by this approach.

IV. Additional Disclosure

The proposal also calls for increased disclosure. Referencing the roundtable discussions held by the Commission in May, the Release notes that "the vindication of these state law rights must be accomplished in a way that accommodates the abiding federal interest in the full and fair disclosure to shareholders of information that is material to a contested election."[24]

The proposal does so in part by requiring shareholders submitting nominees to make certain additional disclosure. This is the approach taken by proposed Rule 14a-17. The Race to the Bottom supports this approach. It would require additional disclosure anytime shareholder nominees are included in the company's proxy statement, irrespective of the reason for inclusion (whether required by a bylaw or inserted voluntarily by management).

The Commission, however, goes much further and proposes to impose additional disclosure requirements not on a nominating shareholder, but on a shareholder proposing an access bylaw. We do not question the potential value of such disclosure or its appropriateness in some cases. We do question the singling out of access proposals for this kind of disclosure.

The explanation for the unique treatment is inadequate. As the Release explains: "The already significant role that full disclosure plays in our proxy rules is rendered still more important when individual shareholders or groups of shareholders, who do not owe a fiduciary duty to the company or to other shareholders, use company assets and resources to propose changes in the company's governing documents."[25] All proposals, not just those seeking access

[22] *See* Exchange Act Release No. 39093) (Sept. 18, 1997)("The Commission has recognized, however, that the exclusion is 'perhaps the most subjective provision and definitely the most difficult for the staff to administer' because it 'requires the staff to make determinations essentially involving the motivation of the proponent in submitting the proposal.'").
[23] Rule 14a-8(i)(4) allows for the exclusion of proposals arising out of personal grievances. 17 CFR 240.14a-8(i)(4).
[24] Exchange Act Release No. 56160 (July 27, 2007).
[25] Exchange Act Release No. 56160 (July 27, 2007).

for shareholder nominees, use corporate resources.[26] Nothing in the Release sets out a rationale that would justify the imposition of disclosure requirements only for shareholders submitting access proposals.

The Release also notes that the information is necessary for "proposals that could cause a fundamental change in the relationship between the company and its shareholders".[27] The history of these proposals to date suggests otherwise. However, even if true, plenty of other proposals pose the same risk. Proposals calling for cumulative voting could cause a fundamental change in the relationship between the company and its shareholders. So could majority vote proposals. Yet nothing in the Release suggests the need for disclosure by the submitting shareholder in these instances.

We strongly recommend that the Commission limit these additional disclosure requirements to those shareholders inserting nominees into the company's proxy statement. In the meanwhile, to the extent that the Commission believes that shareholders need disclosure about those proposing a bylaw rather than those nominating a director, it should study the issue systematically rather than impose these requirements in a hurried and ad hoc fashion.

V. Imprecise Language

Another less discussed problem has been the decision to broaden the reach of the exclusion in Rule 14a-8(i)(8) well beyond the access proposal at issue in *AFSCME*.

The proposed language would allow for the exclusion of proposals that relate to the nomination of directors and to procedures used to nominate or elect directors. On its face, the language would allow for the exclusion of proposals that sought to impose minimum qualifications for director nominees or proposals that sought the institution of election procedures such as majority or cumulative voting, areas that, in the past, the staff has declined to permit exclusion.

In the short release, the Commission acknowledged the problem posed by the broad language but merely observed that the staff will "not adopt an inappropriately broad reading" of the language in order to exclude "all proposals regarding the qualifications of directors, the composition of the board, shareholder voting procedures, and board nomination procedures."[28] The language, however, does not appear in the long release, suggesting that the staff is not making the same commitment.

Even if the interpretation applies in the case of the long release, we view the promise as inadequate to ensure a proper interpretation of Rule 14a-8. A promise to avoid an "inappropriately broad reading" is no real limitation. It contains no objective content, is susceptible to multiple interpretations, and will likely have shifting meanings over time, as the

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[26] All proposals presumably require the expenditure of some resources, whether because of the administrative efforts by the issuer or the increased costs associated with a longer proxy statement.
[27] Exchange Act Release No. 56160 (July 27, 2007).
[28] Exchange Act Release No. 56161 (July 27, 2007).

facts in *AFSCME* illustrate. Moreover, the language is broad enough to allow for the exclusion of proposals that the staff has previously concluded are not subject to exclusion.

If this language is adopted, the Commission staff will find itself having to make fine distinctions on proposals that relate to critical areas of shareholder governance, including nominations and election procedures, limited only by vague admonitions against inappropriately broad readings. The language will result in uncertainty, something that will add cost to the shareholder proposal process, a cost that will be felt most severely by shareholders. Finally, the changes will reopen areas already deemed resolved by the staff of the Commission, with shareholders forced to incur the expenses associated in defending these positions.

VI. Precatory (Non-Binding) Proposals

The Release also asks for comments on proposed amendments that will "enable shareholders, if they choose to do so, to determine the particular approach they wish to follow with regard to non-binding proposals." The Release explained that the proposal arose out of comments made by "[s]everal participants" at the May 7 Roundtable that Rule 14a-8 somehow "expands rather than vindicates the framework of shareholder rights in state corporate law."[29] A footnote references the testimony of Chancellor Strine of the Delaware Court of Chancery.

A review of the Roundtable transcript indicates that while Chancellor Strine did express some reservations about precatory proposals, his concern was mostly with the practices employed by the staff. It is the staff that unnecessarily encourages the use of precatory proposals. The staff frequently receives no action requests for proposals that are alleged to be improper under state law because they interfere with the management of the company. The dearth of law in this area makes the issue difficult to resolve.[30] As long as the proposal is non-binding, however, the staff will usually decline to exclude it, even if an argument exists that it violates state law.[31]

This was the practice criticized by Chancellor Strine. He advised the Commission to stop encouraging precatory proposals and instead let the Delaware courts sort out their legality. As he noted at the Roundtable:

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[29] Exchange Act Release No. 56160 (July 27, 2007). The unofficial transcript can be found here: http://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf.

[30] In the May 7 Roundtable, Marty Dunn from the Division of Corporation-Finance made the following observation: "Every time we get a binding [shareholder proposal], we get competing state law opinions, one of which says form the company that 141 doesn't allow this, and then we get one that says 109 does allow this.. We sit there and go we don't know. We are going to say you haven't met your burden of proof because we have competing opinions." http://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf.

[31] The approach is essentially codified in the shareholder proposal rule. *See* Note to paragraph (i)(1) of Rule 14a-8, 17 CFR 240.14a-8 ("some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposal that are cast a recommendations or requests that the board of directors take specific action are proper under state law. Accordingly we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.").

> "I think those of us from Delaware would say one of the things the Commission could do to facilitate this is to make clear that if it's uncertain under state law and it's a by-law proposal, then it shouldn't be excluded and they should be able to put it on absent some showing, and then leave it to us, hold us accountable, and if we make the wrong decisions, you can bet we are going to hear about it from the institutional investor community and from the management community."

We agree with the views expressed by Chancellor Strine. The best way to reduce the number of precatory proposals is to have the Commission change its policy and, specifically, amend note (i)(1) in Rule 14a-8. Rather than assuming precatory proposals are valid under state law, the Commission should assume all proposals alleged to be improper under state law are valid "unless the company demonstrates otherwise." This would put the burden on the company to demonstrate that the proposal is invalid, a burden that would not be met where the law was unclear. The proposals, if adopted, could still be challenged under state law, the proper forum for determining validity. Such an amendment would likely reduce considerably the number of precatory proposals made by shareholders.[32]

Otherwise, with respect to the determination of a "particular approach" by each company, we recommend that the Commission not build into Rule 14a-8 the right of companies to develop their own particular approach towards the use of precatory proposals. Despite the suggestion that these will be adopted by shareholders "if they choose," the practical effect of this proposal will be to permit boards to impose limitations on the use of precatory proposals by shareholders. It is an inappropriate area for the Commission to regulate. The matter should be left to state law. Considerable discretion and authority under state law already exists to regulate the proposal process.

VII. Shareholder Forums

The proposal also includes language designed to facilitate electronic shareholder forums. The Release indicates that an important purpose of these forums is to enable "companies to better communicate with shareholders". It would do so by reducing a sponsor's exposure for statements made by "another person" under the federal securities laws.[33] The proposal would also amend Rule 14a-2 to exempt from most of the proxy rules solicitations made more than 60 days before a shareholder meeting.

Any proposal designed to increase shareholder communications is welcome.There are some issues, however, that require additional consideration. First, the forums can be easily set up to limit access. Thus, for example, a company could prohibit participation by, or refuse to publish comments from, shareholders that are critical of management. The forums would become a mechanism for a one sided discussion.

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[32] They would not disappear. Some shareholders would make them in order to increase the odds of adoption. Nonetheless, it is likely that a significant number of the precatory proposals are submitted to avoid exclusion under Rule 14a-8(i)(1) rather than for strategic reasons.

[33] We leave unaddressed whether the Commission has the authority to grant this type of exemption.

Second, the proposal permits complete anonymity. For ordinary shareholders, this may be appropriate. In some instances, however, the identity of the speaker will be extremely important to shareholders. This is particularly true for statements by a company or a company's agents or for shareholders engaging in a solicitation or planning to engage in a solicitation.

The Commission should seriously weigh whether to make the exemptions from liability and the solicitation requirements contingent upon the creation of electronic forums designed to promote full disclosure and equal access.

VIII. Conclusions

The Commission has noted in the Release that the "proxy process is meant to serve, as nearly as possible, as a replacement for an actual in-person meeting of shareholders . . . " Moreover, in an effort to "reinforce state law rights and responsibilities of shareholders", the proxy rules should be "neutral" in effect.[34] Specifically, the access proposal is designed to "facilitate shareholders' exercise of their state law rights to propose bylaw amendments concerning shareholder nominations of directors."

This proposal accomplishes none of these lofty goals. It is not neutral and, rather than reinforce, seeks largely to override state law, ultimately reducing the governance rights of shareholders.

The Release uniquely singles out access proposals for ownership thresholds, motivation tests, and additional disclosure requirements. These involve substantial shifts in the traditional approach used in Rule 14a-8 without an adequate explanation of the reasons why only access proposals warrant such restrictions. They will add to the cost of making the proposals, make them far less likely, and transfer the gatekeeping function from the states to the Commission.

Likewise, the language of the proposed amendment is ambiguous and will be subject to shifting interpretations over time, increasing uncertainty and costs associated with the process. The language will also result in efforts to exclude categories of proposals previously deemed permissible by the Commission staff. The result will tax Commission resources and force the agency to make fine distinctions about shareholder proposals.[35]

Those arguing that access will somehow be disruptive to the deliberative process or result in the election of special interest directors (unproven and likely inaccurate assertions) are asking the Commission to fix a concern that arises from the operation of state law. They are, in the end, unhappy that state law permits shareholders to elect directors without prior approval of the board of directors or the nominating committee. It is not, however, the role of the Commission to "fix"

[34] Exchange Act Release No. 56160 (July 27, 2007).
[35] As the Release noted, the staff last year handled 360 no action requests. See Exchange Act Release No. 56160 n. 24 (July 27, 2007). The number will likely increase if this proposal is adopted.

these concerns but to ensure that the proxy rules function “as nearly as possible, as a replacement for an actual, in-person gathering of security holders”.

As noted in the essay, “Corporate Governance, the Securities and Exchange Commission, and the Limits of Disclosure,"[36] the Commission has become increasingly involved in the corporate governance process. A hallmark of the involvement should, at a minimum, be to do no harm, which means avoiding the use of federal regulation to reduce existing governance rights for shareholders. The proposal violates that edict, restricting and limiting some of the few governance rights possessed by shareholders.

Yours truly,

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[36] The paper is available at http://ssrn.com/abstract=982444. It is scheduled for publication in the Catholic University Law Review.