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Unfetter the Shackle: Promoting Shareholder Involvement in Corporate Governance through Proxy Mechanism

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UNFETTER THE SHACKLE: PROMOTING SHAREHOLDER INVOLVEMENT IN CORPORATE GOVERNANCE THROUGH PROXY MECHANISM

INTRODUCTION

From time to time, scholars argue that the role of corporate law is to guarantee that shareholders have adequate information to participate intelligently in the securities market, or to empower them to make changes to the corporation's internal structure.[1] As an important mechanism to realize these goals, proxy rules serve to ensure that the shareholders receive sufficient information about corporate matters and are afforded the opportunity to act as they wish on the matter.[2]

State statutes and case law provided the initial foundation for the emergence of proxy rules. But state laws merely empowered proxy voting, instead of regulating its mechanics, and case law rarely addressed problems of shareholder access.[3] As a gap-filler, a set of rules under Section 14 of the Securities Exchange Act of 1934 has been playing a major role in constructing the proxy mechanism.[4] Federal proxy rules apply if a company has securities listed on a national securities exchange, has a class of equity securities held by 500 or more shareholders, and total assets exceeding $10 million,[5] or is a registered investment company or a public utility holding company.[6] Thus, this essay limits the discussion to the proxy rules applicable to these types of companies, most of which are not likely to be small. Since the ownership interests in these "big" companies are scattered and discrete, more elaborate proxy solicitation is required.[7] However, there have always been focus points among various proxy approaches, and the current legal system has made certain choices when determining to what extent the proxy should be utilized in the hands of shareholders. This essay will identify the commonly used

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1 Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1509–10 (2006).

2 *Executive Legal Summary* 224, EXECLSUM 224 (database updated Dec 2015).

3 Melvin Aron Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489, 1492–93 (1970).

4 *Id.*

5 15 U.S.C § 78l(a)(g) (2011).

6 17 C.F.R. § 270.20a-1(a) (2009); 17 C.F.R. §§ 250.60–61 (2009).

7 Eisenberg, *supra* note 3, at 1491.

approaches, analyze how shareholders can make use of these measures, and discuss the factors that impact the development of important proxy mechanisms toward a more pro-shareholder direction.

I. MODERN PROXY MECHANISM AND ITS TYPICAL FORM

The modern federal proxy rules start from the Securities Exchange Act of 1934 ("1934 Act"),[8] and are imposed in detail by accompanying Securities and Exchange Commission regulations.[9] The term "proxy" refers to a document that authorizes a designated person to vote the shareholder's shares with respect to the matters and in the manner specified in such document.[10] Normally proxy solicitation takes place at least once a year for board elections and other important corporate issues.[11] In most cases, the existing directors nominate the slate of candidates and the company sends information to the shareholders through "proxy materials"—usually comprising a proxy voting card and a proxy statement—so those shareholders have information to vote their shares.[12] As a result, the board of incumbent directors constantly takes control of the proxy process, whereas individual shareholders have little say in determining the election.[13] Several reasons contribute to this imbalance. First, the incumbent directors and management make proxy proposals and frequently the only votes that count are the votes cast in favor of the names on the proxy.[14] Furthermore, companies often have a staggered board, which means only one-third of board seats are up for election each year.[15] Finally, shareholders have to incur significant costs, but do not receive reimbursement

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[8] *See* 15 U.S.C. § 78n (1982 & Supp. IV 1986) (enabling the SEC to regulate the proxy solicitation process by stipulating "It shall be unlawful for any person . . . , in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors . . . , to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.").

[9] *See generally* Solicitation of Proxies, 17 C.F.R. § 240.14a (2013).

[10] *Executive Legal Summary*, *supra* note 2.

[11] *Id.*

[12] *SEC Adopts New Measures to Facilitate Director Nominations by Shareholders*, U.S. SEC. AND EXCH. COMM'N (Aug. 25, 2010), https://www.sec.gov/news/press/2010/2010-155.htm; *see also* Bus. Roundtable v. SEC, 647 F.3d 1144, 1147 (D.C. Cir. 2011) ("The proxy statement concerns voting procedures and background information about the board's nominee(s); the proxy card enables shareholders to vote for or against the nominee(s) without attending the meeting").

[13] *See* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 825 (1992).

[14] Mitchell, *supra* note 1, at 1507.

[15] *Id.*

from the corporation, while the board can charge its full expenses to the company.[16]

Nonetheless, shareholders who desire to input their advice to the annual meeting can achieve the goal by means of shareholder proposal. Rule 14a-8 of the Securities Exchange Act provides that eligible shareholders are entitled, at no cost to themselves, to include proposals in board's proxy materials.[17] But in addition to the eligibility issue and certain procedural hurdles set forth by the rule, shareholders may encounter the company's, in essence the board's, refusal if the proposal's subject matter falls within one of the listed grounds for exclusion.[18] Not surprisingly, director election is among the exclusionary reasons and the relevant clause bars shareholders from intervening in the election in any form, including putting a specific individual in the company's proxy materials for election to the board of directors.[19] To exclude a shareholder proposal, a company must submit a "no-action" request to the SEC before it files definitive proxy materials.[20]

To introduce their nominees into the director election, many shareholders would mount a "proxy fight" or "proxy contest." Generally, proxy contests are used to replace board members where a serious dispute exists about the current management's policies, competence, or integrity, and where sufficient shareholder dissatisfaction provides reasonable grounds for a prospective success in an electoral challenge against the incumbent board.[21] To initiate a proxy contest, a shareholder who wishes to nominate a candidate other than the ones proposed by the incumbent board should separately file his own proxy statement and solicit votes from other shareholders.[22] Although proxy contests may seem like an optimal measure to remove an unwanted director from the board, this often requires significant funding and additional social resources.[23] Typically, for an "insurgent" shareholder or shareholder group to succeed in a proxy contest, the shareholders need to either hold sufficient shares that are entitled to vote, or persuade enough other shareholders to vote for their nominee, so that they have a better chance to obtain majority votes in the

16 Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 690 (2007).
17 *See* 17 C.F.R. § 240.14a-8.
18 *See id.* § 240.14a-8(i).
19 *See id.* § 240.14a-8(i)(8).
20 *See id.* § 240.14a-8(i)(9).
21 Corporate Acquisitions § 1:151, Westlaw (updated Dec. 2015).
22 *Bus. Roundtable*, 647 F.3d at 1147.
23 *See* Joseph W. Yockey, *On the Role and Regulation of Private Negotiations in Governance*, 61 S.C. L. REV. 171, 188–89 (2009).

upcoming election.[24] For example, as one of the rare successes,[25] John D. Rockefeller won his fight with the management of the Standard Oil Company of Indiana mainly because of his relatively large ownership stake, his ability to fund the fight, and his own standing in the community.[26]

Additionally, shareholders launching a proxy contest have to deal with various defensive tactics adopted by the board, including the classic anti-takeover strategy, "poison pill," which sometimes creates obstacles for shareholders to gather enough shares.[27] This allows existing shareholders, excluding the dissenting shareholder who has acquired sufficient shares, to purchase more discounted shares, and thereby allowing investors to make instant profits while the shares held by the dissenting shareholder are diluted.[28]

Apparently, the modern proxy system has created many impediments to shareholder participation via proxies. In summary, two major legal barriers impair dissenters' ability to let their voice be heard effectively: (1) the indirectness of the shareholder intervention, due to separate filing requirements independent from a management-initiated proxy;[29] and (2) obstacles to owning a meaningful stake of shares, which leads to the dispersion of the ownership interest and less incentives for shareholders to act collectively as a group.[30]

II. RULE-MAKING EFFORT IN PROMOTING SHAREHOLDER INVOLVEMENT

Since the SEC started handling the proxy access issue, numerous institutional and individual investors have suggested that granting long-term shareholders a meaningful choice directors is the most important proxy reform to be considered.[31] In response to complaints by shareholders and academics that the proxy rules impose excessive costs on proxy campaigns, the SEC has

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24 Randall S. Thomas, *Judicial Review of Defensive Tactics in Proxy Contests: When is Using a Rights Plan Right*, 46 VAND. L. REV. 503, 512 (1993).

25 *See* Black, *supra* note 13, at 823 (suggesting that proxy fights are rare and costly).

26 ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 76–78 (New York, Harcourt, Brace & World, 2d ed. 1968).

27 *See* Black, *supra* note 13, at 823 (discussing that current rules make it hard for a single shareholder to own a large percentage stake in a single company).

28 *Poison Pill*, INVESTOPEDIA http://www.investopedia.com/terms/p/poisonpill.asp (last visited Apr. 10, 2016). *See also* Randall S. Thomas, *supra* note 24.

29 *See Bus. Roundtable*, 647 F.3d, at 1149.

30 *See* Black, *supra* note 13, at 823.

31 Damon A. Silvers & Michael I. Garland, *The Origins and Goals of the Fight for Proxy Access*, *in* SHAREHOLDER ACCESS TO THE CORPORATE BALLOT (Lucian Bebchuk, ed., Harvard University Press) (forthcoming 2004), https://www.sec.gov/spotlight/dir-nominations/silversgarland022004.pdf.

made efforts in proposing rule changes that would reduce those costs and enhance shareholder access.[32]

Perhaps one of the boldest attempts by the SEC was its changes to Rule 14a-11 in 2010. Based upon the rationale that long-term significant shareholders should have a means of nominating candidates to the boards of the companies that they own,[33] the SEC adopted the new rules which required companies to provide shareholders the opportunity to have their nominees included in the company proxy materials sent to all shareholders.[34] Meanwhile, SEC's proposed rules also permit shareholders to use shareholder proposals to amend fundamental corporate documents and to create rules for them to propose director nominees in proxy materials.[35] To have their nominees included in the proxy materials, shareholders should own at least three percent of the total voting power of the company's securities and are entitled to vote on the election of directors at the annual meeting, though they will be able to aggregate holdings to meet this threshold.[36] They also will be required to have held their shares for at least three years and will be required to continue to own at least the required amount of securities until the date of the meeting at which directors are elected.[37]

The new rules essentially bridged a shortcut for shareholder involvement in board elections because shareholders can directly include their nominees at the beginning of the proxy process and the corporation is required to do so.[38] To some extent, the inclusion of shareholder director nominees has nullified the exclusionary ground in shareholder proposal rules that the company can use to exclude the shareholder's request to put a specific candidate in the proxy material. However, the new rules cannot fully replace proxy contests from the perspective of seeking control, due to limits on the number of nominees a

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32 *See* Black, *supra* note 13, at 829.

33 *SEC Adopts New Measures to Facilitate Director Nominations by Shareholders*, *supra* note 12; *see also* Eisenberg, *supra* note 3, at 1504 (arguing that under the corporate statutes the power to elect the board is vested exclusively in the shareholders, and to give the incumbent board exclusive access to the corporate proxy materials for the purpose of designating directorial candidates "would be virtually tantamount to giving [the board] the power to elect the board [itself]").

34 *SEC Adopts New Measures to Facilitate Director Nominations by Shareholders* , *supra* note 12.

35 *Id.*

36 Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,674 (Sept. 16, 2010) (to be codified at 17 C.F.R. § 240.14a-11).

37 *Id.* at 56,675.

38 *SEC Adopts New Measures to Facilitate Director Nominations by Shareholders*, *supra* note 12.

shareholder can include in the proxy material,[39] and such shareholder will lose eligibility if he or she is holding the securities for the purpose of changing control of the company.[40] The rule does not apply if applicable state law or company's governing documents "prohibit shareholders from nominating a candidate for election as a director."[41] It appears that the SEC's reform of this particular rule in the Act echoes Black's proposition of "institutional voice," which will allow a certain number of shareholders to collectively have a significant say in corporate affairs, while limiting the power of any one to act on its own.[42] It is a fair comment that the change did not direct the control issue, but rather reduced obstacles of shareholder access. Although the rule imposed a mandatory requirement upon companies instead of offering them a mere choice, this may be due to the fear that the board's inaction would render such choice meaningless in practice.

In spite of the SEC's intention to mildly improve shareholders' role in corporate governance, the United States Court of Appeals for the District of Columbia Circuit invalidated Rule 14a-11 in less than one year.[43] The D.C. Circuit court struck down the rule primarily because the Commission "acted arbitrarily and capriciously."[44] The court reasoned that the Commission neglected and failed to effectively quantify significant costs the company might incur in order to oppose the shareholder's candidate.[45]

Another important factor on the cost side arose from the concern that institutional investors with special interests, such as state pension funds, would act in concert and take advantage of the Rule to serve their own interest, rather than the share value.[46] Furthermore, the court agreed with the petitioner's contention that the Commission relied upon insufficient empirical data when it concluded that Rule 14a-11 will improve board performance and increase

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39 *Id.* (stating that the company is not required to include in its proxy materials more than one shareholder nominee or the number of nominees, if more than one, equal to 25 percent of the number of directors on the board).

40 *Id.*

41 *Id.*

42 Black, *supra* note 13, at 815–16.

43 *Bus. Roundtable*, 647 F.3d at 1148.

44 *Id.*

45 *Id.* at 1150.

46 *See id.* at 1152.

shareholder value by facilitating the election of dissident shareholder nominees.[47]

Just as the preceding paragraph has pointed out that Rule 14a-11 cannot replace the traditional proxy contest in full owing to its limits on shareholders' votes, the D.C. Circuit court realized that certain traditional proxy contests would coexist with the mechanism created by the new rules if rules were adopted, and such co-existence of two separate approaches for a common goal would improve shareholders' involvement in board nomination.[48] However, the court found that the SEC's estimated frequency of nominations under Rule 14a-11 is internally inconsistent, because it "anticipated frequent use of Rule 14a-11 when estimating benefits, but assumed infrequent use when estimating costs."[49]

In general, at least from the surface, this was due to the SEC's failure to conduct a more consistent and comprehensive economic analysis and thus, the court was not persuaded by such proposal. Many academic commentators have criticized the court's decision and focused on the improper application of the standard of review, "arbitrary and capricious," arguing that the court should have deferred to the agency's judgment and the use of empirical analysis.[50] Assuming arguendo the court had the means to assess the SEC's analysis, scholars are barely convinced by the court's view of law and economics.[51] But regardless of how the current judicial world views shareholder increasing democracy, trends and forces in the market change the stereotypical notions toward the structure of the corporate governance and the function of legal regime with respect to the proxy mechanism.

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47 *Id.* at 1151. The D.C. Circuit court used one of many counter empirical studies as an example that "when dissident directors win board seats, those firms underperform peers by 19 to 40% over the two years following the proxy contest."

48 *Bus. Roundtable*, 647 F.3d at 1153.

49 *Id.* at 1153–54.

50 *See* Anthony W. Mongone, Note, *Business Roundtable: A New Level of Judicial Scrutiny and Its Implications in a Post-Dodd—Frank World*, 2012 COLUM. BUS. L. REV. 746, 793 (concluding that the court used an improperly onerous standard and that it should have upheld the regulation using a more deferential standard).

51 *See* Grant M. Hayden & Matthew T. Bodie, *The Bizarre Law and Economics of Business Roundtable v. SEC*, 38 J. CORP. L. 101, 120–33 (arguing that the court's decision in Business Roundtable rests on economic theory that "departs dramatically from the standard law and economics of corporate law, which assumes that shareholders and directors will act rationally, that agency costs are a natural byproduct of the separation of ownership and control, and that the shareholder franchise will increase overall efficiency").

III. MODERN MARKET FORCES IN PROMOTING SHAREHOLDER INVOLVEMENT

While the court did not consider the petitioner's additional argument that the Commission arbitrarily rejected proposed alternatives that would have allowed shareholders to decide whether to adopt a proxy access mechanism in a company,[52] such practice has gained much attention in the practical world. According to the most recent survey conducted by Shearman & Sterling on the One Hundred Largest US Public companies, there has been a 200% increase from 2014 to 2015 in shareholder proposals calling for the board to take steps necessary to amend the company's governing documents to permit shareholders satisfying certain ownership criteria to include director nominees in the company's proxy materials.[53] Many companies adopted or committed to adopt a proxy access by-law in 2015.[54] With such a significant change in public companies' attitudes toward shareholder proxy access, one would wonder what driving force is behind such changes in the absence of rules akin to 14a-11. This article argues that the capacity and monitoring of both institutional investors and proxy advisory firms are the major forces that help form the contemporary use of proxy measures and improve the shareholder involvement.

A. *Institutional Investors' Role in Corporate Governance and Shareholder Involvement*

With significant share-purchasing capacity, information advantages and less liquidity in certain long-term investments, financial intermediaries as institutional investors are the only available candidates capable of effectively monitoring corporate management.[55] In addition to its financial capability, one of the important aspects of institutional investors' capacity is that they normally run highly diversified portfolios of investments and may have their funds in different corporations.[56] Such diversification results in institutional investors' interest more in monitoring from a perspective of scale economies than in company-specific oversight.[57]

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52 *Bus. Roundtable*, 647 F.3d at 1149.

53 *13th Annual Survey of the 100 Largest US Public Companies*, SHEARMAN & STERLING LLP (2015), http://shearman.uberflip.com/i/581509-2015-corporate-governance-executive-compensation-survey.

54 *Id.*

55 *See* Black, *supra* note 13, at 873–74, 887.

56 OECD, *The Role of Institutional Investors in Promoting Good Corporate Governance* 12 (2011), http://www.oecd.org/daf/ca/49081553.pdf.

57 *See* Black, *supra* note 13, at 887.

The effect of scale economies offers unparalleled advantages to institutional investors that individual shareholders cannot acquire.[58] Generally scholars hold positive views toward institutional investors' activism in deciding major corporate issues and monitoring firms.[59] Even those that are not convinced of such activism as a value-added factor, remain optimistic toward institutional investors' role in promoting good corporate governance, albeit the means shall be different and more than activism.[60]

While there have always been heated debates about institutional investors' functions in promoting corporate governance; in practice, institutional shareholders have long taken on an active role in influencing corporate matters with the tool of the proxy process[61] and their activism has made other shareholders more involved and informed in corporate governance. For example, many institutional shareholders now post their voting decisions and voting guidelines of proxy process on the internet, prior to the meeting, to offer individual investors a chance to see where the large investors stand on issues and the rationales for their decisions.[62] More frequent communication among investors provides dynamics for them to act collectively.[63] The inherent information advantage of large institutions makes such solicitation more influential,[64] which adds more support to collective shareholder actions. A powerful institutional stockholder may contact management directly to discuss a specific proposal, suggest modifications to the proposal, or even urge the

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[58] *Id.* at 822 (discussing that a shareholder with economies of scale can "reduce her per-company solicitation cost, while preserving the per-company benefit from success").

[59] *See generally* Bernard S. Black, *The Value of Institutional Investor Monitoring: The Empirical Evidence*, 39 UCLA L. REV. 895 (1992) (discussing that empirical evidence shows that oversight by institutional investors can add value to the companies in which they own stock).

[60] *See generally* Roberta Romano, *Less is More: Making Institutional Investor Activism A Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174 (2001) (arguing that current practice of institutional investor activism does not promote the corporate value and suggesting some other measure should be taken by these investors).

[61] *See* E. Norman Veasey, *The Stockholder Franchise Is Not A Myth: A Response to Professor Bebchuk*, 93 VA. L. REV. 811, 817 (2007).

[62] Jason Van Bergen, *Proxy Voting Gives Fund Shareholders A Say*, INVESTOPEDIA, http://www.investopedia.com/articles/basics/04/082704.asp (last visited Apr. 10, 2016).

[63] *See* Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1301 (2009) (discussing that electronic shareholder forums may facilitate enhanced communication between shareholders and thus reduce the cost of collective action).

[64] *See, e.g.*, Edward S. Adams, *Bridging the Gap Between Ownership and Control*, 34 J. Corp. L. 409, 432 (2009) (discussing that institutional investors have adequate information on evaluating management).

board to withdraw the entire proposal.[65] With more such ex ante measures, institutional investors have stronger influence in shareholder proposals.[66]

Institutional investor activism could impact shareholder involvement in a more direct way, such as asking for proxy access in shareholder proposals. For example, New York City Pension Funds used to file proposals at seventy-five different public companies asking for proxy access for three percent shareholders who have held their shares for three years.[67] While institutional investors have adequate resources to push their activist proposals to the forefront, another source of market force could favorably back up shareholders' activism, especially when a proposal concerns shareholder access in general.

B. Influence of Proxy Advisory Firms

Proxy advisory firms provide analysis and voting recommendations on shareholder voting issues included in proxy statements and institutional investors hire many of them.[68] It is argued that proxy advisory firms are highly efficient and crucial for the exercise of rational shareholder voting because they are sophisticated in corporate voting issues, they have the scaled economics advantage in making voting decisions for a very large variety of firms and, most importantly, they solve the shareholder's restriction on information and free-rider problems.[69]

The widespread adoption of proxy advisory firms' opinions allows these firms to become vital in forming public opinions and summoning shareholders' decisions.[70] Today, any decision by the company regarding proxy matters could be especially challenging, until the proxy advisory firms publicly

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65 Jason Van Bergen, *supra* note 62.

66 *See* Adam J. Sulkowski & Kent Greenfield, *A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN'S L. REV. 929, 938 (2005) (discussing that institutional shareholders can have particular impact through shareholder proposal due to their influence over corporations' decision-makers).

67 Courtney Johnson, *VII. SEC Rule 14A-8(I)(9) & The Whole Foods Proxy Saga*, 34 REV. BANKING & FIN. L. 458, 460–61 (2015).

68 Sagiv Edelman, *Proxy Advisory Firms: A Guide for Regulatory Reform*, 62 EMORY L.J. 1369, 1374 (2013).

69 David F. Larcker et al., *Outsourcing Shareholder Voting to Proxy Advisory Firms*, 58 J.L. & ECON. 173, 174 (2015) ("[P]roxy advisory firms to form and invest in costly data collection and research when this cost is shared across many institutional investor clients").

70 *See* George W. Dent, Jr., *A Defense of Proxy Advisors*, 2014 MICH. ST. L. REV. 1287, 1292–93 (2014) (arguing that 'the proxy firms' positions essentially mirror the current consensus on good governance").

announce the factors to be considered in their voting recommendations.[71] Many of the firms view shareholder involvement as an important factor to consider when giving voting advice, and one of the largest advisory firms, Institutional Shareholder Services ("ISS"), even provides corporate governance ratings to institutional investors.[72] Under proxy advisory firms' systematic monitoring and evaluation, corporations would feel pressured to improve their performance,[73] or at least be more open to shareholder involvement.

IV. A PROPOSAL TO LEGAL REFORM ON PROXY ACCESS

With the influence of institutional investor activism and rating and monitoring from proxy advisory firms, shareholders in big corporations are more incentivized to include proxy access by-law amendments into shareholder proposals and the instances are indeed increasing in recent years.[74] In contrast to a mandatory requirement upon corporations to include shareholder nominations in the management proxy material, future law should just provide shareholders with channels and enable them to exercise their own choices. However, granting corporations free choice does not mean that the law should stay totally indifferent in facilitating either, otherwise it makes no difference to promulgate a new rule. The law should focus on simplifying the procedure, removing hindrances and empowering shareholders in a more significant manner than the current legal regime.

The most frequently used approach to create proxy access is shareholder proposals, as previously discussed in the essay. Shareholders can propose shareholder proxy access in the proxy materials, so future shareholders can include their nominees into proxy materials, which in effect is a corporate-level promulgation of Rule 14a-11.[75] But Rule 14a-8(i)(9) permits a company, upon submitting a "no-action" letter to the SEC, to exclude a shareholder proposal that directly conflicts with a management proposal on the same

71 Andrew J. Brady & Lucas F. Torres, *SEC Staff Will No Longer Issue No-Action Letters on Conflicting Shareholder Proposals During the 2015 Proxy Season*, AKIN GUMP (Jan. 28, 2015), https://www.akingump.com/en/experience/practices/corporate/ag-deal-diary/sec-staff-will-no-longer-issue-no-action-letters-on-conflicting.html.

72 Edelman, *supra* note 68, at 1384.

73 *See, e.g.*, *id.* at 1385–86 (discussing that proxy advisory firms wield great influence over corporations and institutional investors).

74 *13th Annual Survey of the 100 Largest US Public Companies*, *supra* note 53.

75 *See SEC Adopts New Measures to Facilitate Director Nominations by Shareholders*, *supra* note 12.

topic.[76] The SEC does not usually overturn no-action letters.[77] Although shareholders may resort to litigation to compel inclusion of its proposal in the company's proxy materials, this approach may be costly and time-consuming.[78]

Therefore, one optimal method to balance between shareholders and directors is to grant mandatory inclusion of proxy access proposals, if certain thresholds are met. Such thresholds can be the amount of shares making the proposal (for instance, six percent of the voting shares) and the minimum holding period (for instance, three years) to avoid frivolous proposals, and to allow shareholders to aggregate their shares.[79] Once sufficient eligible shares are gathered, the shareholder group may file a request to the SEC, prior to the directors' filing of a proxy statement and ask for mandatory inclusion. Upon preliminary review of the proposal, the SEC should then grant the inclusion. The company may object regarding the inclusion to either SEC or to the court and it cannot rely on the ground of conflicts with the company's proposal,[80] but instead it should provide more substantive reasons.

It is not hard to imagine, under this set of rules, after the proposal is included in the proxy materials and the proposal moves to the voting round, under the influence of pro-shareholder proxy advisory firms, that an adequate number of shareholders might vote for the proposal. Such a rule does not significantly undermine the corporate autonomy but merely tilts the balance a bit more toward the shareholder side than before.

CONCLUSION

Although the failure of the SEC's proposal of 14a-11 disappointed many practitioners and scholars,[81] the institutional investors and proxy advisory firms have been pushing companies, especially large companies, to pay attention to shareholder involvement as a key standard of evaluating their

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[76] 17 C.F.R. §240.14a-8 (2010); Mary Jo White, *Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals*, SEC.GOV (Jan. 16, 2015), https://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html.

[77] *See* Andrew Ackerman & Joann S. Lublin, *SEC Reverses Decision on Shareholder Proposal—Update*, ADVFN (Jan. 17, 2015), http://uk.advfn.com/stock-market/NASDAQ/WFM/share-news/SEC-Reverses-Decision-on-Shareholder-Proposal-Upd/65138631.

[78] Brady & Torres, *supra* note 71.

[79] *See, e.g.*, Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,674–75 (Sept. 16, 2010) (to be codified at 17 C.F.R. § 240.14a-11).

[80] *Cf.* 17 C.F.R. §240.14a-8 (2010).

[81] *See* Mongone, *supra* note 50, at 792; Hayden & Bodie, *supra* note 51, at 132.

businesses.[82] Considering the current market incentives for more demands in shareholder involvement, the prospective legal reform of proxy rules should utilize such trends and play the role of supplementer and facilitator, by removing certain procedural hurdles in proxy access. Such reform can effectively promote meaningful shareholder involvement, especially in director election, and in the meantime avoid the risk of being repealed by judicial review.

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82 *See, e.g.*, Edelman, *supra* note 68.

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