

Access Granted: Proxies and the SEC

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For years, the Securities and Exchange Commission (“SEC”), without exception, has permitted companies to exclude shareholder proposals to adopt proxy access policies. However, a decision by the U.S. Court of Appeals for the Second Circuit, American Federation of State, County and Municipal Employees v. American International Group, Inc. (“AFSCME v. AIG”), has opened the door for shareholder access to proxy materials and represents a significant leap forward for shareholders seeking to elect directors more responsive to their concerns. This note will explain proxy access rights, specifically with regard to shareholder proposals covering the election of a board of directors, and conclude by describing how this recent Second Circuit case has incited a renewed consideration by the SEC to modify its position on shareholder elections.

I. INTRODUCTION

Shareholder access to company proxy materials has profound implications in the United States.¹ For years, shareholders have attempted to install policies which would allow fellow shareholders to consider and vote on proposals through corporate proxy materials.² Despite these efforts, the Securities and Exchange Commission (“SEC”), without exception, has permitted companies to exclude shareholder proposals to adopt proxy access policies.³

However, a decision by the U.S. Court of Appeals for the Second Circuit, *American Federation of State, County and Municipal Employees v. American International Group, Inc.* (“*AFSCME v. AIG*”), has opened the

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¹ Phil Kerpen, *An Under-the-Radar Threat to Capitalism*, NATIONAL REVIEW ONLINE, Jan. 16, 2007, available at <http://article.nationalreview.com/?q=NDNIMGQ2YjIzMDVhMTNjOTE3NmYxZTk1ZmY0NjVmOWY=>.

² Jay Eisenhofer, *Holy Grail Ruling for Shareholders on Proxy Access*, SARBANES-OXLEY COMPLIANCE J., Oct. 6, 2006, available at <http://www.sox.com/News/detail.cfm?articleID=1967>.

³ *Id.*

door for shareholder access to proxy materials and represents a significant leap forward for shareholders seeking to elect directors more responsive to their concerns. The court ruled that a shareholder proposal does not relate to an election (under SEC Rule 14a-8(i)(8)) if it simply seeks to amend the corporate by-laws to establish general, procedural rules governing elections.⁴ In turn, the court implied that the SEC must reevaluate Rule 14a-8(i)(8).

This note will explain proxy access rights, specifically with regard to shareholder proposals covering the election of a board of directors, and conclude by describing how this recent Second Circuit case has incited a renewed consideration by the SEC to modify its position on shareholder elections.

II. PROXY ACCESS

The board of directors of a corporation does not have total control of the election of a successor board.⁵ Instead, shareholders have an exclusive right to elect the board as well as the right to nominate candidates for directorships.⁶ If a shareholder is not able to directly apply his or her rights, he or she can apply them via a “proxy.”

The term “proxy” refers to a written authorization of voting power by a shareholder.⁷ A proxy is typically given because a shareholder may be unwilling or unable to attend the annual shareholder meeting.⁸ Nowadays, this is quite common. Shareholder attendance is usually low because “ownership of most publicly held corporations is widely dispersed.”⁹ Thus, proxies, under certain requirements,¹⁰ must be solicited in order to satisfy a quorum requirement.¹¹ After soliciting proxies, “management mails to each shareholder a proxy form, along with a proxy statement and annual report.”¹² A proxy form authorizes a specific “proxy holder” to represent the shareholder and vote the shares at the annual shareholder meeting.¹³ A

⁴ AFSCME v. AIG, 462 F.3d 121, 130 (2d Cir. Sept. 5, 2006).

⁵ See DEL. CODE ANN. tit. 8, § 223 (Supp. 2002) (although it is often empowered to fill interim vacancies caused by death, resignation, or removal).

⁶ DEL. CODE ANN. tit. 8, § 211(b) (Supp. 2000), cited in Poirier v. Welch, 233 F. Supp. 436, 439 (D.D.C. 1964).

⁷ 17 C.F.R. § 240.14a-4 (1992).

⁸ *Id.*

⁹ Jayne Elizabeth Zanglein, *Pensions, Proxies and Power: Recent Developments in the Use of Proxy Voting to Influence Corporate Governance*, 7 LAB. LAW. 771, 791 (1991).

¹⁰ See 17 C.F.R. § 240.14a-8(a)(1) (1998).

¹¹ Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1135 (1993).

¹² Jayne Elizabeth Zanglein, *From Wall Street Walk to Wall Street Talk: The Changing Face of Corporate Governance*, 11 DEPAUL BUS. L.J. 43, 98 (1998).

¹³ Zanglein, *supra* note 9, at 791 n.190. Rule 14a-4 describes the requirements for a proxy form. 17 C.F.R. § 240.14a-4 (2007). A proxy form must:

“proxy statement” is a detailed communication which discloses all material information about the organization¹⁴ in such a manner that can be easily understood by shareholders.¹⁵

When corporate proxy materials are submitted, the process is referred to as “improving shareholder access to the proxy.”¹⁶ Specifically, a shareholder may direct the proxy holder to vote in a certain manner.¹⁷ However, it is more typical for the shareholder to grant the proxy holder the authority to vote according to the proxy holder’s preference, which must be clearly indicated on the proxy form.¹⁸ When there is a failure by the shareholder to indicate a preference, a proxy may vote at the proxy holder’s discretion.¹⁹

Regardless of how a proxy is voted, the main issue of concern is the specific information presented in proxy statements. Specifically, a shareholder has some rights to present information on a company’s proxy materials. These shareholders’ rights are governed by Rule 14a-8.

(1) identify in boldface type the person or group which is soliciting the proxy. Rule 14a-4(a)(1).

(2) provide a “specifically designated blank space for dating the proxy card.” Rule 14a-4(a)(2).

(3) clearly and impartially identify the matters to be voted upon. Rule 14a-4(a)(3).

(4) provide the shareholder with the opportunity to choose between approval, disapproval or abstention with respect to all matters to be voted upon other than the election of directors. Rule 14a-4(b)(1).

(5) set forth the names of each person nominated as a director and provide the shareholder with a means by which to withhold authority to vote for a particular nominee. If a means is provided for the shareholder to grant authority to vote for the nominees as a group, then a means must also be provided for the shareholder to withhold authority to vote for the entire group. Rule 14a-4(b)(2).

(6) provide that the shares represented by the proxy will be voted, and if the shareholder properly has indicated his or her choice of approval, disapproval, or abstention, the proxy will be voted in accordance with the shareholder’s instructions.

Rule 14a-4(e).

¹⁴ Rule 14a-4(c)(1) requires the proxy form to contain a statement such as the following: So far as is known by [management], no matters other than the election of directors [and other matters listed on the proxy form, if any] will be considered at the [annual] meeting. However, if any other matters properly come before the meeting, the Proxies names in the accompanying proxy intend to vote said proxy in accordance with their best judgment. Zanglein, *supra* note 9, at 809 n.192 (cited in SEC Release Nos. 33-66-76, 34-23789 (Nov 20, 1986)).

¹⁵ 17 C.F.R. § 240.14a-9 (2007).

¹⁶ 17 C.F.R. § 240.14a-4 (2007) (cited in Fisch, *supra* note 11, at 1135 (referring to a proxy voting mechanism)).

¹⁷ Zanglein, *supra* note 12, at 98.

¹⁸ 17 C.F.R. § 240.14a-4(b)(1) (2007).

¹⁹ *Id.*

III. ESTABLISHMENT OF RULE 14a-8

In 1934, Congress authorized the SEC to regulate proxies through Section 14(a) of the Securities Exchange Act.²⁰ Subsequently, the SEC promulgated proxy rules.²¹ One of these rules was Rule 14a-8, which grants an opportunity for a shareholder “to have his or her proposal placed alongside management’s proposals in that company’s proxy materials and be put to a vote at an annual or special meeting of shareholders.”²² Thus, Rule 14a-8 has become increasingly popular because it provides a nexus between shareholders and companies, as well as among shareholders themselves.²³

Though 14a-8 gives shareholders access to the corporate proxy materials in order to submit proposals on certain matters,²⁴ access is restricted in important ways (even after proper submission). One way is via a management claim that certain proxy rules are not applicable to all corporations which solicit proxies.²⁵

Another substantial way to restrict shareholder proposals, one more thoroughly discussed in this note, is that management may exclude a proposal without violating Rule 14a-8.²⁶ For example, even though the proposal might be a proper subject for shareholder action under state law, the corporation is still allowed to exclude the proposal if it “deals with a matter relating to the company’s ordinary business operations”²⁷ or “if the proposal directly conflicts with one of the company’s own proposals to be

²⁰ Securities Exchange Act § 14(a), 15 U.S.C. § 78n(a) (1934).

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or any facility of a national securities exchange or otherwise, 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 or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

Id.

²¹ 17 C.F.R. § 240.14a (2007).

²² Division of Corporation Finance: Staff Legal Bulletin No. 14 (Jul. 13, 2001), available at <http://www.sec.gov/interps/legal/cfs1b14.htm>.

²³ *Id.*

²⁴ 17 C.F.R. § 240.14a-8 (2007).

²⁵ 17 C.F.R. § 240.14a-2 (2007); see also *Carter v. Portland Gen. Elec. Co.*, 362 P.2d 766, 769 (Or. 1961) (“We know that it could be invoked for harassing purposes that could only be avoided by extensive litigation. We must be aware that to judicially impose the suggested rules in these circumstances might well impair rather than benefit the orderly development of this important area of the law of corporations.”).

²⁶ Myron P. Curzan and Mark L. Pelesh, *Revitalizing Corporate Democracy: Control of Investment Managers’ Voting on Social Responsibility Proxy Issues*, 93 HARV. L. REV. 670, 673 (1980).

²⁷ 17 C.F.R. § 240.14a-8(i)(7) (2007).

submitted to shareholders at the same meeting.”²⁸ However, the most recent tension between management and shareholders is over the exclusionary power of a proposal that “relates to an election.”²⁹

IV. 14a-8 (i)(8): THE “TOWN MEETING RULE”

Of all the restrictions imposed by management on proxy proposals, the one that has received recent attention deals with a proposal that “relates to an election.”³⁰ In 1942, an unfavorable public response to a Rule 14a-8 proposal (which would have allowed management to include these proposals³¹) led to the SEC interpretation that Rule 14a-8 should not permit shareholder proposals in support of challengers.³² Subsequently, the SEC amended the text of the Rule to explicitly exclude proposals relating to director elections.³³

Under Rule 14a-8(i)(8), a corporate board may exclude a proposal “if the proposal relates to an election for membership on the company’s board of directors or analogous governing body.”³⁴ In other words, shareholders are given an opportunity to only vote on those candidates nominated by the company.³⁵ This restriction, along with the others in 14a-8, was developed by Congress in order to prevent abuses perpetrated by shareholders.³⁶ These abuses were directed not merely in connection with securities transactions, but also with the misuse of proxy machinery.³⁷

The basic application of the provision is that it prevents a shareholder from using Rule 14a-8 to nominate or advocate the election of a particular director.³⁸ It is crucial to note that the SEC has not interpreted

²⁸ 17 C.F.R. § 240.14a-8(i)(9) (2007).

²⁹ 17 C.F.R. § 240.14a-8(i)(8)(2007).

³⁰ *Id.*

³¹ See *Security and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the H. Comm. on Interstate and Foreign Commerce*, 78th Cong. 17-19 (1943) (testimony of Chairman Ganson Purcell).

³² *Id.*; see also James McRitchie, Re: S7-10-03 Possible Changes to Proxy Rules (May 26, 2003), available at <http://www.corpgov.net/forums/commentary/S7-10-03.html>.

³³ Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 183 n.60 (1988).

³⁴ See *id.*

³⁵ Security Holder Director Nominations, Exchange Act Release No. 34-48,626, Investment Company Act Release No. 26,206, 68 Fed. Reg. 60,784, 60,786 (proposed Oct. 23, 2003) (to be codified at 17 C.F.R. pts. 240, 249, 274).

³⁶ Report on Stock Exchange Practices, S. Rep. No. 1455, 73d Cong., 2d Sess. (1934), as reprinted in 5 LEGISLATIVE HISTORY 77 (cited in note 235)[hereinafter the “Fletcher Report”].

³⁷ *Id.*

³⁸ See, e.g., SCI Systems, Inc., SEC No-Action Letter, 1992 SEC No-Act. LEXIS 875 (Aug. 14, 1992) (permitting exclusion of a proposal nominating director candidates); CMT Investment Co., SEC No-Action Letter, 1981 SEC No-Act. LEXIS 3382 (Mar.

Rule 14a-8(i)(8) to bar general proposals relating to election procedures, such as cumulative voting rights and general qualifications for directors.³⁹ However, the SEC has allowed management to exclude any proposal that could be viewed as merely interfering with election of existing directors.⁴⁰

The SEC staff has explained that even proposals relating to general director qualifications may be excluded if they relate to or would interfere with the election of current nominees.⁴¹ However, this does not mean that a proposal, for example, to institute cumulative voting may be omitted under this rationale.⁴² Instead, it means that a proposal to elect or not to elect persons who do not own stock in the registrant (if persons who do not own stock have been nominated) may be omitted.⁴³ For example, the SEC approved the exclusion of a shareholder proposal submitted to Mobil which sought to amend Mobil's by-laws by preventing citizens of OPEC countries from serving on the board of directors.⁴⁴ Mobil argued that the proposal would have the effect of barring a sitting director, who was an OPEC citizen, from re-election.⁴⁵ The SEC staff agreed that the proposal could be excluded under Rule 14a-8(c)(8) because it related to an election.⁴⁶ Mobil's exclusion of the proposal was upheld by the court.⁴⁷

27, 1981) (applying Rule 14a-8(c)(8) to nominations for election to the board of directors).

³⁹ See Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 1976 SEC LEXIS 326, *34-35 (Nov. 22, 1976) (explaining the scope of the exclusion).

⁴⁰ See, e.g., Tylan Corp., SEC No-Action Letter, 1987 SEC No-Act. LEXIS 2530 (Sept. 25, 1987) (allowing exclusion of a proposal that would increase representation, on the director's slate, of certain groups, including minorities. A letter dated June 23, 1987 from Sidney L. Groves requesting that Tylan include in its 1987 Proxy Statement a proposal (the "Groves Proposal") to:

(a) reduce the number of directors; and

(b) nominate a new slate of directors to represent the interests of (i) outside and minority employee stockholders, (ii) Tylan employees, and (iii) bank lenders).

⁴¹ See, e.g., Chicago Milwaukee Corp., SEC No-Action Letter, 1992 SEC No-Act. LEXIS 961 (Sept. 23, 1992).

⁴² Philip R. Lochner, Jr., *Proxy statements and proxies under the Securities Exchange Act of 1934*, 591 PLI/Corp 355, 417 (1988).

⁴³ See *Dyer v. SEC*, 266 F.2d 33 (8th Cir. 1959).

⁴⁴ See *Rauchman v. Mobil Corp.*, 739 F.2d 205, 206-07 (6th Cir. 1984) (describing the SEC review of and response to the shareholder proposal).

⁴⁵ *Id.* at 206.

⁴⁶ *Id.* at 207 (SEC staff advised Mobil that the "proposal and supporting statement call into question the qualifications of Mr. Olayan for reelection and thus the proposal may be deemed an effort to oppose management's solicitation on behalf of the reelection of this person.").

⁴⁷ *Id.*

V. THE EVOLUTION OF 14a-8(i)(8)

In the early 1940s, the SEC took a few tentative steps toward providing access to shareholders.⁴⁸ While the SEC began to address ballot access for shareholder proposals, it also considered whether shareholders should have direct access to the corporate ballot in connection with director elections. In 1942, the SEC proposed a rule that would have required corporations to include shareholder-nominated director candidates in the corporation's proxy statement.⁴⁹ Corporate management criticized the proposed rule on the grounds that it was unworkable; shareholders might nominate unqualified candidates or create ballot confusion by nominating too many candidates.⁵⁰ The fear was that interference with effective corporate management could prove costly in connection with the wartime effort.⁵¹ The SEC abandoned its efforts to pass the rule.⁵² Consequently, the unfavorable response in 1942 led to a 1947 amendment, which interpreted the Division of Corporate Finance's policy to "exclude proposals that related to the election of the directors so that proponents could not use the shareholder proposal process to effectuate a proxy contest."⁵³

In 1976, the SEC codified the 1947 amendment when it created the Rule 14a-8 (i)(8) exclusion.⁵⁴ The final rule deleted the words "corporate, political or other" from the election exclusion.⁵⁵ The Commission explained that it "intended to expand the scope of the existing exclusion to cover proposals dealing with matters previously held not excludable by the

⁴⁸ Exchange Act Release No. 3347, 1942 SEC LEXIS 44 (Dec. 18, 1942); *see also Security and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the H. Comm. on Interstate and Foreign Commerce, 78th Cong. 17-19 (1943)* (testimony of Chairman Ganson Purcell).

⁴⁹ Exchange Act Release No 3347, *supra* note 48.

⁵⁰ Fisch, *supra* note 11, at 1163 (citing J.A.C. Hetherington, *When the Sleeper Wakes: Reflections on Corporate Governance and Shareholder Rights*, 8 HOFSTRA L. REV. 183, 214 (1979)).

⁵¹ *Id.*

⁵² *See Security and Exchange Commission Proxy Rules, Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 before the House Committee on Interstate and Foreign Commerce, 78th Cong., 1st Sess. (1943)*. Although commentators have continually called for a rule permitting shareholders direct access to the ballot to nominate candidates for the board of directors, the SEC has never re-proposed such a rule. *See, e.g.,* Robert N. Shwartz, *A Proposal for the Designation of Shareholder Nominees for Director in the Corporate Proxy Statement*, 74 COLUM. L. REV. 1139 (1974); Mortimer M. Caplin, *Shareholder Nominations of Directors: A Program for Fair Corporate Suffrage*, 39 VA. L. REV. 141 (1953).

⁵³ Fisch, *supra* note 11, at 1163-64.

⁵⁴ Exchange Act Release No. 12,598, 9 SEC Dock. 1030, 1034-35 (1976) (proposing release); Exchange Act Release No. 12,999, 10 SEC Dock. 1006, 1013 (1976) (adopting release).

⁵⁵ *See AFSCME v. AIG*, 2005 WL 562207 (Feb. 25, 2005).

Commission, such as cumulative voting rights, general qualifications for directors, and political contributions by the issuer.”⁵⁶ The SEC’s interpretation of Rule 14a-8(i)(8) allowed a corporation to exclude a proposal if “[t]he proposal relates to an election for membership on the company’s board of directors or analogous governing body.”⁵⁷ In other words, the SEC interpreted the proposal as addressing the nomination of committees, not necessarily shareholder access to company proxies.⁵⁸

In 1989, the California Public Employee’s Retirement System (“CalPERS”), the largest publicly funded retirement system in the country,⁵⁹ submitted proposals for comprehensive revisions to the SEC’s proxy rules adopted under Section 14(a) of the Exchange Act. The 48 proposals submitted were divided into four categories: (1) structure and procedure; (2) shareholder communications; (3) enhancement of disclosure; and (4) SEC filing and review of proxy materials.⁶⁰ The intent of the proposals was to illuminate the substantial imbalance between shareholders and management concerning the filing and processing of proxy materials.⁶¹ CalPERS suggested that proposals relating to an election to office would only be permitted to be excluded “if the proposal related to the election of a specifically named individual to a specific office or to an election to office being considered at the meeting for which proxies are being solicited.”⁶²

Consequently, the SEC proposed shareholder director nomination rules in June 1991 as well as in June 1992. These proposals, however, were not as effective as the proposal in 2003.⁶³

VI. THE 2003 PROPOSAL: 14a-11

In lieu of the challenges facing the rights of shareholder proposals in Rule 14a-8, a shareholder’s only alternative is a counter-solicitation, as

⁵⁶ Adoption of Amendments Relating to Proposals by Security Holders, Securities Exchange Act Release No. 12999, 1976 WL 160347 (Nov. 22, 1976).

⁵⁷ *Id.*

⁵⁸ Lewis J. Sundquist III, Note, *Proposal to Allow Shareholder Nomination of Corporate Directors: Overreaction in Times of Corporate Scandal*, 30 WM. MITCHELL L. REV. 1471, 1474 (2004).

⁵⁹ Roberta S. Karmel, *CalPERS Versus The Business Roundtable*, 9/28/06 N.Y.L.J. 5, (col. 1) at n.13.

⁶⁰ Letter from Dale E. Hanson, Executive Officer of CalPERS, to Linda C. Quinn, Director of Corporation Finance SEC 2 (Nov. 3, 1989) (on file with THE BUSINESS LAWYER, Univ. of Maryland School of Law).

⁶¹ Norma Sharara and Anne E. Hoke-Witherspoon, *The Evolution of the 1992 Shareholder Communication Proxy Rules and Their Impact on Corporate Governance*, 49 BUS. LAW. 327, 336 (1993).

⁶² *Id.*

⁶³ 17 C.F.R. § 240.14a-11(2003); *see also* Rule 14a-11, Proposed Rule: Security Holder Director Nominations, *available at* <http://www.sec.gov/rules/proposed/34-48626.htm>.

governed by Rule 14a-11.⁶⁴ On October 14, 2003, the SEC issued this proposal, which would require companies (under certain circumstances) to include in their proxy materials security holder nominees for election as director.⁶⁵ Under Rule 14a-11, a shareholder wishing to nominate a director, criticize an existing director, or propose changes in director qualifications that would disqualify a member of the current board is faced with fewer hurdles than a shareholder seeking control of the company.⁶⁶ This proposed initiative,⁶⁷ most likely incited by the mistrust and skepticism in the wake of recent corporate scandals, is intended to improve disclosure to security holders and enhance their ability to participate meaningfully in the proxy process for the nomination and election of directors.⁶⁸

Though Rule 14a-11 was developed in response to concerns that current procedures hamper shareholders' access to the nominating process and frustrate shareholder influence with regard to the boards of directors of the companies in which they invest, it does not solve all shareholder concerns. First, nothing in the proposal's procedure establishes an inherent right of security holders to nominate candidates for election to a company's board of directors; rather, the procedure involves disclosure and other

⁶⁴17 C.F.R. § 240.14a-11 (2003). (A counter-solicitation occurs when a group of shareholders propose their own slate of candidates and conduct a solicitation in which they seek proxy authority to vote in favor of their slate rather than the slate nominated by management.)

⁶⁵ Security Holder Director Nominations, *supra* note 35, at 60,784.

⁶⁶ See Union Elec. Co., Pub. Utility Holding Company Act Release No. 13,962, 1959 SEC LEXIS 730, *5-6 (March 26, 1959) (finding that a shareholder proposal "which would censure all of the present members of Union's board of directors, who are also management nominees for reelection at the 1959 meeting, and declare all of them disqualified for re-election to office" constitutes "a solicitation in opposition to the election of directors within the meaning of Rules 14a-1 and 14a-11 and therefore could be made only by use of a proxy statement" and requires compliance with the rules pertaining to election contests).

⁶⁷ Schooly, Renner and Allen, *Corporate Governance Reform: Electing Directors Through Shareholder Proposals* (Oct. 2005), available at <http://www.nysscpa.org/cpajournal/2005/1005/essentials/p62.htm>.

⁶⁸ Security Holder Director Nominations, *supra* note 35, at 60,784 ("[T]he proposed rules are intended to create a mechanism for nominees of long-term security holders, or groups of long-term security holders, with significant holdings to be included in company proxy materials where there are indications that security holders need such access to further an effective proxy process. This mechanism would apply in those instances where evidence suggests that the company has been unresponsive to security holder concerns as they relate to the proxy process. The proposed rules would enable security holders to engage in limited solicitations to form nominating security holder groups and engage in solicitations in support of their nominees without disseminating a proxy statement. The proposed rules also would establish the filing requirements under the Securities Exchange Act of 1934 for nominating security holders.").

requirements concerning proxy materials that are conditioned on the existence of such a right under state law and the occurrence of specified events.⁶⁹ In addition, Rule 14a-11 is financially burdensome.⁷⁰ Specifically, the administrative cost burdens that would be imposed on companies by the proposed Rule 14a-11 may range from \$89.4 million to \$175.1 million per year.⁷¹

Though Rule 14a-11 does not solve all Rule 14a-8(i)(8) concerns, the SEC subsequently received a record number of comment letters based on this proposal.⁷² However, in 2004, citing the complexities of implementing proxy access, the SEC tabled the proposal indefinitely.⁷³ Regardless, the recent *AFSCME v. AIG* decision may be the tipping point for proxy access.

VII. *AFSCME v. AIG*

The U.S. Court of Appeals for the Second Circuit reopened the possibility of shareholder proxy access in its decision in *American Federation of State, County and Municipal Employees v. American International Group, Inc.*⁷⁴

A. Background

American Federation of State, County and Municipal Employees (“AFSCME”), one of the country’s largest public service employee unions, held 26,965 shares of voting common stock of American International Group, Inc. (“AIG”), a multi-national corporation operating in the insurances and financial services sector.⁷⁵ AFSCME, acting as a shareholder, submitted a proposal to AIG for the company’s 2005 proxy statement. This proposal, if adopted by a majority of AIG shareholders at the Company’s 2005 annual meeting,⁷⁶ would have amended the AIG by-laws to require the company, under certain circumstances, to publish the

⁶⁹ 17 C.F.R. § 240.14a-11(2003); *see also* Rule 14a-11, Proposed Rule: Security Holder Director Nominations, *available at* <http://www.sec.gov/rules/proposed/34-48626.htm>.

⁷⁰ Edward E. Potter, Comments of The Employment Policy Foundation on S7-19-03 to Jonathan G. Katz, *available at* <http://www.sec.gov/rules/proposed/s71903/epf122203.htm>.

⁷¹ *Id.*

⁷² Roel C. Campos, Speech by SEC Commissioner: The SEC’s Shareholder Access Proposal (Jan. 10, 2005), *available at* <http://www.sec.gov/news/speech/spch011005rcc.htm>.

⁷³ David A. Katz & Laura A. McIntosh, *Proxy Access: Not Then, not Now*, 9/28/06 N.Y.L.J. 5, (col.1).

⁷⁴ *AFSCME v. AIG*, 462 F.3d 121, 121 (2d Cir. Sept. 5, 2006).

⁷⁵ *Id.*

⁷⁶ *See* DEL. CODE ANN. TIT. 8, § 109(a) (2002).

names of shareholder-nominated candidates for director positions together with any candidates nominated by AIG's board of directors.⁷⁷

AIG refused to place the AFSCME proposal on its proxy.⁷⁸ Subsequently, the SEC approved the decision, determining that the proposal concerned shareholder elections and, thus, was not appropriate for a shareholder proposal.⁷⁹ In addition, a lower court rejected AFSCME's argument that the proposal was non-excludable because it concerned a proposal to reform election procedures rather than a proposal regarding a

⁷⁷ AFSCME v. AIG , 462 F.3d 121,124 (2nd Cir. 2006). (citing AFSCME's proposal (herinafter the "Proposal")):

RESOLVED, pursuant to Section 6.9 of the By-laws (the "By-laws") of American International Group Inc. ("AIG") and section 109(a) of the Delaware General Corporation Law, stockholders hereby amend the By-laws to add section 6.10:

'The Corporation shall include in its proxy materials for a meeting of stockholders the name, together with the Disclosure and Statement (both defined below), of any person nominated for election to the Board of Directors by a stockholder or group thereof that satisfies the requirements of this section 6.10 (the 'Nominator'), and allow stockholders to vote with respect to such nominee on the Corporation's proxy card. Each Nominator may nominate one candidate for election at a meeting).

To be eligible to make a nomination, a Nominator must:

(a) have beneficially owned 3% or more of the Corporation's outstanding common stock (the 'Required Shares') for at least one year;

(b) provide written notice received by the Corporation's Secretary within the time period specified in section 1.11 of the By-laws containing (i) with respect to the nominee, (A) the information required by Items 7(a), (b) and (c) of SEC Schedule 14A (such information is referred to herein as the 'Disclosure') and (B) such nominee's consent to being named in the proxy statement and to serving as a director if elected; and (ii) with respect to the Nominator, proof of ownership of the Required Shares; and

(c) execute an undertaking that it agrees to (i) assume all liability of any violation of law or regulation arising out of the Nominator's communications with stockholders, including the Disclosure (ii) to the extent it uses soliciting material other than the Corporation's proxy materials, comply with all laws and regulations relating thereto.

The Nominator shall have the option to furnish a statement, not to exceed 500 words, in support of the nominee's candidacy (the 'Statement'), at the time the Disclosure is submitted to the Corporation's Secretary. The Board of Directors shall adopt a procedure for timely resolving disputes over whether notice of a nomination was timely given and whether the Disclosure and Statement comply with this section 6.10 and SEC Rules... We urge stockholders to vote for this proposal.

⁷⁸ *Id.*

⁷⁹ SEC No-Action Letter, 2005 WL 372266 (Feb. 14, 2005).

specific election.⁸⁰ Thus, the issue before the U.S. Court of Appeals for the Second Circuit was to determine whether, under Rule 14a-8(i)(8), a shareholder proposal “relates to an election” if it seeks to amend the corporate by-laws to establish a procedure by which the shareholder-nominated candidates may be included on the corporate ballot.⁸¹

B. *The Decision*

The U.S. Court of Appeals for the Second Circuit determined that Rule 14a-8(i)(8) seeks to amend the corporate by-laws to establish a procedure by which certain shareholders are entitled to include in the corporate proxy materials their nominees for the board of directors.⁸² The court first noted the SEC’s specific language, “relates to an election,” was not helpful in distinguishing between proposals addressing a particular seat in a particular election and those, like AFSCME’s proposal, that simply set the background rules governing elections generally.⁸³ The court explained that the language of this regulation was too ambiguous to decide on its face.⁸⁴ The court implied that the SEC should clarify the language when it explained that the Rule “provides no reason to adopt one interpretation over the other.”⁸⁵

While attempting to look for guidance in the SEC’s interpretation of its own regulation,⁸⁶ the court became concerned with the SEC’s amicus brief.⁸⁷ Specifically, the SEC argued that AFSCME’s proposal is excludable under Rule 14a-8(i)(8) because

it would result in an immediate election contest (e.g., by making a director nomination for a particular meeting) or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholder director nominees in the company’s proxy materials for subsequent meetings.⁸⁸

However, the court found that this interpretation greatly conflicted with the interpretation the SEC made in 1976.⁸⁹ In that year, the SEC rejected a proposed rule (which would have authorized the exclusion of proposals that “relate to a corporate, political or other election to office”) in favor of the

⁸⁰ *Am. Fed’n of State, County & Mun. Employees Pension Plan v. American Int’l Group, Inc.*, 361 F. Supp.2d 344, 346 (S.D.N.Y. 2005).

⁸¹ *AFSCME v. AIG*, 462 F.3d 121, 123 (2d Cir. Sept. 5, 2006).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *AFSCME v. AIG*, 462 F.3d 121, 127 (2d Cir. Sept. 5, 2006).

⁸⁸ *Id.* at 127-28.

⁸⁹ *Id.*

current version (which authorizes the exclusion of proposals that simply “relate to an election”) which merely avoids creating “the erroneous belief that the Commission intended to expand the scope of the existing exclusion to cover proposals dealing with matters previously held not excludable by the Commission, such as cumulative voting rights, general qualifications for directors, and political contributions by the issuer.”⁹⁰ From 1976 to 1990, the SEC applied this interpretation by excluding shareholder proposals *only* if they related to an immediate election contest which would be governed by other proxy rules.⁹¹

In 1990, the SEC inexplicably signaled a change of course by deeming excludable proposals that “*might* result in contested elections, even if the proposal purports to alter general procedures for nominating and electing directors.”⁹² Because the SEC had never discussed its shift in policy, the court found it more appropriate to defer to the 1976 interpretation rather than the SEC’s interpretation post-1990.⁹³ Therefore, based on the 1976 interpretation, the court agreed with the SEC that a shareholder proposal seeking to contest management’s nominees would be excludable under Rule 14a-8(i)(8).⁹⁴ However, a proposal seeking to add a proxy access amendment to the corporate by-laws, like in this case, does not involve opposing solicitations dealing with “the election or removal of directors” and should be allowed.⁹⁵

In response to the defendant’s brief,⁹⁶ the court recognized that its holding promotes a less restrictive process than that created by proposed Rule 14a-11.⁹⁷ In other words, there may be no reason for a rule like 14a-11 to coexist with the procedure that the holding makes available to shareholders.⁹⁸ If the Commission ultimately decides to adopt Rule 14a-11,

⁹⁰ *Id.* (citing Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34-129999, 41 Fed. Reg. 52,994, 52,998 (Nov. 22, 1976))[hereinafter the “1976 Adoption”].

⁹¹ *See, e.g.*, Union Oil Co. of Calif., SEC No-Action Letter, 1983 WL 30873, at *4-5 (Feb. 24, 1983); Mobil Corp., SEC No-Action Letter, 1981 WL 26205, at *22 (Mar. 3, 1981); Union Oil Co. of Calif., SEC No-Action Letter, 1981 WL 24701, at *7 (Jan. 29, 1981); Unicare Servs., SEC No-Action Letter, 1980 WL 15475, at *7 (May 13, 1980); *see also* Newbury Corp., SEC No-Action Letter, 1986 WL 67178, at *3 (Aug. 11, 1986) (emphasis added).

⁹² *AFSCME v. AIG*, 462 F.3d 121, 127 (citing Thermo Electron, SEC No-Action Letter, 1990 WL 286329, at *19 (Mar. 22, 1990); Unocal Corp., SEC No-Action Letter, 1990 WL 285946, at *7 (Feb. 6, 1990); Bank of Boston, SEC No-Action Letter, 1990 WL 285947, at * 14 (Jan. 26, 1990)) (emphasis added).

⁹³ *AFSCME*, 462 F.3d at 129.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 124-25.

⁹⁷ *AFSCME v. AIG*, 462 F.3d 121, 127-28 (2d Cir. Sept. 5, 2006).

⁹⁸ *Id.*

then such an action, although unnecessary, would likely be sufficient to modify the interpretation of Rule 14a-8(i)(8) that the court adopted.⁹⁹

Essentially, the court decided that an agency's interpretation of an ambiguous regulation made at the time the regulation was implemented should control unless the agency has offered sufficient reasons for its changed interpretation.¹⁰⁰ It explained that although the SEC has substantial discretion to adopt new interpretations of its own regulations, it nevertheless has a "duty to explain its departure from prior norms."¹⁰¹ The court arrived at this decision because a governmental agency's own conflicting interpretations do not receive the usual deference a court would reserve for its own interpretations.¹⁰² Given the court's ultimate decision to interpret Rule 14a-8(i)(8) as applying to shareholder proposals that relate to a particular election and *not* procedural rules governing elections generally,¹⁰³ the SEC had to respond.

VIII. SEC RESPONSE

The ruling in *AFSCME v. AIG* did not strike down the SEC's position (the SEC was not a party to the suit). Instead, it gave the agency the opportunity to clarify its position: to either restate its former policy or adopt a new one.¹⁰⁴

Two days after this decision, SEC Chairman Christopher Cox directed the Division of Corporation Finance to draft a rule to standardize nationwide application of 14a-8(i)(8), the "town meeting rule."¹⁰⁵ Specifically, the SEC intended to present its proposal at an October 18, 2006 open meeting, leaving time for public commentary before a final proposal and rulemaking for the 2007 proxy season.¹⁰⁶ After no action was taken at the meeting on October 18, plans for discussion were rescheduled

⁹⁹ *Id.*

¹⁰⁰ *AFSCME*, 462 F.3d at 131.

¹⁰¹ *Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (citing *Sec. of Agric. v. United States*, 347 U.S. 645, 652-53 (1954)); *cf. Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 589 (2d Cir.1994) (stating that "an agency may alter its interpretation of a statute so long as the new rule is consistent with the statute, applies to all litigants, and is supported by a 'reasoned analysis'").

¹⁰² *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987)) (stating that an agency's interpretation of a regulation that conflicts with a prior interpretation is "'entitled to considerably less deference' than a consistently held agency view").

¹⁰³ *AFSCME*, 462 F.3d at 130 (2d Cir. Sept. 5, 2006) (emphasis added).

¹⁰⁴ *Id.* at 129.

¹⁰⁵ Bill Baue, *Court Affirms Shareowner Right to File Resolutions on Proxy Access for Nominating Directors* (Sept. 14, 2006), available at <http://www.socialfunds.com/news/article.cgi/2109.html>.

¹⁰⁶ *Id.*

for December 13, 2006.¹⁰⁷ Unfortunately, discussion of the *AIG* case was dropped from the agenda of this December 13 Commission meeting,¹⁰⁸ and put off “until at least January 2007.”¹⁰⁹ Subsequently, the SEC has received “shareholder access” by-law proposals.¹¹⁰

A. *Proposals after AFSCME v. AIG*

Though proxy access proposals have incited some controversy after their submissions to companies such as Reliant Energy and UnitedHealth Group,¹¹¹ the most telling reaction by the SEC is with regards to the Hewlett-Packard Co.¹¹² In a November 3, 2006 letter to the staff of the SEC’s Division of Corporation Finance, lawyers for Hewlett-Packard asked for permission to exclude an access proposal.¹¹³ In that letter, representatives of Hewlett-Packard¹¹⁴ argued that the *AIG* decision of the Second Circuit (based in New York) is not binding on the computer company because it is based in California and plans to hold its annual meeting there, which is outside the court’s jurisdiction.¹¹⁵

On January 22, 2007, the SEC declined to weigh in on whether Hewlett-Packard may block a proposal to give shareholders more say in selecting corporate directors by the use of corporate proxy ballots.¹¹⁶ The SEC’s abstention from the Hewlett-Packard proposals implies that they had no response to the decision in *AFSCME v. AIG* and still raises questions

¹⁰⁷ SEC Press Release, Commission Announces Schedule for Action Regarding Section 404 of the Sarbanes-Oxley Act of 2002, Foreign Private Issuer Deregistration, Internet Availability of Proxy Materials, and Securities Exchange Act Rule 14A-8 (Oct. 11, 2006), available at <http://www.sec.gov/news/press/2006/2006-172.htm>.

¹⁰⁸ Ronald H. Janis, *Mandating Democracy In Corporate Governance: The Right Move?* (January 2007), available at <http://www.metrocorpccounsel.com/current.php?artType=view&artMonth=January&artYear=2007&EntryNo=6131>.

¹⁰⁹ Peter J. Wallison, *A Costly Delay Keeps Firms in the Dark* (Dec. 15, 2006), available at <http://www.american.com/archive/2006/december/a-costly-delay-keeps-firms-in-the-dark/>.

¹¹⁰ *Id.*

¹¹¹ Judith Burns, *Reliant Energy shareholder withdraws proxy-access proposal* (Feb. 21, 2007), available at <http://www.marketwatch.com/news/story/reliant-energy-shareholder-withdraws-proxy-access/story.aspx?guid=%7B451B14D9-1D38-4256-ADF6-2F5EA0B81FDF%7D>.

¹¹² *Id.*

¹¹³ Kara Scannell, *Activist Holders Gain Ground In Quest for Access to Ballots*, WALL ST. J., Jan. 23, 2007, at C3.

¹¹⁴ Tad Kopinski, *SEC Delays Proxy Access Again*, Institutional Shareholder Services (Dec. 8, 2006), available at http://blog.issproxy.com/2006/12/sec_delays_proxy_access_agains.html (The proposal was filed by AFSCME and state pension funds from Connecticut, New York, and North Carolina.).

¹¹⁵ *Id.*

¹¹⁶ Judith Burns, *3rd UPDATE: SEC Staff Takes No Position On H-P Proxy Vote*, Dow Jones Newswires (Jan. 22, 2007), available at http://news.morningstar.com/news/ViewNews.asp?article=/DJ/200701221610DOWJONESDJONLINE000529_univ.xml.

about whether companies may continue to exclude certain types of shareholder proposals from proxy ballots.¹¹⁷

B. *What Happens to Rule 14a-8(i)(8) now?*

The failure of the SEC to act is difficult to understand. It raises inevitable difficulties for companies that will now be receiving proposals from shareholders, demanding the same treatment AIG has been compelled to offer AFSCME.¹¹⁸ Essentially, the abstention taken (at least for companies in the Second Circuit) means those companies must include such an amendment in their proxy material.¹¹⁹ Companies outside the court's immediate jurisdiction, however, are likely to feel that they should also follow the court precedent.¹²⁰ Failure to do so might leave them open to litigation.¹²¹

Though the SEC is not bound by the court's decision,¹²² SEC Chairman Christopher Cox said the SEC is working on a "clear rule" that would apply to all companies in 2008.¹²³

1. *Potential SEC action*

If a decision by the SEC stands "as is," it would make it significantly easier for shareholders to add their own nominees to ballots.¹²⁴ Specifically,

shareholders could submit proposals under Rule 14a-8 that would allow them to make nominations to the board in future years (if the proposals were approved by shareholders and if the nominating shareholders were eligible to nominate candidates under the criteria set forth in the by-law amendment).¹²⁵

However, if the SEC does amend Rule 14a-8(i)(8), it can take one of two actions: amend it to the liking of the Second Circuit or amend it to strengthen the language of the 1947 proposal.

¹¹⁷ Kevin Drawbaugh, *SEC Stays On Fence Over HP Shareholder Proposal*, Reuters (Jan. 23, 2007), available at <http://www.crn.com.au/story.aspx?CIID=71768&r=rstory>.

¹¹⁸ *Id.*

¹¹⁹ Wallison, *supra* note 109.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Judith Burns, *3rd UPDATE: SEC Staff Takes No Position On H-P Proxy Vote*, Dow Jones Newswires, (Jan. 22, 2007), available at http://news.morningstar.com/news/ViewNews.asp?article=/DJ/200701221610DOWJONESDJONLINE000529_univ.xml.

¹²⁴ Broc Romanek, *The SEC's Response, Amend Rule 14a-8*, (Sept. 8, 2006), available at <http://www.thecorporatecounsel.net/blog/archive/001221.html>.

¹²⁵ *Id.*

2. *Amending the Rule to the liking of the Second Circuit*

The Second Circuit's ultimate decision was to interpret Rule 14a-8(i)(8) as applying to shareholder proposals that relate to a particular election and *not* procedural rules governing elections generally.¹²⁶ Proponents of the *AIG* decision believe that one of the basic assumptions of corporate governance is that shareholders should have the right to exercise a meaningful role in the election of directors to ensure board accountability.¹²⁷ Consequently, the strengthening of shareholder rights could lead to positive economic effects in the U.S. market.¹²⁸

Moreover, proponents believe that the lack of these rights and the inability for shareholders to have a meaningful say in electing directors has contributed to the costly and inefficient adversarial relationships that often develop between shareholders and companies in the U.S.¹²⁹ Strengthening shareholders' rights with respect to director selection would encourage more dialogue, negotiation, and constructive engagement, and would help reduce the confrontational nature of shareholder activism in the United States.¹³⁰ Based on our global perspective, the U.S. system clearly lags behind other major markets where the rights of shareholders to participate in and influence director elections are already well established.¹³¹ Giving shareholders a stronger voice in the nomination and election process would allow the U.S. market to use pre-existing successful international practices and election standards.¹³² In turn, by opening up the process to permit shareholder access proposals, U.S. corporate governance standards will be further improved.

Critics of the decision of the Court of Appeals for the Second Circuit have expressed concern that shareholders would abuse procedures that might develop pursuant to resolutions establishing the right to access.¹³³ However, institutional investors, as fiduciaries, "are obligated to behave rationally and in the economic interest of their beneficiaries."¹³⁴ In other

¹²⁶ *AFSCME v. AIG*, 462 F.3d 121, 130 (2d Cir. Sept. 5, 2006) (emphasis added).

¹²⁷ Letter from John Wilcox, Chair of Committee on Cross-Border Voting Practices to Christopher Cox, Chairman of SEC, "Re: SEC Review of Rule 14a-8(i)(8)," International Corporate Governance Network, (Oct. 13, 2006), available at http://www.icgn.org/organisation/documents/cbv/cox_letter_oct2006.pdf.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Letter from John Wilcox, Chair of Committee on Cross-Border Voting Practices to Christopher Cox, Chairman of SEC, "Re: SEC Review of Rule 14a-8(i)(8)," International Corporate Governance Network, (Oct. 13, 2006), available at http://www.icgn.org/organisation/documents/cbv/cox_letter_oct2006.pdf.

¹³⁴ *Id.*

words, proponents believe that it “makes no sense for shareholders to undermine the enterprises in which they have invested.”¹³⁵

3. *Amending the Rule to strengthen the language of the 1947 proposal*

On the other side of the spectrum, others feel that current existing rules do not necessarily preclude shareholder activism.¹³⁶ Specifically, dissident shareholders have the right to mount proxy fights to challenge company-nominated slates of directors.¹³⁷ Moreover, the listing standards for both the Nasdaq and NYSE require that boards be composed of a majority of independent directors, who themselves comprise the search committees for new directors.¹³⁸

If the SEC did adopt changes granting more access to shareholders, some feel that this alteration would surrender corporate governance to anti-corporate interests.¹³⁹ Proponents of this idea, typically siding with the corporation, argue that “the original SEC position made a great deal of sense, since it required those who wanted to challenge a company’s board nominees to prepare and distribute their own proxy material.”¹⁴⁰ “This process would provide shareholders with the necessary information to make a decision.”¹⁴¹

A contention from critics of the Court of Appeals for the Second Circuit decision is that shareholders lack accountability.¹⁴² Specifically, “a shareholder who is elected as a representative will disrupt the delicate internal dynamics that make boards successful.”¹⁴³ “Its effect will be analogous to that of cumulative voting,” which opens the possibility for minority shareholders to have representatives on the board.¹⁴⁴ “Experience with cumulative voting suggests that it often leads to pre-meeting caucuses by the majority and a reduction in information flows to the board as a whole.¹⁴⁵ ...In turn, this results in adversarial relations between the majority and minority board members, which can interfere with effective board governance.”¹⁴⁶

¹³⁵ *Id.*

¹³⁶ Kerpen, *supra* note 1.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Wallison, *supra* note 109.

¹⁴¹ *Id.*

¹⁴² Peter Clapman, *Letter to the Editor ‘Corporate Democracy’ Ultimately Means Improved Shareholder Value*, WALL ST. J., Jan. 4, 2007, at B4.

¹⁴³ Stephen Bainbridge, *Does the SEC Know When Enough is Enough?* (Jan. 8, 2004), available at <http://www.techcentralstation.com/010804B.html>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

In addition, as elaborated by the D.C. Circuit's seminal decision in *Business Roundtable v. SEC*,¹⁴⁷ the federal proxy rules were not intended to deal with the substantive aspects of shareholder voting rights.¹⁴⁸ The federal proxy rules are properly concerned only with the need for full disclosure and fair solicitation procedures. It is state corporation law that decides the rules of the game by which directors are elected.¹⁴⁹ Thus, the exclusion of matters relating to election of directors created by Rule 14a-8(i)(8) needs to be interpreted expansively.

XI. CONCLUSION

For years, the SEC has allowed companies to reject requests by shareholders to have their own slate of directors included on a company's official election materials.¹⁵⁰ Shareholder access on most rights was a dead issue until September 2006, when the U.S. Court of Appeals for the Second Circuit ruled in favor of shareholders in *AFSCME v. AIG*.¹⁵¹ Since then, shareholders have been taking advantage: Reliant Energy, UnitedHealth Group and Hewlett-Packard Co. are examples. On January 23, 2007, the AFSCME and the Connecticut Retirement Plans & Trust Funds sued the Hewlett-Packard Co. in U.S. District Court in Connecticut.¹⁵² "The lawsuit asks the court to force Hewlett-Packard to include in this year's proxy a proposed change to company by-laws that would make it easier for shareholder groups to run their own candidates for board elections."¹⁵³ Shareholder groups intend to make Hewlett-Packard a proxy access test case.¹⁵⁴

Though some believe that the Hewlett-Packard case has not come soon enough, others think it is too soon to argue the case for or against shareholder access.¹⁵⁵ Specifically, skeptics point out that we do not know what forms of access shareholders might propose, nor do we know the limitations or "qualifications that might be included in resolutions designed to attract widespread shareholder support needed for approval."¹⁵⁶

¹⁴⁷ *Business Roundtable v. SEC*, 905 F.2d 406, 416-17 (D.C. Cir. 1990).

¹⁴⁸ Stephen Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 WASH. U. L.Q. 565, 611 (1991).

¹⁴⁹ *Id.*

¹⁵⁰ Editorial, *Board Games*, WALL ST. J., Nov. 27, 2006, at A12.

¹⁵¹ See *AFSCME v. AIG*, 462 F.3d 121 (2d Cir. Sept. 5, 2006).

¹⁵² Lorraine Woellert, *HP Fight Forecasts Stormy Proxy Season*, Businessweek.com. (Jan. 24, 2007), available at

http://www.businessweek.com/technology/content/jan2007/tc20070124_559157.htm?chan=top+news_top+news+index_businessweek+exclusives.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Letter from John Wilcox, *supra* note 127, at 2.

¹⁵⁶ *Id.*

We do know, however, that where these rights already exist in jurisdictions outside the U.S., there have been none of the abuses which opponents of shareholder access fear.¹⁵⁷ Evidence indicates that though shareholders' bargaining powers are increased, these rights actually create a form of activism fostering collaborative dialogue and negotiation rather than confrontation and adversarial proceedings.¹⁵⁸

Regardless, "long gone are the days when a director could get away with a quick rubber-stamp of a CEO's plans."¹⁵⁹ Now, shareholders have become more interested in playing a stronger role in corporate governance decisions. Thus, the SEC should conclude that some form of shareholder access is inevitable, and that it must adopt rules to provide some certainty.¹⁶⁰

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Christoph Neimann, *News & Insights*, BUS. WK., Jan. 22, 2007, at 37-39.

¹⁶⁰ Kerpen, *supra* note 1.