

**COMMENT: PROPOSAL TO ALLOW SHAREHOLDER  
NOMINATION OF CORPORATE DIRECTORS:  
OVERREACTION IN TIMES OF CORPORATE SCANDAL**

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I. INTRODUCTION

Shareholder access to a company’s proxy statement has been debated for several decades.<sup>1</sup> Currently, shareholders have limited access to a company’s proxy statement<sup>2</sup> and equally limited ability

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1. Div. Of Corp. Fin., SEC, Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, (July 15, 2003), at page 12, at <http://www.sec.gov/news/studies/proxyreport.pdf> (last visited April 18, 2004) [hereinafter July 15, 2003 SEC Staff Report]. The Staff Report states that this issue has been debated for more than sixty years. *Id.* For a discussion on the history of the shareholder access debate *see infra* Part II.

2. The Securities Exchange Act of 1934 outlines the procedures for shareholders to make proposals to be included in a company’s proxy materials. 17 C.F.R. § 240.14a-8 (2003).

to nominate a candidate for a seat on the board of directors.<sup>3</sup> Director nominations typically are the responsibility of the corporate board of directors.<sup>4</sup> Recently, the United States Securities and Exchange Commission (“Commission”) proposed significant changes to the federal rules that would allow greater shareholder access to corporate proxy statements.<sup>5</sup> Largely supported by shareholders and shareholder activists, interest in this rule is arguably a reaction to underperforming stocks and recent corporate scandal.<sup>6</sup> In order to address what many see as a fundamental problem with American corporate governance, the Commission has proposed a momentous rule change.<sup>7</sup> The proposed change would allow specific shareholders or groups of shareholders, after the occurrence of certain “triggering” events, to nominate a director candidate and have that candidate appear on the company’s proxy materials.<sup>8</sup>

Implementation of this rule would cause several negative

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3. For a discussion on the current processes for shareholder director nomination, *see infra* Part III.

4. 17 C.F.R. § 240.14a-8 (i)(8) (2003) (stating a shareholder proposal is excluded “[i]f the proposal relates to an election for membership on the company’s board of directors or analogous governing body”).

5. July 15, 2003 SEC Staff Report, *supra* note 1; Proposed Rule: Security Holder Director Nominations, Exchange Act Release No. 34-48626 (Oct. 14, 2003) *available at* <http://www.sec.gov/rules/proposed/34-48626.htm> (last visited April 18, 2004).

6. Andrew Countryman, *Most Shareholders Back Proxy Access, Study Says*, CHI. TRIB., Sept. 24, 2003, at 1 (stating that in a study of more than 1000 shareholders, 80 percent favored shareholder access to the proxy for nominating board candidates); Kathleen Day, *SEC Chief Supports Plan to Aid Investors*, WASH. POST, July 16, 2003, at A1 (stating that investors groups claim that corporate wrongdoing over the previous eighteen months has “shattered” investor confidence); Deborah Solomon, *SEC Plans Comprehensive Look at Rules for Proxy Exclusions*, WALL ST. J., Apr. 15, 2003, at C9 (stating “[s]hareholder activists . . . have been pushing the SEC to consider broader investor access, especially in light of recent corporate scandals”).

7. *See* Andrew Countryman, *SEC Moves Toward Revamp of Board Nominations*, CHI. TRIB. July 16, 2003, at 1 (noting a “historic shift” in the Commission and stating that shareholder access has been considered for more than sixty years yet this is the closest the Commission has ever come to altering the shareholder-nomination rules); Interview by National Public Radio with Nell Minow, Editor of the Corporate Library, *All Things Considered*, 2003 WL 5580470 (July 16, 2003) (stating “[t]his is far, far greater in import than any of the post-Enron reforms, the Sarbanes-Oxley legislation, [or] the New York Stock Exchange listing standards”); Jonathon Peterson, *SEC Acts on Behalf of Investors*, L.A. TIMES, July 16, 2003, at C3 (calling shareholder access a “long-cherished goal” and stating that “advocates of corporate democracy have sought greater influence over board nominations” for decades).

8. July 15, 2003 SEC Staff Report, *supra* note 1, at 7-9.

results in American corporations, such as further disenfranchising investors, increasing special-interest contests, and escalating the difficulty of finding qualified persons to sit on a board.<sup>9</sup> Additionally, the Commission may lack the authority to implement such a rule in states like Minnesota.<sup>10</sup> Furthermore, sweeping corporate governance reforms have been adopted in the last year.<sup>11</sup> These changes in corporate governance law should be allowed sufficient time to be fully implemented and their impact assessed before any additional, drastic reforms are enacted.<sup>12</sup>

This comment will examine the history of the shareholder access debate.<sup>13</sup> Next, the comment looks at the current rules governing the nomination of directors.<sup>14</sup> The comment will then analyze the Commission's July 15, 2003 proposal<sup>15</sup> and October 14, 2003 proposed rules.<sup>16</sup> The comment will also discuss the possible negative effects of the proposed rules if put into practice and consider the implications on Minnesota state law.<sup>17</sup> Finally, the comment will analyze whether a wholesale rule change is necessary<sup>18</sup> and conclude that the Commission's proposal should not be implemented as a rule at this point in time.<sup>19</sup>

## II. HISTORY OF THE SHAREHOLDER ACCESS DEBATE

In 1942, the Commission first addressed the question of shareholder access to the proxy for the purpose of nominating director candidates.<sup>20</sup> The Commission requested that its staff analyze the proxy rules and suggest changes.<sup>21</sup> The staff proposed that "minority stockholders be given an opportunity to use the management's proxy materials in support of their own nominees for directorships."<sup>22</sup> However, the Commission did not adopt the

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9. *See infra* Part VI.B.

10. *See infra* Part VI.C.

11. *See infra* Part VII.

12. *See id.*

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Parts V.

17. *See infra* Part VI.

18. *See infra* Part VII.

19. *See infra* Part VIII.

20. July 15, 2003 SEC Staff Report, *supra* note 1, at 2 (citing SEC Release no. 34-3347 (Dec. 18, 1942)).

21. *Id.*

22. *Id.* More specifically, the proposal would have allowed shareholders to

1942 proposal allowing shareholder access.<sup>23</sup>

Almost thirty-five years later, in 1977, the Commission again addressed the issue of shareholder access.<sup>24</sup> The Commission requested comment on whether “shareholders should have access to management’s proxy soliciting materials for the purpose of nominating a person of their choice to serve on the board of directors.”<sup>25</sup> After public hearings were held, the Commission proposed and adopted amendments regarding the nomination of directors.<sup>26</sup> These proposed amendments, however, did not address shareholder access to the proxy but instead addressed nominating committees.<sup>27</sup> The proposal required corporations to state whether they have a nominating committee and whether that committee will accept shareholder recommendations.<sup>28</sup> Once again, the Commission did not adopt any rule allowing shareholder access to company proxies.<sup>29</sup>

The Commission took no further action until 1992, when once again the Commission visited shareholder access.<sup>30</sup> The Commission considered shareholder access in the context of an amendment to Exchange Act Rule 14a-4.<sup>31</sup> In the enactment of the amendment, the Commission discussed the difficulty shareholders experience in attempting to affect the nomination process.<sup>32</sup> Despite noting that difficulty, the Commission did not expand

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promote their own nominations for director seats and nominations for company management. *Id.*

23. *Id.* There apparently was no reason given why the shareholder access rule was not adopted. *Id.* at 2, note 7.

24. *Id.* at 3.

25. *Id.* (citing SEC Release no. 34-13482 (April 28, 1977)).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* In a 1980 staff report, the Commission stated because of the “emerging concept of nominating committees,” the Commission felt it should not propose and adopt a shareholder access rule at that time. *Id.* However, the staff report did recommend that the Commission “monitor” the development of nominating committees and their “consideration of shareholder recommendations.” *Id.* The 1980 staff report advised that if the nominating committees proved ineffective, “Commission action might be necessary.” *Id.* at 3-4.

30. *Id.* at 4 (citing SEC Release No. 34-31326 (Oct. 16, 1992)).

31. *Id.* (discussing 17 C.F.R. § 240.14a-4(d)(4) (2002), which states “[a] person shall not be deemed to be a bona fide nominee and he shall not be named as such unless he has consented to being named in the proxy statement and to serve if elected”).

32. *Id.*

shareholder access to a company's proxy.<sup>33</sup> Instead, the Commission revised the bona fide nominee rule<sup>34</sup> to allow a shareholder to file his or her own proxy statement and proxy card.<sup>35</sup> However, as discussed below, this is conducted by the shareholder or shareholder group at its own expense.<sup>36</sup>

Until the proposal and proposed rule that is the subject of this comment, the Commission conducted no further public discussion on shareholder access after 1992.<sup>37</sup>

### III. EXISTING AVENUES FOR SHAREHOLDER NOMINATION

Currently, there are three options for shareholders to nominate candidates for directorships.<sup>38</sup> Shareholders may nominate a candidate at a company's annual meeting.<sup>39</sup> Shareholders may also recommend a candidate to a company's nominating committee.<sup>40</sup> Finally, under the current rules, a shareholder may conduct his/her own director election.<sup>41</sup>

Minnesota state law does not require that a corporation hold an annual meeting.<sup>42</sup> However, the statute does carve out an exception where no regular meeting<sup>43</sup> has been held for a period of

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33. *Id.* (citing SEC Release No. 34-31326 (Oct. 16, 1992)). The Commission stated "[p]roposals to require the company to include shareholder nominees in the company's proxy statement would represent a substantial change in the Commission's proxy rules. This would essentially mandate a universal ballot including both management nominees and independent candidate for board seats." *Id.*

34. *See supra* note 31.

35. *See infra* Part III.

36. *See id.*

37. July 15, 2003 SEC Staff Report, *supra* note 1, at 4.

38. *Id.* at 5.

39. *See* MINN. STAT. § 302A.205 (2003) (stating the election procedures are left to be determined by the corporate bylaws and articles of incorporation).

40. July 15, 2003 SEC Staff Report, *supra* note 1, at 5.

41. *Id.*

42. MINN. STAT. § 302A.431, subd. 1 (2003) ("Regular meetings of shareholders *may* be held on an annual or other less frequent periodic basis." (emphasis added)).

43. Since Minnesota law does not require an annual shareholder meeting, the state no longer uses the term "annual meeting" and instead employs the term "regular meeting" in reference to shareholder meetings. *Id.* However it should be noted that both the New York Stock Exchange and the National Association of Securities Dealers (NASDAQ) require that listed companies hold an annual shareholders' meeting in each fiscal year. N.Y. STOCK EXCH., LISTED COMPANY MANUAL § 302.00 (2003), *available at* <http://www.nyse.com/listed/1022221393251.html> (last visited April 18, 2004); NAT'L ASS'N OF SECS. DEALERS, BY-LAWS OF THE NASDAQ STOCK MARKET, INC. Art IV, § 4.11(a) (2003), *available at* <http://>

fifteen months or greater.<sup>44</sup> In such a situation, a shareholder or shareholder group that holds more than 3% of a corporation's shares may demand a meeting of the shareholders.<sup>45</sup> Regardless of whether the corporation scheduled the meeting or its occurrence is a result of a shareholder demand, state law dictates that director elections are to take place at all regular meetings.<sup>46</sup> There are no formal state law requirements for director elections at annual meetings.<sup>47</sup> Provided the corporation's articles and bylaws do not require nominations to be submitted prior to the meeting, a shareholder may simply nominate a person from the floor.<sup>48</sup> Practically speaking, many Minnesota companies include provisions in their articles of incorporation or bylaws requiring nominations for director seats be submitted to the corporation a specified period before the meeting.<sup>49</sup> In such a situation, a shareholder would be required to provide a corporation with notice of her intent to nominate a candidate for the board at the next meeting.<sup>50</sup>

Despite the relative ease of nominating a candidate for the board at a shareholder meeting, proponents of increased shareholder access contend that this option is ineffective.<sup>51</sup> Since many shareholders vote by proxy before a meeting, a candidate

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cchwallstreet.com/nasd/nasviewer.asp?SelectedNode=3&FileName=/nasd/organization/CorporateOrganization.xml#chp\_1\_3\_22 (last visited April 18, 2004).

44. § 302A.431, subd. 2.

45. *Id.* The statute defines the procedure in which a shareholder or shareholder group may demand a regular meeting. *Id.* The demand for a regular meeting must be in the form of a written notice to the corporation's chief executive officer or chief financial officer. *Id.* The corporation must respond to the demand within thirty days of receipt. *Id.* In response to the demand, the board of directors must call and schedule a regular meeting within ninety days after receipt of the shareholder demand. *Id.* All expenses incurred are the responsibility of the corporation. *Id.*

46. *Id.* at subd. 4 ("At each regular meeting of shareholders there shall be an election of qualified successors for directors.")

47. *See* MINN. STAT. § 302A.205 (2003) (stating the election procedures are left to corporate bylaws and articles of incorporation).

48. *See id.*

49. 18 JOHN H. MATHESON & PHILIP S. GARON, MINN. PRAC. CORP. L. & PRAC. § 8.35 (2003). This measure is practiced by Minnesota corporations to deflect hostile takeover attempts, and state law does not authorize nor condone this practice. *Id.* However, a 1998 decision in Delaware, a state of incorporation for many U.S. companies, ruled that a 100-day notice provision in a corporation's bylaws was reasonable. *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.* 728 A.2d 25, 40 (Del. Ch. 1998).

50. 18 MATHESON & GARON, *supra* note 49, § 8.35.

51. July 15, 2003 SEC Staff Report, *supra* note 1, at 5.

nominated at a meeting is unlikely to receive the needed amount of votes to become a board member.<sup>52</sup> Thus, it is argued that shareholder nomination at an annual meeting does not provide an effective means for candidate nomination to the board.<sup>53</sup>

Currently, a shareholder may propose a candidate for a directorship to a company's nominating committee "or group of directors fulfilling a similar role."<sup>54</sup> The primary function of the nominating committee is to recommend nominees for election as directors.<sup>55</sup> The Securities Exchange Act of 1934 states that if a company has a nominating committee, the company needs to state in its proxy statement whether the "committee will consider candidates recommended by security holders" and "describe the procedures to be followed" in order to nominate a candidate.<sup>56</sup> Because a company is under no current obligation to disclose why a shareholder-recommended candidate was not nominated, this process has been criticized by shareholders as being ineffective.<sup>57</sup>

To address the perceived ineffectiveness of shareholder recommendations to nominating committees, the Commission recently proposed additional rules.<sup>58</sup> The purpose of these rules is to enhance a corporation's duty to disclose how shareholders may propose candidates to a company's nominating committee, to disclose why a shareholder nominee may have not been accepted,

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52. *Id.*

53. *Id.*

54. *Id.*

55. CORPORATE DIRECTOR'S GUIDEBOOK: *Third Edition*, 56 BUS. LAW. 1571, 1608 (2001) (outlining the membership, function, and criteria for a nominating committee).

56. 17 C.F.R. § 240.14a-101, Item 7(d)(2) (2003).

57. Appendix A, Summary of Comments, In Response to the Commission's Solicitation of Public Views Regarding Possible Changes to the Proxy Rules, Exchange Act Release No. 34-47778, 30 (July 15, 2003), at <http://www.sec.gov/news/studies/proxycomsum.pdf> (last visited April 18, 2004).

58. See Disclosure Regarding Nominating Committee Functions and Communications between Security Holders and Boards of Directors, Exchange Act Release No. 34-48301, 68 Fed. Reg. 48, 724 (proposed Aug. 14, 2003) available at <http://www.sec.gov/rules/proposed/34-48301.htm> (last visited April 18, 2004). A collateral issue to this comment, the Commission's proposed changes are intended to "enhance the transparency" of a corporation's nominating committee functions. The proposal would require companies to state in their proxy whether they have an existing policy regarding shareholder nominations to the board. 68 Fed. Reg. at 48, 725-27. Further, a company would need to disclose in the proxy statement the procedure used by the nominating committee in selecting a board candidate. *Id.* Any rejections of shareholder-nominated candidates would require a specific explanation from the company's nominating committee. *Id.*

and to make corporate nominating committees more “transparent” to investors.<sup>59</sup> This was the first time the Commission considered increasing disclosure regarding nominating committees since 1978.<sup>60</sup> The Commission called this “a critical step in alleviating present-day corporate abuses.”<sup>61</sup> While realizing the “bigger battle” is allowing shareholder access to the proxy, the Commission believes this increase in disclosure of nominating committee procedures will aid investors in understanding director elections and increase the ability for shareholders to nominate board candidates.<sup>62</sup> This proposal was largely adopted as a final rule on November 24, 2003.<sup>63</sup>

A shareholder or shareholder group may also elect to run its own slate of candidates.<sup>64</sup> Under current federal rules, a shareholder has the right to request and receive a list of the security holders of a corporation.<sup>65</sup> Minnesota law grants a similar right.<sup>66</sup> Under both state and federal law, the request must be in writing and the security holder must defray the reasonable expenses to be incurred by the corporation.<sup>67</sup>

Once a list of shareholders is obtained, an individual or shareholder group may distribute its own proxy materials, provided

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59. *Id.* at 48, 726-27.

60. Judith Burns, *SEC Gives Preliminary Approval to Rules on Board Nominations*, WALL ST. J., Aug. 7, 2003, at C9 (“SEC disclosure rules for nominating committees haven’t been updated since 1978.”).

61. Carrie Johnson, *SEC Votes to Propose Director Rules*, WASH. POST, Aug. 7, 2003, at E3 (quoting SEC Commissioner Harvey J. Goldschmid).

62. *See id.*

63. Disclosure Regarding Nominating Committee Functions and Communications between Security Holders and Boards of Directors, Exchange Act Release Nos. 33-8340; 34-48825 (Nov. 24, 2003) (to be codified in scattered sections of 17 C.F.R.), available at [http://www.sec.gov/rules/final/33-8340.htm#P28\\_2205](http://www.sec.gov/rules/final/33-8340.htm#P28_2205) (last visited April 18, 2004). The rule follows the proposal briefly outlined in note 58, *supra*, with one exception. Fearing a quelling of corporate board dialog, the SEC did not require companies to explain why a shareholder-recommended candidate was not accepted. Judith Burns, *SEC Sets New Rules on Boards*, WALL ST. J., Nov. 20, 2003, at C15 (stating the SEC “scrapped a plan to require boards” to disclose their reasons for not accepting a candidate recommended by shareholders).

64. *See* July 15, 2003 SEC Staff Report, *supra* note 1, at 4-5.

65. 17 C.F.R. § 240.14a-7(a)(2)(ii) (2003) (stating the corporation must provide, within five business days, “a reasonably current list of the names, addresses and security positions of the record holders”).

66. MINN. STAT. § 302A.461, subd. 4(c) (2003).

67. MINN. STAT. §§ 302A.461, subd. 4, subd. 5 (2003); 17 C.F.R. § 240.14a-7(a)(2)(i) (2003).

it complies with the Commission's proxy rules.<sup>68</sup> The shareholder is responsible for printing and mailing the proxies.<sup>69</sup> The cost of undertaking such an endeavor can be quite high.<sup>70</sup> Regardless, shareholders and shareholder groups have the legal right to run their own proxy contest and nominate their candidate(s) for the board.<sup>71</sup> Thus, shareholders currently have a process for the nomination of board candidates.<sup>72</sup>

#### IV. THE SEC PROPOSALS FOR SHAREHOLDER ACCESS

##### A. *Shareholder Access to the Proxy Statement*

On April 14, 2003, Securities and Exchange Commission Chairman William Donaldson stated "the time has come for a thorough review of the proxy rules and regulations to ensure that they are serving the best interests of today's investors, while at the same time, fostering sound corporate governance and transparent business practices."<sup>73</sup> The Commission announced that it had directed the Division of Corporation Finance (the "Division") to conduct a full review of the proxy rules.<sup>74</sup> Along with solicitation of proxies for director elections, contests for corporate control, and disclosure requirements, the Commission directed the Division to review the current proxy rules and regulations regarding the procedures for nominating and electing corporate directors.<sup>75</sup> The Commission asked the Division to consult with all interested parties, including "representatives of pension funds, shareholder advocacy groups, and representatives from the business and legal communities."<sup>76</sup> The Commission requested the Division provide

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68. See July 15, 2003 SEC Staff Report, *supra* note 1, at 5. The rules for soliciting proxy materials and the elaborate scheme of disclosure obligations found in the Securities Exchange Act of 1934 are very detailed and outside the scope of this comment.

69. See *id.*

70. Lewis Braham, *Bring Democracy to Boardroom Elections*, BUS. WK., Oct. 21, 2002, at 126. One estimate puts the proxy cost at \$2 per shareholder. *Id.* In a large corporation, the cost to solicit a proxy could easily go over \$1 million. *Id.*

71. See July 15, 2003 SEC Staff Report, *supra* note 1, at 5.

72. *Id.*

73. Commission to Review Current Proxy Rules and Regulations to Improve Corporate Democracy, Press Release No. 2003-46 (Apr. 14, 2003), at <http://www.sec.gov/news/press/2003-46.htm> (last visited April 18, 2004).

74. *Id.*

75. *Id.*

76. *Id.*

any recommendations for changes to the proxy rules to the Commission by July 15, 2003.<sup>77</sup>

On May 1, 2003, the Commission solicited public comment on the Division's review of the proxy rules regulating the nomination and election of directors.<sup>78</sup> Of the 690 comments received, the majority were made by individuals.<sup>79</sup> Accordingly, the overall majority of comments were in support of the proposal of giving shareholders access to corporate proxies to nominate directors.<sup>80</sup> Among those that opposed the proposal were corporations and corporate executives as well as the majority of law firms and individual attorneys.<sup>81</sup>

On July 15, 2003, the Commission published "Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors."<sup>82</sup> The Commission listed "alternatives" to increase shareholder involvement in the nomination and election of directors.<sup>83</sup> Of the alternatives discussed by the Commission, the proposal to grant shareholders direct access to the proxy statement garnered the most attention.<sup>84</sup>

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77. *Id.*

78. A full summary of the comments received by the Commission is available at Appendix A, Summary of Comments, In Response to the Commission's Solicitation of Public Views Regarding Possible Changes to the Proxy Rules, Exchange Act Release No. 34-47778 (July 15, 2003), at <http://www.sec.gov/news/studies/proxycomsum.pdf> (last visited April 18, 2004).

79. *Id.* at 21. The categorization of the comments are as follows: 424 individuals; 165 unions, pension funds, institutional investors, and investor associations; twenty-four social, environmental, and religious funds; eighteen law firms and attorneys; sixteen associations; ten corporations and corporate executives; ten shareholder resource providers; eight investment advisers and managers; five academics; five other shareholder groups; two governmental representatives; and three miscellaneous comments.

80. *Id.*

81. *Id.*

82. July 15, 2003 SEC Staff Report, *supra* note 1.

83. *Id.* at 7. The SEC discusses five alternatives to accomplish increased shareholder involvement. *Id.* Regarding shareholder nominations, the Commission considered requiring companies to include shareholder nominees in the proxy materials, requiring companies to deliver nominating shareholder proxy cards with company proxy materials, and amending the Securities Exchange of 1934, Rule 14a-8 to allow for shareholder proposals regarding director nomination. *Id.* The Commission also considered expanding disclosure regarding nominating committees and the nomination process, including the consideration of candidates recommended by shareholders, and also discussed expanding shareholder access to the board as well as direct communications with the boards of directors. *Id.* This comment will focus on the proposed requirements of shareholder nominee inclusion in company proxies. *Id.*

84. *Id.*

Simply stated, this alternative would require companies to include shareholder nominees on its proxy card.<sup>85</sup> Suggested information to be included on the proxy card would be biographical information on the candidate and arguments for and against each of the company's and nominating shareholder's candidates.<sup>86</sup> The Commission noted that any and all soliciting materials would continue to be filed electronically.<sup>87</sup> Further, the Commission observed, all communication would still be subject to the bar on false and misleading statements found in Exchange Act Rule 14a-9.<sup>88</sup>

The Commission stated two issues that require consideration before enacting any shareholder access rule: when shareholder access may be granted and who may qualify to gain access.<sup>89</sup> In considering when a shareholder or group of shareholders shall be given access to a proxy for the purpose of director nomination, the Commission discussed "triggering events" that would need to occur prior to the granting of shareholder access.<sup>90</sup> The Commission acknowledged that a triggering event might add additional complexity to the rule.<sup>91</sup> However, the Commission stated that limiting the use of the shareholder access rule to these circumstances would best serve the clear purpose of the rule: to increase shareholder participation in the election of directors.<sup>92</sup>

One triggering event discussed would be where a company failed to act on a shareholder proposal that received a majority of votes.<sup>93</sup> A related possible triggering event is an election where a director candidate received a significant amount of abstention or "withhold" votes.<sup>94</sup> In the election of directors, shareholders may vote or withhold a vote for each nominee.<sup>95</sup> Unlike other matters voted on by shareholders where one may vote for, against, or abstain, election voting is simply a vote cast for the nominee or an

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85. *Id.* at 7.

86. *Id.* It is also suggested by the Commission that arguments for or against may need to be in word-limited form or outside of the proxy entirely—for instance, on one or more designated websites.

87. *Id.*

88. *Id.* (citing 17 C.F.R. § 240.14a-4 (2003)).

89. *Id.* at 8.

90. *Id.*

91. *Id.*

92. *Id.* at 2.

93. *Id.* at 9.

94. *Id.*

95. 17 C.F.R. § 240.14a-4(b) (2).

abstention.<sup>96</sup> Accordingly, director elections are generally conducted under plurality voting,<sup>97</sup> where the candidate with the greatest number of votes—but not necessarily a majority—is elected.<sup>98</sup> In a situation where a director candidate received a significant amount of “withhold” votes but nonetheless still established a plurality, the Commission suggests this to be a triggering event that would invoke the shareholder access rule.<sup>99</sup>

Another triggering event discussed by the Commission was the approval of a shareholder proposal to activate the shareholder access rule.<sup>100</sup> If a shareholder did not believe the proxy process had been effective, the July 15, 2003 Staff Report suggested the shareholder could submit a proposal via Exchange Act Rule 14a-8 requesting that the corporation comply with the shareholder access procedure.<sup>101</sup>

In the Staff Report, the Commission briefly discussed other triggering events such as poor economic performance,<sup>102</sup> sanctioning of the corporation by the Commission, or indictments of corporate officers on criminal charges.<sup>103</sup> However, the Commission stated that any triggering event should be closely linked to evidence of a failing proxy process.<sup>104</sup>

Equally important to the determination of *when* shareholder access should become available is the issue of *who* should qualify to receive such access.<sup>105</sup> While the Commission recommended that there be specific minimum standards regarding shareholders who have access to a proxy for nomination purposes, those specific standards were not defined in the July 15 proposal.<sup>106</sup> Those who commented on the proposed rule made recommendations that ranged from all shareholders having access to only shareholders

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96. July 15, 2003 SEC Staff Report, *supra* note 1, at 8.

97. However, Minnesota is unique in that it requires a majority vote in the election of directors. See *infra* note 230.

98. July 15, 2003 SEC Staff Report, *supra* note 1, at 12 n.25.

99. *Id.* at 9.

100. *Id.*

101. *Id.* at 9, note 20. The Commission stated that this type of triggering event would require a revision of the Exchange Act Rule 14a-8 in order to enable shareholders to obtain the capacity to submit such a proposal. A discussion of the revision of Exchange Act Rule 14a-8 can be found *infra* Part IV.B.

102. *Id.* at 9.

103. *Id.* at 9, note 21.

104. *Id.* at 9.

105. *Id.* (emphasis added).

106. *Id.* at 32-33.

with substantial share ownership having access.<sup>107</sup> The argument for having no share-ownership threshold put forth by many was that large shareholders already have resources to exercise their rights using existing rules.<sup>108</sup> At the same time, those with larger ownership contended that they have a greater stake in the company and thus have a greater interest in the use of company funds that would result in the shareholder nomination process.<sup>109</sup> Throughout this debate, the ownership thresholds for shareholder access most frequently discussed were 3% and 5%.<sup>110</sup> Also discussed was the length of time a shareholder has owned voting stock.<sup>111</sup> Length of ownership suggestions ranged from one year to at least three years.<sup>112</sup> As stated above, the Commission declared that some sort of criteria will need to be implemented.<sup>113</sup>

Two other alternatives were discussed in the Staff Report that, while somewhat outside the scope of this comment, merit some discussion.<sup>114</sup>

#### *B. Two Alternatives to Shareholder Access*

The Commission discussed two alternatives to shareholder access. The first alternative is similar to a requirement that companies include shareholder nominees in company proxy materials.<sup>115</sup> The Commission discussed delivering separate, nominating shareholders' proxy cards along with company proxy

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107. *Id.* at 9-10

108. *Id.* at 10. Current nomination processes available to shareholders were discussed *supra* Part III. One such process is a shareholder-conducted election. This can be an expensive endeavor. Thus the minority shareholders argue that large shareholder or shareholder groups have the resources to conduct such an election and therefore are not the group that needs increased access to the proxy.

109. *Id.* Companies would be required to fund the listing of shareholder nominees on the proxy materials. Since this cost will impact the company and thus the largest shareholders, that group feels they should have the greatest control over exactly who is placed on the proxy ballot.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 9. In the proposed rule the Commission narrowed this criteria by stating that only shareholders or shareholder groups owning at least 5% of company's shares, for at least two years prior to the triggering event, can nominate a candidate for the next director election. For a discussion on the proposed rule, *see infra* Part V.

114. *Id.* at 16, 28.

115. *Id.* at 16.

materials.<sup>116</sup> The American Bar Association's Task Force on Shareholder Proposals proposed this variation on shareholder access.<sup>117</sup> This differs from the alternative outlined above where a company would be required to include a shareholder nominee on the company's proxy material.<sup>118</sup> This alternative would require a company to include a separate nominating shareholder's proxy card together with the company's own proxy card.<sup>119</sup> This occurrence could also be subject to a triggering event.<sup>120</sup> Directives for the rule include a requirement for a company "to note briefly in its proxy materials that a shareholder or shareholder group had nominated a candidate to board of directors, that the shareholder's proxy card is included in the company's mailing, and that additional disclosure . . . may be found on a specified website."<sup>121</sup>

While unlike the alternative discussed above where the shareholder nominees would actually appear on the company's

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116. *Id.*

117. Comments of Task Force on Shareholder Proposals, Section of Business Law of the American Bar Association (June 13, 2003), at <http://www.sec.gov/rules/other/s71003/aba061303.htm> (last visited April 18, 2004) [hereinafter ABA Comment]. The thirty-one-page comment written by the Task Force in response to the Commission's May 1, 2003, solicitation for comment is mainly analytical in nature. The Task Force states that due to the early procedural stage of the Commission's examination of shareholder access, no specific recommendations were given. Instead, the ABA outlines what it believes to be fundamental policy issues, such as the need for a new director selection system, eligibility requirements, and viewpoints for and against the expansion of shareholder access. The Task Force goes on to discuss some alternatives to the shareholder access proposals. Along with allowing shareholders to utilize the company's proxy mailings to solicit their own candidates, the Task Force also looks at a revision of Exchange Act Rule 14a-8. Finally, the Task Force examines the Commission's authority to expand shareholder access.

118. July 15, 2003 SEC Staff Report, *supra* note 1, at 16.

119. *Id.*

120. *Id.* The SEC did not outline any specific triggering events that would require a company to include a nominating shareholder's proxy card along with the company's proxy. *Id.* It is assumed that the SEC would subject such a rule to the same triggering events outlined *supra* Part IV.A.

121. *Id.* The SEC notes that any disclosure regarding the nomination of shareholder candidates, including campaigning for shareholder nominees, would appear on a nominating shareholders' website. Additionally, all disclosures related to nominating shareholders would be filed electronically with the Commission. *Id.* The Commission also states that a rule similarly could require that the company's soliciting materials be listed on the company's website. *Id.* Regardless of where the information is listed and who lists it, the Commission states that all communications related to shareholder nominees would be subject to the prohibition against false and misleading statements as prescribed by Exchange Act Rule 14a-9. *Id.*

proxy materials, the company would still be required to absorb the cost of mailing the nominating shareholder's proxy card.<sup>122</sup> Additionally, a current rule requires that any solicitation delivered to a shareholder be preceded by or concurrent with the delivery of a definitive proxy statement.<sup>123</sup> This alternative could cause a shareholder to receive a nominating shareholder's proxy card without first, or at least concurrently, receiving a proxy statement disclosure about the shareholder nominee.<sup>124</sup> Thus, if implemented, this alternative would need to provide shareholders with the required disclosure, enabling an informed decision when casting a vote for a shareholder candidate or a board candidate.<sup>125</sup> As discussed above, the Commission suggests a designated website where relevant information could be found regarding the nominees.<sup>126</sup>

An additional alternative discussed by the Commission was the revision of Securities Exchange Act Rule 14a-8(i)(8).<sup>127</sup> This rule currently allows companies to exclude a shareholder proposal that "relates to an election for membership on the company's board of directors or analogous governing body."<sup>128</sup> The Commission has ruled that a company may exclude a shareholder proposal if such a proposal may result in an election contest.<sup>129</sup>

The Commission in the Staff Report of July 15, 2003 discussed the alternatives to this rule.<sup>130</sup> The Commission stated two possible options: establish a new analysis of Rule 14a-8(i)(8) or amend the

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122. *Id.* The Commission notes that currently under Exchange Act Rule 14a-7, a company may choose to mail a shareholder's proxy materials instead of providing the nominating shareholder with a mailing list of current shareholders. *Id.* at 16, n.27. However, this mailing is by choice and has two major distinctions over the current proposal. *Id.* First, the shareholder's proxy materials would be mailed separately from the company's proxy. *Id.* Second, the cost of the mailing would be charged to the shareholder and not absorbed by the company. *Id.*

123. *Id.* at 17 (citing 17 C.F.R. § 240.14a-4(f) (2002)). This rule states "[n]o person conducting a solicitation subject to this regulation shall deliver a form of proxy, consent or authorization to any security holder unless the security holder concurrently receives, or has previously received, a definitive proxy statement that has been filed with the Commission pursuant to § 240.14a-6(b)." 17 C.F.R. § 240.14a-4(f) (2002)).

124. July 15, 2003 SEC Staff Report, *supra* note 1, at 17.

125. *Id.*

126. *Id.*

127. *Id.* at 28.

128. 17 C.F.R. § 240.14a-8(i)(8).

129. July 15, 2003 SEC Staff Report, *supra* note 1, at 28.

130. *Id.*

rule to allow shareholders to access a company's proxy.<sup>131</sup> The Commission suggests that under either an amendment or a change in analysis to the rule, state law would be implicated.<sup>132</sup> State law requires shareholder proposals to be voted on by the board.<sup>133</sup> Thus, a change to Rule 14a-8(i)(8) would need to provide an exemption for any proposal, such as a shareholder nomination, that would violate state law.<sup>134</sup> The Commission notes that the rule could still be utilized to exclude certain proposals, "such as those that nominate a particular person to the board," or "proposals that seek to remove current directors from the board," as well as proposals to attempt to affect the outcome of a director election.<sup>135</sup>

#### V. THE PROPOSED RULE

On October 14, 2003 the Commission issued a proposed set of rules that put the proposal outlined above into a rule format.<sup>136</sup> Over more than sixty years of debate, this is the first time the concept of allowing shareholder nomination has made it to the proposed rule stage.<sup>137</sup> While the Commission originally had planned on implementation of the rule by the 2004 proxy season, the SEC recently held a roundtable discussion to further discuss the proposed rule and appears to be taking no action regarding the rule until at least early spring 2004.<sup>138</sup>

The October 14, 2003 proposed rule is more than 100 pages long, contains more than 200 footnotes, and puts forward more than 300 separate questions posed to the potential commenter.<sup>139</sup> However, the proposed rule does not appear to stray far from the July 15, 2003 proposal discussed at length above.<sup>140</sup> One of two triggering events, discussed in the July 15 proposal and fine-tuned

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131. *Id.*

132. *See id.*

133. *Id.* For a discussion on state law, *see infra* Part VI.C.

134. *See id.*

135. *Id.*

136. Proposed Rule: Security Holder Director Nominations, Exchange Act Release No. 34-48626 (Oct. 14, 2003) *available at* <http://www.sec.gov/rules/proposed/34-48626.htm> (last visited April 18, 2004) [hereinafter October 14, 2003 Proposed Rule].

137. *See supra* Part II.

138. Notice of Roundtable Discussion Regarding Proposed Rules Relating to Security Holder Director Nominations, Feb. 9, 2004, *at* <http://www.sec.gov/news/press/2004-15.htm> (last visited April 18, 2004).

139. October 14, 2003 Proposed Rule, *supra* note 136.

140. *See id.*

in the October 14 proposed rule, must occur before shareholders will have the option to nominate a director candidate.<sup>141</sup> The first triggering event outlined by the Commission is if at least 35% of the shares voted are withheld from a particular board nominee.<sup>142</sup> That is, if at least one of the board's candidates receives "withhold votes" from 35% or more of the voting shares at an annual meeting, shareholder nomination would be considered "triggered."<sup>143</sup> Alternatively, under the proposed rule, shareholders may also trigger the right to nominate a candidate if a 1% shareholder, or a group constituting 1% of share ownership that has owned shares of the company's stock for at least one year, proposes the right to nominate a director candidate.<sup>144</sup> Once that event occurs, a majority of voting shareholders must approve the proposal to nominate.<sup>145</sup>

The Commission also put forth a third triggering event to solicit public comment: failure by a company to act on a shareholder proposal that receives a majority vote.<sup>146</sup> The Commission devoted far less discussion to this possible third triggering event.<sup>147</sup> The Commission expressed concern over whether or not "the link between the possible ineffectiveness of, or dissatisfaction with, a company's proxy process and this possible nomination procedure triggering event is more indirect than in the case of the two nominating process triggering events proposed [above]."<sup>148</sup> The Commission expressed further concern over the intricacies of the rule, relating to the determination of whether a shareholder proposal was actually implemented, potentially causing time-consuming disputes.<sup>149</sup>

After leaving the issue somewhat unsettled in the July 15 proposal discussed above, the Commission discussed exactly *who* could nominate a director.<sup>150</sup> Once one of the triggering events

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141. *Id.* at Part II.A.3.a.

142. *Id.*

143. *Id.* The reality of a 35% withhold vote was recently evidenced by the 43% withhold vote for Walt Disney CEO and ex-Chairman Michael Eisner. Dennis K. Berman & Debra Solomon, *Death by Proxy? Vote on Eisner Causes Stir*, WALL ST. J., Mar. 4, 2004 at C5.

144. October 14, 2003 Proposed Rule, *supra* note 136, at Part II.A.3.a.

145. *Id.*

146. *Id.* at Part II.A.3.b.

147. *See id.*

148. *Id.*

149. *Id.*

150. *Id.* at Part II.A.5.a.

outlined above occurs, any shareholder or group of shareholders holding at least 5% of a company's shares for at least two years prior to the triggering event, can propose a candidate for the next director election.<sup>151</sup> If more than one shareholder or group of shareholders propose candidates, the candidate for largest holder or group will be nominated.<sup>152</sup>

Once the shareholder access rule has been triggered, the Commission also proposed a limitation on how many shareholder nominees would be permitted.<sup>153</sup> For a company that has a board composed of eight or fewer directors, the proposed rule calls for one shareholder nominee to be included on the proxy.<sup>154</sup> Under the proposed rule, a company that has more than eight but fewer than twenty directors would be required to include two shareholder nominees.<sup>155</sup> If the board consists of twenty or more members, three nominees would be required.<sup>156</sup> To put the above quotas into perspective, the vast majority of public companies' boards are made up of fewer than twenty directors, with an overall median board size of nine.<sup>157</sup>

Comments for the October 14, 2003 proposed rule were due by December 22, 2003.<sup>158</sup> The response was extraordinary. In the history of the Securities and Exchange Commission, no proposed rule has generated more comment letters.<sup>159</sup> The Commission received a record 12,000-plus comment letters regarding the proposed rule.<sup>160</sup> It should be noted, however, that almost 9500 of those comment letters were form letters generated by large, unidentified lobby organizations in favor of the proposed rule.<sup>161</sup>

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151. *Id.* Thus any actual shareholder nomination would take place the year following the triggering event.

152. *Id.*

153. *Id.* at Part II.A.7.a.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at note 114 (stating that in a sample 1439 public companies, approximately 42% of the surveyed companies had eight or fewer directors and approximately 58% were composed of nine to nineteen directors).

158. October 14, 2003 Proposed Rule, *supra* note 136.

159. Adrian Michaels, *SEC Move to Boost Power of Shareholders Wins Support*, FIN. TIMES, Dec. 23, 2003 at 1 (stating the Commission "received a record number of comments").

160. *Id.* (stating that previously the Commission had received 7000 comment letters on a proposal that would force institutional investors to disclose their voting records).

161. *Id.*

At the time of this writing,<sup>162</sup> the Commission had yet to make any final decisions regarding the proposed rule, and the SEC's five commissioners appear to be "divided on the issue."<sup>163</sup> On March 10, 2004, the Commission held a roundtable discussion on the proposed shareholder nomination rule. The daylong discussion includes a comment period extending through the end of March 2004.<sup>164</sup> Accordingly, it appears the Commission will not be acting on the proposed rule until April 2004 at the earliest.<sup>165</sup>

## VI. ANALYSIS

### A. *The Misnomer of Corporate Democracy*

Those who submitted comments in favor of increased shareholder access to the proxy often use the concept of "corporate democracy" as their rally cry.<sup>166</sup> In a country where the principle of democracy is held in the highest esteem, it is easy to understand why many believe democracy should extend to the selection of those who inhabit the boardroom.<sup>167</sup> Yet a strong argument can be made that this is a misplaced analogy and the common notion of democracy is not synonymous with the idea of "corporate

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162. March 11, 2004.

163. Joshua Chafin & Adrian Michaels, *Proposals on Proxies Spark Disagreement*, FIN. TIMES, Mar. 11, 2004, at 17.

164. See *supra* note 138.

165. See Andrew Countryman, *Vote on Shareholder Nominations Weeks Away, Regulators Say*, CHI. TRIB., Feb. 10, 2004, at A3, available at 2004 WL 6924830 (stating that due to the complexity of the rule, it may be "several weeks" before the SEC takes any action).

166. See Comments of Institutional Shareholder Services (June 13, 2003), at <http://www.sec.gov/rules/other/s71003/iss061303.htm> (last visited April 18, 2004) (stating "[a]ny democracy is only as robust as its electoral process" and "[e]lections at U.S. corporations lack several attributes of any good democratic system"); Comments of State of Wisconsin Investment Board (June 12, 2003), at <http://www.sec.gov/rules/other/s71003/swib061203.htm> (last visited April 18, 2004) (suggesting the Commission takes steps toward more competitive board elections in the name of corporate democracy); Comments of Trillium Asset Management Corporation (June 12, 2003), at <http://www.sec.gov/rules/other/s71003/trilliumamc061203.htm> (last visited April 18, 2004) (stating it is time for the Commission to make changes so that corporate democracy will no longer be an "oxymoron"); Comments of Council of Institutional Investors (May 10, 2003), at <http://www.sec.gov/rules/other/s71003/cii051003.htm> (last visited April 18, 2004) (likening corporate board members to elected government officials who thus are subject to the rules of democracy).

167. See *supra* note 166.

democracy.”<sup>168</sup>

Foremost among the differences between government elections and corporate board of director elections is the issue of duty.<sup>169</sup> In an election for a board seat, the board has a fiduciary duty to nominate candidates that will act in the best interest of the corporation.<sup>170</sup> Distinguish that duty from an election for a government official, where the voter may vote with her sole interests in mind.<sup>171</sup> The fiduciary duty of board members, to nominate director candidates that benefit the entire corporation and not just the interests of one shareholder or shareholder group, is of utmost importance to corporate survival.<sup>172</sup> Since shareholders have no duty to the corporation, if the shareholder nomination proposal becomes a rule, a shareholder would be free to nominate whomever she desires.<sup>173</sup> Without the legal responsibility charged to directors by law in the nominations of director candidates, shareholders could nominate candidates with their sole interests in mind, without any recourse or accountability to the corporation or the body of shareholders.<sup>174</sup>

Another difference to note when distinguishing corporate democracy from political democracy is the ability of a shareholder to take the “Wall Street Walk.”<sup>175</sup> There is no requirement for anyone to be a shareholder.<sup>176</sup> Unlike a voter in a governmental election, if a shareholder is unhappy with a company for any reason, she may sell her stock and cease contact with that corporation.<sup>177</sup> It is important to remember that a corporation is

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168. ABA Comment, *supra* note 117 (stating that a corporation is not a political entity).

169. Comments of American Society of Corporate Secretaries (June 13, 2003), at <http://www.sec.gov/rules/other/s71003/ascs061303.htm> (last visited April 18, 2004) (stating the most fundamental difference between corporate and governmental elections is the duty that the two different electorates owe).

170. *Ray v. Homewood Hosp.*, 223 Minn. 440, 444, 27 N.W.2d 409, 411 (1947) (“Directors may not agree to exercise their official duties for the benefit of any other individual or interest other than the corporation itself . . .”).

171. Comments of American Society of Corporate Secretaries (June 13, 2003), *supra* note 169.

172. *Id.*

173. *Id.*

174. *See id.*

175. Constance A. Bagley & Karen L. Page, *The Devil Made Me Do It: Replacing Corporate Directors’ Veil of Secrecy with the Mantle of Stewardship*, 36 SAN DIEGO L. REV. 897, 909 (1999) (defining the “Wall Street Walk” as the ability of a shareholder to sell her stock in a company in which she is dissatisfied).

176. ABA Comment, *supra* note 117.

177. Bagley & Page, *supra* note 175, at 909.

an “economic entity whose function is to create wealth for its owners.”<sup>178</sup> A corporation is not a political body in which the lack of voting power to nominate a candidate would create oppression.<sup>179</sup> In the case of the nomination of a board candidate, if a shareholder is not happy, she may simply sell her shares.<sup>180</sup>

A fundamental piece of the discussion of corporate democracy is the debate over who actually “owns” a corporation. The commonly accepted answer to that question is that the shareholders are the rightful owners.<sup>181</sup> Those who commented on the proposal discuss ownership of a corporation as being akin to owning actual property.<sup>182</sup> Along with this notion is the idea that a property owner may do whatever she wants with her property, provided she does not harm any third parties.<sup>183</sup> The argument follows that a corporation must do whatever its owners, the shareholders, wish.<sup>184</sup> Yet, what do shareholders actually own? A share of stock is a *financial interest* in a corporation, not ownership of a corporation’s assets or property.<sup>185</sup> There are other parties involved—employees, customers, creditors, and communities—that all have a strong interest in the corporation’s survival.<sup>186</sup> Shareholder interest lies in financial gain and thus may or may not have concern for the corporation’s long-term success.<sup>187</sup> While the common belief may be that the shareholders “own” the corporation, it is very important to realize that there are other interests at stake along with the shareholders’ financial interest.<sup>188</sup> Granting a significant amount of control to shareholders under the

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178. ABA Comment, *supra* note 117.

179. *Id.*

180. *Id.*

181. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 248 (1999) (stating that many “legal scholars” feel that shareholders are the owners of a corporation).

182. Comments of the Council of Institutional Investors (May 10, 2003), at <http://www.sec.gov/rules/other/s71003/cii051003.htm> (last visited April 18, 2004) (stating that “wealth is maximized when owners . . . care for their own property” and thus shareholders should be able to control what they own).

183. Martin Lipton & Steven A. Rosenbaum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 191 (1991).

184. *Id.* at 191-92.

185. *Id.* at 193-94.

186. *Id.* at 192.

187. For a discussion of the fiduciary duty of a director, *see supra* Part VI.A.

188. Bill George, *Why It’s Hard to Do What’s Right . . .*, FORTUNE, Sept. 29, 2003, at 95 (placing shareholder concerns after the concerns of employees and customers).

notion that they are “owners” may place the focus upon short-term financial gain at the risk of the long-term growth and sustainability of a corporation.<sup>189</sup>

There is a tremendous amount of misplaced emotion behind the concept of corporate democracy.<sup>190</sup> One commenter even went so far as to liken current director elections to elections “held today in North Korea, Iraq, Cuba and many other countries where a dictatorship style of government still exists.”<sup>191</sup> This notion is greatly misguided. Analysis of the proposal shows that it is not the small, private investor who will be given a voice by this proposed rule.<sup>192</sup> Instead, it is a few large shareholders or shareholder groups who will receive these rights.<sup>193</sup> It is also significant to remember that most of the individually held stock in this country is owned by the wealthiest citizens.<sup>194</sup> While the goal of the proposal is to increase “shareholder participation in the process related to elections”<sup>195</sup> and thus improve corporate governance, the proposal actually could further disenfranchise a large number of smaller, non-institutional shareholders.<sup>196</sup> By granting these special rights to large shareholders who, unlike directors, have no duty to act in the best interest of all shareholders, the proposal actually brings corporate America farther from the goal of corporate democracy.

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189. Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 177 (2001) (stating “[t]he danger is that too much deference to stockholder interest may get in the way of transactions that otherwise make sense and should go forward.”).

190. Comments of American Society of Corporate Secretaries (June 13, 2003), at <http://www.sec.gov/rules/other/s71003/ascs061303.htm> (last visited April 18, 2004) (urging the Commission to be “cautious of the emotionally charged nature” of the term “corporate democracy”).

191. Comments of Gary L. Nystrom (May 30, 2003), at <http://www.sec.gov/rules/other/s71003/glnystrom053003.htm> (last visited April 18, 2004).

192. October 14, 2003 Proposed Rule, *supra* note 136, at Part II.A.5.a (stating the right to nominate would be given to shareholders holding more than 5% of the shares of a company).

193. *See id.*

194. Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 310 n.115 (1998) (stating the wealthiest 10% in the United States own almost 90% of all stock).

195. July 15, 2003 SEC Staff Report, *supra* note 1, at 2.

196. This begs the question: If the proposal only grants the power to nominate to shareholders of 5%, what about the other 95%?

### B. Policy Issues

One of the biggest concerns related to the enactment of a shareholder access rule is the threat that special interest groups might attain a position on the board.<sup>197</sup> A group of shareholders or even a single shareholder that owns 5% of a company's shares would have the power to nominate a director.<sup>198</sup> It is possible that this proposal, through a nominating shareholder wanting to gain a voice on the board to advance his concern, could give additional power to special interest groups.<sup>199</sup> For example, if a group wanted to advance its agenda, it may attempt to nominate a candidate who would represent its cause in the boardroom rather than the broader interest of the corporation.<sup>200</sup> If elected, that candidate would have what many see as a conflict of interest.<sup>201</sup> Directors have a fiduciary duty to act in the best interest of the corporation as a whole.<sup>202</sup> However, since a director candidate needs at least a plurality vote to be elected, even a special-interest director would join the board only if she received approval from a large group of shareholders.<sup>203</sup> In reality, the argument of a special interest candidate being elected and carrying that agenda into the boardroom may not be that large of a threat. Nevertheless, the threat of special interest directors leads to another policy concern regarding shareholder access.

While the fact that a director needs a plurality vote to be

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197. See Comments of the Association of the Bar of the City of New York (June 13, 2003), at [http://www.sec.gov/rules/other/s71003/tfpcprabny061303.htm#P39\\_25962](http://www.sec.gov/rules/other/s71003/tfpcprabny061303.htm#P39_25962) (last visited April 18, 2004) (stating the adoption of the proposal would "facilitate the election of 'special interest' directors"); Comments of the Committee of Securities Regulation of the Business Law Section of the New York State Bar Association (June 13, 2003), at <http://www.sec.gov/rules/other/s71003/scrblsnysba061303.htm> (last visited April 18, 2004) (claiming the proposal could "lead to directors representing special interest which would run counter to the initiatives for independent boards"); Comments of Harvard University (June 6, 2003), at <http://www.sec.gov/rules/other/s71003/harvard060603.htm> (last visited April 18, 2004) (warning that mechanisms should be put in place that prohibit the election of any special interest directors).

198. October 14, 2003 Proposed Rule, *supra* note 136.

199. See *supra* note 197.

200. *Id.*

201. Comments of Harvard University (June 6, 2003), at <http://www.sec.gov/rules/other/s71003/harvard060603.htm> (last visited April 18, 2004).

202. For a discussion of the fiduciary duty of a director, see *supra* Part VI.A.

203. Comments of Professor Lucian A. Bebchuk (June 13, 2003), at <http://www.sec.gov/rules/other/s71003/labebchuk061303.htm> (last visited April 18, 2004).

elected may quell the special interest argument, the threat of a special interest causing coercion by threatening a director nomination is real.<sup>204</sup> In order to advance an agenda, a 5% shareholder may threaten to nominate a candidate to the board who carries that special interest.<sup>205</sup> True, the candidate would still need to obtain at least a plurality vote, depending on the state, before being elected.<sup>206</sup> Nonetheless, under the proposal a corporation would be forced to absorb the cost of including the candidate's name on the proxy.<sup>207</sup> While this threat is presently available to shareholders interested in nominating a candidate, the key difference is that currently the corporation does not fund a proxy contest lodged by a shareholder.<sup>208</sup> If the proposal is passed into law, it could force corporations to engage in and fund proxy contests each year.<sup>209</sup> Ironically, since a company may now need to fund the contest, this could shift the cost of a shareholder proxy contest from a few shareholders that lodge the contest to all shareholders.<sup>210</sup> Conceivably, in order to avoid this cost burden, a corporation's board of directors may give greater weight to a special interest proposal.<sup>211</sup> This may or may not be in the best interest of the corporation as a whole.<sup>212</sup>

Another concern among opponents of the proposed rule is the increasing difficulty in finding qualified persons to sit on a corporate board.<sup>213</sup> The Sarbanes-Oxley Act (Sarbanes) and recent

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204. Comments of Wachtell, Lipton, Rosen, & Katz (June 11, 2003), at <http://www.sec.gov/rules/other/s71003/wachtell061103.htm> (last visited April 18, 2004) (stating that, even under the current rules, the "mere threat of a proxy contest" can force a board to act).

205. See *supra* note 197.

206. A plurality vote is needed for director elections in most states. However, Minnesota law requires a majority. MINN. STAT. § 302A.437 (2003) (stating any action by the shareholders requires a majority vote).

207. July 15, 2003 SEC Staff Report, *supra* note 1, at 9.

208. MINN. STAT. §§ 302A.461, subd. 4, subd. 5 (2003); 17 C.F.R. § 240.14a-7(a)(2)(i) (2003).

209. Comments of Wachtell, Lipton, Rosen, & Katz (June 11, 2003), at <http://www.sec.gov/rules/other/s71003/wachtell061103.htm> (last visited April 18, 2004) (stating that proxy contests can be very "disruptive" to a corporation).

210. Comments of the Committee of Securities Regulation of the Business Law Section of the New York State Bar Association (June 13, 2003), at <http://www.sec.gov/rules/other/s71003/scrblsnysba061303.htm> (last visited April 18, 2004).

211. *Id.*

212. Directors are under a duty to act in the best interest of the corporation. See *supra* Part VI.A.

213. See Comments of the Association of the Bar of the City of New York (June

corporate scandal has subjected directors to a significant increase in public scrutiny.<sup>214</sup> Finding qualified candidates to fill board positions that satisfy the increased requirements under Sarbanes is becoming difficult.<sup>215</sup> It can now take twice as long to find a qualified candidate as it did a decade ago.<sup>216</sup> It is estimated that 90% of qualified board candidates already turn down director positions for fear of being sued.<sup>217</sup> A qualified director candidate may be less likely to agree to board service given the greater possibility of a proxy contest creating contentious elections and “risk to reputation in the event of a loss.”<sup>218</sup> Again, by not having the most qualified people on the board, this may sacrifice the best interest of the corporation to satisfy the interest of a few.<sup>219</sup>

Finally, it is important to remember the corporate scandals that the shareholder access proposal addressed were the improper actions of only a few companies, namely Enron and WorldCom.<sup>220</sup> However, the shareholder access proposal will affect all public companies, for better or worse.<sup>221</sup> Thus hundreds, perhaps thousands,<sup>222</sup> of public companies across the nation that are currently conducting business ethically and responsibly will be punished for the acts of a few.<sup>223</sup>

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13, 2003), at [http://www.sec.gov/rules/other/s71003/tfpcprabny061303.htm#P39\\_25962](http://www.sec.gov/rules/other/s71003/tfpcprabny061303.htm#P39_25962) (last visited April 18, 2004).

214. *Id.* For a discussion on the Sarbanes-Oxley Act, see *infra* Part VII.

215. Kembra J. Dunham, *Reforms Turn Search for Directors Into a Long, Tedious Task*, WALL ST. J., Aug. 29, 2002, at B1 (citing increased restrictions on independence, criminal liability, and disclosure as having contributed to the difficult task of attracting qualified board candidates).

216. Lisa Holton, *Help Wanted: Filling Vacancies on Corporate Boards Creates Headaches for In-House Lawyers*, 90 A.B.A. J. 30, 30 (2004) (stating that for small and mid-sized companies, recent corporate scandal and new governance rules that require increased independence have resulted in twice the director search time than that of ten years ago).

217. Dunham, *supra* note 215 at B1.

218. *Id.*

219. *Id.*

220. Tom Walsh, *The 2003 Herald Hundred; Bears Settled in, at Home in 2002*, BOSTON HERALD, Apr. 24, 2003, at 4 (naming Enron including Arthur Anderson, WorldCom, and Tyco as being major players in the corporate scandals of 2002).

221. Many, if not most, of the companies that would be affected are listed on the New York Stock Exchange. Thus, to get an idea of the number of companies that may be impacted, one can look at the more than 2800 companies listed on the NYSE. New York Stock Exchange website, at <http://www.nyse.com/listed/p1020656067970.html?displayPage=%2Flisted%2F1020656067970.html> (last visited April 18, 2004).

222. *Id.*

223. Comments of Securities and Exchange Commissioner Cynthia A.

C. *The SEC versus the State*

Any rule regarding shareholder rights traditionally has been left up to the state of incorporation to determine.<sup>224</sup> The United States Supreme Court has weighed in on this topic, stating “[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”<sup>225</sup> Under Minnesota law, it is the board of directors, and not the shareholders, that manage the business of the corporation.<sup>226</sup> Foremost in this analysis is the fact that Minnesota law allows any requirements regarding director elections to be determined by the corporation.<sup>227</sup> While not specifically addressed, the nomination of director candidates is certainly a requirement regarding the election of directors.<sup>228</sup> Thus, under Minnesota law, this leaves the nomination of directors up to the corporation.<sup>229</sup>

Minnesota corporate law is unique in that it requires a majority vote for any director election.<sup>230</sup> This invalidates one of the

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Glassman, Securities and Exchange Commission Open Meeting (Oct. 8, 2003), at 23:35, at <http://www.sec.gov/news/openmeetings.shtml> (last visited April 18, 2004) [hereinafter SEC Open Meeting] (stating the best way to implement this proposal would be to “ferret out the complacent boards . . . and leave the effective boards alone.”).

224. *Farmers Educ. & Co-op. Union of Am., Minn. Div. v. Farmers Educ. & Co-op. Union of Am.*, 207 Minn. 80, 85, 289 N.W. 884, 886 (1940) (quoting 1 RESTATEMENT, CONFLICT OF LAWS, § 194, Cmt. a, “[t]he existence and extent of the right of shareholders to control the actions of corporate officers or agents is determined by the law of the state of incorporation”).

225. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975), emphasis in original); see Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 222 (1999) (discussing federal law’s “respect” for state corporate law).

226. MINN. STAT. § 302A.201 subd. 1 (2003) (stating that the “business and affairs of a corporation shall be managed by or under the direction of a board”).

227. MINN. STAT. § 302A.205 (2003) (stating that under state law the only requirement is that directors be natural persons. “The method of election and any additional qualifications for directors may be imposed by or in the manner provided in the articles or bylaws.”).

228. *Id.*

229. *See id.*

230. MINN. STAT. § 302A.437 (2003) (stating any action by the shareholders requires a majority vote). The majority of states include a provision in their state corporate laws that allow for plurality voting in director elections. See ARIZ. REV. STAT. § 10-728 (2003); CONN. GEN. STAT. § 33-712 (2003); FLA. STAT. ANN. §

Commission's chief triggering events for the proposal—a substantial withhold vote.<sup>231</sup> In Minnesota, a nominee for the board can be elected only after receiving a majority vote from the shareholders.<sup>232</sup> Therefore, the concern expressed by the Commission, that a director may be elected without a majority vote, is not a reality in Minnesota.<sup>233</sup>

A rule that allows shareholders direct access to a proxy statement for nomination purposes arguably could violate state law because state law grants nominations to the board.<sup>234</sup> It has been argued that the core responsibility of the Commission is to regulate corporate disclosure rather than address substantive corporate law, which typically is a state law function.<sup>235</sup> Indeed, the Commission

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607.0728 (2003); GA. CODE ANN. § 14-2-728 (2003); HAW. REV. STAT. ANN. § 414-149 (2002); IDAHO CODE § 30-1-728 (2003); IND. CODE § 23-1-30-9 (2003); KY. REV. STAT. ANN. § 271B.7-280 (2003); ME. REV. STAT. ANN. tit. 13-C, § 730 (2003); MISS. CODE ANN. § 79-4-7.28 (2003); MONT. CODE ANN. § 35-1-531 (2003); NEB. REV. STAT. § 21-2066 (2003); N.H. REV. STAT. ANN. § 293-A:7.28 (2002); OR. REV. STAT. § 60.251 (2001); S.C. CODE ANN. § 33-7-280 (2002); TENN. CODE ANN. § 48-17-209 (2003); VT. STAT. ANN. tit. 11A, § 7.28 (2002); VA. CODE ANN. § 13.1-669 (2003); W.VA. CODE § 31D-7-728 (2003); WIS. STAT. § 180.0728 (2003); WYO. STAT. ANN. § 17-16-728 (2002) (all stating “[u]nless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting”); DEL. CODE ANN. tit. 8, § 216 subd. 3 (2003) (stating “[d]irectors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting”); KAN. STAT. ANN. § 17-6506 (2002) (stating “directors shall be elected by a plurality of the votes of the stockholders present in person or represented by proxy at the meeting and entitled to vote on the election of directors.”); MD. CODE ANN. CORPS. & ASS'NS § 2-404 (2003) (stating “[u]nless the charter or bylaws of a corporation provide otherwise, a plurality of all the votes cast at a meeting at which a quorum is present is sufficient to elect a director”); MICH. STAT. ANN. § 450.1441 (2003) (providing a carve-out for director elections, stating a majority vote is required for all shareholder acts except a director election, where a plurality is needed to elect a director); MO. ANN. STAT. § 351.265 (2003) (stating all shareholders actions must be approved by a majority vote except for director elections where a plurality vote is needed); N.J. STAT. ANN. § 14A:5-11 (2003) (stating “[e]xcept as otherwise provided by the certificate of incorporation, directors shall be elected by a plurality of the votes cast at an election.”); N.Y. BUS. CORP. LAW § 614 (2003) (stating “[d]irectors shall, except as otherwise required by this chapter or by the certificate of incorporation as permitted by this chapter, be elected by a plurality of the votes cast at a meeting of shareholders”); OKLA. STAT. tit. 18 § 1061 (2002) (stating directors must be elected by a plurality of the vote); TEX BUS. ORG. CODE ANN. § 21.359 (2003) (allowing the articles of incorporation to alter the state plurality vote rule for director elections).

231. October 14, 2003 Proposed Rule, *supra* note 136, at Part II.A.3.a.

232. MINN. STAT. § 302A.437 (2003).

233. *See id.*

234. *Id.*

235. *Bus. Roundtable v. S.E.C.*, 905 F.2d 406, 408 (D.C.Cir. 1990) (stating that

itself states that the federal securities laws “derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it.”<sup>236</sup> In order to accomplish this, the Commission requires “public companies to disclose meaningful financial and other information to the public.”<sup>237</sup> A District of Columbia circuit court ruled in 1990 that a Commission rule regulating a substantive corporate governance issue was “far beyond the matters of disclosure.”<sup>238</sup> A shareholder access rule can be characterized as a necessary and primary task of the board of directors that “is conceded a part of corporate governance traditionally left to the states.”<sup>239</sup> Accordingly, a rule granting shareholder access is outside of the authority of the Commission and is better served by state law.<sup>240</sup> If the proposed rule passes, it will surely be challenged as preempting state law, historically the domain of corporate law.<sup>241</sup> One group already has threatened such a suit.<sup>242</sup> Should the rule be adopted, the U.S. Chamber of Commerce, a not-for-profit business federation, has stated it will explore taking the Commission to court.<sup>243</sup> As outlined in the argument above, the trade group’s position is that the Commission lacks the authority to regulate the nomination and election of board candidates and that such authority should be left to the individual states.<sup>244</sup>

## VII. RECOMMENDATION—ALLOW TIME FOR RECENT REGULATIONS

Reacting to a year of major corporate scandal, in 2002

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“the Exchange Act cannot be understood to include regulation of an issue that is so far beyond matters of disclosure”).

236. Introduction—The SEC: Who We Are, What We Do, U.S. Securities and Exchange Commission website, at <http://www.sec.gov/about/whatwedo.shtml> (last visited April 18, 2004).

237. *Id.*

238. *Bus. Roundtable*, 905 F.2d at 408.

239. *Id.*

240. *Id.* at 411 (quoting a 1934 Senate Report, stating that when enacting the Exchange Act of 1934, Congress did not intend for the Commission to have the authority or “power to interfere in the management of corporations”).

241. Comments of Commissioner Paul S. Atkins, SEC Open Meeting, *supra* note 223, at 48:48 (questioning whether the SEC has the ability to impose substantive rules outside of disclosure provisions).

242. Phil McCarty, *SEC’s Proxy Plan Threatened with Suit by Business Chamber*, WALL ST. J., Mar. 11, 2004, at A6.

243. *Id.*

244. *Id.*

Congress enacted the Sarbanes-Oxley Act (“Sarbanes”).<sup>245</sup> Sarbanes has caused major changes in corporate governance law.<sup>246</sup> Addressing what it believed to be defective corporate governance laws, Congress enacted a number of provisions that dictate how a corporation should be managed.<sup>247</sup> Specific attention was paid to a corporation’s audit committee.<sup>248</sup> These corporate governance reforms were focused on audit committees to strengthen the committee’s role as a “watchdog” of the corporation.<sup>249</sup> An audit committee is responsible for the supervision of all outside accounting and auditing.<sup>250</sup> Sarbanes requires that the entire audit committee be independent and that no audit committee director can be “an affiliated person of the issuer.”<sup>251</sup> This means that an audit committee member cannot be an executive officer or employee of the company, or hold more than 10% stock in the company.<sup>252</sup> Congress enacted this provision in an attempt to remedy recent “financial scandals.”<sup>253</sup> This goal is exactly the same as one of the goals the shareholder nomination proposal is attempting to achieve.<sup>254</sup>

Sarbanes has been called “the most sweeping corporate regulatory statute since the Great Depression.”<sup>255</sup> While that fact is important, it is even more crucial to realize that Sarbanes is still being implemented.<sup>256</sup> Many of these regulations have not yet

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245. Niels Schaumann, *The Sarbanes-Oxley Act: A Bird’s-Eye View*, 30 WM. MITCHELL L. REV. 1317 (2004). Sarbanes is a large and comprehensive Act that, in summary, involves the regulation of accounting practices, audit committees, director independence, professional conduct for lawyers, financial statement certification, disclosure requirements, and corporate management. *Id.*

246. Jeffrey N. Gordon, *Governance Failures of the Enron Board and the New Information Order of Sarbanes-Oxley*, 35 CONN. L. REV. 1125, 1142 (2003) (stating that Sarbanes “straightforwardly works significant changes in corporate governance of public corporations”).

247. Schaumann, *supra* note 245, at 1317.

248. *Id.* at 1340.

249. *Id.*

250. *Id.*

251. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775-776 (2002) (to be codified at 15 U.S.C. § 78j-1) (amending the Securities Exchange Act of 1934 § 10A(m)(1)(A)).

252. Schaumann, *supra* note 245, at 1342 n.148.

253. *Id.* at 1322.

254. July 15, 2003 SEC Staff Report, *supra* note 1, at 5 (stating a majority of comments on the proposal expressed concern over recent corporate scandals).

255. Frederick Tung, *From Monopolists to Markets?: A Political Economy of Issuer Choice in International Securities Regulation*, 2002 WIS. L. REV. 1363, 1433 n.8 (2002).

256. Schaumann, *supra* note 245, at 1317 (stating that while many rules have been adopted, some are still pending).

become effective and some of the changes have not even yet been adopted.<sup>257</sup> The impact and long-term effect of this “record-level” new set of regulations is still to be determined.<sup>258</sup>

On November 4, 2003, the Commission adopted a final set of corporate governance rules regulating all companies that list on the New York Stock Exchange (NYSE).<sup>259</sup> Among the rules adopted: regulations that require a majority of a company’s board to consist of independent directors, tighter restrictions on the definition of “independent,” and requirements for companies to adopt and disclose guidelines for corporate governance, business conduct, and ethics.<sup>260</sup> While Sarbanes considered a major set of governance rules, the NYSE rules are even more restrictive than Sarbanes and further enhance the corporate governance practices of American companies.<sup>261</sup> Furthermore, these rules were just put into place in November 2003.<sup>262</sup> Like Sarbanes, the impact and effectiveness of these rules, whether negative or positive, has yet to be determined.

The Commission has been in this position before. In 1980, the Commission decided against proposing and implementing a shareholder access rule despite the urgings of a large shareholder voice.<sup>263</sup> The Commission instead decided to allow the emerging concept of nominating committees to be fully implemented before enacting any further regulations regarding director elections.<sup>264</sup> With ongoing implementation of Sarbanes regulations, the recent adoption of the New York Stock Exchange rules, and the recent

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257. Comments of Broc Romanek, Chair, Corporate & Securities Law Committee, The American Corporate Counsel Association (June 13, 2003), at <http://www.sec.gov/rules/other/s71003/acca061303.htm> (last visited April 18, 2004).

258. *Id.*

259. New York Stock Exchange, Final NYSE Corporate Governance Rules (Nov. 4, 2003) codified as Section 303A in the NYSE Listed Company Manual, at <http://www.nyse.com/pdfs/finalcorpgovrules.pdf> (last visited April 18, 2004).

260. *Id.* § 303A(1) (requiring “listed companies” to have majority of independent directors on their boards); § 303A(2) (defining “independent director” as a director who has no material relationship with the listed company); § 303A(9) (stating listed companies must adopt and disclose corporate governance guidelines); § 303A(10) (requiring listed companies to implement guidelines for business conduct and ethics).

261. Andrew Countryman, *U.S. OKs Governance Rules for Listing on Exchanges*, CHI. TRIB., Nov. 5, 2003, at 1 (stating the “new rules go beyond [Sarbanes]”).

262. *Id.*

263. *See supra* note 29.

264. *Id.*

nominating committee enhancements,<sup>265</sup> the Commission finds itself in a familiar position. The changes in 1980 were not nearly as vast and significant as Sarbanes.<sup>266</sup> Yet in 1980, the Commission decided it needed to allow those changes to be implemented and evaluate their impact before implementing further corporate governance regulations.<sup>267</sup> That is exactly the path the Commission should now take regarding shareholder nominations.

### VIII. CONCLUSION

Currently there appears to be a feeling in this country that if corporate America opposes something, it must be good for shareholders.<sup>268</sup> However, if a rule imposes a misdirected regulation on a corporation that limits its “competitiveness,” that is good for no one.<sup>269</sup> That is especially true if the rule, under the guise of “corporate democracy,” actually benefits only a few major shareholders who are under no duty to the corporation. The corporate scandals of 2002<sup>270</sup> were no doubt harmful for shareholders, both in terms of trust and personal investment, but there is vast legislation addressing these scandals. That legislation needs time to work. Furthermore, regulation of director elections historically has been left to the individual states. While the intentions behind corporate democracy are commendable, they are misguided in the realm of shareholder nominations. “Even though our intentions are good, . . . the consequences of being wrong could be very serious,” one SEC Commissioner recently said.<sup>271</sup> Let’s not overreact to the crimes of a few companies by punishing all companies.

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265. See *supra* note 63.

266. Sarbanes has been called “the broadest and farthest-reaching securities reform legislation since the Securities Exchange Act of 1934.” Schaumann, *supra* note 245, at 1349-50.

267. See *supra* note 29.

268. Comments of Commissioner Cynthia A. Glassman, SEC Open Meeting, *supra* note 223, at 24:28.

269. *Id.*

270. Enron, WorldCom, et al. See *supra* note 220.

271. Comments of Commissioner Cynthia A. Glassman, SEC Open Meeting, *supra* note 223, at 28:20.