SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-93596; IC-34419; File No. S7-24-16

RIN 3235-AL84

Universal Proxy

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is amending the federal proxy rules to enhance the ability of shareholders to elect directors though the proxy process in a manner consistent with their ability to vote in person at a shareholder meeting. Specifically, the Commission is requiring the use of a universal proxy card in all non-exempt solicitations involving director election contests, except those involving registered investment companies and business development companies. To facilitate the use of a universal proxy card, the Commission is also amending the federal proxy rules to establish certain notice, minimum solicitation, filing, formatting and presentation requirements, along with other related rule changes consistent with the adoption of a universal proxy requirement. In addition, the Commission is adopting new disclosure requirements relating to voting standards and further requiring certain voting options for all director elections, whether or not contested.

DATES: *Effective date*: The rules are effective [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

Compliance dates: See Section II.K.

FOR FURTHER INFORMATION CONTACT: Christina Chalk, Senior Special Counsel, or David M. Plattner, Special Counsel, in the Office of Mergers and Acquisitions, at (202) 551-3440, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to 17 CFR 240.14a-2 ("Rule 14a-2"), 17 CFR 240.14a-3 ("Rule 14a-3"), 17 CFR 240.14a-4 ("Rule 14a-4"), 17 CFR 240.14a-5 ("Rule 14a-5"), 17 CFR 240.14a-6 ("Rule 14a-6"), and 17 CFR 240.14a-101 ("Schedule 14A"), and new rule 17 CFR 240.14a-19 ("Rule 14a-19"), each under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*] ("Exchange Act").[1]

[1] Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. 78a of the United States Code, at which the Exchange Act is codified, and when we refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to title 17, part 240 of the Code of Federal Regulations [17 CFR 240], in which these rules are published.

TABLE OF CONTENTS

I. INTRODUCTION

A. Background
B. Overview of Final Amendments

II. DISCUSSION OF FINAL AMENDMENTS

A. Mandatory Use of Universal Proxies in Non-Exempt Solicitations in Contested Elections
1. Proposed Rules
2. Comments Received
3. Final Amendments

B. Dissident's Notice of Intent to Solicit Proxies in Support of Nominees Other than the Registrant's Nominees
1. Proposed Rules
2. Comments Received
3. Final Amendments

C. Registrant's Notice of Its Nominees
1. Proposed Rules
2. Comments Received
3. Final Amendments

D. Minimum Solicitation Requirement for Dissidents
1. Proposed Rules
2. Comments Received
3. Final Amendments

E. Dissident's Requirement to File Definitive Proxy Statement 25 Calendar Days Prior to Meeting
1. Proposed Rules
2. Comments Received
3. Final Amendments

F. Access to Information about All Nominees
1. Proposed Rules
2. Comments Received
3. Final Amendments

G. Formatting and Presentation of the Universal Proxy Card
1. Proposed Rules
2. Comments Received
3. Final Amendments

H. Director Election Voting Standards Disclosure and Voting Options
1. Proposed Rules
2. Comments Received
3. Final Amendments

I. Bona Fide Nominee and Short Slate Rules
1. Elimination of the Short Slate Rule
a. Proposed Rules
b. Comments Received
c. Final Amendments
2. Modification of the Bona Fide Nominee Rule
a. Proposed Rules
b. Comments Received
c. Final Amendments

J. Funds
1. Proposed Rules
2. Comments Received
3. Final Amendments

K. Compliance Dates

III. OTHER MATTERS

IV. ECONOMIC ANALYSIS

A. Introduction

B. Baseline
1. Affected Parties
a. Shareholders
b. Registrants
c. Dissidents in Contested Elections
d. Directors
2. Contested Director Elections
a. Proxy Contest Data
b. Notice, Solicitation, and Costs of Proxy Contests
c. Results of Proxy Contests
d. Split-Ticket Voting
3. Other Methods to Seek Change in Board Representation

C. Discussion of Economic Effects
1. Effects on Shareholder Voting
2. Potential Effects on Costs of Contested Elections
a. Typical Proxy Contests
b. Nominal Proxy Contests
3. Potential Effects on Outcomes of Contested Elections

4. Potential Effects on Incidence and Perceived Threat of Contested Elections
   a. Typical Proxy Contests
   b. Nominal Proxy Contests
5. Specific Implementation Choices
   a. The Short Slate and Bona Fide Nominee Rules
   b. Use of Universal Proxies
   c. Voting Standards Disclosure and Voting Options

V. PAPERWORK REDUCTION ACT

A. Summary of the Collection of Information
B. Effect of the Final Amendments on Existing Collections of Information
C. Aggregate Burden and Cost Estimates for the Amendments

VI. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

A. Need for, and Objectives of, the Final Amendments
B. Significant Issues Raised by Public Comments
C. Small Entities Subject to the Final Amendments
D. Projected Reporting, Recordkeeping, and Other Compliance Requirements
E. Agency Action to Minimize Effect on Small Entities

VII. STATUTORY AUTHORITY

I. INTRODUCTION

A. Background

State statutes require corporations to hold an annual meeting of shareholders for the purpose of electing directors.[2] A shareholder's ability to participate in the election of directors is a fundamental right under state corporate law,[3] and the process by which directors are elected is a fundamental aspect of corporate governance that is central to maintaining the accountability of directors to shareholders. Today, few shareholders of public companies with a class of securities registered under the Exchange Act attend a registrant's meeting to vote in person.[4] Instead, the primary means for shareholders to become informed about matters to be decided on at a meeting and to vote on the election of directors and other matters is through the proxy process.

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[2] *See, e.g.*, Model Bus. Corp. Act § 7.01 (2016); Cal. Corp. Code § 600(b); Del. Code. Ann. tit. 8, § 211(b); N.Y. Bus. Corp. Law § 602.

[3] *See Preston v. Allison*, 650 A.2d 646, 649 (Del. 1994); *see also Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.").

[4] During the COVID-19 pandemic, many registrants have held virtual rather than in-person shareholder meetings. Because registrants holding virtual shareholder meetings conducted proxy solicitations in the same manner as they would for in-person meetings, for purposes of this release, our references to in-person meetings include virtual shareholder meetings unless otherwise indicated.

Although virtual shareholder meetings have become more prevalent, it remains unclear whether virtual shareholder meetings will be used as frequently in the future. Because voting at a virtual shareholder meeting still requires attendance by a shareholder, most shareholders are likely to continue to rely on the proxy voting system to exercise their vote. This is supported by the fact that, during 2020, the vast majority of shareholders who attended virtual shareholder meetings did not vote at the meetings. Instead, to the extent they voted, they did so in advance by proxy or via voting instruction forms submitted in advance of the meetings, rather than by attending the virtual shareholder meeting and casting their votes at the meeting. Based on 1,957 virtual meetings hosted by one proxy services provider in 2020, the average number of shareholders voting at virtual meetings (rather than voting in advance by proxy) was 13 shareholders for meetings with shareholder proposals (218 cases) and 2 shareholders for meetings without shareholder proposals. *See* Broadridge, Virtual Shareholder Meetings 2020 Facts and Figures (April 2021), available at https://www.broadridge.com/_assets/pdf/vsm-facts-and-figures-2020-brochure-april-2021.pdf. Accordingly, the use of virtual shareholder meetings will not obviate the need for the final rules regarding universal proxy cards.

When a shareholder votes by proxy, the shareholder executes a written directive instructing the entity to whom the proxy is granted how to vote on that shareholder's behalf at the meeting. Although state law typically authorizes the use of proxies to vote shares without requiring in-person attendance at a shareholder meeting,[5] registrants and other parties soliciting proxy authority must comply with the federal proxy rules.[6] Regulation of the proxy process has been a core function of the Commission since its inception.[7] Further, protecting the ability of shareholders to vote, including their right to elect directors through the proxy process, has been the focus of numerous Commission rulemakings and other efforts over the years.[8]

As described in greater detail in Section I.B of the Proposing Release (defined below), the current proxy rules do not allow shareholders voting by proxy in a contested election[9] to replicate the vote they could cast if they voted in person at a shareholder meeting. Shareholders voting in person at a meeting may select among all of the duly

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5 *See, e.g.*, Del. Code Ann. tit. 8, § 212.

6 15 U.S.C. 78n(a).

7 Section 14 of the Exchange Act authorizes the Commission to establish rules and regulations governing the solicitation of any proxy, consent or authorization in respect of any security registered pursuant to Section 12 of the Exchange Act. Registrants with reporting obligations only under Exchange Act Section 15(d) and foreign private issuers are not subject to the federal proxy rules with respect to solicitations of their own security holders.

8 *See, e.g.*, *Reexamination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process, and Corporate Governance Generally*, Release No. 34-13901 (Aug. 29, 1977) [42 FR 44860 (Sept. 7, 1977)]; *Regulation of Communications Among Shareholders*, Release No. 34-30849 (June 23, 1992) [57 FR 29564 (July 2, 1992)] ("Short Slate Rule Revised Proposing Release"); and *Regulation of Communications Among Shareholders*, Release No. 34-31326 (Oct. 16, 1992) [57 FR 48276 (Oct. 22, 1992)] ("Short Slate Rule Adopting Release"); *Roundtable on Proxy Voting Mechanics* (May 24, 2007) (materials available at https://www.sec.gov/spotlight/proxyprocess.htm); *Proxy Voting Roundtable* (Feb. 19, 2015) (materials available at http://www.sec.gov/spotlight/proxy-voting-roundtable.shtml); and *Roundtable on the Proxy Process* (Nov. 15, 2018) (materials available at https://www.sec.gov/proxy-roundtable-2018).

9 As used in this release, the term "contested election" refers to an election of directors where a registrant is soliciting proxies in support of nominees and a person or group of persons is soliciting proxies in support of director nominees other than the registrant's nominees.

nominated[10] director candidates proposed for election by any party in an election contest and vote for any combination of those candidates. Shareholders voting by proxy, however, do not have this same flexibility. The interplay between state and federal law means that shareholders voting by proxy generally are unable to choose a mix of dissident[11] and registrant nominees. The dissident and registrant each send a proxy card to shareholders, with the registrant's proxy card typically listing only the registrant's nominees and the dissident's proxy card typically listing only the dissident's nominees. State law provides that a later-dated proxy card invalidates an earlier-dated card.[12] Additionally, shareholders voting by proxy are limited by federal law in their choice of nominees by Exchange Act Rule 14a-4(d)(1), the "bona fide nominee rule,"[13] which provides that no proxy shall confer authority to vote for any person to any office for which a "bona fide nominee is not named in the proxy statement." The term "bona fide nominee" under Rule 14a-4(d) is a nominee who has "consented to being named in the proxy statement and to serve if elected."[14] Thus, in an election contest, one party cannot include the other party's nominees on its proxy card without the other party's nominees'

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[10] A duly nominated director candidate is a candidate whose nomination satisfies the requirements of any applicable state or foreign law provision and a registrant's governing documents as they relate to director nominations.

[11] The term "dissident" as used in this release refers to a soliciting person other than the registrant who is soliciting proxies in support of director nominees other than the registrant's nominees.

[12] *See, e.g.*, *Standard Power & Light Corp. v. Inv. Assocs.,* 51 A.2d 572, 608 (Del. 1947); *Parshalle v. Roy*, 567 A.2d 19, 23 (Del. Ch. 1989). *See also* R. Franklin Balotti, et al., *Delaware Law of Corporations and Business Organizations,* § 7.20 (3d ed. 2015) ("Except in the case of irrevocable proxies, a subsequent proxy revokes a former proxy. In determining whether a proxy is subsequent, the date of execution controls.").

[13] 17 CFR 240.14a-4(d)(1).

[14] 17 CFR 240.14a-4(d)(4).

consent. In practice, such consent is rarely provided.[15] Therefore, shareholders voting by proxy in a director election contest must choose between the dissident's or registrant's proxy card. This effectively precludes such shareholders from voting by proxy for a mix of director candidates from both sides' slates in the contest.

Although the Commission attempted to address some aspects of this problem by adopting the "short slate rule" in 1992, shareholders voting by proxy still lack the ability to make selections based solely on their preferences for particular director candidates as they could were they voting in person at a shareholder meeting.[16] For years, shareholders and their advocates have expressed concerns arising from being unable to choose a mix of dissident and registrant nominees when voting by proxy, and support for universal proxy has grown over time.[17]

In response to the concerns outlined above, the Commission proposed rule amendments in 2016 to mandate the use of universal proxy cards in contested director elections to allow shareholders to vote by proxy in the same manner as they could do if attending a shareholder meeting ("Proposed Rules").[18] In 2021, the Commission reopened the comment period for the Proposing Release to permit commenters to further

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[15] Even if a nominee consents to being named on the other party's proxy card, each party currently can decide whether to include the other's nominees for strategic or other reasons. These kinds of strategic decisions may impede shareholder voting options.

[16] 17 CFR 240.14a-4(d)(4). The short slate rule permits a dissident in certain circumstances to solicit votes for some of the registrant's nominees through the use of its proxy card where the dissident is not nominating enough director candidates to gain majority control of the board in the contest, thereby allowing shareholders using the dissident's proxy card to vote for a particular split ticket combination. However, as described in greater detail in Section I.B of the Proposing Release, shareholders voting on the dissident's proxy card are still limited to voting for those registrant nominees selected by the dissident, rather than any registrant nominee of their choice.

[17] *See* Section I.C of the Proposing Release and *infra* Section II.A.2 and II.A.3.

[18] The Proposed Rules were set forth in a release published in the Federal Register on November 10, 2016 (Release No. 34-79164) ("Proposing Release"), and the related comment period ended on January 9, 2017.

analyze and comment upon the Proposed Rules in light of developments since the publication of the Proposed Rules.[19] We received many comment letters in response to the Proposing Release and the Reopening Release.[20] After taking into consideration these public comments, which were generally supportive of the rulemaking, and developments in proxy contests since the Proposing Release, we are adopting the Proposed Rules substantially as proposed, with the exception of an increase in the minimum solicitation requirement (described in detail in Section II.D below) and other minor changes.

B. Overview of Final Amendments

The new rules will require use of a "universal proxy card" in all non-exempt director election contests. This universal proxy card must include the names of all duly nominated director candidates presented for election by any party and for whom proxies are solicited. Requiring a universal proxy card in non-exempt director election contests is the most effective means to ensure that shareholders voting by proxy are able to elect directors in a manner consistent with their right to vote in person at a shareholder meeting.[21]

The amendments that we are adopting today will not apply to investment companies registered under Section 8 of the Investment Company Act of 1940 or

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[19] This reopening of the comment period was set out in a release published in the Federal Register on May 6, 2021 (Release No. 34-91603) ("Reopening Release"). The comment period ended on June 7, 2021.

[20] Unless otherwise indicated, comment letters cited in this release are comment letters received in response to the Proposing Release and the Reopening Release, which are available at https://www.sec.gov/comments/s7-24-16/s72416.htm.

[21] Congress intended our proxy rules to effectuate shareholders' ability to fully and consistently exercise the "fair corporate suffrage" available to them under state corporate law. *See* H. R. Rep. No. 73-1383, 2d Sess., at 13 (1934). *See also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970); *J. I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964).

business development companies as defined by Section 2(a)(48) of the Investment Company Act of 1940 ("BDCs," and together with registered investment companies, "funds").[22] Funds were not covered by the Proposed Rules. In light of developments since 2016, as well as the comments that we have received, we believe further consideration of the application of a universal proxy mandate to some or all funds before deciding how to proceed with respect to funds is appropriate.

II. DISCUSSION OF FINAL AMENDMENTS

We are adopting the Proposed Rules largely as proposed to better align the federal proxy rules with a shareholder's ability to vote in person at a shareholder meeting. The final rules:

- Require the use of a universal proxy card by all participants in a non-exempt director election contest. The universal proxy card must include the names of both registrant and dissident nominees, along with certain other shareholder nominees included as a result of proxy access;
- Expand the determination of a "bona fide nominee" to include a person who consents to being named in any proxy statement for a registrant's next shareholder meeting for the election of directors;
- Require dissidents to provide registrants with notice of their intent to solicit proxies and to provide the names of their nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting;

[22] 15 U.S.C. 80a-8; 15 U.S.C. 80a-2(a)(48). BDCs are a category of closed-end investment companies that are not registered under the Investment Company Act, but are subject to certain provisions of the Investment Company Act. *See* Proposing Release at n.178.

- Require registrants to notify dissidents of the names of the registrants' nominees no later than 50 calendar days before the anniversary of the previous year's annual meeting;
- Require dissidents to file their definitive proxy statement by the later of 25 calendar days before the shareholder meeting or five calendar days after the registrant files its definitive proxy statement;
- Require each side in a proxy contest to refer shareholders to the other party's proxy statement for information about the other party's nominees and refer shareholders to the Commission's website to access the other side's proxy statement free of charge;
- Require that dissidents solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting; and
- Establish presentation and formatting requirements for universal proxy cards that ensure that each party's nominees are presented in a clear, neutral manner.

We also are adopting, as proposed, changes to the form of proxy and proxy statement disclosure requirements applicable to all director elections. These amendments:

- Require proxy cards to include an "against" voting option in director elections, when there is a legal effect[23] to a vote against a director nominee;

[23] State law and the registrant's governing documents determine the voting standard for director elections, with director nominees generally elected under either a plurality voting standard or majority voting standard. They also determine whether an "against" voting option has a legal effect under the applicable voting standard. For example, under a plurality voting standard, a director nominee can be elected to the board with a single vote in favor of his or her election, with the "withhold or "against" votes having no impact on the outcome of the election.

- Require that the proxy card provide shareholders with the ability to "abstain" in a director election where a majority voting standard applies; and
- Require proxy statement disclosure about the effect of a "withhold" vote in an election of directors.

We discuss the final amendments in greater detail below.[24]

A. Mandatory Use of Universal Proxies in Non-Exempt Solicitations in Contested Elections

1. Proposed Rules

The Commission proposed to require the use of universal proxy cards in all non-exempt solicitations in contested director elections except those involving funds.[25] The Commission proposed that each side's proxy card in a contested director election must include the names of all nominees of both the dissident and registrant and the nominees of certain shareholders (i.e., proxy access nominees). In proposing the mandatory use of universal proxy cards in these kinds of contests, the Commission was guided by the principle that shareholders should enjoy the same ability to vote on a proxy card as they would have if attending a shareholder meeting in person.

2. Comments Received

A number of commenters expressed views on whether the use of a universal proxy card should be voluntary or mandatory. Most favored the mandatory approach because it more effectively replicates the voting options available through in-person

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[24] In addition to the substantive final amendments, we are making technical amendments to: (i) Rule 14a-3 (punctuational and related minor edits); and (ii) Rule 14a-4(b) and Note 3 to Rule 14a-6(a) (removal of obsolete references to vacated Rule 14a-11).

[25] *See* proposed Rule 14a-19(e).

voting at a shareholder meeting.[26] Some commenters favored a mandatory system to avoid logistical issues that would arise in the absence of such a system, and several commenters cited the potential for shareholder confusion arising from a voluntary approach.[27] Several commenters noted that an optional system would promote gamesmanship, and would lead to the use of a universal proxy card as a tactical strategy to benefit a particular participant in a contest.[28] Another noted that proxy contest

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[26] *See* letters dated Dec. 28, 2016, Sep. 7, 2017, Nov. 8, 2018, and Jun. 2, 2021 from Council of Institutional Investors ("CII"); letters dated Jan. 4, 2017 and Jun. 7, 2021 from Ohio Public Employees Retirement System ("OPERS"); letter dated Jan. 9, 2017 from Colorado Public Employees Retirement Association ("Colorado PERA"); letter dated Jan. 9, 2017 from Trian Fund Management, L.P. ("Trian"); letter dated Jan. 9, 2017 from Ad Hoc Coalition of Institutional Investors in Closed-End Funds ("Ad Hoc Coalition"); letter dated Jan. 9, 2017 from CFA Institute ("CFA Institute"); letters dated Jan. 11, 2017 and Jun. 16, 2021 from Securities Industry and Financial Markets Association ("SIFMA"); letter dated Jan. 11, 2017 from State Board of Administration of Florida ("SBA-FL"); letter dated Jan. 9, 2017 from United Brotherhood of Carpenters and Joiners of America ("Carpenters"); letter dated Jan. 9, 2017 from Office of the Comptroller, State of New York ("NY Comptroller"); letter dated Jan. 9, 2017 from California State Teachers' Retirement System ("CalSTRS"); letter dated Jan. 6, 2017 from American Federation of State, County and Municipal Employees ("AFSCME"); letters dated Dec. 19, 2016 and Jun. 7, 2021 from Investment Company Institute ("ICI"); letter dated Jun. 7, 2021 from Institutional Shareholder Services Inc. ("ISS"); letter dated Jun. 4, 2021 from Elliott Investment Management L.P. ("Elliott"); letter dated Jun. 3, 2021 from Canadian Coalition for Good Governance ("CCGG"); letter dated Jun. 4, 2021 from Domini Impact Investment LLC ("Domini"); letters dated Jan. 9, 2017 and Jun. 7, 2021 from Better Markets ("BM"); letter dated Jun. 7, 2021 from Mediant, Inc. ("Mediant"); letter dated Jun. 28, 2021 from Principles for Responsible Investment ("PRI"); letter dated Jun. 7, 2021 from 41 Signatories with AUM of $309,413,549,298; letter dated Jun. 7, 2021 from Professor Scott Hirst, Boston University School of Law ("Prof. Hirst"), letter dated Jun. 15, 2021 from Matthew P. Lawlor ("M. Lawlor"); letter dated Jun. 17, 2021 from Chris Fowle ("C. Fowle"); letter dated Apr. 19, 2021 from Undisclosed Majority Shareholder in Numerous Ventures ("Anonymous 1"); letter dated Dec. 8, 2017 from Eamonn Burke ("E. Burke"). *See also* Recommendation of the SEC Investor Advisory Committee (IAC): Proxy Plumbing, dated Sep. 5, 2019, available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-proxy-plumbing.pdf ("IAC Report"). The IAC Report indicated support for the mandatory universal proxy system proposed, while noting that a minority of Committee members favored making universal proxy voluntary rather than mandatory. Previously, as discussed in the Proposing Release, in 2013, the IAC recommended that we explore revising our proxy rules to provide proxy contestants with the option to use a universal proxy card in connection with short slate director nominations. Exchange Act Section 39(g)(2) requires the Commission to "promptly issue a public statement— (A) assessing the finding or recommendation of the [Investor Advisory] Committee; and (B) disclosing the action, if any, the Commission intends to take with respect to the finding or recommendation." We have carefully considered the recommendations of the IAC on the use of universal proxy cards in connection with this rulemaking.

[27] *See* letters from CalSTRS; SIFMA; ISS.

[28] *See* letters from SIFMA; CCGG.

participants would have little incentive to use a universal proxy card under an optional system.[29] One commenter advocated a mandatory system that registrants could opt out of with approval of a majority of shareholders.[30]

Several commenters favored making the use of a universal proxy card optional. One noted that this would allow the Commission to study the effect of its use before making it mandatory.[31] Another advocated that registrants be able to opt out of a universal proxy requirement through a board vote.[32] Two commenters argued that shareholders should have to demonstrate a continued and significant ownership stake in a registrant in order to trigger the use of a universal proxy card.[33]

Some commenters did not support the use of a universal proxy card. Some argued that a mandate would increase the number of proxy contests and thereby expose more registrants to costly distraction or increased influence of short-term activist investors at the expense of other investors.[34] Two of these commenters argued that the mandatory use of universal proxies would "encourage balkanization" of the boards of public companies by facilitating "mix and match" voting between nominees from different slates of director candidates, ultimately providing a disincentive for companies

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29 *See* letter dated Jan. 9, 2017 from Fidelity Investments ("Fidelity").

30 *See* letter from Prof. Hirst.

31 *See* letter dated Jan. 4, 2017 from Davis Polk & Wardwell LLP ("Davis Polk").

32 *See* letter dated Jun. 7, 2021 from Sidley Austin LLP ("Sidley").

33 *See* letter from Sidley and letters dated Jan. 10, 2017 and Jun. 7, 2021 from Society for Corporate Governance ("Society") (comparing universal proxy to Rule 14a-8 and vacated Rule 14a-11).

34 *See* letters dated Jan. 9, 2017 and Jun. 7, 2021 from Center for Capital Markets Competitiveness, U.S. Chamber of Commerce ("CCMC"); letter dated Jan. 9, 2017 from Corporate Governance Coalition for Investor Value ("CGCIV"); letter dated Apr. 30, 2021 from International Bancshares Corporation ("IBC"); letters from Society. The letters from CCMC and CGCIV also objected to the mandatory use of a universal proxy on First Amendment grounds. *See* Section II.F below for additional detail.

to go public in the United States.[35] Similarly, another commenter claimed that the "mix and match" voting enabled by universal proxy cards could result in suboptimal board compositions in which board members lack complementary skill sets.[36] Various commenters who opposed the adoption of a universal proxy requirement contended that there was not a compelling reason to change the existing system[37] and noted that adoption of universal proxy could have unintended consequences, such as shareholder confusion and more frequent disqualification of defective ballots.[38] Several commenters argued that a universal proxy requirement would increase the influence of proxy advisory firms.[39] One commenter opposed the proposed amendments, suggesting that the Proposed Rules "would likely exceed the Commission's authority under the Exchange Act" and arguing that a universal proxy requirement represents a "substantial change" in policy that the Commission had not justified under the Administrative Procedure Act.[40] That commenter noted that if the Commission proceeds with the rulemaking, it should adopt an optional approach rather than a mandatory one.

Another commenter supported mandated universal proxy for operating companies, but expressly opposed its use for funds, in part due to the additional protections afforded by the Investment Company Act of 1940.[41]

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35 *See* letters from CCMC; CGCIV.

36 *See* letter dated Jan. 3, 2017 from National Association of Corporate Directors ("NACD").

37 *See*, *e.g.*, letters from Davis Polk; CCMC; CGCIV.

38 *See, e.g.*, letters from CCMC; CGCIV.

39 *See* letters from Sidley; CCMC; CGCIV.

40 *See* letter from Davis Polk.

41 *See* letters from ICI.

3. Final Amendments

We are adopting Rule 14a-19(e), as proposed, to require the mandatory use of universal proxy cards by operating companies in all non-exempt director election contests. A mandatory system better protects the shareholder voting franchise, while avoiding the confusion that could result from a voluntary universal proxy system, where one party or the other strategically uses universal proxy only when they perceive it to be to their advantage. The logistics of how votes are cast through the proxy voting system should not affect the substantive voting options of shareholders, and therefore potential outcomes of the vote. The ability of shareholders to fully exercise their right under state law to elect their preferred candidates through the proxy process represents a key reason to adopt the rule amendments. In particular, we note that under existing rules, institutional and other large shareholders can split their vote between registrant and dissident candidates – albeit with effort and expense – because they can arrange for a representative to attend the shareholder meeting and vote in person. Retail and other smaller investors, however, are unlikely to have the resources or sophistication to be able to do so.[42] The mandatory use of universal proxy cards would address this disparity and remove this impediment to retail investors' ability to exercise their right to vote to the full extent allowed by state law.

Use of a universal proxy card should not be dependent on the potentially self-interested considerations of the contesting parties, the registrant's board of directors, or

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[42] While an increase in virtual meetings and corresponding technological advances may theoretically make it easier for certain retail investors to attend and vote at meetings, most shareholders (including many retail investors) hold their shares in "street name" and, as such, would need to obtain a legal proxy from the securities intermediaries that hold their shares (such as a broker-dealer) in advance to vote at a virtual shareholder meeting, as they would need to do to vote at the meeting in person. We therefore expect that the vast majority of retail investors will continue to vote by proxy and will continue to rely on the ability to do so.

any controlling shareholders, as it would be under an optional system, or one where a registrant (through, for example, a board or shareholder vote) could opt out of a universal proxy requirement. Mandating a universal proxy is a more efficient and effective means to achieve the objective of allowing shareholders to elect their preferred candidates through the proxy process. Similarly, a universal proxy requirement should not be dependent on the size of a dissident's equity stake in a registrant or the period of time it has maintained its equity position. The purpose of requiring a universal proxy is to allow shareholders to exercise their right to vote for directors in the same manner as they could vote through in-person attendance at a shareholder meeting. Conditioning a universal proxy mandate on a minimum ownership threshold or holding period, as certain commenters advocated, would be contrary to this purpose. Conditioning a universal proxy mandate in such manner would inappropriately subject shareholders' ability to vote in director election contests through the proxy process to conditions that are not imposed upon shareholders' ability to vote if attending a shareholder meeting.

In response to commenters arguing for an optional universal proxy system, an optional system without additional accompanying rule changes would raise problems not presented by a mandatory requirement, such as issues related to how and when shareholders presented with a universal proxy card would access information about the other party's nominees in order to make an informed voting decision. Mandating a universal proxy in all non-exempt election contests is less likely to cause shareholder confusion than an optional system which would operate differently, depending on whether one or both sides elected to opt in or opt out of universal proxy. Finally, in response to the commenter who advocated an optional system to allow us to study the impact of universal proxy, we note that we already have experience with optional

universal proxy. Our existing proxy rules already effectively allow optional universal proxy for registrants because a registrant can require dissident nominees to consent to being named on the registrant's proxy card as part of an advance notice bylaw provision and associated director and officer (D&O) questionnaire, a tactic used by registrants on multiple occasions.[43] This form of optional universal proxy, however, falls well short of meeting the objectives of our rulemaking. Use of this tactic creates an unfair advantage for registrants, who are then able to place dissident nominees on the registrant's proxy card without granting dissidents the same ability to place registrant nominees on the dissident's cards. Further, use of universal proxy cards and the ability of shareholders to select their preferred mix of nominees would exist at the sole discretion of the registrant and would be subject to management's self-interest.

As discussed in Section IV.C.4 below, it is unclear whether the rule changes we are adopting will increase or decrease the number of proxy contests. Similarly, it is unclear whether they will increase the influence, directly or indirectly, of dissidents, including short-term activist investors, as some commenters predicted. Under current rules, a shareholder may be forced to make an "all or nothing" choice between one or the other soliciting party's proxy card. However, a universal proxy card may result in increased split votes where dissidents do not gain majority control of a board of directors in one election. We view the arguments that mandatory universal proxy will lead to distraction for registrants, hamstring directors, and lead to greater "balkanization" of boards of directors as unpersuasive. Even with the use of universal proxy cards,

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[43] For example, both the dissident group and the registrant used universal proxy cards at EQT Corporation's 2019 Annual Meeting. *See* DEFC14A filed May 20, 2019 by dissidents and DEFC14A filed May 22, 2019 filed by EQT Corp. The registrant but not the dissident group used a universal proxy card at Sandridge Energy's 2018 Annual Meeting. *See* DEFC14A filed May 10, 2018 by Sandridge Energy, Inc. and DEFC14A filed May 11, 2018 by dissidents.

registrants and dissidents will retain the same ability to advocate the election of their nominees and raise concerns about negative boardroom dynamics that they have today. Shareholders will continue to have the ability to evaluate these concerns, including potential "balkanization" of the board, when they make their voting decisions. The rule amendments we are adopting are intended to improve the mechanics of the proxy voting process, not influence its outcome. Further, it is not apparent that allowing shareholders to more easily base their vote on individual and collective characteristics of board candidates, rather than forcing an "either or" choice between dissident or registrant nominees, would negatively impact registrants or boardroom dynamics. We are also unaware of such arguments about mix and match voting being made in the context of in-person voting, where such a choice is already possible for larger shareholders and institutions who expend the effort to vote through an in-person representative. Lastly, even if the use of universal proxy will lead to greater frequency of "split" boards, it is unclear whether that effect will necessarily lead to detrimental changes in board dynamics, with some viewing a diversity of viewpoints among board members as a positive development.[44] The mandatory use of universal proxy cards will permit shareholders to choose their preferred mix of directors, taking into consideration both complementary skill sets and other board dynamics.

For the same reason, we do not believe the universal proxy requirement we are adopting will result in promoting the interests of special interest groups and short term activists, at the expense of shareholders generally. Even with the use of universal proxy cards, a dissident must ultimately persuade shareholders that its agenda is in their best

[44] *See infra* note 295 and accompanying text.

interests in order to successfully elect its nominees. Moreover, if elected to the board of directors, such dissident nominees will be subject to the same state-law fiduciary duties to the corporation and, and by extension, all of its shareholders as all other directors, many of whom are also commonly affiliated with other entities.

Similarly, it is unclear to us how these rule amendments, which improve the mechanics of the proxy process, would increase the influence of proxy advisory firms,[45] also referred to as "proxy voting advice businesses." These businesses provide voting recommendations to their clients, mainly institutional investors and investment advisers, who then may consider such recommendations as part of their decision-making process. The client, not the proxy voting advice business, retains the legal right to vote and makes the ultimate decision on how it wishes to exercise that right in the election.[46] In addition, investment advisers and other institutional investors using these recommendations are also subject to fiduciary duties and other legal obligations with respect to their proxy voting obligations. This would not change if universal proxy cards are used. Rather, the rule amendments we are adopting simply make it easier for the shareholder to vote for the nominees that it wants, regardless of whether they are from the dissident's slate or the registrant's slate.

In response to the commenter questioning our authority to adopt a universal proxy requirement,[47] the final rules are well within the plain language of the authority granted

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[45] Several commenters suggested that the use of universal proxies could increase the influence of proxy advisory firms. *See* letters from Sidley; CCMC; CGCIV.

[46] To the extent a proxy voting advice business has an interest in the director contest, such as a material relationship with the dissident or registrant, the federal proxy rules require the proxy voting advice business to disclose this conflict of interest, which may mitigate concerns about the objectivity of the advice.

[47] *See* letter from Davis Polk.

by Congress to the Commission under Section 14(a). The fact that the Commission in the past enacted measures that did not provide for universal proxies in no way suggests that the Commission lacked the statutory authority to do so.

In our view, the suggestion that the Commission has not provided a sufficient justification for these rules is unfounded. We are adopting these rules now because they best effectuate the Commission's goal of having proxy voting mirror the choices that a shareholder has in person at a meeting. As noted above, the Commission has long understood the limitations that the proxy rules place on a shareholder's ability to select its preferred mix of registrant and dissident nominees.[48] As discussed below, the Commission adopted the short slate rule in 1992 in an attempt to address this problem. Yet, the short slate rule has not resolved the problem, with its conditions limiting the full exercise of shareholders' ability to vote for director nominees through the proxy process. Further, based on the Commission staff's experience, substantial confusion exists regarding the use of the short slate rule, including by dissidents attempting to use it.

For many years, we have received comments from shareholders and their advocates expressing strong concerns about the limitations on their rights when voting by proxy.[49] Many commenters on the Proposing Release reiterated those concerns and supported a mandatory universal proxy system to address them.[50] Since the issuance of the Proposing Release in 2016, the call for universal proxy cards has persisted.[51] Further, voluntary use of universal proxy cards in director contests has increased since 2016,[52]

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48 *See, e.g.*, Short Slate Rule Revised Proposing Release and Short Slate Rule Adopting Release.

49 *See* Section I.C of the Proposing Release.

50 *See, e.g.*, letters from CII; OPERS; Trian, CalSTRS; Elliott; Domini; PRI.

51 *See, e.g.*, IAC Report; letter dated Aug. 6, 2020 from Universal Proxy Working Group ("UPWG").

52 *See supra* note 43 and accompanying text.

along with an increased presence of provisions in registrants' governing documents (such as advance notice bylaws) designed to facilitate the use of universal proxy cards including by requiring dissidents to provide consents for their nominees to be listed in the registrant's proxy materials. These provisions, however, do not typically provide dissidents with similar consents to include the registrant's nominees and, as discussed above, do not adequately address many shareholders' concerns. The concerns described above are valid and can be addressed through the universal proxy requirement we are adopting today. The fact that we previously took other steps to try to address some of these same concerns does not preclude us from making the changes now that will address the current voting limitations. Additionally, we have carefully considered the economic effects of the rule, including the costs and benefits to shareholders, in Section IV.C below.

We recognize that whether proxy contests become more frequent may depend in part on whether the rule amendments increase a dissident's chances of electing some or all of its nominees. We discuss the costs associated with proxy contests in Section IV.C below. However, assuming these rule amendments result in more frequent proxy contests, the ultimate decision on who is elected to the board of directors rests with shareholders. In this sense, the mere fact that a dissident mounts a proxy contest does not necessarily mean it will be successful unless shareholders are persuaded that its platform will benefit them and the registrant. Again, these decisions at the heart of corporate governance are best left to shareholders.

The additional disclosure and presentation provisions adopted today and described in greater detail below will help to avoid some of the concerns of those who do not favor mandatory universal proxies. For example, participants in a contested election

will not be required to include information about the opposing side's nominees in their own proxy statement. Rather, each side's proxy statement must direct shareholders to the opposing side's proxy statement for information about that participant's nominees.[53] Each universal proxy card will be subject to the formatting and presentation requirements in the revised rules we adopt today. These requirements are intended to ensure that each side's nominees are grouped together and clearly identified as such, and presented in a fair and impartial manner.[54] In addition, each universal proxy card must disclose the treatment of proxy cards containing over-votes and under-votes.[55] These disclosure and presentation mandates in our rule amendments are intended to avoid shareholder confusion that could result in an increase in defective ballots and shareholder disenfranchisement. As shareholders become more familiar with universal proxy cards in director election contests, any initial confusion will likely abate.[56] While we are mindful of the arguments that mandated universal proxy could have unintended consequences with respect to the mechanics of voting, the safeguards described above are intended to reduce that possibility.

B. Dissident's Notice of Intent to Solicit Proxies in Support of Nominees Other than the Registrant's Nominees

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53 *See* newly-adopted Item 7(h) of Schedule 14A.

54 *See* Rule 14a-19(e).

55 *See* Rule 14a-19(e)(7). By "under-votes," we mean instances in which a shareholder returns a proxy card in a director election contest but does not exercise a vote with respect to all of the board seats up for election at the relevant shareholder meeting.

56 Current proxy rules relating to split-ticket voting in a director election contest may also be confusing to shareholders. Rule 14a-4(d)(4) permits a dissident to "round out" the slate of nominees listed on its proxy card under specified circumstances. However, Rule 14a-4(d)(4)(ii) prevents a dissident from directly naming a director nominee whom the dissident supports. (*See* Section II.I below.) The staff has observed confusing descriptions in proxy statements and proxy cards as a result of this rule. We believe that shareholder confusion will decrease, not increase, as a result of the amendments we are adopting.

1. Proposed Rules

The Commission proposed to require the dissident to provide notice to the registrant of the names of the dissident's nominees no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date.[57] The proposed notice had to include a statement that the dissident intends to solicit the specified percentage of the voting power of the shares entitled to vote.[58]

2. Comments Received

Several commenters discussed the requirement that dissidents provide the registrant with the names of its nominees no later than 60 calendar days prior to the anniversary of the prior year's annual meeting date.

Many commenters supported the requirement as proposed.[59] Two commenters expressed concern that such requirement could have a chilling effect on any ongoing settlement discussions between the parties.[60] To avoid this, one commenter suggested adopting an exception that would temporarily exempt the dissident from the proposed notice requirement while settlement discussions between the parties are taking place.[61]

Other commenters expressed concern that the proposed deadline would compel the board of directors to vet nominees on an accelerated timeframe, to the detriment of shareholders at large, where a registrant's advance notice bylaw provision required

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57 *See* proposed Rule 14a-19(a) and (b).

58 *See* proposed Rule 14a-19(b)(3).

59 *See* letters from CII; Colorado PERA; CalSTRS; CFA Institute; SBA-FL; Carpenters; NY Comptroller; AFSCME.

60 *See* letters dated Jan. 9, 2017 and Jun. 7, 2021 from Olshan Frome Wolosky LLP ("Olshan"); Society.

61 *See* letters from Olshan.

dissidents to provide notice of their nominees before the 60-day period mandated in our proposed rules.[62] One commenter expressed concern that where a registrant has an advance notice deadline that falls after the dissident's 60 calendar day notice deadline (e.g., an advance notice deadline of 45 days prior to the anniversary of the prior year's meeting), the proposed notice requirement would give the registrant an unfair advantage in preparing for an activist campaign, since the dissident would have to reveal the identities of its nominees before it would be required to do so under the registrant's own governing documents.[63] This commenter suggested adopting an exception to the proposed notice requirement applicable to registrants that have advance notice bylaw provisions, such that the dissident's notice deadline would be the later of the currently proposed deadline or the registrant's own advance notice deadline.[64]

Several commenters supported allowing dissidents to launch a contest after the 60 calendar day deadline, as they could under existing rules, without the ability to use a universal proxy card.[65] Finally, one commenter suggested that the dissident's notice be made publicly available.[66]

3. Final Amendments

We are adopting, as proposed, the requirement that a dissident provide the registrant with the names of the nominees for whom it intends to solicit proxies no later

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62 *See* letters from CCMC; CGCIV; Society; IBC; Sidley.

63 *See* letters from Olshan.

64 *See* letters from Olshan.

65 *See* letters from CII; SBA-FL; Carpenters; NY Comptroller; CalSTRS; Colorado PERA; AFSCME.

66 *See* letter from Fidelity (arguing that such practice could serve as a means for investors who engage in securities lending to identify a potential contest before the record date for a meeting, thereby providing them with the ability to recall loaned shares).

than 60 calendar days before the anniversary of the previous year's annual meeting date.[67] If the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, Rule 14a-19(b)(1), as adopted, requires that the dissident provide notice by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant. Rule 14a-19 requires a dissident to indicate its intent to comply with the minimum solicitation threshold in the adopted rules by including in its notice a statement that it intends to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors.[68] Rule 14a-19 does not require a dissident to provide this notice to the registrant if the information required in the notice has already been provided in a preliminary or definitive proxy statement filed by the dissident by the deadline imposed by the rule. Rule 14a-19 also does not require a dissident to file the notice with the Commission or otherwise make the notice publicly available.

In our view, the Rule 14a-19(b) notice requirement is necessary to provide a definitive date by which the parties in a contested election will know that use of universal proxies has been triggered and to provide the parties with a definitive date by which they will have the names of all nominees to compile a universal proxy card. The 60-day deadline provides a definitive date far enough in advance of the meeting to give the

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[67] The rule also mandates that a dissident promptly notify the registrant if any change occurs with respect to its intent to solicit proxies in support of its director nominees. *See* Rule 14a-19(c).

[68] *See* Rule 14a-19(b)(3). *See also*, *infra* Section II.D for a discussion of the minimum solicitation requirement.

parties sufficient time to prepare a proxy statement and form of proxy in accordance with the universal proxy requirements.[69] In addition, 60 calendar days before the anniversary of the previous year's annual meeting date does not represent a significant additional burden for most dissidents. The deadline that we are adopting for the notice is 30 calendar days later than the deadline found in most advance notice bylaws, which typically require notice to be delivered no earlier than 120 days and no later than 90 days prior to the first anniversary of the prior year's annual meeting.[70] Based on a review of the filings for the 101 contested elections initiated from 2017–2020, we estimate that dissidents provided some form of notice of their intent to nominate candidates for election to the board of directors 60 or more calendar days prior to the first anniversary of the prior year's annual meeting in 90% of the contests.[71]

A dissident's obligation to comply with the notice requirement is in addition to its obligation to comply with any applicable advance notice provision in the registrant's

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69 For many registrants, the record date for determining shareholders entitled to notice of the meeting cannot be more than 60 days before the date of such meeting. *See, e.g.*, Del. Code Ann. tit. 8, § 213. Thus, as a practical matter, registrants very rarely file their definitive proxy statement prior to such date.

70 *See* Sullivan & Cromwell LLP, *Proxy Access Bylaw Developments and Trends*, at 4 (Aug. 18, 2015), available at https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Proxy_Access_Bylaw_Developments_and_Trends.pdf ("S&C 2015 Report"); Wachtell, Lipton, Rosen & Katz, *Nominating and Corporate Governance Committee Guide*, at 22 (2015), available at http://www.wlrk.com/files/2015/NominatingandCorporateGovernanceCommitteeGuide2015.pdf. *See also* Arthur Fleischer, Jr., Gail Weinstein and Scott B. Luftglass, *Takeover Defense: Mergers and Acquisitions* (9th ed. 2020) (stating, "As of December 31, 2020, over 98% of the S&P 500 firms had at least a 60-day advance-notice requirement for board nominations and/or shareholder proposals").

71 The sample ("contested elections sample") is based on staff analysis of EDGAR filings for election contests with dissident preliminary proxy statements filed in calendar years 2017 through 2020, other than election contests involving funds. The staff has identified 101 proxy contests involving competing slates of director nominees during this time period. For purposes of determining the earliest date the dissident provided some form of notice of its intent to nominate candidates for election to the board, staff considered disclosure in the dissident's definitive additional soliciting materials filed under Rule 14a-12, disclosure in amendments to the dissident's Schedule 13D and disclosure in both the registrant's and dissident's proxy statements.

governing documents. Rule 14a-19's notice requirement is a minimum period that does not override or supersede a longer period established in the registrant's governing documents.[72] In most cases, Rule 14a-19(b) will not meaningfully impact dissidents because, as discussed above, most registrants' advance notice provisions impose an earlier deadline to provide notice of a dissident's nominees.[73] In those cases, the new requirement does not affect timing considerations, as dissidents would already have signaled to registrants their intent to launch a contest pursuant to the registrants' bylaw requirements.

We acknowledge that where the registrant does not have an advance notice provision in its governing documents, or has such a provision requiring less than 60 days' advance notice, Rule 14a-19(b) imposes an additional obligation. Such late-developing contests are rare.[74] The Rule 14a-19(b) 60-day notice requirement is designed to ensure the orderly conduct of proxy contests under the new universal proxy framework and justifies the potential burden that may arise in the few director contests at companies with no advance notice provision or a provision requiring less than 60 days' advance notice.

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72 Several commenters expressed concern that the proposed 60-day deadline would shorten the notice that registrants receive of impending proxy contests. *See* letters from CCMC; CGCIV; Society; IBC. To clarify and address these concerns, where an advance notice bylaw provision requires dissidents to provide earlier notice of its nominees, that longer time period controls. Rule 14a-19(b) establishes a minimum, not a maximum, notice period.

73 According to a law firm report, 99% of the S&P 500 and 95% of the Russell 3000 had advance notice provisions at 2020 year-end. *See* WilmerHale, *2021 M&A Report*, at 6 (2021), available at https://www.wilmerhale.com/en/insights/publications/2021-manda-report (*citing* www.SharkRepellent.net) ("WilmerHale M&A Report").

74 Based on a review of the contested elections sample, *see supra* note 71, the staff found that dissidents provided notice of their intent to nominate director candidates fewer than 60 calendar days prior to the shareholder meeting date in 10% of the contests.

Despite some commenters' suggestions,[75] we are not adopting exceptions to the 60-day notice deadline imposed by new Rule 14a-19. The universal proxy requirement we are adopting is designed to ensure consistency and predictability in election contests; exceptions to the 60-day deadline would likely invite gamesmanship, create confusion, and fundamentally undermine the goals of the rulemaking. As discussed above, the orderly use of universal proxy cards in director election contests requires timely notice to the registrant, with the 60-day deadline in Rule 14a-19(b) establishing a baseline for such notice.[76] Exceptions to this deadline, or requiring less than 60 days' advance notice, could lead to confusion among registrants, dissidents, and shareholders, as well as increase the risk that universal proxy cards and other proxy materials would not be delivered in a timely and orderly manner. Finally, in response to the commenters who supported allowing contests to take place after the 60-day deadline,[77] we would note that while dissidents who are unable to meet the 60-day notice deadline would be prevented from conducting an election contest under the rule amendments we are adopting,[78] such dissidents would not be prevented from taking other actions to attempt to effectuate changes to the board, such as initiating a "vote no" campaign, conducting an exempt solicitation, or calling a special meeting (to the extent permitted under the registrant's bylaws) to remove existing directors and appoint their own nominees to fill the vacancies.

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75 *See*, in particular, letters from Olshan.

76 Further, as previously noted, most registrants require advance notice under their governing documents far earlier than the Rule 14a-19(b) notice requirement.

77 *See supra* note 65 and accompanying text.

78 In our view, this is appropriate when balanced against the goals of the rulemaking and the necessity of the notice period for the orderly solicitation process under a mandatory universal proxy system.

The Rule 14a-19(b) notice requirement should not deter settlements between dissidents and registrants. Under current market practice, settlements often occur after the parties have filed their proxy statements and even after they have begun soliciting. The new notice requirement therefore is unlikely to affect this practice. Finally, the purpose of the notice requirement is not served by requiring that the notice be made public. However, in practice, each of the dissident and the registrant is likely to publicize the sending of the notice voluntarily.[79]

C. Registrant's Notice of Its Nominees

1. Proposed Rules

Similar to the notice required from a dissident under Rule 14a-19(b), the Commission proposed to require the registrant to notify the dissident of the names of its nominees unless the names have already been provided in a preliminary or definitive proxy statement filed by the registrant.[80] For the registrant, the Commission proposed that the deadline for such notice be no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date.

2. Comments Received

Relatively few commenters addressed this proposed requirement. Two commenters expressly supported the proposed notice requirement for registrants.[81] Three

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[79] For example, depending on the particular facts and circumstances, the registrant may disclose the notice under its Form 8-K filing obligations. We acknowledge the commenter who suggested that a publication requirement could be beneficial to those investors who engage in securities lending, but we see securities lenders' voting practices and record date disclosure practices as outside the scope of this rulemaking, with any concerns more appropriately addressed through a separate effort.

[80] *See* proposed Rule 14a-19(d).

[81] *See* letters from CalSTRS; CII.

others argued in favor of establishing the same notice deadline for registrants and dissidents.[82] One of these commenters believed the proposed later deadline for registrants would give registrants a significant strategic advantage over dissidents in the solicitation.[83] This commenter suggested that registrants should be required to publicly announce their nominees before dissidents are required to provide notice of their nominees.[84] By contrast, two commenters opposed any notice requirement for registrants.[85]

3. Final Amendments

We are adopting Rule 14a-19(d) as proposed. As discussed in the Proposing Release and as explained above in the context of the dissident's notice deadline, notification deadlines are important in a mandatory universal proxy system to provide the parties with a definitive date by which they will have the names of all nominees to compile a universal proxy card. Absent such a requirement for registrants, dissidents could face an informational and timing disadvantage in a universal proxy system. Registrants would know the names of dissident nominees no later than 60 days prior to the meeting,[86] while dissidents would not necessarily know the names of the registrant nominees until the registrant files its preliminary proxy statement, which is only required to be filed at least 10 calendar days before the definitive proxy statement is first sent to

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82 *See* letters from Olshan; CFA Institute; Elliott.

83 *See* letters from Olshan.

84 *See* letters from Olshan.

85 *See* letters from Society; Sidley.

86 Because the deadline under proposed Rule 14a-19(b)(1) is tied to the anniversary of the previous year's annual meeting date, 60 calendar days before the meeting date approximates the latest date on which registrants would know the names of dissident nominees.

shareholders and may be filed much closer to the meeting date.[87] In that case, dissidents would have to wait to file their definitive proxy statement and proxy card until the registrant filed its preliminary proxy statement with the names of the registrant nominees.

A deadline that is 10 calendar days after the latest date the registrant will receive the dissident's notice of nominees is appropriate because it provides a sufficient period of time for the registrant to consider the dissident's notice, finalize its nominees, and respond with its own notice of nominees. The 10-day period is appropriate, given that the dissident's notice of nominees may be the first indication of a contested solicitation that the registrant receives. Moreover, the 50-day deadline is appropriate for providing dissidents with timely access to the names of registrant nominees for purposes of preparing a universal proxy card. While the deadline for registrants is 10 days after the deadline for dissidents, as a practical matter, dissidents are unlikely to be disadvantaged because registrant nominees are often existing directors about whom information will already be available.

Based on a review of recent contested elections and the staff's experience, dissidents typically do not file their definitive proxy statement more than 50 calendar days before the meeting date.[88] Thus, based on this market practice, we would not expect the rules adopted today to delay the timing of the filing of dissident's definitive proxy statement.

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87 *See*, as adopted, Rule 14a-19(b)(1); 17 CFR 240.14a-6(a).

88 Because the deadline under Rule 14a-19(d) is tied to the anniversary of the previous year's annual meeting date, 50 calendar days prior to the meeting date approximates the latest date on which registrants would be required to notify the dissident of the names of the registrant's nominees. Based on a review of the contested elections sample, *see supra* note 71, we estimate that dissidents filed their definitive proxy statement more than 50 calendar days prior to the shareholder meeting date in 20% of the contests.

It is possible that a registrant could provide notice of the names of its nominees under Rule 14a-19 and later change its nominees. As with the notice requirement for dissidents, Rule 14a-19(d), as adopted, requires a registrant to promptly notify the dissident of any change in the registrant's nominees. If there is a change in the registrant's nominees after the dissident has disseminated a universal proxy card, the dissident could elect, but would not be required, to disseminate a new universal proxy card reflecting the change in registrant nominees. Each side will generally be incentivized to amend its own card if such a change occurs to make it more appealing to shareholders, who could otherwise turn to the other side's universal proxy card for a current list of director nominees. Votes for an individual nominee who withdraws his or her name from consideration are generally disregarded pursuant to state law, as under current rules.

D. Minimum Solicitation Requirement for Dissidents

1. Proposed Rules

The Commission proposed, as a key piece of the new universal proxy requirement, that the dissident in a contested election be required to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors. The Commission also proposed that the dissident would need to affirm its intention to meet the minimum solicitation requirement by making a statement to that effect in its proxy materials and in its notice to the registrant.[89]

The minimum solicitation requirement was intended to strike the appropriate balance to ensure that, where a universal proxy requirement is implemented, dissidents

[89] *See* proposed Rule 14a-19(a)(3) and (b)(3).

must still engage in meaningful independent solicitation efforts in order to have their director nominees elected. Current proxy rules do not obligate a dissident to solicit any number of shareholders or percentage of voting power in an election contest; rather, current rules only require a dissident to furnish a proxy statement to each person solicited.[90] The Proposed Rules were based on the premise that, while registrants would have to include dissident nominees on their universal proxy card, dissidents would be subject to a new requirement to solicit a minimum percentage of voting power. The concept of a minimum solicitation threshold for dissidents remains central to the universal proxy requirement we are adopting, and we have increased the threshold for the reasons discussed below.

2. Comments Received

We received significant comment on the proposed minimum solicitation requirement for dissidents. Initially, there was significant support for the majority minimum solicitation requirement proposed.[91] When the comment period was reopened in 2021, however, most commenters who addressed the issue favored an increased minimum solicitation requirement.[92] Most of those advocating an increased solicitation

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[90] *See* 17 CFR 240.14a-3.

[91] *See* letters from ICI; CII; CalSTRS; CFA Institute; SBA-FL; Carpenters; NY Comptroller; Colorado PERA; AFSCME.

[92] *See* letters from ICI; Society; CCMC; OPERS; Mediant; Elliott; letter dated May 27, 2021 from American Business Conference ("ABC"). CII, in its third letter submitted to the comment file, dated Nov. 8, 2018, indicated that, while it continued to agree with the minimum solicitation requirement as originally proposed, it would – in light of concerns expressed by then-Chairman Clayton – support moving to a higher threshold in the final rule that would (i) increase the minimum solicitation requirement to 75% and (ii) require that the total number of persons solicited exceeds 10. In its fourth and final letter submitted to the comment file, dated Jun. 2, 2021, CII indicated support for moving to a minimum solicitation threshold of two-thirds of outstanding voting power. *See also* letter from UPWG, which states that a two-thirds dissident minimum solicitation requirement "could also be workable," while noting that its members held differing views on the subject. *See also* IAC Report, which also supports increasing the dissident minimum solicitation threshold to 67%.

threshold for dissidents recommended either two-thirds or 75% of the voting power. Two commenters advocated a 100% minimum solicitation requirement for dissidents in order to treat retail investors equally with institutional investors and because, as a practical matter, the registrant will solicit all shareholders as well.[93] Two commenters recommended that the Commission adopt a requirement that all soliciting parties solicit proxies from the same number of shareholders, which in practice would likely mean all shareholders (because registrants typically solicit all shareholders).[94]

Another commenter urged a minimum solicitation threshold of a majority of shareholder accounts (versus voting power) entitled to vote on director nominations, asserting that this would help ensure meaningful dissident solicitation efforts.[95] Another commenter suggested that the Commission consider whether an additional requirement that a minimum number of registered shareholders are solicited is necessary to prevent frivolous use of universal proxy.[96]

One commenter suggested that, "as a compliance mechanism, a dissident should provide the registrant with a written statement indicating that the dissident has taken the necessary steps to solicit shareholders of at least a majority of the voting power."[97] Another commenter suggested that registrants should reimburse dissidents for the reasonable costs associated with the solicitation process when at least 50% (or a more appropriate percentage established by the Commission) of a dissident's nominees are

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93 *See* letters from SIFMA; Mediant.

94 *See* letters from BM; Mediant.

95 *See* letter from Elliott.

96 *See* letter from CalSTRS.

97 *See* letter from CalSTRS.

elected.[98] Another commenter opposed any type of solicitation requirement for dissidents.[99]

3. Final Amendments

For reasons described in more detail in the Proposing Release,[100] a universal proxy requirement without a minimum solicitation requirement could enable dissidents to capitalize on the registrant's solicitation efforts while relieving dissidents of the time and expense necessary to undertake meaningful solicitation efforts, thereby potentially exposing registrants to frivolous proxy contests. The minimum solicitation requirement establishes a fundamentally important check in that regard.[101]

After careful consideration of the many comments received on this topic, and an updated economic analysis of the costs and benefits of setting the minimum solicitation threshold at various levels, we have decided to adopt the requirement that dissidents solicit holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors. We have raised the threshold from a majority of the voting power to 67% of the voting power in response to commenters' concerns that setting the threshold at the proposed majority of the voting power would insufficiently deter the potential for "freeriding" of dissident nominees on the registrant's proxy card.

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98 *See* letter from BM.

99 *See* letter dated Dec. 5, 2016 from Bulldog Investors, LLC ("Bulldog") (asserting that "The Commission seems troubled by the prospect that such a condition is needed to deter 'nominal' or 'frivolous' proxy contests but fails to clearly articulate the actual harm resulting from such contests").

100 *See* Proposing Release at Section II.B.4.

101 In response to the commenter who questioned whether actual harm results from frivolous contests, unserious contests launched by dissidents who are not truly invested in the registrants they target impose costs on those registrants and their shareholders without a corresponding benefit. *See supra* Section II.D.2 (discussing comments regarding such contests).

A 67% threshold represents an appropriate balance between achieving the benefits of the universal proxy requirement for shareholders and preventing dissidents from capitalizing on the inclusion of dissident nominees on the registrant's universal proxy card without undertaking meaningful solicitation efforts. Comments from a wide range of market participants, including comments received from the Universal Proxy Working Group and the IAC indicated that a 67% threshold enjoys broad support and represents a reasonable compromise between the competing policy objectives related to this topic.[102]

The increase in the dissident minimum solicitation requirement to 67% should mitigate concerns that the originally-proposed threshold would have incentivized dissidents to solicit only the minimum number of shareholders while ignoring all others, particularly retail shareholders with small holdings. Notably, our analysis of data provided by a proxy services provider demonstrates that dissidents overwhelmingly tend to solicit a substantial majority of voting power despite not being subject to any minimum solicitation threshold in contested elections.[103] We agree that a higher threshold better incentivizes dissidents to engage and solicit votes from more shareholders without imposing an undue burden on dissidents. As a practical matter, those shareholders who are not solicited by the dissident will receive the registrant's proxy materials with the names of the dissident's nominees and information on how to access the dissident's materials on the Commission's website. Therefore, those shareholders who wish to do so

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102 *See* letter from UPWG and IAC Report.

103 Based on industry data from a proxy services provider, all dissidents solicited a number of shareholders that exceeded a 67% threshold of shares entitled to vote in a sample of 31 proxy contests for annual meetings held between July 1, 2018 and June 30, 2019. In addition, data provided by a proxy services provider for an earlier sample of 35 proxy contests from June 30, 2015 through April 15, 2016, which we used in the economic analysis in the Proposing Release, show that only two dissidents (around 6% of the sample) solicited less than 67% of the shares entitled to vote. *See infra* Section IV.C.2.a.

can take steps to access information about dissident nominees before exercising their vote, whether or not they are solicited by the dissident. As noted above, current proxy rules do not require a dissident to solicit any minimum number of shareholders, so the 67% minimum solicitation threshold we are adopting represents an important step forward in establishing a minimum requirement for dissidents to engage with shareholders.

A requirement for dissidents to solicit holders of 100% of the voting power, as some commenters recommended, would represent a substantial burden on dissidents and would likely deter bona fide efforts by dissidents, particularly those with fewer resources, to elect directors to a registrant's board.[104] While we recognize that a minimum solicitation threshold of anything less than 100% of voting power may mean that dissidents may exclude some retail shareholders from their solicitation efforts, as noted above, current proxy rules do not contain a requirement to solicit any minimum number of shareholders. Under the rules we adopt today, as under current rules, the primary incentive for a dissident to solicit is to have its director nominees elected, which remains more likely the more shareholders the dissident solicits. In addition to the sizeable costs imposed by a 100% voting power solicitation requirement, such a requirement would represent a drastic change from current proxy rules, which do not mandate that dissidents solicit even a single shareholder. In establishing a minimum solicitation requirement for dissidents, we are cognizant of the fact that those soliciting on behalf of an incumbent board of directors can, win or lose, routinely expect to be reimbursed by the company for their costs under state law, while a dissident's only hope of reimbursement occurs if its

[104] *See infra* Section IV.C.5.b.

solicitation succeeds, or if it otherwise reaches a settlement with the registrant.[105] A significant increase in the minimum solicitation threshold may therefore further tip the economic scales in favor of the registrant. Finally, given the practical possibility of a very small number of shareholders being unintentionally omitted from a proxy solicitation, we would envision justifiable concerns regarding compliance, and the potential for related gamesmanship contrary to shareholder interests – in the form of registrants seeking to take advantage of dissidents' technical or immaterial failures to solicit every last shareholder account – if a 100% minimum threshold were adopted.

One commenter suggested imposing a threshold based on a minimum number of registered shareholders in addition to a voting power threshold "to prevent frivolous use of the Universal Proxy rule."[106] We do not agree that such a requirement is necessary to prevent proxy contests where dissidents have no intention of conducting their own solicitations. We note that there are relatively few registered shareholders, as the vast majority of voting shares of public companies are held in "street name" through securities intermediaries (such as broker-dealers).[107] Imposing an additional requirement for dissidents to solicit those relatively few registered shareholders when most voting shares are held by "street name" shareholders would increase the burdens on dissidents while doing little to address the freeriding concerns discussed above.

For similar reasons, a requirement for the dissident to solicit a minimum number of all shareholder accounts (both registered and "street name" shareholders), as suggested

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105 *See* IAC Report.

106 *See* letter from CalSTRS.

107 *See Concept Release on the U.S. Proxy System*, Release No. 34-62495 (Jul. 14, 2010) [75 FR 42982 (Jul. 22, 2010)], at Section II.A, for an explanation of registered shareholders and "street name" shareholders.

by one commenter, could impose significantly higher burdens on dissidents, particularly those seeking to effect change at large, widely-held public companies.[108] A requirement to solicit a minimum of 67% or even a majority of the shareholder accounts could result in dissidents having to deliver proxy statements and universal proxy cards to thousands or tens of thousands of shareholder accounts, including those that have relatively few shares entitled to vote on the director election. The high cost of such deliveries could unduly deter many dissidents, particularly those with fewer resources, from attempting to effect change by contesting the election of registrants' nominees. Such a burden is unnecessary to address the freeriding concerns underlying the minimum solicitation requirement.

We have not adopted a special mechanism for ensuring compliance with the minimum solicitation requirement because existing proxy rules are adequate in that regard. If a dissident fails to meet the 67% minimum solicitation threshold, that failure would constitute a violation of Rule 14a-19 and the dissident would face the same liability as if it had violated any other proxy rules. In addition, Rule 14a-19(a)(3) requires dissidents to include a statement in the proxy statement or form of proxy that it intends to solicit holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors. The dissident would be subject to liability under Exchange Act Rule 14a-9, which prohibits material misstatements or omissions in proxy soliciting materials, if such a statement is false.

In response to the suggestion that registrants reimburse dissidents for the reasonable costs associated with the solicitation process when at least 50% of a dissident's nominees are elected, the universal proxy rules are not intended to address the

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[108] *See infra* notes 390-397 and accompanying text for a detailed discussion of the potential costs associated with such a requirement.

appropriate cost-sharing between registrants and dissidents for soliciting fees, which is a separate issue. The purpose of the minimum solicitation requirement is to prevent freeriding by dissidents who want to take advantage of the benefits of the universal proxy requirement but do not intend to undertake meaningful solicitation efforts. We also note that registrants often have policies in their governing documents outlining when reimbursement can be sought, and the universal proxy requirement is not intended to intrude into those arrangements.

We acknowledge the concern regarding some retail investors not receiving proxy materials from dissidents electing to solicit the minimum required. Increasing the minimum solicitation threshold to 67% of the voting power may help address this concern. However, as explained above, we must balance this concern against the risk of imposing undue costs on dissidents and thereby deterring legitimate, potentially value-enhancing contests.

Finally, we recognize any minimum solicitation requirement imposes on the dissident the costs of delivering proxy materials to shareholders. To address this concern, the adopted rules, like the Proposed Rules, do not mandate a specific method of furnishing the proxy materials. A dissident may choose to use the less costly e-proxy delivery method (i.e., the "notice and access" method of mailing a notice of internet availability and posting the proxy materials on a website) should it wish.[109] We also acknowledge that some dissidents might have chosen to initiate contests to pursue goals other than changes in board composition, such as to publicize a particular issue or to

[109] *See infra* Section IV.B.2.b for additional detail regarding this topic.

encourage management to engage with the dissident.[110] Such contests will not be possible without meaningful solicitation efforts under the rules we adopt today.

E. Dissident's Requirement to File Definitive Proxy Statement 25 Calendar Days Prior to Meeting

1. Proposed Rules

The Commission proposed to require a dissident in a contested election to file its definitive proxy statement with the Commission by the later of 25 calendar days prior to the meeting date or five calendar days after the registrant files its definitive proxy statement, regardless of the proxy delivery method. As proposed, the five calendar day deadline would be triggered if the registrant files its definitive proxy statement fewer than 30 calendar days prior to the meeting date, in which case the dissident would be required to file its definitive proxy statement no later than five calendar days after the registrant files its definitive proxy statement.

2. Comments Received

We received few comments on this proposed requirement. Three commenters expressed support for the deadline imposed on dissidents to file their definitive proxy statement with the Commission.[111] One commenter opposed a filing deadline for the dissident in the absence of a similar deadline for registrants.[112] This commenter advocated requiring the registrant to publicly disclose in a Form 8-K the names of its nominees, as well as other information about the shareholder meeting, such as the record and meeting dates, at least 30 days before the earlier of the nomination deadline under the

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110 *See* discussion in Section IV.B.2.c *infra.*

111 *See* letters from ICI; CFA Institute; CII.

112 *See* letters from Olshan.

registrant's governing instruments or the notice deadline established in proposed Rule 14a-19.[113] One commenter proposed, as a disciplinary measure, that if a dissident fails to file and disseminate its definitive proxy statement by the deadline, then the dissident should be prohibited from engaging in a proxy contest at any registrant (or at least, the registrant in question) for a period of time (e.g., three years).[114]

3. Final Amendments

We are adopting, as proposed, the requirement that a dissident in a contested director election file its definitive proxy statement with the Commission by the later of 25 calendar days prior to the meeting date or five calendar days after the registrant files its definitive proxy statement.

Due to the typical sequencing of registrant and dissident proxy filings, as well as the fact that dissidents may choose not to solicit all shareholders, shareholders may not have seen information about the dissident's nominees when they receive a universal proxy card from the registrant. Therefore, a dissident filing deadline is appropriate to help ensure that shareholders who receive a universal proxy card will have access to information about all nominees sufficiently in advance of the meeting.[115] We recognize, however, that some shareholders could receive the registrant's proxy statement and submit their votes on the registrant's universal proxy card before the dissident's proxy

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113 *See* letters from Olshan.

114 *See* letter from Sidley.

115 As discussed in Section II.F *infra*, we are also adopting a requirement that each party in a contested election include a statement in its proxy materials referring shareholders to the other party's proxy statement for information about the other party's nominees and explaining that shareholders can access the other party's proxy statement on the Commission's website. Because this required disclosure will be included in the registrant's proxy materials, which all shareholders would likely receive, the rules should ensure that even those shareholders that do not receive the dissident's proxy materials will have access to information about the dissident's nominees.

statement is available. The 25 calendar day deadline will provide those shareholders with sufficient time to access the dissident's proxy statement, once available, and to change their votes if preferred.

We acknowledge that dissidents that use the full set delivery method in a contested election have not previously been subject to a filing deadline for their definitive proxy statement, and thus this new requirement will impose a new filing deadline for such dissidents.[116] Although some dissidents may be required under the final rules to prepare their proxy statements earlier than they would have otherwise, dissidents filed their definitive proxy statement 25 or more calendar days prior to the shareholder meeting date in 82% of the contests initiated in 2017 through 2020.[117] Therefore, the new filing deadline should not impose a significant additional burden for most dissidents.

We are not adopting a filing deadline for registrants. State corporate statutes generally require a registrant to hold an annual shareholder meeting for the purpose of electing directors, and those statutes generally impose a quorum requirement for such meetings.[118] Unlike dissidents, registrants therefore already have an incentive to file the

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[116] We understand from a proxy services provider that in the 31 proxy contests from July 1, 2018 through June 30, 2019, dissidents sent full sets of proxy materials to each of the shareholders solicited. Dissidents that elect notice and access delivery are currently required to make their proxy statement available by the later of 40 calendar days prior to the meeting date or 10 calendar days after the registrant files its definitive proxy statement. For such dissidents, the new filing deadline will provide five fewer days to furnish a proxy statement where the registrant files its definitive proxy statement less than 30 calendar days before the meeting date, which we estimate occurred in 11% of recent contested elections. Based on past practice, as described above, we would not expect a dissident to elect notice and access delivery in a contested election, although it is unclear whether this practice would change under the rules adopted today.

[117] Based on staff analysis of the contested elections sample. *See supra* note 71 and *infra* note 219 and accompanying text. The data is based on 74 out of 101 identified proxy contests since the dissident did not file a definitive proxy statement in 27 cases.

[118] *See*, *e.g.*, Del. Code. Ann. tit. 8, § 211(b) and § 215(c).

definitive proxy statement and proxy card[119] to solicit proxies well in advance of the meeting date to achieve a quorum for the meeting. For example, based on a review of the 101 contested elections initiated from 2017 through 2020, the staff found that registrants filed their definitive proxy statement 25 or more calendar days prior to the shareholder meeting date in over 95% of the contests.[120] We also note that where the registrant nominees are incumbent directors, shareholders will have access to information about those nominees from prior Commission filings before the registrant files and disseminates its definitive proxy statement.

We recognize that it is possible that a registrant will have prepared and disseminated its definitive proxy statement, including a universal proxy card more than 25 calendar days before the meeting (i.e., the general deadline under Rule 14a-19 for a dissident to file its definitive proxy statement with the Commission). If a registrant discovers after disseminating its universal proxy card that a dissident failed to file its definitive proxy statement 25 calendar days prior to the meeting (or five calendar days after the registrant files its definitive proxy statement),[121] the registrant could elect to disseminate a new, non-universal proxy card including only the names of the registrant's nominees. Where a dissident fails to comply with Rule 14a-19, the new rules will not permit the dissident to continue with its solicitation under Regulation 14A.

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119 The definitive proxy statement, form of proxy and all other soliciting materials must be filed with the Commission no later than the date they are first sent or given to shareholders. 17 CFR 240.14a-6(b).

120 Based on staff analysis of the contested elections sample. *See supra* note 71.

121 A dissident could meet the deadline for director nominations under the company's governing documents and the deadline for providing notice to the registrant under Rule 14a-19 but fail to proceed with or later abandon its solicitation. This could happen for a number of reasons. For example, the dissident and the registrant may enter into a settlement agreement, the dissident may elect to discontinue its solicitation for another reason or the dissident may fail to comply with some aspect of Rule 14a-19.

In response to the commenter who suggested we adopt a specific penalty for dissidents who fail to file a definitive proxy statement by the deadline, we believe that existing proxy rules serve as an adequate deterrent, in a similar manner to that explained above in the context of a potential violation of the new minimum solicitation requirement. If a dissident fails to file its definitive proxy statement by the new deadline prescribed, that failure would constitute a violation of Rule 14a-19 and the dissident would face the same liability as if it had violated any other proxy rules.

Because a registrant may disseminate a universal proxy card before discovering that a dissident is not proceeding with its solicitation, we are requiring the registrant, as proposed, to include disclosure in its proxy statement advising shareholders how it intends to treat proxy authority granted in favor of a dissident's nominees in the event the dissident abandons its solicitation or fails to comply with Regulation 14A.[122]

As a result of the adopted rules described above, and as set out in the Proposing Release, the overall timing of the process for soliciting universal proxies generally would operate as follows:

[122] *See* newly-adopted Item 21(c) of Schedule 14A.

Due Date	Action Required
No later than 60 calendar days before the anniversary of the previous year's annual meeting date or, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, by the later of 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant. [new Rule 14a-19(b)(1)]	Dissident must provide notice to the registrant of its intent to solicit the holders of at least 67% of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees and include the names of those nominees.
No later than 50 calendar days before the anniversary of the previous year's annual meeting date or, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, no later than 50 calendar days prior to the date of the annual meeting. [new Rule 14a-19(d)]	Registrant must notify the dissident of the names of the registrant's nominees.
No later than 20 business days before the record date for the meeting. [existing Rule 14a-13]	Registrant must conduct broker searches to determine the number of copies of proxy materials necessary to supply such material to beneficial owners.
By the later of 25 calendar days before the meeting date or five calendar days after the registrant files its definitive proxy statement. [new Rule 14a-19(a)(2)]	Dissident must file its definitive proxy statement with the Commission.

F. Access to Information about All Nominees

1. Proposed Rules

The Commission proposed new Item 7(h) of Schedule 14A to require that each party in a contested election refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement without cost on the Commission's website. The Commission also proposed to revise Rule 14a-5(c) to permit the parties to refer to

information that would be furnished in a filing of the other party to satisfy their disclosure obligations.[123] Taken together, these proposed changes were intended to enable shareholders to access information with respect to all nominees when they receive a universal proxy card. Finally, the Commission proposed to change the definition of "participant" in Instruction 3 to Items 4 and 5 of Schedule 14A to ensure that, even though all nominees would be included on the universal proxy card, only the party's own nominees would be considered "participants" in that party's solicitation.

2. Comments Received

Several commenters expressed support for the requirements that each soliciting person in a contested election must refer shareholders to the other party's proxy statement for information about the other party's nominees and must explain that shareholders can access the other party's proxy statement without cost on the Commission's website.[124] Many of these commenters indicated that such a statement is sufficient and no additional information, such as instructions as to how to access proxy statements on the Commission's website or a hyperlink to that website, is necessary.[125] One of these commenters noted that requiring a reference to proxy materials available on the Commission's website will allow shareholders to make an informed voting decision where they receive a proxy statement and universal proxy card from only one soliciting party.[126]

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[123] Prior to today's rule changes, Rule 14a-5(c) permits parties only to refer to information that has already been furnished in a filing of another party.

[124] *See* letters from CII; Fidelity; CFA Institute; SBA-FL; Carpenters; NY Comptroller; CalSTRS; Colorado PERA; AFSCME.

[125] *See* letters from CII; SBA-FL; Carpenters; NY Comptroller; CalSTRS; Colorado PERA; AFSCME.

[126] *See* letter from Fidelity.

Several commenters expressed concern that retail investors would not receive proxy materials from dissidents electing to solicit the minimum required.[127] One of these commenters indicated that shareholders omitted from the dissident's solicitation would be at an informational disadvantage, making it difficult for those shareholders to make informed voting decisions which would potentially discourage shareholders from participating in the election.[128] Two commenters suggested adopting an additional requirement to include a toll-free telephone number where shareholders could request paper copies of proxy materials free of charge.[129] To permit retail investors to obtain dissident materials without having to navigate the Commission website, two commenters suggested permitting broker-dealers to provide dissident proxy materials to shareholders upon request and requiring dissidents to bear any associated costs.[130]

Two commenters argued that requiring both the registrant and dissident to "publicize the election campaign" of the opposing side in the contest is an inappropriate attempt by the Commission to compel corporate speech, in contravention of the First Amendment.[131]

3. Final Amendments

We are adopting, as proposed: (i) new Item 7(h) of Schedule 14A, (ii) the changes to Rule 14a-5(c) described above, and (iii) the changes to Items 4 and 5 of Schedule 14A

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127 *See* letters from BM; SIFMA; ABC; CCMC; CGCIV; Davis Polk; letter dated Jan. 9, 2017 from Business Roundtable ("BR").

128 *See* letter from BR.

129 *See* letters from Fidelity; SIFMA.

130 *See* letters from Fidelity; SIFMA.

131 *See* letters from CCMC; CGCIV.

described above, in each case for the reasons detailed in the Proposing Release.[132] Although we acknowledge the views of the dissenting commenters described above, the final rule changes will sufficiently enable shareholders to access information with respect to all nominees when they receive a universal proxy card. Requiring a new toll-free telephone number is unnecessary, given that existing rules already mandate that proxy statements include information on how to obtain paper copies.[133] In our view, the Commission website, including the EDGAR system, is sufficiently user-friendly, with available aids and ongoing enhancements, for all investors to access proxy statements filed with the Commission through a simple search, and we therefore disagree that retail investors will lack the information to locate such materials. Furthermore, proxy solicitors and others involved in the contest are available to assist retail investors in this regard. Given these facts, the imposition of additional costs on dissidents in connection with additional delivery procedures, such as through required reimbursement of broker-dealers, would not be justified.

Finally, we do not agree with commenters that suggest that the final rule runs afoul of the First Amendment. Far from being "controversial corporate speech,"[134] the rule simply provides shareholders voting by proxy with the same information – the names of all the candidates for whom they can vote – as they would receive if they attended the shareholder meeting in person, and is squarely within the "economic or investor protection benefits that our rules ordinarily strive to achieve."[135] Under the existing

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132 *See* Proposing Release at Section II.B.5.b.

133 *See* Rule 14a-16.

134 *See* letters from CCMC; CGCIV.

135 *Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518, 521 (D.C. Cir. 2015) (internal quotation marks omitted). Similarly, we do not agree with the commenter's suggestion that the rule requires

proxy rules, soliciting parties in a contest commonly direct shareholders to required disclosure that appears in the other side's proxy statement.[136]

G. Formatting and Presentation of the Universal Proxy Card

1. Proposed Rules

The Commission proposed Rule 14a-19(e) to include the following presentation and formatting requirements for universal proxy cards:

- The proxy card must set forth the names of all duly nominated director candidates;
- The proxy card must provide a means for shareholders to grant authority to vote for the nominees set forth;
- The proxy card must clearly distinguish among registrant nominees, dissident nominees, and any proxy access nominees;
- Within each group of nominees, the nominees must be listed in alphabetical order by last name on the proxy card;
- The same font type, style and size must be used to present all nominees on the proxy card;
- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- The proxy card must prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected, in a manner that grants authority to vote for

a corporation to "subsidize and publicize" speech with which it may not agree; the rule requirements may be met by, for example, the registrant simply pointing out that the opponent's materials can be accessed at no cost on the Commission's website.

136 *See* Rule 14a-5(c).

fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.

In addition, where both parties have presented a full slate of nominees and there are no proxy access nominees, the Commission proposed Rule 14a-19(f), which would allow (but not require) the universal proxy card to provide the ability to vote for all dissident nominees as a group and all registrant nominees as a group.

2. Comments Received

The formatting and presentation requirements for the universal proxy card and whether each party in a contest should be permitted to customize and use its own universal proxy card were the subject of multiple comments. Many commenters expressly supported the Proposed Rules' presentation and formatting requirements.[137] Some favored a more prescriptive approach, including standardized colors for registrant and dissident proxy cards, noting that priority should be afforded to standardization and uniformity to avoid shareholder confusion.[138] Several commenters favored mandating identical or similar universal proxy cards,[139] including specific requirements for font, style, and text size across both cards.[140]

3. Final Amendments

We are adopting the formatting and presentation requirements for universal proxy cards as proposed. As under current rules, each side will disseminate its own proxy card.

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137 *See* letters from Colorado PERA; CalSTRS; SBA-FL; Carpenters; NY Comptroller; AFSCME; UPWG; ISS.

138 *See* letters from Sidley; OPERS; CFA Institute; UPWG; CII.

139 *See* letters from Mediant; ISS; Broadridge Financial Solutions, Inc.; Bulldog.

140 *See* letter from SIFMA.

Each side will be free to choose the design of its card, subject to the requirements of the final rules.

As discussed in the Proposing Release, we considered the merits of creating a system whereby the registrant and dissident distribute an identical card, with the only difference being the persons given proxy authority on the card. In our view, such a system would be inferior to the one adopted today for the reasons discussed in the Proposing Release.[141] While we recognize the potential benefits of more prescriptive requirements for the universal proxy card, the final rules, as adopted, appropriately strike a balance between ensuring clarity and fairness on the one hand while preserving flexibility on the other. Under current proxy rules, each side in a contest has the ability to design and use its own proxy card, subject to the requirements set forth in the proxy rules. This ability will continue under the new rules we adopt. Rather than specifically mandating a set format for each card or requiring that each side's universal proxy card look identical to the other's, we are allowing each party some latitude in designing and distributing its own universal proxy card. However, we note that the font type, style, and size must be consistent for all nominees presented on the same card. This should avoid concerns about bolding or otherwise drawing attention to certain candidates. The goal of our adopted rules with respect to the formatting and presentation of the universal proxy cards is to ensure clarity and fairness in presentation, so that the cards allow shareholders to make an informed voting decision, while at the same time providing flexibility for each side in a contest to craft its own card, as under current rules.

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[141] *See* Proposing Release at Section II.B.6.

Though we understand the concern of commenters who worry about the potential for shareholder confusion in the absence of additional formatting and presentation requirements, including the standardization of proxy card colors, we disagree that such additional regulation is necessary. Existing disclosure requirements, such as the Rule 14a-4(a) requirement that the proxy card prominently identify whether the card is sent by the registrant or dissident, along with the new presentation requirements described above, will sufficiently inform shareholders as to the party sending the card and mitigate any potential confusion resulting from the universal proxy cards. We do not believe it is necessary to limit each soliciting party to a specific color proxy card to ensure shareholders know which party is soliciting their vote, and we note that this is not a limitation under current rules. Furthermore, any potential confusion over which side may be sending a particular card may be less consequential, as each side's card will list the full group of nominees from both sides.

In addition, permitting each side to use its own proxy card will preserve each side's ability to exercise discretionary authority under Rule 14a-4(c). As explained in the Proposing Release, we did consider a system whereby the registrant would distribute a single universal proxy card that would include the names of the registrant's nominees and the dissident's nominees, as well as all other proposals to be considered at the meeting.[142] However, our reasons for rejecting that idea in the Proposing Release still hold.[143]

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[142] *See* Proposing Release at Section II.B.6.

[143] In addition to the reasons set out in the Proposing Release, we agree with the reasoning set out in the letter from UPWG: "We believe both of these alternative models could cause unnecessary disruption for market participants accustomed to the circulation of two competing cards. The core improvement we seek is the ability of shareholders to use any proxy card they choose to vote for any combination of board nominees they prefer."

Finally, we adopt, in slightly modified form, the rule that permits (but does not require) the universal proxy card to allow a shareholder to grant authority to vote for all of the nominees of either the dissident or the registrant as a group, so long as the card also provides a similar means by which a shareholder can withhold authority to vote for such group of nominees and so long as the number of nominees of the registrant or the dissident is less than the number of directors being elected.[144] A new instruction to the adopted rule clarifies that, where applicable state law gives legal effect to votes cast against a nominee, a soliciting party that wishes to present the "for-all" voting option described above on its universal proxy card must also provide shareholders an "against-all" option rather than a "withhold-all" option.[145]

H. Director Election Voting Standards Disclosure and Voting Options

1. Proposed Rules

The Commission proposed additional amendments to the form of proxy and disclosure requirements with respect to voting options and voting standards that would apply to all director elections.[146] First, the Proposed Rules would amend Rule 14a-4(b) to: (1) mandate the inclusion of an "against" voting option in lieu of a "withhold authority to vote" option on the form of proxy for the election of directors where there is a legal effect to such a vote; and (2) provide shareholders who neither support nor oppose a director nominee an opportunity to "abstain" (rather than "withhold authority to vote")

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144 *See* Rule 14a-19(f). Under the final rules and to avoid shareholder confusion, where the form of proxy includes one or more shareholder "proxy access" nominees, the form of proxy may not confer the ability to vote for the registrant and dissident nominees as a group.

145 *See* Instruction to paragraph (f) of Rule 14a-19. *See also* Section II.H below and similar changes to the text of Rule 14a-4.

146 The proposed amendments to the form of proxy and disclosure requirements with respect to voting options discussed in this section would apply to funds.

in a director election governed by a majority voting standard.[147] Second, the proposed rule would amend Item 21(b) of Schedule 14A to expressly require the disclosure of the effect of a "withhold" vote. Finally, the Proposed Rules would delete the phrase "the method by which votes will be counted" from Item 21(b) of Schedule 14A.

2. Comments Received

Several commenters supported the proposed requirement that the form of proxy for a director election governed by a majority voting standard include a means for shareholders to vote "against" each nominee and a means for shareholders to "abstain" from voting in lieu of providing a means to "withhold authority to vote."[148] Many of these commenters requested that the Commission further amend the proxy rules to prohibit registrants from providing an "against" voting option if making that choice has no legal impact on the outcome of the election and to require registrants to refer to voting options consistently throughout the proxy materials.[149] One commenter suggested that Instruction 2 to Rule 14a-4(b)(2) be eliminated entirely, and that same commenter recommended that the Commission replace the "withhold" voting option with an "abstain" option for director elections governed by a plurality voting standard.[150]

Several commenters addressed the proposed changes to Item 21 of Schedule 14A. These commenters supported the proposed amendment to Item 21(b) of Schedule 14A to

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147 *See* proposed Rule 14a-4(b)(4).

148 *See* letters from CII; Colorado PERA; CalSTRS; SIFMA; SBA-FL; NY Comptroller; AFSCME; Carpenters; letter dated Jun. 7, 2021 from California Public Employees' Retirement System ("CalPERS").

149 *See* letters from CII; CalSTRS; SBA-FL; NY Comptroller; Colorado PERA; AFSCME.

150 *See* letter from Carpenters.

require the disclosure of the effect of a "withhold" vote.[151] Another commenter believed that the phrase "the method by which votes will be counted" in Item 21 of Schedule 14A should be retained, in order to clarify for shareholders the effect of each voting option presented on the proxy card, as well as how each voting option will be counted.[152]

3. Final Amendments

We are adopting the rule amendments with the modifications described below. Rule 14a-4(b) mandates, as proposed, the inclusion of an "against" voting option in lieu of a "withhold authority to vote" option on the form of proxy for the election of directors where there is a legal effect to such a vote. It also provides shareholders who neither support nor oppose a director nominee an opportunity to "abstain" (rather than "withhold authority to vote") in a director election governed by a majority voting standard. These changes will provide shareholders with a better understanding of the effect of their votes on the outcome of the election. We also have not eliminated Instruction 2 to Rule 14a-4(b)(4), as one commenter had requested, because it may provide useful guidance about voting options where applicable state law gives legal effect to votes cast against a nominee.

We agree with commenters, however, that including an "against" voting option on a proxy card where there is no legal effect to such vote is unnecessarily confusing for shareholders and have therefore amended Rule 14a-4(b) to prohibit such a voting option on the proxy card where such votes have no legal effect. Further, in light of comment received from the public, we are retaining the phrase "the method by which votes will be counted" from Item 21(b) of Schedule 14A to avoid any ambiguity regarding the need for

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151 *See* letters from CalPERS; CII.

152 *See* letter from Carpenters.

clear disclosures in the proxy statement regarding the effect of each voting option presented to shareholders.

I. Bona Fide Nominee and Short Slate Rules

1. Elimination of the Short Slate Rule

a. Proposed Rules

The Commission proposed to amend Rule 14a-4(d) to eliminate the short slate rule for registrants other than funds. The short slate rule allows dissidents soliciting in support of a partial slate of nominees that would make up a minority of the board of directors to seek authority to vote for some of a registrant's nominees.[153] The Proposed Rules would eliminate the short slate rule for operating companies because it would be unnecessary with a universal proxy requirement and the revised bona fide nominee rule. The Proposed Rules, however, would maintain the short slate rule for funds, since, as proposed, they would not be included in the universal proxy requirement.[154]

b. Comments Received

Relatively few commenters addressed the proposed elimination of the short slate rule for operating companies that would be subject to a mandated universal proxy requirement. Several commenters supported its elimination in connection with the adoption of a universal proxy requirement, noting that such a system would eliminate many of the practical constraints associated with the short slate rule (as well as the bona

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153 *See* Rule 14a-4(d)(4). Rule 14a-4(d)(4)(ii) provides that a dissident using the short slate rule may not name the registrant nominees for which it will vote using proxy authority; rather, the dissident may name only those registrant nominees for which it is *not* seeking proxy authority. This requirement may render the proxy card confusing for shareholders.

154 *See infra* Section II.J.

fide nominee rule).[155] Another commenter similarly supported the changes, but also advocated retaining the short slate rule, in optional form, if the universal proxy requirement is not mandated.[156]

c. Final Amendments

We are eliminating the short slate rule, as proposed, for operating companies that will be subject to the final rules mandating the use of universal proxy cards. The revisions we adopt to the bona fide nominee rule,[157] along with the changes to mandate the use of a universal proxy card in all non-exempt director election contests, obviate the need for the short slate rule for operating companies. The amended short slate rule, however, will continue to be available for funds in contested elections, which will not be subject to the universal proxy requirements at this time.[158] If we later adopt rule changes to make the universal proxy requirement applicable to some or all funds, we will consider whether to eliminate the short slate rule completely at that time.

2. Modification of the Bona Fide Nominee Rule

a. Proposed Rules

In order to facilitate the ability of both parties in a contested election to include the names of all nominees on each side's proxy card, the Proposed Rules would revise the bona fide nominee rule. To remove the technical impediment to including the names of the other side's nominees on a universal proxy card created by Rule 14a-4(d)(1) and (4), the Proposed Rules would revise the determination of a "bona fide nominee" in Rule 14a-

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155 *See* letters from Elliott; CFA Institute.

156 *See* letter from Colorado PERA.

157 *See infra* Section II.I.2.

158 *See* Rule 14a-4(d)(1)(ii)(A)-(D).

4(d).[159] The proposed revisions would change the requirement that a nominee consent to being named in "the" proxy statement of the party listing that nominee on its card, to a more general requirement that a nominee consent to being named in "a" proxy statement of either side in the contest. Proposed Rule 14a-4(d)(1)(i) would maintain the requirement that a nominee consent to serve, if elected.

b. Comments Received

Multiple commenters who supported the adoption of a universal proxy requirement supported the proposed changes to the bona fide nominee rule to effectuate that system.[160] Several of these commenters expressly supported allowing a soliciting party to include the names of some or all of the registrant's nominees on its own proxy card even when the soliciting party is not nominating its own candidates.[161]

Some commenters advocated more limited changes to the consent required by the bona fide nominee rule to narrow its application. As proposed, revised Rule 14a-4 would permit (but not require) a dissident soliciting in favor of its own proposal, without its own slate of director candidates, to include some or all of the registrant's nominees on the dissident's proxy card. Similarly, a dissident conducting a "vote no" campaign against some of the registrant's nominees could (but would not be required to) include on the dissident's proxy card those registrant nominees it did not oppose. One commenter warned of the shareholder confusion that might result in those instances in which the

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159 *See* proposed Rule 14a-4(d)(1)(i). Without the adoption of the proposed revisions, Rule 14a-4(d)(1) and (4) would limit the ability of one side in a contested election from seeking proxy authority to vote for any director nominee unless such nominee consented to being named in that side's proxy statement, and to serve if elected.

160 *See, e.g.,* letters from CII; CalSTRS; CalPERS; Colorado PERA; UPWG; NY Comptroller; AFSCME; SBA-FL; Elliott; CFA Institute.

161 *See* letters from CalSTRS; Colorado PERA; CFA Institute; letter from CII dated Dec. 28, 2016.

dissident chooses not to include all registrant nominees on the dissident's card, and argued that such confusion could lead to under-voting that would distort voting results.[162] Several commenters favored limiting the consent provided under the revised bona fide nominee rule to situations where the opposing side solicits in favor of its own nominees.[163]

c. Final Amendments

We are adopting changes to the consent requirement for a bona fide nominee in Rule 14a-4(d)(1)(ii) as proposed. This rule change expands the scope of a nominee's consent in an election contest to include consent to being named in *any* proxy statement for the applicable meeting. The rule amendment is necessary to permit the universal proxy requirement we adopt today, because it expands the concept of consent to allow a nominee to be considered a bona fide nominee when named on any side's proxy card in a director election contest.

As a practical matter and as noted by commenters, it will also permit a dissident soliciting in favor of a proposal (but not its own director nominees) to include some or all of the registrant's nominees on its proxy card. It further allows a dissident conducting a "vote no" campaign without presenting its own slate of competing nominees to permit shareholders to vote for select registrant nominees on the dissident's card. In both of these circumstances, the changes to the bona fide nominee rule will further shareholder enfranchisement. Although including a registrant's nominees on its own proxy card in both of these circumstances will remain optional for the dissident under the final rules, this optionality will not limit shareholders' voting choices. If the dissident does not

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162 *See* letter from BR.

163 *See* letters from Society; Sidley; Davis Polk; BR.

include some or all registrant nominees on the dissident's card, shareholders will always be able to vote on the registrant's proxy card. Where a dissident includes some but not all registrant nominees on its proxy card, or where it solicits in favor of a proposal but does not include registrant nominees on its proxy card, the dissident should – in order to avoid potential liability under Rule 14a-9 for omission of material facts – disclose the fact that its proxy card does not include some or all of the registrant nominees and that shareholders who wish to vote for nominees not included on the dissident's proxy card may do so on the registrant's proxy card. Such disclosure should mitigate the risk of shareholder confusion.

In addition, and in response to the commenter who was concerned with the potential of under-voting, we note that the potential for disenfranchisement exists under the status quo, but in a more severe form. Under current rules, dissidents who are ineligible to use the short slate rule (including those not soliciting on behalf of their own director nominees) lack the ability to list registrant nominees on their proxy card. The risk of any disenfranchisement under the final amendments may be mitigated because we expect that dissidents will have an incentive to include the registrant nominees on their proxy card (so as to increase the incentive for shareholders to use their card) and will generally not have strategic reasons to exclude registrant nominees from their proxy card due to the lack of a competing slate. Finally, to the extent that shareholders vote for fewer nominees than open board seats because they are voting on a dissident's proxy card that does not list all registrant nominees, this will occur in the context of an uncontested election, in which the consequences of casting fewer votes in favor of any particular nominee are less significant than in the context of a contested election.

The final rules maintain the requirement that a bona fide nominee consent to serve if elected.[164] This will ensure that neither party nominates an individual who has not consented to serve if elected as a director. To the extent that any nominee would not serve if elected with other nominees (or would not serve unless certain other nominees were elected), we would expect this material fact to be disclosed prominently in the proxy statement of the party nominating such individual. If one or more of the registrant's nominees will not serve under such circumstances, the registrant should explain in its proxy statement how such vacancies would be filled.

J. Funds

1. Proposed Rules

The Proposed Rules excluded funds. Like operating companies, funds have boards of directors that are elected by shareholders. Also like operating companies, fund boards have significant responsibilities in protecting shareholder interests and funds are subject to the federal proxy rules. However, fund shareholders also have important rights granted to them under the Investment Company Act of 1940 that distinguishes funds from operating companies. For reasons detailed in the Proposing Release,[165] the Commission did not propose to apply the universal proxy requirement to funds, but solicited comment on whether funds should be covered by the Proposed Rules. In the Reopening Release, the Commission observed that since the Proposing Release, there had been certain developments in corporate governance matters affecting funds, particularly registered closed-end funds and BDCs. In light of such developments, the Commission stated that it was considering applying the proposed universal proxy card requirements to

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164 *See* proposed Rule 14a-4(d)(1)(i).

165 *See* Proposing Release at Section II.D.

registered closed-end funds and BDCs and again solicited comment on whether funds should be covered by the Proposed Rules, with particular emphasis on issues related to such funds.[166]

2. Comments Received

Comments received in response to the Proposing Release and Reopening Release were mixed. On the one hand, many commenters supported excluding funds from the Proposed Rules because of the differences between funds and operating companies – including the investor protections provided by applicable securities laws and regulations and fund governance structures.[167] With respect to statutory and regulatory protections, some commenters observed that the Investment Company Act of 1940 supplements state law to provide shareholders with the right to approve fundamental fund features, including the right to approve the investment advisory contract and any material amendments to the investment advisory contract and changes to any of a fund's fundamental investment policies.[168] With respect to fund governance structures, several commenters observed that split-ticket voting that results in dissident directors joining a fund board could disrupt the widespread practice of unitary and cluster boards at funds,[169] which could lead to additional and costly administrative complexities and redundancies for funds that ultimately would be borne by fund shareholders.[170]

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166 *See* Reopening Release at Section II.

167 *See, e.g.,* letters from ICI; CII; Fidelity; letter dated Jan. 9, 2017 from Independent Directors Council ("IDC"); letter dated Feb. 27, 2017 from Mutual Fund Directors Forum ("Forum").

168 *See* letters from CII, ICI; IDC; Fidelity.

169 *See* letters from ICI; IDC; Fidelity; Forum.

170 *See* letters from ICI; IDC; Forum. In addition, those commenters explained that a dissident director may disrupt other fund governance standards such as standards regarding disinterested and independent directors.

In addition to providing reasons that the universal proxy rules should not apply to funds generally, some commenters also discussed the application of those universal proxy rules to specific types of management investment companies. Specifically, some commenters stated that universal proxies are not necessary for open-end funds because open-end funds are not required to have annual shareholder meetings and investors are able to redeem at net asset value, resulting in contested elections being rare.[171] With regard to closed-end funds and BDCs, several commenters also suggested that universal proxies are not necessary because dissidents almost always nominate a full slate of nominees in order to achieve a specific objective, such as a liquidation event.[172] Therefore, according to these commenters, shareholders typically have a binary choice to vote with fund management or against it and these commenters believed such binary choices would likely continue with the use of a universal proxy card.[173]

On the other hand, many commenters opposed the exclusion of funds generally, and registered closed-end funds and BDCs in particular, from the Proposed Rules.[174] Some commenters contended that because of the large retail investor base of registered closed-end funds and BDCs, it is difficult for shareholders to effect change when necessary.[175] One commenter expressed support for universal proxies for BDCs and

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171 *See* letters from ICI; IDC; Fidelity; Forum.

172 *See* letters from Forum; ICI; *see also* letter from IDC. One commenter stated that to serve the interests of long-term investors, the Commission should provide closed-end funds with more protections against activist investors and not erode the protections and benefits offered by closed-end funds. *See* letters from ICI.

173 *See* letters from ICI; IDC; Forum.

174 *See* letters from Bulldog; Ad Hoc Coalition; E. Burke; BM; Mediant; letter dated Jan. 12, 2017 from Blue Bell Private Wealth Management; letter dated Feb. 3, 2017 from Almitas Capital ("Almitas"); letter dated Jun. 29, 2021 from Saba Capital Management, L.P. ("Saba").

175 *See* letters from Almitas; Bulldog.

closed-end funds and suggested that whether shareholders of such entities are well-served by unitary or cluster boards is an open question.[176] Another commenter stated that the administrative efficiency of a unitary board structure, while worth considering, should be secondary to allowing shareholders to promote nominees of their choosing to effect the investment objectives of the fund.[177] A separate commenter recommended extending the Proposed Rules to closed-end funds and BDCs, but not to open-end funds, given the latter's greater organizational complexity and the extreme rarity of proxy contests affecting them.[178]

3. Final Amendments

The final rules we adopt today will not apply to funds at this time, as the Commission continues to consider any application of the rules to funds. Developments since 2016, along with various comments discussed above that we have received have led us to conclude that further consideration of potential application of the universal proxy rules to certain funds is warranted.

K. Compliance Dates

Because the rule amendments we adopt today involve significant changes to the manner in which election contests are conducted, a transition period is appropriate. New Rule 14a-19 imposes notice and other mandates that will require planning and coordination by both parties to an election contest. Therefore, to avoid disruption to the upcoming proxy season, the rule changes we adopt today will become effective for any shareholder meeting featuring an election contest held after August 31, 2022. The length

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176 *See* letter from Ad Hoc Coalition.

177 *See* letter from Saba.

178 *See* letter from Mediant.

of this transition period is designed to allow adequate time for affected parties to plan and prepare for compliance with the new rules, and to adjust to the elimination of existing provisions, such as the short slate rule.

Some of the rule amendments we adopt today will apply to all director elections, not just those that are contested. While these changes do not require coordination and notice to the other party, as is required in a contested election, they do involve enhanced disclosure of the legal effect of votes under the applicable voting standard for the election. The amendments also impose new voting options where the applicable voting standards give effect to abstain or withhold votes. Given these changes, the same transition period for compliance (for shareholder meetings held after August 31, 2022) is appropriate for all of the rule amendments we adopt today.

III. OTHER MATTERS

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

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these rules a "major rule," as defined by 5 U.S.C. 804(2).

IV. ECONOMIC ANALYSIS

We are attentive to the costs imposed by and the benefits obtained from the final amendments.[179] The discussion below addresses the potential economic effects of the

[179] Exchange Act Section 3(f) requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in

final amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation. We also analyze the potential costs and benefits of reasonable alternatives to the amendments.

A. Introduction

As discussed above, we are adopting amendments that will require the use of a universal proxy card in all contested elections with competing slates of director nominees to address concerns over the inability of shareholders using the proxy system to vote for the combination of candidates of their choice in a contested election. These amendments will allow shareholders voting by proxy to choose among director nominees in an election contest in a manner that more closely reflects the choice that could be made by voting in person at a shareholder meeting. Shareholders voting in person in a contested election with competing slates of nominees are able to choose among all of the duly nominated candidates. By contrast, shareholders currently voting by proxy are typically limited to voting for only registrant nominees or voting for only the dissident's nominees (or, in the case of certain short slate elections, for the dissident's nominees and certain registrant nominees chosen by the dissident).[180] If shareholders wish to vote for a combination of nominees across the two slates, they generally must do so in person by attending or sending a representative to the shareholder meeting and incurring the costs

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addition to the protection of shareholders, whether the action will promote efficiency, competition, and capital formation. 15 U.S.C. 78c(f). Exchange Act Section 23(a)(2) requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition, and prohibits any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. 15 U.S.C. 78w(a)(2).

[180] Though our economic analysis focuses on contests between a registrant and a single dissident for ease of exposition, we believe that the economic effects discussed below would also apply to contests involving more than one dissident. Election contests with more than one soliciting dissident are uncommon. For example, the staff has identified only one proxy contest in operating companies from 2017–2020 that involved more than one dissident with separate slates of nominees.

of doing so. In some cases, parties such as proxy solicitors may make arrangements for one or more individuals to attend a meeting on behalf of certain shareholders to facilitate split-ticket voting. However, many shareholders, particularly retail shareholders or those who do not hold a large stake in the registrant, might not be willing or able to bear the costs of voting in person and may not have access to other arrangements. Therefore, these shareholders may not currently be able to vote for their preferred selection of candidates.

The mandated use of universal proxies will allow shareholders to vote for any combination of nominees when voting their shares by proxy in advance of the meeting, which is generally the way in which the vast majority of shares are voted. For shareholders who would otherwise incur incremental costs to vote for a combination of candidates that could not be voted for by proxy, such as by attending the meeting in person, universal proxies will result in direct cost savings. Universal proxies will also enable shareholders who want to split their vote but are unwilling (or unable) to bear additional costs to be able to vote for their preferred combination of nominees to do so without incurring additional costs.

The nomination and election of directors by shareholders represents a fundamental governance mechanism that can mitigate conflicts of interest between shareholders and management. While the most direct effect of the final amendments will be to improve the efficiency of the voting process and permit shareholders greater choice when voting by proxy in contested director elections, they will also likely impose direct costs on dissidents and registrants in certain contests. The final amendments may also have broader impacts on corporate governance and the relationship between shareholders

and management. For reasons discussed below,[181] it is difficult to predict the likely extent or direction of these broader potential effects, but we cannot rule out the possibility that they could be significant.[182] For example, enabling split-ticket voting could lead to a greater number of boards that are composed of a mix of registrant-nominated[183] and dissident-nominated directors ("mixed boards"), which may affect the effectiveness of boards, either positively or negatively. Additionally, mandating the use of universal proxies by registrants as well as dissidents – which, in practice, would likely result in the names of dissident nominees being disseminated via registrant proxy cards to all shareholders – may provide potential dissidents with a new means of generating publicity for alternative nominees or for the broader concerns behind a contest at a relatively low cost, which could change the nature of interactions between potential dissidents and management.[184] The overall incidence of contested elections may change as well. These and other potential effects, as well as possible mitigating factors, are discussed in detail below.

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181 *See* Section IV.C.

182 We are unaware of any empirical studies that find that universal proxies would have significant effects on corporate governance and the relationship between shareholders and management. A recent study submitted by a commenter (*see* letter from Prof. Hirst) finds that a universal proxy is unlikely to lead to more proxy contests or to greater success by special interest groups. *See* Scott Hirst, *Universal Proxies*, Yale J. on Reg. 35, 437 (2018) ("Hirst Study"). This is an updated version of a study we previously discussed in the Proposing Release (*see* note 209 in the Proposing Release). We note that this study relies on several critical assumptions that might not be reliable. *See infra* note 284.

183 For ease of exposition, we refer throughout this economic analysis to the nominees of the board, including those that are incumbent directors, or its nominating committee, as the nominees of the registrant and, in total, as the registrant slate.

184 *See, e.g.*, letter from CCMC (arguing that "Seeking to avoid the cost and distraction of an SEC-sanctioned proxy fight, many companies will simply follow the path of least resistance and negotiate to place dissident directors directly on their boards without the need for a shareholder vote.").

At the outset, where possible, we have attempted to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the final amendments. In many cases, however, we are unable to quantify the potential economic effects because we lack information necessary to provide a reasonable estimate. For example, we are unable to quantify the potential change in the number of mixed-board outcomes at contests as a result of the final amendments. We are also unable to quantify the change in the instance of proxy contests that may result from the final amendments.

Although many commenters supported the mandated use of universal proxy in contested director elections, some commenters raised a number of economic concerns with the proposed amendments and also suggested alternatives in some cases. We have considered those concerns and, where appropriate, have expanded our economic analysis to address those concerns and alternatives.

B. Baseline

To assess the economic impact of the final amendments, we are using as our baseline the current state of the proxy process. Our baseline includes existing Commission rules, state laws, and corporate governing documents that jointly govern the ability to solicit proxies in support of director nominees other than the registrant nominees and the manner in which contested elections are conducted. This section discusses the parties involved in director election contests under the current legal framework, current proxy voting practices, and the means available to shareholders to influence the composition of boards of directors.

1. Affected Parties

We consider the impact of the final amendments on shareholders, registrants, dissidents in contested elections (who are typically also shareholders), and directors.

a. Shareholders

Different types of shareholders exhibit different degrees of involvement in voting on matters up for a vote at the companies they invest in. In particular, a study by a proxy services provider found that there are, on average, large differences in involvement by institutional investors compared to retail investors.[185] Institutional and retail investors also face different levels of difficulty and resource constraints to vote for their preferred choices of nominees in contested director elections under current rules.[186] As a result, the final amendments are likely to have a differential impact with respect to the costs of voting and feasible voting choices for these two types of shareholders.

The number of beneficial shareholder accounts for U.S. public companies varies significantly by company market capitalization: the average (median) number of beneficial shareholder accounts is approximately 3,900 (1,400) for companies with less than $300 million in market capitalization, approximately 11,000 (5,700) for companies with between $300 million and $2 billion in market capitalization, approximately 28,300 (16,500) for companies with between $2 billion and $10 billion in market capitalization, and approximately 279,000 (102,700) for companies with market capitalization above

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185 *See* Broadridge and PwC, *Proxy Pulse 2020 Proxy Season Review* (2020), available at https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2020-review.pdf ("Proxy Pulse 2020").

186 *See infra* Section IV.B.2.d for a discussion on different shareholders' current ability to arrange split-ticket voting.

$10 billion.[187] Among all companies, we estimate that 91% of account holders are retail investors.[188] For U.S. public companies that held their annual meetings in the main 2020 proxy season (i.e., between January 2020 and June 2020), a study by a proxy services provider found that retail investors held approximately 29% of shares held in brokerage accounts and institutional investors held 71%.[189] An earlier study by the same proxy services provider for U.S. public companies that held their annual meetings in the main 2016 proxy season (i.e., between January 2016 and June 2016), found that the percentage of ownership by retail investors varies significantly with company size, and was estimated to be 67% in companies with less than $300 million in market capitalization, 32% in companies with between $300 million and $2 billion in market capitalization, 23% in companies with between $2 billion and $10 billion in market capitalization, and 27% in companies with market capitalization above $10 billion.[190]

Retail and institutional shareholders exhibit very different voting behavior. In the main 2020 proxy season, while institutional investors voted 92% of their shares, retail investors voted only 28% of their shares.[191] Based on an earlier study of the main 2015

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187 Based on industry data provided by a proxy services provider. Note that an individual shareholder may have more than one account, so the number of beneficial shareholders likely is lower than the number of beneficial shareholder accounts. For the purpose of estimating costs related to distribution of proxy materials, the number of accounts is the more relevant number because dissemination costs such as intermediary and processing fees apply on a per account basis per NYSE Rule 451. The data is based on domestic companies that held shareholder meetings between July 1, 2018 and June 30, 2019.

188 *Id.*

189 *See* Proxy Pulse 2020.

190 *See* Broadridge and PwC, *Proxy Pulse 2016 Proxy Season Review* (3d ed. 2016), available at https://www.broadridge.com/proxypulse/_assets/docs/broadridge-proxypulse-3rd-edition-2016.pdf ("Proxy Pulse 2016").

191 *See* Proxy Pulse 2020. We acknowledge that the voting participation of retail shareholders in particular could increase in the case of a contested election, because of greater media coverage and expanded outreach efforts, but we do not currently have data that would allow us to separately estimate the degree of retail participation in contested elections.

proxy season, the voting propensity of retail investors does not vary significantly by the size of the registrant.[192] By contrast, institutional investors vote a significantly smaller portion of their shares in registrants with less than $300 million in market capitalization (72%) than in larger registrants (91% to 93%),[193] which may be a function of the types of institutions that invest in companies of different sizes.

Retail and institutional investors may also have differential access to resources that can be expended in order to cast a vote, and may have different levels of incentive to expend such resources. In general, we expect retail investors to face greater resource constraints than institutional investors. Differences across shareholders in the ability to take advantage of different approaches to voting and in the resources expended on voting are discussed in more detail in Sections IV.B.2.d and IV.C.1 below.

b. Registrants

The final amendments mandating the use of universal proxy cards in director election contests will apply to all registrants that have a class of equity securities registered under Section 12 of the Exchange Act and are thereby subject to the federal proxy rules, except funds. The amendments will not apply to foreign private issuers or companies with reporting obligations under only Section 15(d) of the Exchange Act, whose securities are not subject to the federal proxy rules. As of December 31, 2020, we estimate that approximately 5,400 registrants had a class of securities registered under Section 12 of the Exchange Act and will be subject to the amendments mandating the use

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192 *See* Broadridge and PwC, *Proxy Pulse 2015 Proxy Season Wrap-up* (3d ed. 2015), available at http://media.broadridge.com/documents/ProxyPulse-Third-Edition-2015.pdf.

193 *Id.*

of a universal proxy card in contested director elections.[194] We also are adopting some changes to the form of proxy and proxy statement disclosure requirements applicable to all director elections. Because these changes apply to all registrants subject to the federal proxy rules, they will also apply to registered funds. As of September 30, 2021, there were 14,062 registered management investment companies that were subject to the proxy rules: (i) 13,347 open-end funds, out of which 2,497 were Exchange Traded Funds ("ETFs") registered as open-end funds or open-end funds that had an ETF share class; (ii) 701 closed-end funds; and (iii) 14 variable annuity separate accounts registered as management investment companies.[195] In addition, as of June 2021, we identified 99 BDCs that were subject to the proxy rules.[196]

There is substantial variation across registrants in characteristics such as incumbent executive and director ownership and governance structure, which may affect the degree to which different registrants are affected by the final amendments.

Incumbent Executive and Director Ownership

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194 We are able to estimate the number of registrants with the class of securities registered under Section 12 of the Exchange Act by reviewing all Forms 10-K and 10-K amendments filed during calendar year 2020 with the Commission. After reviewing all forms, we then count the number of unique registrants that identify themselves as having a class of securities registered under Section 12(b) or Section 12(g) of the Exchange Act. Foreign private registrants that filed both Forms 20-F and 40-F, as well as asset-backed registrants that filed Forms 10-D and 10-D/A during calendar year 2020 with the Commission are excluded from this estimate. This estimate also excludes BDCs; *see infra* note 196.

195 We estimate the number of unique registered management investment companies based on Forms N-CEN filed between December 2020 and September 2021 with the Commission. Open-end funds are registered on Form N-1A, while closed-end funds are registered on Form N-2. Variable annuity separate accounts registered as management investment companies are trusts registered on Form N-3.

196 BDCs are entities that have been issued an 814- reporting number. Our estimate includes 82 BDCs that filed Form 10-K in 2020, as well as 17 BDCs that were not traded.

We expect that incumbent executives and directors would vote in support of the registrant's slate of nominees in a director contest at the annual meeting,[197] and that the mandated use of a universal proxy card is unlikely to change this expected voting behavior. We therefore think that the percentage of total voting power held by a registrant's incumbent executives and directors can have an effect on the impact of the final amendments on the incidence and outcome of contested director elections.

Table 1 below reports estimates of the average combined vote ownership by incumbent executives and directors for a broad sample of 3,841 potentially affected registrants, as well as for several size-related sub-samples of registrants: those included in the S&P 500 index ("large-cap stocks"), in the S&P 400 index ("mid-cap stocks"), in the S&P 600 index ("small-cap stocks"), and outside the S&P 1500 index that is composed of these three indices (and which tend to be smaller than those registrants in the S&P 1500). The average (median) percentage is 14.6% (5.8%) for all registrants, and this percentage is greatest for registrants outside the S&P 1500 index. We also estimate the percentage of registrants for which incumbent executives and directors hold a majority of the voting power, and hence can control who is elected to the board in most circumstances. Overall, incumbent executives and directors hold a majority of votes in 8.1% of registrants. This percentage ranges from 2.0% for S&P 500 registrants to 11.4% for non-S&P 1500 registrants.

The data in Table 1 indicates that to the extent incumbent executives and directors tend to vote for the registrant's slate of director nominees in contested elections, the

[197] Note that in the case of a dissident who is also an insider (such as an incumbent director), this may not be the case.

impact of such behavior on the economic effects of the final amendments is likely to be more important in the non-S&P 1500 category of smaller registrants.

Table 1. Incumbent Executive and Director Vote Ownership of Registrants Subject to Proxy Rules[198]

	Incumbent executive and director vote ownership (% of total voting power)				Percentage with majority ownership
	Mean	25th percentile	Median	75th percentile	
All registrants	14.6	1.8	5.8	18.8	8.1
S&P 500 registrants	4.4	0.3	0.8	2.3	2.0
S&P 400 registrants	6.8	1.0	2.0	5.5	2.0
S&P 600 registrants	9.5	1.8	3.4	8.4	4.1
Non-S&P 1500 registrants	19.3	4.0	10.4	27.8	11.4

Governance Structure

Registrants' governance characteristics may affect the incidence and outcomes of proxy contests currently as well as the effects, if any, of potential changes in the proxy

[198] Estimates based on staff analysis of director and senior executive vote ownership data from Institutional Shareholder Services Inc. ("ISS") as of calendar year 2019. This data is available for 3,841 of the potentially affected registrants and may include ownership through options exercisable within 60 days. The sample represents over 70% of potentially affected registrants. It is our understanding that the registrants for which data is missing in the ISS database tend to be the smallest registrants in terms of market capitalization, and therefore the data presented may not be representative for these registrants. In particular, we believe it is likely that incumbent management ownership for this group of registrants is on average even greater than for the non-S&P 1500 registrants listed in Table 1.

rules on the incidence and outcomes of proxy contests.[199] For example, as discussed in more detail in the Proposing Release, the presence of a staggered board structure in a registrant will mitigate the impact on board composition of any final amendments to the proxy rules by prolonging the time over which any changes in board composition would occur.[200] We estimate that approximately 42% of registrants have a staggered board.[201] This percentage varies substantially across market capitalization categories: approximately 14% for S&P 500 registrants, 38% for S&P 400 registrants, 43% for S&P 600 registrants, and 48% for non-S&P 1500 registrants.[202]

As discussed in more detail in the Proposing Release, cumulative voting for directors may increase the ability of minority shareholders to elect a director and may therefore also be important to consider when evaluating the potential effects of the final amendments on proxy contests.[203] We estimate that 3.3% of registrants have cumulative voting. This percentage also varies across market capitalization categories: approximately 2.2% for S&P 500 registrants, 3.1% for S&P 400 registrants, 4.1% for S&P 600 registrants, and 3.4% for non-S&P 1500 registrants.[204]

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199 In the Proposing Release, we also discussed the use of dual class shares, where one class of shares has greater voting rights than the other, as a mechanism that could potentially concentrate the voting control of a registrant in the hands of insiders (*see* Section IV.B.1.b of the Proposing Release). However, the potential impact of such dual class share structures on the economic effects of the final amendments would ultimately flow through the vote ownership of insiders, which we discuss above.

200 See Section IV.B.1.b of the Proposing Release.

201 Estimates based on staff analysis of board characteristics data from ISS as of calendar year 2019. This data is available for 3,841 of the potentially affected registrants.

202 *Id.*

203 *See*, *e.g.*, David Ikenberry & Josef Lakonishok, *Corporate Governance through the Proxy Contest: Evidence and Implications*, 66 J. Bus. 405, 413 (1993) (finding that dissidents are successful in obtaining at least one seat in 41.3% of contests held under straight voting and that this increases to 71.9% in contests using cumulative voting).

204 Estimates based on staff analysis of board characteristics data from ISS as of calendar year 2019. This data is available for 3,841 of the potentially affected registrants. We do not have ready access to this data for other registrants.

Registrants' governing documents generally provide that one of two main standards be applied to the election of directors: either a majority voting standard or a plurality voting standard. Under a majority voting standard, directors are elected only if they receive affirmative votes from a majority of the shares voting or present at the meeting, and shareholders can vote "for" each nominee, "against" each nominee, or "abstain" from voting their shares. By contrast, under a plurality voting standard, the nominees receiving the greatest number of "for" votes are elected, and shareholders can withhold votes from specific nominees but cannot vote "against" any of them. In those cases in which a majority standard is in place in director elections, registrants tend to have a carve-out in the bylaws (or charter) that applies a plurality standard in contested director elections. In the case of a majority voting standard in a contested election, there is a risk that some or all of the nominees receiving the highest relative shareholder support may still not win a majority of votes cast. This risk is especially high when nominees only appear on either the registrant's or the dissident's card, which is generally the case under the current proxy rules. Based on data that we have available for affected S&P 1500 registrants, we estimate that whereas approximately 70% have a majority standard in director elections, only approximately 6% of the affected S&P 1500 registrants have a majority standard without a carve-out for a plurality standard in the case of a contested election.[205]

c. Dissidents in Contested Elections

The dissidents in contested elections are typically shareholders of the registrant, but may fit into one of several categories. A common category of dissidents is activist

[205] Estimates based on staff analysis of governance data for S&P 1500 companies from ISS as of calendar year 2020.

hedge funds that take a proactive approach to the companies in their investment portfolios by trying to influence the management and decision-making through various means, such as proxy contests. Dissidents may also be former insiders or employees of the registrant. A party to a possible business combination may also contest the election of directors at a registrant when, for example, it is seeking to acquire the registrant but the registrant's current board does not approve of the transaction. In some cases, a group of dissatisfied shareholders other than activist hedge funds jointly contests an election. Section IV.B.2.a below provides further information about the relative frequency of different types of dissidents in recent director contests.

d. Directors

We note that reputational concerns may be an important consideration for directors and potential directors.[206] Past research has found that proxy contests may affect the reputation of incumbent directors, in that such contests appear to have had a significant adverse effect on the number of other directorships they hold.[207] Therefore, any changes to the proxy rules that would increase the likelihood of proxy contests at any given registrant could reduce the willingness of current and potential directors to be nominated to serve on the registrant's board in the future.

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206 *See, e.g.*, Ronald Masulis & Shawn Mobbs, *Independent Director Incentives: Where Do Talented Directors Spend Their Limited Time and Energy?,* 111 J. Fin. Econ 406, 426 (Feb. 2014) (concluding that director reputation is a powerful incentive for independent directors).

207 *See* Vyacheslav Fos & Margarita Tsoutsoura, *Shareholder Democracy in Play: Career Consequences of Proxy Contests*, 114 J. Fin. Econ. 316, 326 (2014) (finding that, following a proxy contest, all directors in the targeted company experience on average a significant decline in the number of their directorships, not only in the targeted company, but also in other, non-targeted companies).

2. Contested Director Elections

Currently, a shareholder voting by proxy is generally limited to voting for either the registrant slate or the dissident slate (and, when used to round out a slate, certain registrant nominees chosen by the dissident).[208] By contrast, a shareholder that attends an annual meeting may vote for any combination of registrant and dissident nominees.

a. Proxy Contest Data

We identify 148 proxy contests[209] that were initiated through the filing of preliminary proxy statements by dissidents in calendar years 2017–2020 across all registrants subject to the proxy rules other than funds.[210] Of these proxy contests, we estimate that 101 involved an election contest with competing slates of director nominees at an annual meeting of shareholders.[211] In one case, there were two dissidents with separate slates of nominees. Most of the contests with competing slates of board

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208 However, it may be possible for a registrant to require a dissident's nominees to consent to be named on the registrant's card pursuant to the director questionnaires required under a registrant's advance notice bylaw provisions. As noted above, the staff has observed an increased use of this tactic since 2016. This option is not available to the dissident. In addition, we have observed at least one case since 2016 where universal proxy was used by both parties, presumably based on obtaining voluntary consent by the included nominees. *See supra* note 43 and accompanying text.

209 This total number of proxy contests includes all cases in which a proponent or dissident initiated a "solicitation in opposition" to the registrant, whether in relation to an election of directors or with respect to another issue. A solicitation in opposition includes (i) any solicitation opposing a proposal supported by the registrant; and (ii) any solicitation supporting a proposal that the registrant does not expressly support, other than a shareholder proposal included in the registrant's proxy material pursuant to Rule 14a-8. *See* 17 CFR 240.14a-6(a), Note 3. The total number includes consent solicitations for special meetings and written consent solicitations (36 cases), which may be board related contests but are not subject to the required use of universal proxies. This total number of proxy contests does not include exempt solicitations, which are discussed in Section IV.B.3, *infra*.

210 Based on staff review of EDGAR filings in calendar years 2017 through 2020.

211 This represents on average approximately 25 board-nomination contests per year, which is lower than the average of 36 initiated contests per year we found for 2014 and 2015 in the Proposing Release. The 47 proxy contests initiated in 2017–2020 that did not represent election contests with competing slates of candidates at an annual meeting of shareholders include: consent solicitations for the removal and election of directors at a special meeting or through written consent; contests involving "vote no" campaigns; and proposals on issues other than director nominees. Consent solicitations and "vote no" campaigns are discussed in Section IV.B.3, *infra*.

nominees were in smaller to midsize companies: nine were S&P 500 companies, 13 were S&P 400 companies, 17 were S&P 600 companies, and 62 were outside the S&P 1500. In terms of the type of dissidents initiating proxy contests with competing slates, activist investors (mainly hedge funds and other types of investment companies) were dissidents in approximately 79% of the contests, whereas former or current insiders and employees, other groups of shareholders, or companies seeking business combinations made up the rest of the dissidents.[212]

Approximately 30% of the contests with competing slates were contests for majority control of the board.[213] However, because less than a majority of board seats were up for election in approximately 31% of the contests due to staggered board structures, dissidents sought majority control in 43% of contests where it was possible to do so (30 out of 70 cases). Among the 31 cases where less than a majority of seats were up for election, dissidents nominated candidates for all of the seats that were up for election in 48% of contests (15 cases). Overall, dissidents nominated candidates for all of the seats that were up for election in approximately 25% of contests (25 cases out of 101).

b. Notice, Solicitation, and Costs of Proxy Contests

The Commission's proxy rules do not currently require dissidents to provide notice to registrants of their intention to solicit votes for their nominees. However, as discussed, advance notice bylaws are common among registrants. For example, at the

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212 Based on information from Factset's SharkRepellent database and staff's review of EDGAR filings.

213 This percentage is somewhat larger than the 26% reported in the Proposing Release for 72 board contests initiated in years 2014 and 2015.

end of 2020, 99% of S&P 500 registrants had advance notice provisions, and 95% of the Russell 3000 had such provisions.[214] We understand that the latest date on which notice may be provided under advance notice bylaws typically ranges from 90 to 120 days before the anniversary of the meeting date.[215]

Among the 101 director election contests initiated in years 2017–2020, approximately 90% of dissidents either publicly announced or communicated their intent to nominate directors to the registrant at least 60 days before the anniversary of the previous year's annual meeting date (or 60 days before the annual meeting date if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting had changed by more than 30 calendar days from the previous year).[216] Further statistics on the distribution of the timing for initial nomination communications and filing of preliminary proxy statements are shown in Table 2 below.

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214 *See* WilmerHale M&A Report. An advance notice bylaw can generally be waived by a registrant's board of directors at their discretion, though we do not have data that would allow us to determine the frequency with which such bylaws are waived. If not waived, such bylaws may also be challenged in court (such as in the case of "inequitable circumstances"). *See*, *e.g.*, *AB Value Partners, L.P. v. Kreisler Mfg. Corp.*, No. 10434-VCP, 2014 WL 7150465 (Del Ch. Dec. 16, 2015).

215 *See* S&C 2015 Report.

216 Based on information from Factset's SharkRepellent database and staff's analysis of EDGAR filings. When available, staff gathered information on the timing of dissidents' direct communications to registrants of their intent to nominate directors from the parties' proxy filings, which frequently list such information as part of the solicitation background descriptions. Such communications are not always immediately publicly disclosed.

Table 2. Timing of initiation of election contests and filing of preliminary proxy statements relative to anniversary of previous year's meeting dates, in 2017–2020[217]

	Percentage						
	at least 45 days	at least 60 days	at least 90 days	Mean	Median	Min	Max
Days between first announcement or communication of election contest intent and anniversary of previous year's meeting date	93%	90%	65%	108	93	16	377
Days between dissident filing preliminary proxy statement and anniversary of previous year's meeting date	75%	43%	13%	65	56	7	369

For the contests where dissidents ultimately file a definitive proxy statement (74 cases), approximately 80% of dissident definitive statements are filed at most 50 days before the anniversary of the previous year's annual meeting date (or 50 days before the annual meeting date if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting had changed by more than 30 calendar days from the previous year).[218] In addition, more than 82% of dissidents' definitive statements are filed 25 days or more before the actual annual meeting date.[219]

While dissidents in proxy contests are required to make their proxy statements publicly available via the EDGAR system, they are not currently subject to any requirements as to how many shareholders they must solicit. When dissidents actively solicit shareholders they have the choice of sending shareholders a full package of proxy

[217] *Id.* For 37 of the 101 director contests initiated in 2017–2020, the announcement and filing days are measured relative to the annual meeting date rather than the anniversary of the previous year's meeting date, because either the registrant did not hold an annual meeting during the previous year or the date of the meeting changed by more than 30 calendar days from the previous year.

[218] Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings.

[219] *Id.*

materials ("full set") or sending only a one-page notice informing them of the online availability of proxy materials ("notice and access" or "notice-only"). We estimate that approximately 52% of dissidents solicited all shareholders in a sample of recent proxy contests.[220] Furthermore, the dissidents in this sample of contests sent full sets of proxy materials to each of the shareholders solicited.[221] The use of the full set delivery method may be driven by findings that such solicitations are associated with a higher rate of voting than notice-only solicitations.[222] Among those contests in which dissidents did not solicit all shareholders, the average (median) percentage of shares held by solicited shareholders was approximately 95% (96%) of the outstanding shares of the registrant eligible to vote, and the minimum (maximum) percentage of the outstanding shares eligible to vote held by solicited shareholders was approximately 83% (99.9%).[223] The average (median) percentage of shareholder accounts solicited in these contests was approximately 20% (14%), and the minimum (maximum) percentage of accounts solicited was 1% (71%).[224]

In proxy contests, both registrants and dissidents incur direct costs of solicitation.[225] These costs may include, for example, fees paid to proxy solicitors,

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220 Based on industry data provided by a proxy services provider for a sample of 31 proxy contests for annual meetings held between July 1, 2018 and June 30, 2019.

221 *Id.*

222 *See*, *e.g.*, Broadridge, *Analysis of Traditional and Notice & Access Issuers: Issuer Adoption, Distribution and Voting for Fiscal Year Ending June 30, 2013* (Oct. 2013), available at http://media.broadridge.com/documents/Broadridge-6-Yr-NA-Stats-Report-2013.pdf.

223 Based on industry data provided by a proxy services provider for a sample of 31 proxy contests for annual meetings held between July 1, 2018 and June 30, 2019.

224 *Id*.

225 In some cases, dissidents may seek reimbursement of their expenses from registrants. Such potential reimbursement is governed by state law and is more likely in the case of a successful proxy contest. The proxy rules require dissidents to disclose whether reimbursement will be

expenditures for attorneys and public relations advisors, and printing and mailing costs. We understand that for registrants, the costs of solicitation in proxy contests generally exceed the solicitation costs associated with a shareholder meeting without a contested election. Both dissidents and registrants are required to provide estimates of the costs of solicitation in their proxy statements.[226] As shown in Table 3 below, based on a review of proxy contests initiated in years 2017–2020, the median reported estimated total costs were approximately $1,650,000 for registrants and approximately $750,000 for dissidents.[227]

Table 3. Reported estimates of solicitation expenses in election contests initiated in 2017–2020[228]

	Mean	Median	Minimum	Maximum
Estimated Total Costs:				
Registrant	$3,891,886	$1,650,000	$65,000	$35,000,000
Dissident	$1,812,938	$750,000	$20,000	$25,000,000
Estimated Fees Paid to Proxy Solicitor:				
Registrant	$540,486	$300,000	$10,000	$3,500,000
Dissident	$278,614	$125,000	$12,500	$2,500,000

Beyond these estimated solicitation expenses, proxy contests may be associated with other indirect costs, such as the cost of management or dissident time spent in the

sought from the registrant, and, if so, whether the question of such reimbursement will be submitted to a vote of shareholders. *See* 17 CFR 240.14a-101, Item 4(b)(5).

226 Registrants may, but do not have to, exclude from the total estimated solicitation costs the amount normally expended for a solicitation for an election of directors in the absence of a contest, and costs represented by salaries and wages of regular employees and officers, provided a statement to that effect is included in the proxy statement. It is our understanding that most registrants exclude such costs from their estimated total costs.

227 This represents a substantial increase in median (and average) reported solicitation expenses for both registrants and dissidents compared to earlier years, as reported in the Proposing Release (*see* Section IV.B.2.b of the Proposing Release for data on estimated solicitation expenses in earlier years).

228 Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings in calendar years 2017–2020.

process of conducting the contest and expenses associated with any discussions held between management and the dissident(s) or other participants who could influence the outcome (e.g., large investors and proxy advisor firms). We do not have data on these indirect costs. One study that considers the cost of earlier as well as later stages of engagement between management and activist hedge fund dissidents, which eventually culminate in a proxy contest, estimates that a campaign ending in a proxy contest has a total (direct and indirect) average cost to the dissident of approximately $10 million over the full period of engagement.[229]

In addition to the typical proxy contests[230] discussed above, on rare occasions, there have also been "nominal contests," in which the dissidents incur little more than the basic required costs to pursue a contest. In particular, a dissident engaging in a nominal proxy contest would have to bear the cost of drafting a proxy statement and undergoing the staff review and comment process for that filing. However, a dissident in a nominal contest would not expend resources on substantial solicitation, such as to disseminate its proxy materials through full set delivery to a substantial percentage of shareholders versus only to select shareholders, to hire the services of a proxy solicitor, or to engage in other broad outreach efforts, as would be the case in a typical proxy contest. Based on staff experience in administering the proxy rules, nominal contests are very rare, and the staff is unaware of any nominal contest that has resulted in the dissident gaining seats for its nominees. We do not have data that is well-suited for empirically identifying nominal contests, in part because a contest is sometimes settled or withdrawn before the dissident

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229 *See* Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. Fin. Econ. 610, 624 (2013).

230 For ease of reference, we use "typical proxy contests" to refer to contested elections of directors other than the nominal contests described below.

has filed its definitive proxy statement and no estimates are included in the preliminary proxy statement.

c. Results of Proxy Contests

A proxy contest may result in several possible outcomes. Our staff's review of 101 proxy contests initiated in 2017–2020 found that approximately 53% (54 cases) did not make it to a vote. In these cases, registrants may have settled by agreeing to nominate or appoint some number of the dissident's candidates to the board of directors or by making other concessions, the dissident may have chosen to withdraw in the absence of any concessions, or other events may have precluded a vote.[231] Among the approximately 47% (47 cases) of proxy contests initiated in 2017–2020 that proceeded to a vote, dissidents were at least partially successful (i.e., achieved some board representation) in about 38% (18 cases) of these contests.[232] In six voted contests where dissidents achieved board representation, only some of the nominees on the dissident's slate were elected to the board, which represents a "split-ticket" outcome in around 13% of the contests that went to a vote. In 17 of the voted contests where dissidents achieved board representation, the end result was a "mixed board" with directors elected from both slates, whereas the dissident's nominees were elected to fill all positions of the board in

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231 This percentage of director election contests not proceeding to a vote is higher than the 33% that we found in the Proposing Release for a sample of 72 contests initiated in 2014 and 2015. However, it is in line with what has been reported in previous research for contests prior to 2014. *See*, *e.g.*, Vyacheslav Fos, *The Disciplinary Effects of Proxy Contests*, 63 Manag. Sci. 655 (2017) ("Fos study") (finding that, for proxy contests including contested elections as well as a much smaller number of issue contests from 1994 to 2012, about 53% did not make it to a vote, where 25% were settled, 15% were withdrawn, 6% ended with a delisting or a takeover, and 7% did not make it to a vote for other reasons).

232 The estimated percentage of voted director election contests that lead to dissident board representation is somewhat less than what has been found for contest samples from earlier years, where dissidents won board representation in about half of the cases that went to a vote at the annual meeting. *See* Section IV.B.2.c of the Proposing Release.

one contest. Between settlements and voted contests, dissidents achieved at least some board representation in a bit more than half of the director election contests (53 out of 101), and achieved majority control in approximately 20% of contests.

Contests differ in the closeness of voting outcomes. The staff has analyzed the difference in votes between the elected director with the lowest number of votes and the nominee who came closest to being elected. Out of the 47 contests initiated in 2017–2020 that proceeded to a vote, registrants disclosed full voting results in Form 8-K filings in 41 contests. In these contests, the median director elected with the fewest votes received 73% more votes than the nominee with the next highest number of votes. The median difference in votes received between the director elected with the fewest votes and the nominee with the next highest number of votes as a percentage of total outstanding votes was approximately 19%, and around 24% of the contests (10 out of 41) had a difference in votes received as a percentage of outstanding votes of 5% or less. In the contests where the difference in votes received was 5% or less of total outstanding votes, the elected director who received the fewest votes received no more than 13% more votes than the non-elected nominee who received the greatest votes. For the purpose of our analysis below, we define "close contests" as those where the difference in votes received between the director elected with the fewest votes and the nominee with the next highest number of votes is 5% or less of total outstanding votes, because in such contests a relatively small number of shareholders could have been determinative of the outcome.

We are unaware of any nominal contest that has resulted in the dissident gaining seats for their nominees. Dissidents may nevertheless choose to initiate nominal contests to pursue goals other than changes in board composition, such as to publicize a particular

issue or to encourage management to engage with the dissident. However, we do not have data that would allow us to measure success along those other dimensions.

d. Split-Ticket Voting

Shareholders have the option of voting a split ticket but can do so only by attending the shareholder meeting in person and voting their shares at that meeting. In practice, however, in-person meeting attendance may be limited due to cost and other logistical constraints,[233] which may be especially likely for small shareholders and retail investors. We understand that in certain elections, the parties to the contest and their agents (e.g., proxy solicitors) will help some shareholders "split their ticket" by arranging for an in-person representative to vote these shareholders' shares at the meeting on the ballots used for in-person voting. We do not have data on the number or characteristics of shareholders that are arranging to vote a split ticket through current practices, but our understanding is that these practices are available only to relatively large shareholders.

We recognize that the monetary costs and other burdens of attending a meeting in person will likely be lower to shareholders if the meeting is held virtually, because the time and expenses associated with travelling to the meeting would be eliminated. However, there may still be time or other resource constraints that would affect a shareholder's ability to attend a virtual meeting. Before the COVID-19 pandemic, fully virtual or hybrid annual meetings were a small fraction of annual meetings, but growing steadily. For example, one recent study of shareholder meetings by U.S. registrants

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[233] *See*, *e.g.*, letter from the Council of Institutional Investors dated Jan. 8, 2014, available at https://www.sec.gov/rules/petitions/2014/petn4-672.pdf (describing in-person attendance as "generally an expensive and impractical proposition"). *See also* letter from CII dated Dec. 28, 2016; letter from Fidelity; letter dated Dec. 23, 2016 from Hermes ("Hermes"); letter from Trian. The burden of attending a meeting for the purpose of voting a split ticket may be significantly lower in the case of a virtual shareholder meeting but such online meetings are still relatively rare.

found that virtual or hybrid shareholder meetings grew from 20 in 2011 to 285 in 2019, with about 60 to 70 new companies adopting meetings with a virtual component each year after 2015.[234] The arrival of the COVID-19 pandemic in the United States in March 2020 caused many registrants to switch to a virtual format for their shareholder meetings, and one study found that more than 2,300 annual meetings were held virtually in 2020. Based on 1,957 virtual meetings hosted by one proxy services provider in 2020, the average number of shareholders voting at virtual meetings (rather than voting in advance by proxy), held in 2020 was 13 shareholders for meetings with shareholder proposals (218 cases) and 2 shareholders for meetings without shareholder proposals.[235] Thus, in-person voting appears to have been rare also in virtual meetings, suggesting shareholder still have a strong preference for voting by proxy, or face barriers to attending and voting at the meeting, even when meetings are held virtually. It is our understanding that virtual meetings are still in widespread use this year (2021) as we are still in the COVID-19 pandemic. It remains to be seen to what extent registrants that were forced to switch to virtual meetings during the current pandemic will continue to hold virtual meetings going forward. Moreover, among the 101 proxy contests initiated from 2017–2020, staff analysis found that only 13 annual meetings were held virtually, and all of those were held after March 2020 (making up approximately 59% of the meetings in the sample that were held after March 2020).

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234 *See* Francois Brochet, Roman Chychyla & Fabrizio Ferri, *Virtual Shareholder Meetings*, European Corporate Governance Institute – Finance Working Paper No. 777/2021, at 10 (July 1, 2021), available at https://ssrn.com/abstract=3743064 (retrieved from SSRN Elsevier database) or http://dx.doi.org/10.2139/ssrn.3743064.

235 *See* Broadridge, *Virtual Shareholder Meetings 2020 Facts and Figures* (April 2021), available at https://www.broadridge.com/_assets/pdf/vsm-facts-and-figures-2020-brochure-april-2021.pdf.

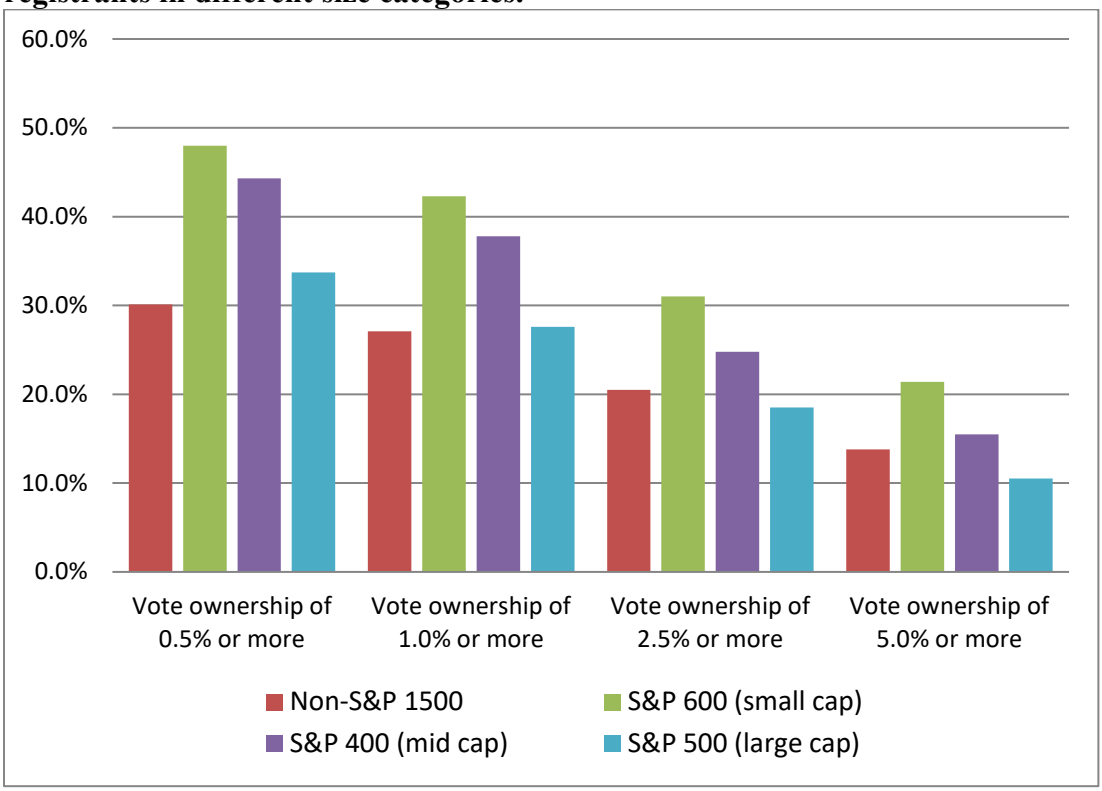
For shareholders that do not have ready access to other arrangements, the decision of whether or not to attend a meeting or seek other arrangements for splitting their ticket is likely to depend on having the ability and resources to do so, as well as having the incentive to incur the associated costs. To the extent an individual investor believes vote splitting is beneficial, the larger its ownership stake is, the greater the financial incentives to incur the current costs of arranging a split-ticket vote. However, beyond the direct financial incentives from a larger ownership stake, a large investor also has a voting impact commensurate with that stake, which increases the likelihood that its votes are determinative. This in turn, increases the large investor's incentives to arrange for vote splitting when deemed beneficial. We believe institutions are more likely than retail shareholders to have both the resources and the incentives to currently vote a split ticket (if they have the preference to do so).

Because the incentive to arrange a split-ticket vote when such a vote is preferred is dependent on having both a sizable financial stake, in dollar terms, as well as significant voting influence, in percentage terms, we consider the distribution of both of these factors for institutional shareholders. We use data from Form 13F filings to estimate these distributions, which limits us to considering institutions required to report their holdings on Form 13F.[236] Moreover, we only consider shares over which these institutions have voting authority in contested director elections. We do not have comparable data for other institutional shareholders or for retail shareholders.

[236] Non-exempt institutional investment managers that exercise investment discretion over $100 million or more in Section 13(f) securities are required to report their holdings on Form 13F with the Commission.

We first consider the potential incentive to arrange split-ticket vote based on voting influence, as measured by fraction ownership of voting shares. Figure 1 shows the average percentage, across registrants, of the total outstanding shares held by Form 13F filers that each meet a given minimum threshold of ownership of voting shares. The average percentage of the total outstanding shares is calculated across all registrants within different size categories. As in previous analyses, registrant size is approximated by reference to the S&P index. The data suggest that there is currently a substantial portion of outstanding shares for which institutional holders may have enough individual voting influence to incentivize them to arrange split-ticket voting if preferred. For example, if we consider average total ownership by Form 13F filers that are larger block holders (individually owning 5% or more of shares) and therefore are likely to be pivotal voters, the average percentage of the total outstanding shares held by these institutions is approximately 14% for non-S&P 1500 registrants, 21% for S&P 600 registrants, 16% for S&P 400 registrants, and 11% for S&P 500 registrants. The large difference in ownership between S&P 600 and non-S&P 1500 registrants, despite both groups being relatively small registrants, is due to a smaller number of institutions holding stock (of any amount) in the non-S&P 1500 registrants. Figure 1 also shows the average total ownership of shares held by Form 13F filers meeting lower minimum thresholds of ownership of voting shares (0.5%, 1.0%, and 2.5% respectively), in case ownership less than 5% may provide sufficient voting influence to incentivize an institution to arrange split-ticket voting. Because we are only considering ownership by institutions required to report their holdings on Form 13F, there may be additional owners with incentives to arrange split-ticket voting (for any given minimum ownership threshold) that are not captured in the data presented in Figure 1.

Figure 1: Average percentage of outstanding shares held by institutions (Form 13F filers) with different levels of minimum individual vote ownership, across registrants in different size categories.[237]

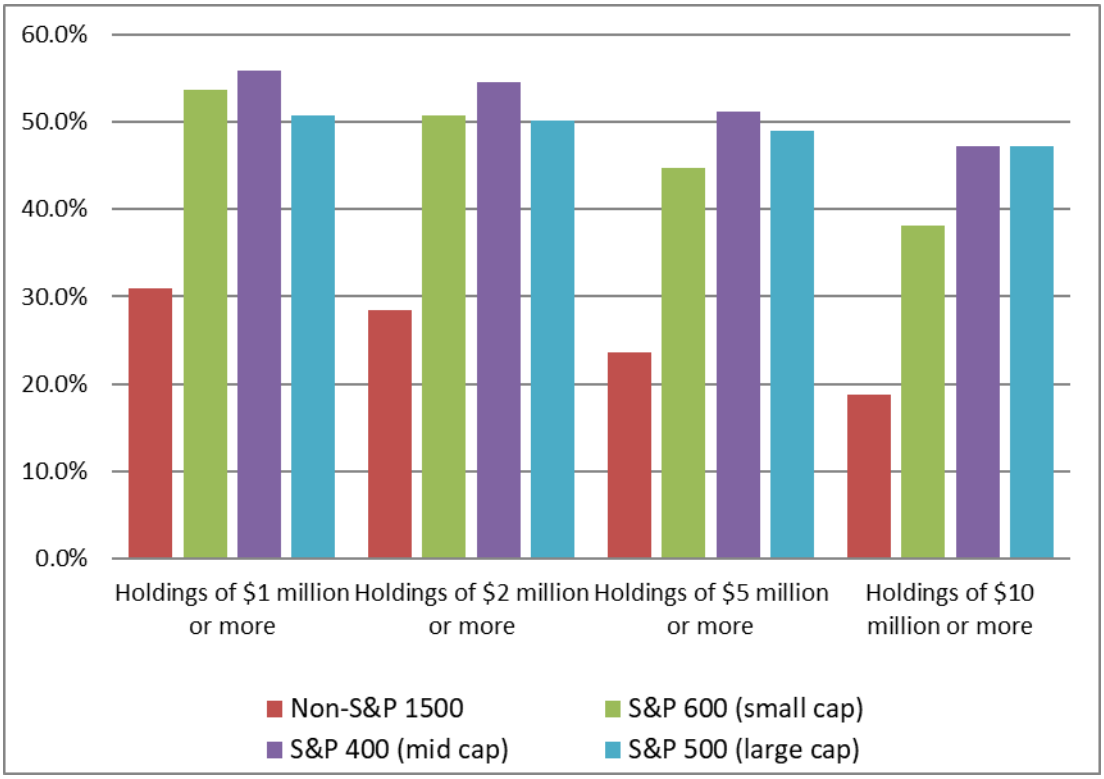


Even a large voting stake in a company may not currently be enough to incentivize a shareholder to incur the costs of attending the annual meeting to vote a split ticket if the investment is low in dollar terms. Therefore we also consider the combined voting power by institutions filing Form 13F that individually have a substantial dollar investment in a registrant. In particular, Figure 2 shows the average percentage, across registrants, of the total outstanding shares held by Form 13F filers that each meet a given threshold of minimum dollar stake in the registrant. For example, for Form 13F filers that hold stock worth $1 million or more in a given registrant, the average percentage of

[237] The estimates in the figure are based on staff analysis of Form 13F filings related to potentially affected registrants from the first quarter of 2020 in the Thomson Reuters Form 13F database, which is the most recent time period we had access to for this analysis. The analysis reflects only holdings for which institutions have voting authority in contested director elections.

the total outstanding shares held by these institutions is above 50% for all registrants belonging to one of the S&P 1500 component indexes. By contrast, the corresponding average percentage of outstanding shares held among non-S&P 1500 registrants is approximately 31%. If we instead consider only Form 13F filers that each hold stock worth $10 million or more, the average percentage of outstanding shares held by these institutions is 47% for S&P 500 registrants, 47% for S&P 400 registrants, 38% for S&P 600 registrants, and 19% for non-S&P 1500 registrants. Overall, the estimates in Figure 2 suggest that a substantial portion of voting shares in registrants are held by institutions that have a significant financial interest. This is particularly so for relatively larger registrants.

Figure 2: Average percentage of outstanding shares held by institutions (Form 13F filers) with different levels of minimum financial interest, across registrants in different size categories.[238]



3. Other Methods to Seek Change in Board Representation

As discussed in more detail in the Proposing Release,[239] beyond proxy contests culminating at annual meetings, we note that under the baseline, there are a number of other methods shareholders currently can use to potentially affect changes to the composition of a board of directors. Such shareholder interventions could be in the form of (i) making recommendations for director candidates directly to the nominating

238 *Id.* Financial interest is estimated as the market value of all shares held by the individual institution in a specific registrant. For the average percentage of outstanding shares, we only considered holdings for which institutions had voting authority in contested director elections.

239 *See* Section IV.B.3 of the Proposing Release.

committee of the board,[240] (ii) pursuing consent solicitations,[241] (iii) pursuing exempt solicitations at the annual meeting, (iv) taking advantage of proxy access provisions in corporate bylaws to nominate a limited number of director candidates for inclusion in the registrant's proxy statement, (v) withholding votes from (or voting against) directors in uncontested elections as well as waging formal "vote no" campaigns to encourage other shareholders to do so, or (vi) seeking a change in board composition by making nominations from the floor of a meeting, without soliciting proxies.

C. Discussion of Economic Effects

The economic benefits and costs of the final amendments, including impacts on efficiency, competition, and capital formation, are discussed below. We first address the effects of the changes to the proxy process together as a package, including both benefits and costs. In particular, we discuss the anticipated effects of the final amendments on shareholder voting and then consider anticipated effects with respect to the costs, outcomes, incidence, and perceived threat of contested elections at affected registrants. We then discuss the economic effects that can be attributed to specific implementation choices in the final amendments, to the extent possible, and the relative benefits and costs of the principal reasonable alternatives to these implementation choices.

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240 *See* letter from NACD (stating that "NACD actively encourages such shareholder participation on director nomination. Indeed, contested elections will likely become less common as boards continue to improve their work in creating optimal boards and in communicating their methods for achieving them.").

241 Consent solicitations may take the form of a two-step procedure where a dissident first obtains sufficient support from shareholders to call a special meeting or sufficient voting ownership to call a special meeting, and then puts to a vote, either by proxy or in person at the special meeting, a proposal to remove certain directors and elect certain other nominees. The criteria for how and when a special meeting can be called vary both by state law and corporate bylaws and governing documents (e.g., certificate of incorporation). Depending on state law and governing documents, a dissident may alternatively be able to perform a consent solicitation in one step, in which it seeks support for a proposal to remove certain directors and elect certain other nominees purely through written consent by shareholders.

Our economic analysis of the final amendments reflects our consideration of a number of broad issues related to corporate governance and the proxy system. First, the design of the voting process, as a primary mechanism through which shareholders provide input into the composition of boards, can affect the ability of shareholders to exercise one of their most fundamental rights – to select and hold accountable the fiduciaries responsible for overseeing their investments. Second, it is difficult to predict how the various parties involved in contested elections are likely to respond to any changes to the proxy process, complicating the evaluation of whether such changes would enhance or detract from board effectiveness and registrants' efficiency and competitiveness. Third, corporate governance involves a number of closely interrelated mechanisms, so any effects on contested elections may be either mitigated or magnified by changes in the use or effectiveness of other mechanisms. These issues are discussed in more detail in the Proposing Release and provide context for the discussion of potential economic effects that follows.[242]

1. Effects on Shareholder Voting

By mandating the use of a universal proxy in contested elections, the final amendments will allow all shareholders to vote through the proxy system for the combination of director nominees of their choice, as they will no longer be limited to voting for only nominees chosen by the registrant or for only nominees chosen by the dissident.[243] In addition, the ability to vote for dissident nominees by proxy would no

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242 *See* Section IV.C in the Proposing Release.

243 Nominees "chosen" by the dissident may include certain registrant nominees. The short slate rule permits a dissident in certain circumstances to solicit votes for some of the registrant's nominees through the use of its proxy card where the dissident is not nominating enough director candidates to gain majority control of the board in the contest, thereby allowing shareholders using the dissident's proxy card to split their vote. However, shareholders voting on the dissident's proxy

longer be limited to shareholders solicited by the dissident because any shareholders not solicited by the dissident would still be able to vote for those nominees using the registrant's proxy card.[244] This change is expected to increase the efficiency with which shareholders vote in contested elections. In particular, universal proxies will result in benefits in the form of cost savings for shareholders who would otherwise expend time and resources to attend a shareholder meeting in person or otherwise arrange to vote for a combination of candidates that could not be voted for by proxy. Other shareholders may be newly able to vote for their most preferred candidates. That is, there may be shareholders who would vote for a combination of management and dissident candidates if a universal proxy were available but who do not currently do so because it is not feasible (and in particular cost-effective) to undertake such a vote. In the Proposing Release, we discussed in more detail the current cost or inability for investors to vote for their preferred mix of director candidates from both slates of nominees, as well as investors' express demand for split-ticket voting.[245]

Several commenters expressed general support for the use of universal proxy to enable split-ticket voting, arguing that split-ticket voting is currently either too costly or outright impossible to achieve for most shareholders given currently available approaches.[246] By contrast, one commenter argued against the mandated use of universal

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card would still be limited to voting for those registrant nominees selected by the dissident, rather than any registrant nominee of their choice.

[244] For shareholders not solicited by the dissident, while the registrant's universal proxy card would allow them to support dissident nominees, they would still need to seek out the dissident's proxy statement in the EDGAR system (as directed by the registrant's proxy statement) to obtain information about the dissident nominees.

[245] *See* Section IV.D.1.a in the Proposing Release.

[246] *See, e.g.,* letters from CII dated Dec. 28, 2016; Fidelity; Hermes; Trian.

proxy and claimed that there already exist less costly "work arounds" for investors who want to be able to choose candidates from both slates without voting in person.[247] We acknowledge "work arounds" exist, but as discussed above, such approaches may still be too costly or are not generally available to all shareholders who wish to split their ticket, whereas mandated use of universal proxy will ensure all shareholders – regardless of time, resources, sophistication, or ability to use other approaches – have access to a comparatively low-cost alternative for split-ticket voting.

As described in Section IV.B.2.d, the increased use of virtual meetings can reduce the cost for shareholders to vote a split-ticket at the annual meeting by eliminating the time and expenses associated with travelling to physically attend the meeting. However it is unclear how widespread the use of virtual meetings will be after the current COVID-19 pandemic is over, especially for meetings with contested director elections. Despite the lower cost of attending virtual meetings, voting by proxy card is likely to be less time-consuming and gives shareholders the flexibility to fill out the card with their votes at a time of their choosing, compared to having to attend a virtual meeting at one specific point in time. Supporting this, the evidence on shareholder attendance and voting at virtual meetings show that a vast majority of shareholders rely on the proxy process to vote even when the meeting is held virtually.[248]

For reasons discussed in more detail in the Proposing Release, we expect that institutional shareholders and large shareholders are relatively more likely than other shareholders to implement a split-ticket vote under current rules, and therefore will

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[247] *See* letter from Society dated Jan. 10, 2017.

[248] *See supra* note 235 and accompanying text.

experience cost savings by being able to do so more easily via the proxy process under the final amendments adopted today.[249]

As discussed in more detail in the Proposing Release, the availability of universal proxies would also expand the voting alternatives of shareholders, such as retail shareholders or other small shareholders, for whom it would not otherwise be practical or feasible to vote for their preferred combination of candidates.[250] To the extent that such shareholders are interested in splitting their ticket, the availability of universal proxies may result in a greater number of split-ticket votes than under the current system.

In addition, because dissidents currently are not required to solicit all shareholders, we observe that, in a substantial fraction of proxy contests, many shareholders do not receive the dissident's proxy card and thus cannot vote by proxy for dissident candidates.[251] The requirement in the final amendments that registrants, as well as dissidents, use universal proxies will allow shareholders who are not solicited by dissidents to nonetheless vote for some or all of the dissident nominees through the proxy process, by using the registrant's universal proxy card.

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249 *See* Section IV.D.1.a of the Proposing Release. *See supra* Section IV.B.1.a and IV.B.1.d for updated data on shareholders, including ownership statistics.

250 One commenter particularly highlighted increased access to split-ticket voting for retail investors and other small shareholders as a benefit of mandating the use of universal proxy; *see* letter from CII dated Sep. 7, 2017 (stating that "Importantly, requiring a universal proxy would benefit retail investors and institutional investors with relatively smaller positions by allowing them to choose among all board nominees without attending the shareholder meeting, which can involve travel and other costs that may be prohibitive.").

251 Based on industry data provided by a proxy services provider for a sample of proxy contests from July 1, 2018 through June 30, 2019, we estimate that there are some shareholders that dissidents do not solicit in approximately 48% of contested elections, while dissidents in the remainder of contested elections solicit all shareholders. In contests in which fewer than all shareholders were solicited, only those accounts holding a number of shares of the registrant that exceeded a minimum threshold of shares were subject to solicitation by the dissident.

Thus, by providing for a universal proxy card, the final amendments will allow all shareholders to vote for their preferred candidates. We expect that retail and small shareholders are more likely than other shareholders to vote differently under a universal proxy system than under the current system because they currently have limited access to other means of voting a split-ticket and a lower likelihood of being solicited by dissidents. However, we also note that such shareholders may be less likely to vote in general.[252] For these shareholders, the final amendments are not likely to result in direct cost savings, but will allow them to submit votes that better reflect their preferences. The indirect benefits or costs of their expanded voting options depend on whether such changes in voting behavior are widespread enough to change actual or expected election outcomes, and the nature of these changes in outcomes, as discussed below.[253]

There is also a possibility that universal proxies could lead some shareholders to be confused about their voting options and how to properly mark the proxy cards to accurately reflect their choices, as noted by some commenters.[254] This may give rise to minor costs to some shareholders in contested elections, if it increases the time required by these shareholders to mark and submit a proxy card. It may also increase the risk that some shareholders submit proxy cards that do not accurately reflect their intentions or that could be invalidated because they are improperly marked. However, we believe that the risk of any such confusion will be mitigated by the presentation and formatting requirements of the final amendments, as discussed in Section IV.C.5.b below.

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[252] Retail shareholders vote 28% of their shares on average, though their participation rate could be higher in the case of a contested election, because of factors such as increased media coverage, expanded outreach efforts, and greater shareholder interest in the contest. *See supra* Section IV.B.1.a.

[253] *See infra* Sections IV.C.3 and IV.C.4.

[254] *See, e.g.*, letters from BR; Broadridge Financial Solutions, Inc.; Society.

Finally, to the extent shareholders currently erroneously believe they can vote for a mix of nominees from the competing slates by using both the registrant's and the dissident's card, universal proxies are likely to mitigate any such behavior among shareholders.

2. Potential Effects on Costs of Contested Elections

The final amendments may directly impose minor costs on registrants[255] and dissidents that engage in proxy contests, relative to the current costs that these parties bear in proxy contests.[256] The final amendments may also have effects on the expected outcomes of contested elections that could result in either a net increase or net decrease in the total costs that either registrants or dissidents incur in contested elections, primarily because of strategic changes in discretionary solicitation expenditures. The extent and direction of such indirect changes in costs incurred are difficult to predict. We also consider the amendments' cost implications in the context of nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest, which are currently rare but could become more or less frequent under the final amendments.

a. Typical Proxy Contests

The total cost borne by a registrant or dissident in a typical proxy contest would generally include solicitation costs, such as basic proxy distribution and postage costs, expenditures on proxy solicitors, attorneys and public relations advisors, and any time spent by the parties or their staff on outreach efforts. The total cost to registrants would also reflect items such as any additional time spent by staff on determining and

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255 Note that costs on registrants are borne by the registrants' investors.

256 The potential direct cost savings resulting from the final amendments for certain shareholders are discussed in Section IV.C.1 *supra*.

implementing a strategy in response to the contest and any costs of revising their proxy materials given the proxy contest. The total cost to dissidents would also reflect time spent by the dissident to pursue a contest, the cost to seek nominees and gain their consent to be nominated, and the cost of drafting a preliminary and definitive proxy statement and undergoing the staff's review and comment process for those filings. These total costs are difficult to estimate because the components of these costs (other than estimated solicitation expenditures) are not specifically required to be disclosed and may vary significantly across contests. However, we note that many of the components of these costs are not likely to be affected by the final amendments. In much of the discussion that follows, we focus primarily on solicitation costs because we believe that these costs are most likely to be affected by the final amendments.

We first consider the direct cost implications of the final amendments. As discussed in more detail in the Proposing Release,[257] we do not expect the solicitation requirement to impose a large incremental cost burden on dissidents in typical proxy contests in which the dissident engages in substantial solicitation efforts. We continue to expect this even though the final rule, in a modification of the proposed rule, raises the solicitation threshold from a majority of the voting power to 67% of the voting power. Our continued expectation is based on staff analysis of data that show most dissidents in director election contests currently solicit at least 67% of the voting power even in the absence of any solicitation requirement.[258] Therefore, in the vast majority of cases, we

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257 *See* Section IV.D.2.a of the Proposing Release.

258 In particular, as noted above, all dissidents solicited a number of shareholders that exceeded the 67% threshold of shares entitled to vote in a sample of 31 recent proxy contests. *See supra* notes 220 and 223 and accompanying text. In addition, data provided by a proxy services provider for an earlier sample of 35 proxy contests from June 30, 2015 through April 15, 2016, which we used in the economic analysis in the Proposing Release, show that only two dissidents (around 6% of this sample) solicited less than 67% of the shares entitled to vote in elections.

expect dissidents that would have engaged in proxy contests even in the absence of the final amendments not to bear any incremental direct costs due to the solicitation requirement. Similarly, for dissidents that newly decide to engage in a typical proxy contest (as opposed to a nominal contest) as a result of the final amendments, we do not expect the solicitation requirement to change the costs that they would expect to bear relative to the costs of any other typical proxy contest.[259]

In the infrequent cases in which dissidents in a typical proxy contest may currently not solicit shareholders holding 67% of the voting power, dissidents are still likely to solicit shareholders holding a significant proportion of these shares to have a chance of winning any board seats.[260] In addition, the number of accounts required to reach the minimum solicitation requirement in typical contests is generally a small fraction of the total accounts outstanding. For example, within a sample of recent proxy contests, we estimate the number of accounts that one would have had to solicit to meet the 67% minimum solicitation requirement ranges from about 0.1% to 13% of the outstanding shareholder accounts, with the median number of accounts required equaling about 1.4% of the total shareholder accounts.[261] Based on our sample, we expect that the incremental cost to a dissident currently soliciting less than the required 67% of the voting power will be minor relative to the total costs incurred by dissidents in typical proxy contests. However, because of the increase in the minimum solicitation

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[259] The median total solicitation cost was approximately $750,000 for dissidents initiating contests in years 2017–2020. *See supra* Section IV.B.2.b.

[260] Based on data provided by a proxy services provider for a sample of 35 proxy contests from June 30, 2015 through April 15, 2016, the two dissidents that solicited less than 67% of shares entitled to vote solicited accounts representing 31.5% and 60% of the shares, respectively.

[261] Based on industry data provided by a proxy services provider for a sample of 31 proxy contests from July 1, 2018 through June 30, 2019.

requirement compared to the proposal, any such incremental costs will be larger under the final amendments compared to what they would have been under the proposed majority of the voting power requirement.

Specifically, in the infrequent case in which a dissident would otherwise have solicited shareholders representing a substantial fraction, but not 67%, of the voting power, we estimate that such a dissident would bear an incremental cost of approximately $5,400, if using the least expensive approach,[262] to expand solicitation to meet the minimum 67% solicitation requirement.[263] This estimated incremental cost is larger than

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262 As in the Proposing Release, staff assumed that the dissident would use the least expensive approach (i.e., notice and access delivery) to solicit additional accounts given that the dissident would not have chosen to solicit these accounts but for the proposed minimum solicitation requirement. To the extent that dissidents were to use an approach other than the least expensive approach to solicit additional shareholders to meet this requirement, their incremental costs would likely be higher than estimated here. Such approaches may include using full set rather than notice and access delivery, soliciting more than the minimum required number of shareholders, or incurring additional solicitation expenditures on phone calls or other forms of outreach. It is difficult to estimate how much more these approaches would cost than the least expensive approach because of the variety of approaches that could be used and because of the degree of variation in expenses, such as postage and printing costs, that would depend on the total size of the dissident's proxy materials.

263 This estimate was derived by the staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. In particular, staff based this estimate on the two cases out of the 35 contests from June 30, 2015 through April 15, 2016 for which information was provided in which less than 67% of the shares eligible to vote were solicited by the dissident. The required increase in expenses to solicit 67% of the shares eligible to vote was estimated based on the number of additional accounts that would have to be solicited and the applicable fees under NYSE Rule 451 and postage costs for notice and access delivery. The staff also used the provided data on the proxy contests to estimate the increase in the number of banks or brokers considered "nominees" under NYSE Rule 451 that might be involved at the higher solicitation level. The estimated average incremental solicitation cost of approximately $5,400 includes nominee coordination fees of $22 for each of the additional nominees expected to be involved, plus basic processing fees, notice and access fees, preference management fees, and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.80 (for other accounts) per additional account to be solicited. Staff assumed that half of the additional accounts to be solicited are suppressed and that none of these accounts requested full set delivery by prior consent or upon receipt of the notice (because such delivery requirements may apply to only a small fraction of accounts and are not expected to significantly affect the overall estimate of costs). Additional notice and access fees of $0.25 per account were assumed to be required for each account that was solicited prior to increasing the level of solicitation because of the use of notice and access delivery for some accounts. Given the number of accounts involved, no additional intermediary unit fees were expected to apply. This estimate does not include printing costs for the notice, for which we do not have relevant data to make an estimate.

the $1,000 incremental cost we estimated in the Proposing Release for dissidents not meeting the proposed majority solicitation requirement. However, it is still minor compared to the median total solicitation expenses estimated for dissidents in director election contests, representing less than one percent of the median total solicitation cost reported in recent proxy statements by dissidents (which may include expenditures for proxy solicitors, attorneys, and public relations advisors as well as the more basic proxy distribution fees and postage costs).[264] The level of any such incremental cost will be driven by any shortfall in the number of shareholders that would otherwise be solicited compared to the number that will be required to be solicited to meet the 67% voting threshold. Factors that may affect this shortfall include the size of the dissident's own voting stake in the registrant and the demographics of the shareholder base, such as whether share ownership is widely dispersed or more concentrated in a given registrant.

It is possible dissidents in future typical contests could target companies more similar to the general population of registrants rather than the type of target companies we have observed in recent contests. Based on aggregated data provided by a proxy services provider for more than 5,000 operating companies holding shareholder meetings from July 1, 2018 through June 30, 2019, we have information on the average distribution of shares by account size within four different size (in terms of market capitalization) categories of registrants. Using this data, we estimate that in the broader population of operating companies, the average fraction of accounts needed to be solicited to meet the minimum requirement ranges from approximately 0.2% for companies with more than $10 billion in market capitalization to approximately 1% for

[264] The median total solicitation cost reported in proxy statements by dissidents in proxy contests in years 2017–2020 is approximately $750,000. *See supra* Section IV.B.2.b.

companies with less than $300 million in market capitalization. These estimated fractions fall within the range of the observed solicited fractions of accounts in the sample of recent proxy contests, which further supports our expectation that the solicitation requirement is unlikely to impose a large incremental cost burden on dissidents in typical proxy contests in which the dissident engages in substantial solicitation efforts.

Registrants may also incur minor incremental costs in typical proxy contests as a direct result of the final amendments to implement the required changes to their proxy cards. For example, under the final amendments, registrants must list dissident nominees on their proxy cards and provide disclosure about the consequences of voting for a greater or lesser number of nominees than available director positions. In addition, both registrants and dissidents may incur costs to make additional changes to their proxy statements in reaction to the final amendments, such as additional disclosures urging shareholders not to support their opponent's candidates using their card and expressing their views as to the importance of a unified or a mixed board. These costs are expected to be minimal in comparison to the total costs that registrants and dissidents bear in a typical proxy contest.[265]

We next consider indirect effects of the final amendments on the costs of proxy contests. As noted in the Proposing Release, for both registrants and dissidents in typical proxy contests, other effects of the final amendments have the potential to result in more significant changes in costs than the effects related to revising proxy materials or the solicitation requirement. This is because the greatest potential impact on the cost of

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[265] *See infra* Section V for estimates for purposes of the Paperwork Reduction Act of 1995 of the incremental burden that may be required to prepare proxy materials under the final amendments.

proxy contests is likely related to strategic increases or decreases in discretionary solicitation efforts in response to any changes that the final amendments may bring about in the (actual or perceived) likelihood of the different potential outcomes of the contest. Changes in discretionary solicitation efforts may include increases or decreases in expenditures on proxy solicitors or the degree of outreach through phone calls or mailings to convince shareholders to vote for a party's candidates. In particular, while we estimate that the median total solicitation cost for dissidents was approximately $750,000, we estimate that the median basic cost of soliciting shareholders, namely the proxy distribution fees and postage costs for the first mailing, was approximately $14,000.[266] The large expenditures on solicitation beyond the basic costs of soliciting shareholders (an estimated median incremental expenditure of over $736,000), demonstrate the potential for substantial increases or decreases in costs if a party were to change its approach to discretionary solicitation activities. However, it is difficult to predict the extent or direction of this potential effect because any changes in discretionary solicitation expenditures are highly dependent on the particular situation and the parties' own views as to how the final amendments would affect their likelihood of gaining or retaining seats and the potential impact of solicitation efforts.[267]

For example, registrants that expect that a universal proxy may otherwise result in more dissident nominees being elected may incur additional costs to increase outreach to

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266 Our estimate of total solicitation costs is based on costs reported in proxy statements in calendar years 2017–2020. *See supra* Section IV.B.2.b. Our estimate of proxy distribution fees and postage costs is based on industry data provided by a proxy services provider for a sample of 31 proxy contests from July 1, 2018 through June 30, 2019, and excludes dissident printing costs (for which we do not have relevant data to make an estimate).

267 Effects on strategic discretionary expenditures, whether increases or decreases, are more likely in the case of what would otherwise be close contests. We estimate that approximately 24% of proxy contests that went to a vote in 2017–2020 were close contests, as defined in *supra* Section IV.B.2.c.

shareholders in an effort to limit support for dissident nominees. Similarly, dissidents may increase solicitation expenditures in cases in which they expect the use of universal proxies and any corresponding increase in split-ticket voting to result in more registrant nominees retaining seats than otherwise expected. At the same time, registrants or dissidents may reduce solicitation expenditures in cases in which they believe that any increased split-ticket voting related to universal proxies would result on average in more support for their own nominees, given that they may therefore be able to achieve the same expected outcome at a lower cost than in the absence of universal proxies.[268] They may also reduce their expenditure if the use of universal proxies is more likely to lead to a less consequential outcome (for example, an expected mixed-board outcome instead of an expected change in majority control), or if the expenditure were less likely to change that outcome than under the current rules.

Supporting the possibility of no change in discretionary expenses at all, one commenter expressed doubt that dissidents or registrants will materially alter solicitation expenditures under the amendments, with the argument that proxy fights already put a premium on each side getting its message out to investors and that letting shareholders vote by proxy for their preferred mix of candidates will not alter this equation.[269]

b. Nominal Proxy Contests

The final amendments may also have implications for nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest by refraining from material solicitation efforts, such as arranging for full set delivery, use of

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[268] That said, such registrants or dissidents could alternatively decide to increase solicitation expenditures relative to what they would otherwise have spent if they think that they may actually be able to gain or retain more seats than would otherwise have been feasible.

[269] *See* letter from CII dated Dec. 28, 2016.

a proxy solicitor, and other outreach. As discussed in the Proposing Release, despite the fact that there may be a low chance of succeeding in obtaining a board seat if a dissident does not undertake substantial solicitation efforts as it would in a typical proxy contest, dissidents may nevertheless choose to initiate nominal contests to pursue goals other than changes in board composition. Such contests are currently rare[270] but could become more or less attractive as a result of the final amendments, as discussed in Section IV.C.4.b below.

A dissident engaging in a nominal proxy contest currently must bear the cost of drafting a preliminary proxy statement and undergoing the staff's review and comment process for that filing. Under the final amendments, such a dissident would also be required to meet the notice requirements and bear the cost of meeting the solicitation requirements of the final amendments. Using aggregated data on average share account distributions by account size for registrants in four different size (market capitalization) categories,[271] we estimate the average cost of using the least expensive approach[272] to meet the 67% minimum solicitation requirement through an intermediary for each of these categories of registrants.[273] Specifically, we estimate that the average cost for a

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270 Based on staff experience. *See supra* Section IV.B.2.b.

271 Based on aggregated industry data provided by a proxy services provider for more than 5,000 operating companies holding shareholder meetings from July 1, 2018 through June 30, 2019. The four different categories for which we have data on operating companies' average distribution of shares are: (i) less than $300 million in market capitalization, (ii) between $300 million and $2 billion, (iii) between $2 billion and $10 billion, and (iv) above $10 billion.

272 *See supra* note 262.

273 The cost estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. The required cost to meet the proposed solicitation requirement was estimated based on the number of accounts that would have to be solicited on average at a registrant in each of four market capitalization categories and the applicable fees under NYSE Rule 451 and postage costs for notice and access delivery. Specifically, industry data provided by a proxy services provider indicates that to reach 67% of the voting power a dissident would have to solicit on average approximately 46 accounts at companies with less than $300 million in market capitalization, approximately 88 accounts at companies with between $300

dissident to meet the solicitation requirement is approximately $5,300 at companies with less than $300 million in market capitalization, approximately $5,800 at companies with between $300 million and $2 billion in market capitalization, approximately $6,300 at companies with between $2 billion and $10 billion in market capitalization, and approximately $9,800 at companies with market capitalization above $10 billion.[274] These estimated average costs are significantly less than the average total solicitation expenses incurred by a dissident in a typical proxy contest. As noted above in Section IV.B.2.b, reported proxy solicitation expenses for dissidents in recent contests range from $20,000 to $25 million, with an average (median) of approximately $1.8 million ($750,000). These expenses substantially exceed the estimated cost of a nominal contest in part because a dissident in a typical proxy contest would generally incur higher proxy dissemination costs through the use of full set delivery and the solicitation of a larger fraction of the shareholders entitled to vote, but also because of substantial additional

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million and $2 billion in market capitalization, approximately 147 accounts at companies with between $2 billion and $10 billion in market capitalization, and approximately 529 accounts at companies with market capitalization above $10 billion. (*See supra* Section IV.B.1.a for statistics on average total number of accounts in each respective category.) Staff also estimated that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee ranges from 12 for the smallest category to 176 nominees for the largest category of registrants. The estimated solicitation costs ranging from $5,300 to $9,800 includes intermediary unit fees, which apply with a minimum of $5,000, plus nominee coordination fees of $22 per bank or broker considered a "nominee" under NYSE Rule 451, plus basic processing fees, notice and access fees, preference management fees, and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.80 (for other accounts) per account. Staff assumed that half of the accounts in question are suppressed and that none of these accounts requested full set delivery by prior consent or upon receipt of the notice (because such delivery requirements may apply to only a small fraction of accounts and are not expected to significantly affect the overall estimate of costs). This estimate does not include printing costs for the notice, for which we do not have relevant data to make an estimate. Note that an individual shareholder may have more than one account, so the number of beneficial shareholders likely is lower than the number of beneficial shareholder accounts. For the purpose of estimating costs related to distribution of proxy materials, the number of accounts is the more relevant number because dissemination costs such as intermediary and processing fees apply on a per account basis per NYSE Rule 451.

274 *Id.*

expenditures on solicitation beyond the cost of proxy dissemination, such as the expense of hiring a proxy solicitor to perform additional outreach.

The basic required cost to contest an election at a given registrant may also be affected by the dissident's own voting stake in the registrant and the characteristics of the shareholder base, such as whether share ownership is widely dispersed or more concentrated in a given registrant. In particular, these costs may be substantially lower in cases where a dissident can meet the solicitation requirement by disseminating materials on its own, without hiring a proxy services provider or similar intermediary, as in the case of a registrant with a very concentrated shareholder base and majority owners that are known and easily contacted. By contrast, these costs are likely to be substantially higher, for example, at larger registrants with highly dispersed ownership where the total number of shareholder accounts that will need to be solicited to reach at least 67% of the voting power can be very high.

Some commenters raised concerns that mandated use of universal proxy would increase the number of proxy contests and thereby expose more registrants to costly distraction.[275] In the Proposing Release we acknowledged that the mandated use of universal proxy may result in an increased incidence of nominal contests, and that we expect that registrants that are the subject of such additional contests will bear incremental costs. We continue to expect these costs to be higher than in the case of current nominal contests (for which we believe that the costs borne by registrants are relatively low), but still significantly lower than in the case of a typical proxy contest. In particular, registrants may revise their proxy materials and increase their solicitation

[275] *See, e.g.*, letters from BR; CCMC; CGCIV.

expenditures to explain the appearance of the names of dissident nominees on their proxy cards and urge shareholders not to support the dissident's nominees. However, we do not expect solicitation expenditures to rise as much as they would in the average typical proxy contest because the registrant, in its solicitation efforts, would not be competing with a dissident that is spending significant resources on solicitation. For these reasons, we estimate that the cost borne by a registrant facing a nominal proxy contest may be approximately $65,000, based on the lowest incremental solicitation cost reported by registrants in recent proxy contests.[276]

3. Potential Effects on Outcomes of Contested Elections

In addition to reducing costs for certain shareholders who would submit split-ticket votes even in the absence of universal proxies, the mandated use of universal proxies we are adopting may result in additional shareholders submitting split-ticket votes. For those shareholders not solicited by dissidents, to the extent they do not support any of the registrant's nominees, universal proxies may also result in an increase in voting support for some or all of the dissident's nominees, as they will now have the ability to cast their votes for dissident nominees without being directly solicited by dissidents (or needing to make other arrangements to be able to vote for dissident nominees). Such changes in voting behavior could be significant enough to affect election outcomes in the contests that would have occurred even in the absence of the final amendments, as well as to change the incentive to initiate contests.[277] In particular, either more registrant nominees or more dissident nominees might be elected than under

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[276] *See supra* Section IV.B.2.b.

[277] The potential incidence of additional contests that would not have occurred in the absence of the final amendments is discussed in Section IV.C.4 *infra*.

the baseline, where vote splitting is harder to achieve and some shareholders do not receive a proxy card that includes the dissident slate. Any resulting changes in board composition or changes in control of the board may result in both benefits and costs for the affected parties. However, these effects are uncertain because it is difficult to predict the extent or direction of any changes in voting behavior as a result of the final amendments and to evaluate whether any resulting changes in board composition will lead to more or less effective board oversight.

There may be elections in which universal proxies will result in changes to the percentage of the vote obtained by each director candidate, but in which the changes in vote totals would not be sufficient to change the ultimate election results. In our assessment this would be the likely outcome for the majority of contested elections that would have taken place in the absence of the final amendments. We estimate that approximately three-quarters of recent contests that went to a vote were not close contests and would require shareholders holding significant voting power (greater than 5%) to change their voting behavior to lead to a different election result.[278] We also note that the voting power represented by shareholders that may potentially change their voting behavior is limited due to the fact that some shareholders, particularly large shareholders, are currently able to send representatives to shareholder meetings or use other mechanisms to implement split-ticket votes when desired. We do not expect the votes submitted by these shareholders to change as a result of the final amendments. The

[278] Based on staff review of contested elections initiated in 2017–2020, votes representing greater than 5% of the total outstanding voting power would have to change in order to change the result in about 76% of the elections. Within that 76%, almost two-thirds of the elections would have required a change in votes representing greater than 20% of the outstanding voting power to result in a change in the election outcome.

extent to which other shareholders are interested in splitting their tickets or, for those not solicited by dissidents, in voting solely for some or all of the dissident nominees, is unclear, particularly as the option has not generally been available to them (without additional cost) under the current rules.[279]

However, any changes in voting behavior due to universal proxies could affect election outcomes in those contests that would otherwise have been very close contests. We estimate that in the 24% of contests that we consider to be close contests, the director elected with the fewest votes received no more than 13% more votes than the non-elected nominee with the most votes.[280] In such cases, universal proxies may be more likely to affect the election outcome. Close contests may be more likely to occur at registrants with cumulative voting.[281]

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279 For example, it has been asserted that retail shareholders, when they vote, tend to support management. *See*, *e.g.*, Neil Stewart, *Retail Shareholders: Looking out for the Little Guy*, IR Magazine (May 15, 2012), available at http://www.irmagazine.com/articles/shareholder-targeting-id/18761/retail-shareholders-looking-out-little-guy/ (stating that "as a rule, retail investors tend to support management"); Mary Ann Cloyd, *How Well Do You Know Your Shareholders?*, Harvard Law School Forum on Corporate Governance and Financial Regulation Blog, June 18, 2013, available at https://corpgov.law.harvard.edu/2013/06/18/how-well-do-you-know-your-shareholders/ (stating that "retail shareholders support management's voting recommendations at high rates"). Additionally, a recent study, using proprietary data on retail investors' voting behavior from a proxy services provider, found further evidence on retail investors voting in support of management. Specifically, the study's analysis suggested that more retail ownership leads to more successful management proposals and fewer successful shareholder proposals in close votes. *See* Alon Brav, Matthew Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, J. Fin. Econ (Aug. 2021) (forthcoming). By contrast, a survey of 801 retail investors found that the majority of these retail investors believe activists add long-term value, and may thus be more likely to support activists than generally thought. *See* Brunswick Group, *A look at Retail Investors' Views of Shareholder Activism and Why it Matters* (July 2015), available at https://www.brunswickgroup.com/media/597919/Brunswick-Group-Retail-Investors-Views-of-Shareholder-Activism-Summary-of-Results.pdf.

280 *See supra* Section IV.B.2.c.

281 Under cumulative voting, each shareholder is generally allowed to cast as many votes as there are nominees and may allocate more than one vote to certain nominees, which may lead to a more concentrated distribution of votes. By contrast, close contests may be relatively less likely at registrants with majority voting standards that do not revert to a plurality standard in the case of a contested election, or with high levels of incumbent executive and director ownership. For example, we estimate that approximately 3% of S&P 1500 registrants have cumulative voting,

A recent study uses an alternative approach to estimate the percentage of contests in which universal proxies may be more likely to affect the election outcome.[282] This study estimates that it is possible that universal proxies would have led to different election outcomes in up to 15% of cases in a sample of proxy contests from 2001 through 2016.[283] This statistic is somewhat lower than our estimate that close contests may represent approximately one-fourth of recent contests, but is also a more direct attempt to estimate how many of the sample contests might have had different outcomes if, hypothetically, universal proxy had been used. However, we note that the study makes several assumptions in arriving at this statistic, and it is unclear whether these assumptions can be relied upon.[284]

To the extent universal proxies lead to changes in election outcomes, it is not clear how this would affect the composition of boards. There may be either more registrant nominees or more dissident nominees elected to boards, or there may be no

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approximately 6% of S&P 1500 registrants have majority voting standards that do not revert to a plurality standard in a proxy contest, and approximately 3% of registrants have incumbent executives and directors who together own a majority of the outstanding shares. *See supra* Section IV.B.1.

282 *See* Hirst Study.

283 *See* Hirst Study, at 488 (finding that 40 out of 269 proxy contests examined may have had outcomes that were distorted as a result of barriers to split-ticket voting).

284 For example, the estimates in this study are based on an assumption that facilitating split-ticket voting through the availability of universal proxies could result only in changes in votes that were otherwise marked as "withheld" from a candidate, while votes "for" any candidate would be assumed not to change. Also, the study assumes that the degree of increase in "for" votes for any given candidate upon facilitating split-ticket voting would be limited to the number of votes withheld from a single opposing candidate, while votes withheld from a different opposing candidate would be assumed not to switch to be in favor of this candidate. For the study's own discussion of the validity and reliability of these assumptions, *see* Hirst Study, at 488. We are unable to test independently the reliability of these assumptions because we do not have data that would allow us to predict how voting behavior might change with the availability of a universal proxy.

change, on average, in the types of nominees elected.[285] Also, there may be either fewer changes in control or more changes in control, or there may be the same frequency of changes in control as under the baseline. The impact of forcing shareholders to choose between one proxy card and the other in an election contest depends on the dynamics of the particular contest. On the one hand, where dissatisfaction with current management is greater, shareholders who would otherwise prefer to split their vote may be more likely under the current proxy system to utilize the dissident's card and forego the opportunity to vote for some registrant nominees, to send the message that board change is needed. This choice will no longer be necessary under the final amendments, which may lead to a greater likelihood that one or more registrant nominees retain their seats. On the other hand, there also may be cases in which the registrant nominees would, in the absence of the final amendments, have retained all of their seats. Currently, we observe that registrant nominees retain all of the seats up for election in 62% of the contests that proceed to a vote.[286] In such cases, an increase in split-ticket voting, as well as any incremental votes for the full dissident slate by shareholders not solicited by the dissident, may increase the likelihood of dissident nominees gaining one or more of those seats.

Given some of these possible dynamics, we expect that the election of mixed boards will be somewhat more likely under the final amendments than under the current proxy system. We expect this in particular for typical contests where the dissidents are

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285 One study finds no evidence that universal proxies are likely to favor dissident nominees; if anything the evidence suggests that the opposite may be the case. *See* Hirst Study. However, this conclusion is based on several critical assumptions about how shareholder behavior may change upon the availability of universal proxy, and we are unable to test the reliability of these assumptions. *See supra* note 284.

286 *See supra* Section IV.B.2.c.

engaging in meaningful solicitation efforts.[287] By contrast, due to the expected minimal level of solicitation efforts by dissidents in nominal contests, we expect the registrant slate to prevail intact in most such contests. However, we cannot predict whether any increase in mixed boards would be the result of one or more registrant nominees retaining seats when a board composed of only dissident nominees would otherwise have been elected or one or more dissident nominees gaining seats when all registrant nominees would have retained their seats, nor can we predict the magnitude of any increase in the frequency of such mixed board outcomes under the final amendments.[288] Also, it is not necessarily the case that any such changes in outcomes would more accurately reflect shareholder preferences, even though these outcomes may be the product of removing constraints on the combination of nominees that shareholders can vote for, because of limitations in the way that voting rules can communicate preferences.[289]

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287 We estimate that approximately 38% of recent contests that proceeded to a vote resulted in a mixed board being elected. *Id.*

288 One study questions whether universal proxies would result in a substantial increase in mixed board outcomes, based on an analysis indicating that mixed board outcomes could increase by no more than approximately 3% of the contests studied. *See* Hirst Study. However, this analysis and conclusion are based on several critical assumptions about how shareholder behavior may change upon the availability of universal proxies, and we are unable to test the reliability of these assumptions. *See supra* note 284.

289 For example, consider a registrant with 100 voting shareholders, three director seats up for election, and a dissident with two nominees. Assume that 54 of the shareholders prefer to elect the dissident nominees but are indifferent about which registrant nominee retains the third seat. On a universal proxy, each of these shareholders therefore votes for one registrant nominee, with equal probability across the three registrant nominees. The remaining 46 prefer the full registrant slate. In this case, with a universal proxy, 54 votes would be earned by each of the dissident nominees, but 64 votes (46 plus one-third of 54 votes) would be earned by each of the registrant nominees, leading to the registrant slate winning the election even though a majority of shareholders prefer that the dissidents gain two seats. *See also* letter from CII dated Nov. 8, 2018 (providing another hypothetical example that shows how voting outcomes may depart from shareholder preferences when universal proxy is used in combination with the dissident nominating a short slate). For further discussion of the limitations of voting rules, *see*, *e.g.*, Kenneth Arrow, *Social Choice and Individual Values* (1st ed. 1951).

Universal proxies may therefore result in either an increase or decrease in changes in control of a board, and in either dissidents or management winning more seats on the board, or a change in voting percentages without a change in the board composition. We expect that dissidents and registrants will take these potential impacts into consideration in their approach to potential proxy contests. For example, as discussed in more detail in the following section, if the parties to a contest anticipate that changes in voting behavior associated with universal proxies may change the number of seats that they expect to win, these expectations may affect the likelihood that they enter into a settlement agreement that results in changes to the board or other concessions. Such changes to board composition and concessions may either enhance or reduce, or have no significant effect on, the efficiency and the competitiveness of registrants.

It is also possible that parties will take measures to reduce the likelihood of changes in election outcomes. For example, proxy statements and other related communications could include additional disclosures intended to deter shareholders from voting split-tickets, such as emphasizing the importance of a unified board and clarifying whether some or all of one party's nominees might not agree to serve if their party does not hold a majority of board seats. Such disclosures might reduce the likelihood of split-ticket voting and limit any potential increase in mixed boards. Another potential tactical response may involve the adoption by registrants of additional defenses to shareholder interventions. For example, registrants might adopt director qualification bylaws or might limit the indemnification or committee membership of dissident-nominated directors.[290] Such changes could limit the likelihood of dissident nominees being elected

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[290] *See*, *e.g.*, J.W. Verret, *Defending Against Shareholder Proxy Access: Delaware's Future Reviewing Company Defenses in the Era of Dodd-Frank*, 36 J. Corp. Law 391, 404-06 (2011);

or limit their impact if they are elected. Similarly, if dissidents anticipate that the final amendments could result in fewer dissident nominees being elected, they may choose to rely more heavily on other types of interventions, such as soliciting consents to replace some board members with their own nominees at a special meeting. Also, dissidents interested in minority representation may nonetheless choose to run longer slates of candidates, to the extent it could increase the likelihood that at least some of their nominees are elected.

While the measures discussed above would serve to blunt the effect of the final amendments on election outcomes, the effect of other potential responses may serve to magnify these effects. For example, the parties to a contested election may change what they spend on solicitation. Some parties may increase these expenditures to further capitalize on an advantage that they anticipate the final amendments would give them, or to mitigate a disadvantage they perceive. If so, that may result in a greater likelihood of the parties' candidates being selected.

The composition of boards may also be affected by changes in the set of potential nominees that may result from effects that the final amendments could have on the incentives of directors. As discussed above, reputational concerns may be an important consideration for directors and potential directors, and research has found that proxy contests may have an adverse effect on a director's reputation.[291] For this reason, some potential directors may be relatively less willing to be nominated if they believe that universal proxies would reduce the likelihood that they are elected to a seat or retain their

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Matthew D. Cain , Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *How Corporate Governance Is Made: The Case of the Golden Leash*, 164 U. Pa. L. Rev. 649, 671 -678 (2016).

[291] *See supra* Section IV.B.1.d.

seat on a board. While we do not have specific data that suggests the final amendments would result in an increase in the reluctance of directors to serve, and it is unclear whether any such reluctance would be more likely to affect more qualified or less qualified candidates, any incremental increase in the reluctance of directors to serve may affect the ability of registrants to recruit individuals with the different skill sets needed to compose an effective board.

The effects of any changes in election outcomes on board effectiveness are difficult to predict. On the one hand, if more dissident nominees are elected or dissidents are more likely to gain control, it could result in greater efficiency and competitiveness to the extent dissident-nominated directors may be more effective monitors.[292] On the other hand, if more registrant nominees retain their seats or are more likely to retain control, the board may be better able to focus on long-term value creation, because a lower risk of board turnover may reduce the risk that directors unduly focus on short-term metrics.[293] Also, a lower chance of changes in control may reduce the risk that expensive change in control provisions in debt covenants and other material contracts and agreements are

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[292] *See*, *e.g.*, Jun-Koo Kang, Hyemin Kim, Jungmin Kim, and Angie Low, *Activist-appointed Directors,* J. Fin. Quant. Anal. (2020) (forthcoming), available at SSRN: https://ssrn.com/abstract=3380837 (retrieved from SSRN Elsevier database) or http://dx.doi.org/10.2139/ssrn.3380837 (finding that companies appointing independent directors nominated by activists, either through contests or negotiations, experience a larger value increase than companies appointing other directors, and that the increase in value is higher among companies with greater monitoring needs and entrenched boards); Ian Gow, Sa-Pyung Sean Shin & Suraj Srinivasan, *Activist Directors: Determinants and Consequences,* Harv. Bus. Sch. Working Paper No. 14-120 (June 2014), available at http://www.hbs.edu/faculty/Pages/item.aspx?num=47599 (finding that activist interventions that result in new directors being appointed to the board are associated with significant strategic and operational actions by firms, as well as with positive stock reactions and improved operating performance).

[293] *See*, *e.g.*, Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Long-Term Firm Value, Revisited*, 128 J. Fin. Econ 422 (Nov. 2017) (suggesting that a greater likelihood of longer director tenure can serve as a longer-term commitment device with positive effects on longer-term value creation).

triggered.[294] Universal proxies may lead to more mixed boards with directors from both parties than under the current proxy system. Mixed boards may increase the effectiveness of boards, such as through a reduction of "groupthink" and benefits stemming from inclusion of directors with diverse backgrounds,[295] particularly because shareholders voting on universal proxies would have the ability to vote for the combination of directors that they believe provides the best mix of backgrounds given the specific circumstances of the registrant.[296] However, mixed boards may also lead to

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294 For example, one study found in its sample of debt issues that over half of the debt issued in 2012 contained change in control covenants that gave bondholders an option to require the issuer to offer to purchase all of the bonds (typically at 101% of their par value) if, at any time, the majority of the board of directors ceased to be those who were directors at the time of issuance or those whose election was approved by a majority of the continuing directors. *See* Frederick Bereskin & Helen Bowers, *Poison Puts: Corporate Governance Structure or Mechanism for Shifting Risk?,* working paper (Sept. 8, 2015), available at https://www.weinberg.udel.edu/IIRCiResearchDocuments/2015/09/FINAL-Poison-Puts-Research-Sept-2015.pdf. Triggering such covenants, often referred to as "proxy puts," can result in companies repurchasing their own debt at a loss as well as having to incur expenses to refinance with a new debt issue. Such covenants are more binding when they are of the "dead hand" variety, which prevents the board from approving dissident-nominated directors in order to avoid triggering the covenant. *See* F. William Reindel, *Dead Hand Proxy Puts – What You Need To Know*, Harvard Law School Forum on Corporate Governance and Financial Regulation Blog, June 10, 2015, available at https://corpgov.law.harvard.edu/2015/06/10/dead-hand-proxy-puts-what-you-need-to-know/.

295 *See*, *e.g.*, Jeffrey Coles, Naveen Daniel & Lalitha Naveen, *Director Overlap: Groupthink versus Teamwork*, working paper (2020), available at https://dx.doi.org/10.2139/ssrn.3650609 (retrieved from SSRN Elsevier database); David Carter, Betty Simkins & Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*, 38 Fin. Rev. 33 (2003); Gennaro Bernile, Vineet Bhagwat & Scott Yonker, *Board diversity, firm risk, and corporate policies*, 127 J. Fin. Econ. 588 (2018).

296 *See* letter from CII dated Dec. 28, 2016.

more frequent internal conflicts and result in less efficient decision-making within boards,[297] as also argued by some commenters.[298]

4. Potential Effects on Incidence and Perceived Threat of Contested Elections

As discussed in Sections IV.C.2 and IV.C.3 above, the effects of the final amendments on the outcomes and costs to registrants and dissidents of contested elections are uncertain, but could be significant. In this section, we consider how any such effects of the final amendments may change the incentives of dissidents to initiate proxy contests and the manner in which registrants react to the possibility of a contested election (the perceived "threat" of a contest), even in the absence of a contest.

We first consider the potential impact of the final rule on the incidence or perceived threat of typical proxy contests, in which the dissident expends significant resources on solicitation. We then consider the impact on the incidence or perceived threat of nominal contests, in which dissidents, taking advantage of the mandatory use of universal proxies, expend significantly fewer resources than in a typical proxy contest.[299] Any changes in the incidence of contested elections of these different types, or, even in

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297 *See*, *e.g.*, Anup Agrawal & Mark Chen, *Boardroom Brawls: An Empirical Analysis of Disputes Involving Directors*, 7 Quart. J. Fin. 1 (2017) (studying boardroom disputes that are disclosed upon directors resigning or declining to stand for re-election and finding that directors who are likely to be more independent of management are more likely to be involved in the dispute); Jason Roderick Donaldson, Nadya Malenko & Giorgia Piacentino, *Deadlock on the Board*, 33 Rev. Fin. Stud.4445 (October 2020) (showing that board diversity can exacerbate deadlock because differences in preferences over alternative polices gives directors an incentive to block implementation of alternatives preferred by other directors, to preserve their option to get their preferred alternative implemented in the future).

298 *See supra* notes 35 and 36 and accompanying text.

299 We also note that there may be effects on the incidence and perceived threat of "late-breaking" proxy contests, or contests initiated close to the meeting date, because of the notice requirement and the proxy statement filing deadline prescribed by the final amendments. These timing requirements and their potential effects are discussed in more detail in Section IV.C.5 *infra*.

the absence of a contest, in managerial decision-making or the relationship between shareholders and management as a result of a change in the perceived threat of such contests, may result in costs and benefits for shareholders, registrants, and dissidents.

Several commenters argued that mandating the use of universal proxy cards will likely increase the frequency of proxy contests, thereby increasing costs for registrants and distracting their managers.[300] By contrast, one commenter argued that mandating the use of universal proxy cards is unlikely to increase the frequency of contested elections, stating that "[s]hareholders invest significant resources in running a proxy contest; the decision to proceed generally is driven by the shareholder's thesis regarding the economics of the engagement and likelihood of success."[301] Other commenters argued the effect on the number of contests is difficult to predict.[302] We disagree with the commenters arguing that contests are likely to increase due to the amendments; instead, we generally agree with the commenters arguing that any effects on the number of contests is hard to predict. In addition, although we to some extent agree with the commenters that argue that the costs to registrants will increase if the number of contests increases, we recognize that there could be benefits as well, which we discuss in more detail below. Overall, the effects on costs and benefits for all affected parties due to any changes in the incidence or perceived threat of contests are uncertain, as the extent and direction of the effects of the final amendments on the outcomes and costs of contested elections are unclear, both because it is difficult to predict how different parties will respond to such effects, and because it is difficult to evaluate whether changes in the

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300 *See* letters from BR; CCMC; CGCIV; IBC.

301 *See* letter from CII dated Dec. 28, 2016.

302 *See* letters from Trian; Hermes.

incidence or perceived threat of contests would have positive or negative effects on board or registrant performance.

a. Typical Proxy Contests

Effects Related to Anticipated Changes in Outcomes

Any effects on the expected outcomes of typical proxy contests may affect the incidence of such contests as well as the likelihood that a registrant makes changes (whether in board composition or with respect to other decisions) even in the absence of actual contests. The likely effects of universal proxies on the outcome of a typical contest depend on the dynamics of the particular contest. Thus, it is not clear whether, on average, the final amendments would increase or decrease the likelihood of changes in control or the number of board seats won by either party.

On the one hand, a dissident who expects to gain more seats under the final amendments than under the baseline may have an increased incentive to initiate a typical proxy contest. This would particularly be the case for a dissident that expects a greater likelihood of gaining control of the board, and for whom majority control of the board would be required to institute the changes the dissident desires. On the other hand, a dissident who expects, under the final amendments, to gain fewer seats or face a lower likelihood of gaining control than under the baseline may have a decreased incentive to initiate a typical contest.

If, under the final amendments, a registrant is expected to face a higher risk of losing seats or control of the board to dissident nominees, it is likely that a potential dissident could exercise greater influence over that registrant. Conversely, it is likely that the influence of potential dissidents would be reduced where a lower risk of losing seats or control to dissident nominees is expected under the final amendments. These changes

in influence may derive from the outcomes of election contests or from negotiations with registrants in the course of, or in the absence of, a contest. In particular, registrants facing a greater likelihood of contests, or a higher chance of losing seats (or control) if a contest were initiated, may be more likely to enter into a settlement agreement with the dissident and may also be more likely to concede at earlier stages of engagement or to make changes in response to alternative interventions (such as "vote no" campaigns).[303] Registrants facing a reduced likelihood of contests or a lower chance of losing seats (or control) if a contest were initiated may be less likely to enter into settlement agreements, to engage in negotiations at earlier stages, or to make changes in response to alternative interventions.

Thus, it is likely that any changes in expectations regarding the outcome of a potential contest would affect the degree of a dissident's influence relative to that of a registrant's incumbent board and management. It is difficult to generalize about the effects of the final amendments as they are very likely to depend on the dynamics of a particular contest (or potential contest). Also, it is not clear whether the actual incidence of contested elections would increase or decrease, because any change in a dissident's incentive to initiate contests may be accompanied by a change in the likelihood that a registrant makes earlier concessions to prevent a disagreement from proceeding to the stage of a proxy contest.

Effects Related to Anticipated Changes in Costs

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[303] *See, e.g.*, Unofficial Transcript of the Proxy Voting Roundtable (Feb. 19, 2015), available at https://www.sec.gov/spotlight/proxy-voting-roundtable/proxy-voting-roundtable-transcript.txt ("Roundtable Transcript"), comment of Michelle Lowry, Professor, Drexel University, at 60 and Lisa M. Fairfax, Professor, George Washington University Law School, at 48 (noting that universal proxies could facilitate settlements with or accommodations to dissidents before a contest arose).

While it is unclear whether the final amendments are likely to change the expected costs of typical proxy contests to registrants and dissidents, any such changes in the expected costs may also affect the incidence or perceived threat of such contests. In particular, a dissident that expects to achieve a similar outcome at a lower cost may have a greater incentive to initiate a typical proxy contest.[304] Registrants that expect dissidents to face lower costs, or those registrants that expect to bear additional costs in the form of increased solicitation expenditures in a contested election, may have greater incentive to make concessions. By contrast, a dissident that expects to incur additional solicitation expenses to achieve the same outcome may have a lower incentive to initiate a typical proxy contest, while registrants that expect dissidents to face higher costs, or registrants that expect to face lower costs in a contested election, may have a lower incentive to make concessions.

Differential Effects Across Registrants

To the extent that the incidence and perceived threat of typical proxy contests may change, certain registrants may be affected more than others. For example, relatively smaller to midsize registrants may be more affected because they are currently the most likely to be involved in proxy contests.[305] Any marginal changes may therefore

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[304] It is possible that a significant reduction in the average cost to dissidents in typical proxy contests could have effects that reduce the incentive to initiate some contests. In particular, some studies have found that a high required cost of proxy contests may serve as a credible signal to other shareholders that the value that the dissident's slate of directors can bring to the registrant is high, or else the dissident would not be bearing the cost of a proxy contest. In an environment in which the average cost of a typical proxy contest is very low, the ability of dissidents to get support for their nominees may be decreased, as it may be more difficult and potentially more costly than otherwise for a dissident whose contest has strong merit to differentiate its contest from less worthy contests. *See*, *e.g.*, John Pound, *Proxy Contests and the Efficiency of Shareholder Oversight*, 20 J. Fin. Econ. 237 (1988); Utpal Bhattacharya, *Communication Costs, Information Acquisition, and Voting Decisions in Proxy Contests*, 10 Rev. Fin. Stud. 1065 (1997).

[305] For example, staff estimates that only nine of the 101 registrants involved in proxy contests initiated in years 2017–2020 were in the S&P 500 index. *See supra* Section IV.B.2.a.

have the greatest impact on this group of registrants. However, more significant changes in the nature of proxy contests could also make it more attractive to target types of registrants that were infrequently the subject of proxy contests in the past. For example, to the extent that large registrants may currently be less likely to be targeted because of the greater resources they can expend to counter a dissident's solicitation efforts, a significant decrease in dissidents' expected discretionary solicitation expenditures or a large increase in their likelihood of success could lead to a higher threat or incidence of contests at such registrants.

The governance structures of registrants are also likely to play a role in the impact of the final amendments. On the one hand, registrants with governance characteristics that may increase the potential impact of proxy contests, such as cumulative voting, may be more affected than others.[306] On the other hand, registrants with governance characteristics that make them more difficult to target with certain kinds of election contests, such as those with high incumbent management ownership, may be less affected by the final amendments.[307]

b. Nominal Proxy Contests

The final amendments may also affect the incidence or perceived threat of nominal proxy contests, in which the dissidents incur little more than the basic costs required to engage in a contest and which are currently rare.[308] The nature of nominal proxy contests may be affected by the final amendments in two key ways. First, the solicitation requirement will likely increase the costs to dissidents of pursuing such

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306 *See supra* note 203.

307 *See supra* Section IV.B.1.b.

308 *See supra* Section IV.B.2.b.

contests. As discussed above, beyond the minimal costs currently incurred, such dissidents will also have to bear the costs required to meet the minimum solicitation requirement, which we estimate would be on average approximately $5,300 to $9,800 depending on the size of the registrant. [309] This cost could be lower in cases in which the services of an intermediary are not required to meet the solicitation requirement (as in the case of registrants with highly concentrated ownership) or higher at registrants with a more dispersed shareholder base. As discussed above, while this required solicitation cost will be greater than the expenditure currently required in a nominal contest, the costs will remain substantially lower than the solicitation costs dissidents bear in typical proxy contests.[310]

Second, requiring that registrants use universal proxies will, in practice, allow dissidents in nominal contests to put the names of their director candidates in front of all shareholders, via the registrant's proxy card, without additional expense. This change could somewhat increase the likelihood that a dissident in a nominal contest succeeds in gaining seats for their nominees, though, as in the case of current nominal contests, dissidents may have a very limited chance of succeeding in gaining seats if they do not engage in meaningful independent solicitation efforts. Dissidents engaging in a nominal contest will not be required to meet the eligibility criteria that apply to other alternatives that would allow dissidents to include some form of information on the registrant's proxy card, such as the requirements of a proxy access bylaw, where available. Dissidents may therefore consider engaging in a nominal contest when they would not qualify to use alternatives such as proxy access or when these alternatives are not available. However,

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309 *See supra* Section IV.C.2.b.

310 *Id.*

the information included in the registrant's proxy materials would likely be more limited in the case of a nominal contest (just a list of names and a reference that the dissident's proxy materials are available without cost at the Commission's website) than these other alternatives.

Based on staff experience, we expect that a dissident that solicits holders that represent at least 67% of voting power and files a preliminary and definitive proxy statement, without engaging in any other solicitation efforts, would generally have a very limited chance of having any of its nominees elected to the board despite their names being included on the registrant proxy card. The likelihood that a nominal contest results in dissident nominees winning seats may depend on many factors including the identity of dissident's nominees, their backgrounds and name recognition, the shareholders' level of dissatisfaction with the registrant, and the efforts of the registrant to dissuade shareholders from supporting the dissident's nominees.[311] In general, we expect that engaging in a nominal contest will not be an attractive alternative for most potential

[311] While the registrant's universal proxy card would permit a vote for dissident nominees, its proxy statement can and likely will include disclosure arguing against such a vote. If the dissident does not counter with positive information about its nominees disseminated in a meaningful way to a significant percentage of shareholders, we expect that the dissident's odds of success in the solicitation will be low.

dissidents that are truly interested in gaining board representation,[312] particularly if other alternatives are feasible.[313]

As discussed in more detail in the Proposing Release, even if the chance of obtaining board representation through a nominal contest may be low, dissidents may be interested in other possible effects, such as attracting attention to themselves and their agenda.[314] Such attention could be used by the dissident to publicize a desired change or a particular issue,[315] or to encourage management to engage with the dissident. However, it is unclear whether the inclusion of dissident nominees on the registrant's proxy card would significantly increase the publicity surrounding a nominal proxy contest.

It is difficult to say whether and to what extent the possibility of such publicity would lead dissidents to more frequently initiate nominal contests, and similarly, whether

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312 We note that the Commission's 2007 amendments to the proxy rules allowing notice and access delivery of proxy statements decreased the minimum cost at which a proxy contest could be conducted through potentially reduced mailing costs, but did not seem to cause an increase in contested elections, which may be evidence of the importance of full set delivery and other solicitation expenditures in gathering support for dissident nominees. *See*, *e.g.*, Fabio Saccone, *E-Proxy Reform, Activism, and the Decline in Retail Shareholder Voting,* The Conference Board Director Notes Working Paper No. DN-021 (Dec. 26, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1731362 (retrieved from SSRN Elsevier database). For details on the 2007 amendments to the proxy rules, *see Shareholder Choice Regarding Proxy Materials*, Release No. 34-56135 (July 26, 2007) [72 FR 42222 (Aug. 1, 2007)].

313 These alternatives may include a typical proxy contest (with additional solicitation expenditures but also, potentially, with a higher chance of success) or use of a proxy access bylaw (if available and if the dissident is eligible to use proxy access). We are unaware of any cases in which such bylaws have been used to nominate directors to date. However, most proxy access bylaws would require a registrant to include information about the dissident nominees and a supporting statement from the dissident in its proxy materials and would not require the dissident to bear the costs and meet the requirements described above. That said, it is possible that dissidents interested in board representation but for whom additional expenditures are not feasible or justified, and for whom proxy access is unavailable, may consider a nominal proxy contest.

314 *See* Section IV.D.4.b of the Proposing Release.

315 While the shareholder proposal process may be used to raise some such concerns, and would allow these concerns to be expressed more directly in the registrant's proxy statement, such proposals would also need to meet the requirements of Rule 14a-8. For example, proposals on certain topics, such as those pertaining to ordinary business matters, may be properly excluded by registrants from their proxy materials. *See* 17 CFR 240.14a-8(i)(7).

the ability of dissidents to run such contests would influence the incentives of management to pursue changes in response to such dissidents. We believe the likelihood of a significant increase in nominal contests will be mitigated by the new costs associated with the minimum solicitation requirement and the current availability to dissidents of other (potentially lower-cost) routes to obtaining publicity.[316] Also, while nominal contests are currently rare, it is also possible that their incidence could decline further under the final amendments given the new costs imposed on such contests. In particular, dissidents that would otherwise pursue nominal contests might consider alternatives that would not trigger the solicitation requirement, such as an exempt solicitation, or could choose not to take any such actions due to the higher costs imposed on nominal contests by the final amendments.

c. Effects of Any Changes in Incidence or Perceived Threat of Proxy Contests

Overall, it is in the incidence or perceived threat of proxy contests, and thus a change in the level of engagement with and the influence of dissidents. However, to the extent that any of these factors is significantly affected, we cannot rule out the possibility that there may be significant effects on the efficiency and competitiveness of registrants. Several commenters expressed concerns that mandating the use of universal proxy cards would increase the number of contests and have a negative impact on the working of boards and managerial decision-making to the detriment of shareholders.[317] We

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316 For example, for a much lower cost, a dissident required to file beneficial ownership reports under Section 13(d) could send a letter to the board detailing its desired changes and file it as an attachment to a Schedule 13D filing, making it available to the public (though, unlike a registrant's universal proxy card, the Schedule 13D filing would not be mailed or otherwise disseminated to shareholders).

317 *See supra* notes 34-36 and accompanying text.

discussed such potential effects in the economic analysis of the Proposing Release and discuss them as well in more detail below.[318] However, we note that while any increase in the incidence or threat of proxy contests would likely increase costs for registrants and take more of registrant management's time and effort, such an increase could still benefit shareholders if the contests (or threat thereof) ultimately result in more effective boards and improved registrant performance. We also discuss the potential for such benefits below.

There is some evidence that proxy contests may be beneficial to shareholders. For example, studies have found proxy contests to be associated with positive share price reactions.[319] In this vein, some observers have argued that the low incidence of proxy contests is due to collective action problems related to the high costs of proxy contests[320] and that a higher rate of proxy contests may be optimal.[321] Any increase in engagement between management, dissidents, and shareholders that may result because of changes in the likelihood of proxy contests, such as discussions at earlier stages of a campaign or reactions to other types of shareholder interventions, could similarly be beneficial. Such

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318 *See* Section IV.D.4.c of the Proposing Release.

319 *See*, *e.g.*, Yair Listokin, *Corporate Voting versus Market Price Setting*, 11 Am. L. & Econ. Rev. 608 (2009) (finding that, in a sample of proxy contests, close dissident victories were related to positive stock price impacts, while close management victories were related to negative stock price impacts); Harold Mulherin & Annette Poulsen, *Proxy Contests and Corporate Change: Implications for Shareholder Wealth*, 47 J. Fin. Econ. 279, 307 (1998) (finding that their sample of proxy contests was associated with shareholder value increases, particularly when the contests led to management turnover or acquisitions) ("Mulherin & Poulsen Study"); Fos Study (finding that the average abnormal returns to target shareholders reach 6.5% around proxy contest announcements). *See also* Matthew Denes, Jonathan M. Karpoff & Victoria McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, 44 J. Corp. Fin. 405 (2017).

320 That is, when a small group of shareholders must bear all of the costs of proxy contests while sharing in only a fraction of any benefits, with other shareholders absorbing the rest, the small group may be discouraged from initiating potentially value-enhancing proxy contests.

321 *See, e.g.*, Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675, 712 (2007); Bernard S. Black, *Shareholder Passivity Reexamined*, 89 Mich. L. Rev. 520 (1990).

engagement may improve the effectiveness of boards, may lead to value-enhancing changes, and may perhaps be a more efficient means to achieve such changes than expensive proxy contests. For example, one study found that an increased likelihood of being targeted with a proxy contest (even if an actual proxy contest does not materialize) is associated with changes in corporate policies that are followed by improved operating performance.[322] In these ways, an increase in the incidence or perceived threat of proxy contests could represent a valuable disciplinary force for some boards.

Conversely, an increase in the incidence and perceived threat of contests could also have a negative impact on the efficiency and competitiveness of registrants. For example, studies have found that proxy contests in which dissidents win one or more seats but there is no change in the incumbent management team and the registrant is not acquired are associated with underperformance in the years after the contest.[323] These results are consistent with the idea that conflicts in the boardroom may have detrimental effects for shareholders. An increase in the perceived threat of proxy contests or in engagement with dissidents could also have negative implications. For example, some studies have found that boards that face a lower threat of being replaced because of poor short-term results may be better able to focus on long-term value creation.[324] Studies have also found that increased dissident influence may be detrimental, to the extent that

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322 *See* Fos Study.

323 *See*, *e.g.*, Mulherin & Poulsen Study, at 305-08; David Ikenberry & Josef Lakonishok, *Corporate Governance Through the Proxy Contest: Evidence and Implications,* 66 J. of Bus. 405, 424-25 (1993).

324 *See* Martijn Cremers, Lubomir Litov & Simone Sepe, *Staggered Boards and Long-Term Firm Value, Revisited*, 126 J. Fin. Econ 422 (2017); Martijn Cremers, Erasmo Giambona, Simone Sepe & Ye Wang, *Hedge Fund Activism and Long-Term Firm Value*, 17-20, working paper (Nov. 19, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693231 (retrieved from SSRN Elsevier database).

managers make concessions or policy changes that are value-decreasing in order to deter activists.[325] Thus, in some cases, an increase in the incidence or perceived threat of proxy contests could represent a costly distraction for boards and corporate officers, as also argued by some commenters.[326] However, for the reasons outlined above, we are not able to assess the likelihood and extent of such costly distraction as a result of the final amendments. In addition, two commenters argued that adoption of a mandated universal proxy card could increase the incentive for founders to keep their companies private.[327] Any such increased incentive for companies to stay or go private rather than bear the threat of proxy contests could negatively affect capital formation,[328] but given the overall relatively low annual frequency of director election contests compared to the number of public registrants, we do not think the final amendments are likely to significantly affect the decisions of founders to take their companies public, even if they perceive the mandated use of universal proxies negatively.

Given these competing factors, to the extent there is any change in the incidence and perceived threat of typical proxy contests, the effects are likely to vary from

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325 *See*, *e.g.*, John Matsusaka & Oguzhan Ozbas, *A Theory of Shareholder Approval and Proposal Rights,* 33 J. Law Econ. Organ. 377 (2017).

326 *See*, *e.g.*, letters from CCMC; CGCIV; IBC; Society.

327 *See* letters from CCMC; CGCIV.

328 *See*, *e.g.*, Geoff Colvin, *Going Private: Take this Market and Shove it*, Fortune Magazine (May 29, 2016), available at http://fortune.com/going-private/ (citing the avoidance of proxy contests as motivation for firms to go private). While it is possible that companies could have some incremental incentive to stay or go private, we believe it is unlikely that the final amendments would result in an increased incentive for registrants to relist or redomicile overseas, given that these changes alone would not be sufficient to avoid being subject to the U.S. proxy rules. For example, foreign issuers may be subject to the U.S. proxy rules unless they qualify as foreign private issuers under Exchange Act Rule 3b-4(c). In particular, a foreign registrant cannot qualify as a foreign private issuer if more than 50% of its securities are held by U.S. residents and at least one of the following applies: (i) a majority of the officers and directors are U.S. citizens or residents; (ii) more than 50% of the issuer's assets are located in the U.S.; or (iii) the issuer's business is principally administered in the U.S. *See* 17 CFR 240.3b-4.

registrant to registrant, and it is difficult to predict the average effects of changes in the nature of proxy contests across all registrants. The possible effects of changes in the incidence or threat of nominal proxy contests are similarly unclear. To the extent that such contests have the potential to affect the outcomes of director elections, the actual incidence or perceived threat of such contests may either increase director discipline or create a distraction for boards, as in the case of typical proxy contests. However, as discussed above, because of the low level of solicitation efforts by dissidents in a nominal contest, we anticipate that these contests will be much less likely to affect the outcomes in director elections compared to typical contests. Nevertheless, such contests may be used to attract attention in the interest of pursuing other changes. In some cases, drawing attention to particular issues in this way could lead to value-enhancing changes. In other cases, dissidents may use such contests to pursue interests that may not be shared by other shareholders, in which case the average shareholder may be unlikely to benefit and yet likely bear the costs of registrants expending additional resources on solicitation in such contests. In these cases, the negotiations resulting from such contests or the perceived threat of such contests could also result in registrants making concessions to dissidents that may not be in the best interest of the average shareholder in order to reduce the costs of contending with such contests.

Finally, the effects of any changes in proxy contests may be affected by managers and market participants altering their behavior in reaction to the final amendments. In particular, changes in the nature of proxy contests may increase or decrease the use of complementary or substitute governance mechanisms.[329] For example, studies have

[329] The concepts of complementary and substitute governance mechanisms are discussed in Section IV.B *supra*.

found that a historical increase in proxy contests was associated with a decrease in hostile takeovers, in which an entity acquires control of a company against the wishes of the incumbent board by purchasing its stock, suggesting proxy contests and hostile takeovers may be substitute mechanisms for control challenges.[330] By contrast, activist shareholders with large holdings in a particular registrant ("activist blockholders") who may be able to directly monitor and communicate with management, may represent a type of governance mechanism that can be a complement to proxy contests.[331] For example, if activist blockholders are present, it may be easier to overcome collective action problems and initiate and win a proxy contest. Thus, any increase in the potential impact of proxy contests may be enhanced by the presence of activist blockholders. At the same time, if the potential impact of proxy contests increases, the incentive of registrants to engage with activist blockholders and make suggested improvements may increase, enhancing the monitoring value of activist blockholders.[332]

Any effects that follow from increasing the incidence or perceived threat of proxy contests may be either mitigated or magnified by indirect effects on these substitute and complementary mechanisms. For example, any increase in the incidence of proxy contests could be offset by reductions in the use of substitute mechanisms such as takeovers.[333] Relatedly, two commenters argued that adoption could impede private

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330 *See*, *e.g.*, Fos Study.

331 *See* Section IV.B.1.b for the frequency and size of institutional blockholdings among potentially affected registrants for which this data is available.

332 For a broader review of issues concerning the role of activist blockholders in corporate governance, *see* Alex Edmans, *Blockholders and Corporate Governance,* 6 Ann. Rev. Fin. Econ. 23 (2014).

333 We note that proxy contests may be a complementary mechanism for certain types of takeovers. In particular, proxy contests can facilitate some hostile takeovers by removing directors who oppose the transaction in question. *See* Mulherin & Poulsen Study, at 309.

ordering and frustrate recent efforts by issuers and their shareholders to adopt "proxy access" bylaws.[334] We cannot rule out this possibility, but if shareholders view a universal proxy system as such a close substitute to proxy access bylaws that they would disband efforts to pass proxy access bylaws at registrants, it is not apparent that it would come at a loss to shareholders. By contrast, another commenter did not expect such substitution, arguing that a universal proxy requirement would not change the equation for those who may use proxy access bylaws in the future because, in their view, universal proxy simply improves the process when there is a proxy contest with competing proxy cards.[335]

Alternatively, an increase in the incidence or perceived threat of proxy contests could be magnified by complementary mechanisms whose effectiveness and therefore usage may increase (such as by activists being more likely to acquire blockholdings) in an environment in which proxy contests are more frequent. Such interactions may have significant effects on the overall economic effects of the final amendments. However, because so many different governance mechanisms are closely interrelated, it is difficult to predict the extent and impact of such interactions.

5. Specific Implementation Choices

In this section, we discuss, to the extent possible, any costs and benefits specifically attributable to individual aspects of the final amendments. We also discuss significant implementation alternatives and their benefits and costs compared to the amendments.

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[334] *See* letters from CCMC; CGCIV.

[335] *See* letter from CII dated Dec. 28, 2016.

a. The Short Slate and Bona Fide Nominee Rules

Elimination of the Short Slate Rule

For registrants other than funds, we are eliminating the short slate rule in Rule 14a-4(d)(4), which currently permits a dissident seeking to elect a minority of the board and running a slate of nominees that is less than the number of directors being elected to round out its slate by soliciting authority to also vote for certain registrant nominees. The elimination of the short slate rule will potentially impose costs on certain dissidents. Under the existing proxy rules, dissidents qualifying to use the short slate rule can select the set of registrant nominees that they prefer to round out their slate. Eliminating this rule, and requiring a universal proxy, will take away this choice on the part of the dissident, reducing any related strategic advantage that the dissident may expect to gain, and will instead allow shareholders voting on the dissident proxy card to select the registrant nominees, if any, that they prefer.

We have considered whether, as an alternative to the final amendments, the proxy rules should instead be revised to treat contests that do not involve a potential change in the majority of the board differently from contests in which control of the board is at stake, as in the current short slate rule and as previously recommended by some observers.[336] For example, we have considered an alternative approach that would not require the use of universal proxies in contests that may involve a potential change in a majority of the board. When a dissident is seeking a majority of seats on the board,

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[336] In 2013, the IAC recommended that the Commission consider providing proxy contestants with the option to provide universal proxies in connection with short slate director nominations. At that time, the IAC did not make such a recommendation in the case of elections in which majority control of the board is at stake. *See* Recommendations of the Investor Advisory Committee Regarding SEC Rulemaking to Explore Universal Proxy Ballots (Jul. 25, 2013), available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/universal-proxy-recommendation-072613.pdf ("IAC 2013 Recommendation"), at 2.

electing a mixed board where a minority of seats would be held by dissident nominees may be inconsistent with the intentions and goals of both the dissident and the registrant. Not requiring universal proxy cards in such cases could reduce the likelihood of electing a mixed board when such an outcome is undesirable to both parties to the contest and could be disruptive. However, under this alternative, shareholders would continue to have more limited voting options when voting by proxy than when voting in person in contests that involve a potential change in a majority of the board. Furthermore, the risk of electing a mixed board when it would be disruptive or contrary to the goals of both parties to the contest could also be mitigated through disclosure emphasizing the importance of achieving (or retaining) majority control of the board and clarifying the willingness of each nominee to serve in the case control is not achieved.

Modification of the Bona Fide Nominee Rule

We are amending the definition of a bona fide nominee under Rule 14a-4(d)(4) for registrants other than funds to include all director nominees that have consented to being named in any proxy statement, whether that of the registrant or that of a dissident, relating to the registrant's next meeting of shareholders at which directors are to be elected.

The final amendment to the definition of a bona fide nominee will remove the impediment imposed by the current rule to including other parties' nominees on one's own proxy card. We believe that this amendment will, in and of itself, likely impose no direct cost on parties to contested elections because it would not require parties to change their slates of nominees or their proxy materials. However, revising Rule 14a-4(d)(4) is a prerequisite to any rule that would allow or require universal proxies. As such, all of the other costs and benefits discussed above, the details of which depend on the other

implementation choices in the final rule, are conditional on this amendment. Additionally, revising Rule 14a-4(d)(4) alone, without the other amendments we are adopting, would permit the optional use of universal proxies, an alternative we discuss below.

Solicitations Without a Competing Slate

Under existing rules, a party may solicit proxies without presenting a competing slate, such as when soliciting proxies against some or all of the registrant nominees (a "vote no" campaign) or when soliciting proxies in favor of one or more proposals on matters other than the current election of directors. The final amendment to the bona fide nominee rule would permit, but not require, proponents conducting solicitations without a competing slate to also solicit authority with respect to some or all registrant nominees in their proxy statements and proxy cards. Because the registrant in a contest without competing slates does not need to include the proponent's proposals on its own card, shareholders who are positively inclined to the proponent's proposals (and solicited by the proponent) may be more likely to use the proponent's card if they are also offered the ability to vote on the election of some or all of the director nominees. As a result, the change to the bona fide nominee rule may result in somewhat increased support for proponents in solicitations without a competing slate.

This potential increase in support may increase proponents' incentives to initiate such campaigns. As in the other contexts discussed above, it is difficult to predict to what extent proponents may increase the incidence of such campaigns, or to what degree the involved parties may react in other ways to the potential for somewhat higher support in solicitations without a competing slate. For example, any resulting increase in the frequency of such campaigns may be partially offset by accompanying changes in

incentives for registrants to engage with proponents. Such interventions could also substitute, in some cases, for contested elections. It is unclear whether increased support for, or an increased incidence of, proponent initiatives would generally enhance or detract from the effectiveness of boards and the efficiency and competitiveness of registrants.

Some commenters were concerned about negative unintended consequences from permitting proponents conducting solicitations without a competing slate to include nominees in their proxy statements and proxy cards, and therefore opposed this approach.[337] Two of these commenters in particular argued that the bona fide nominee rule revisions could lead to misleading or confusing proxy materials and adverse impacts on voting results in otherwise uncontested elections.[338]

We do not think there is a high risk of confusion among shareholders in the case where the soliciting proponent includes all nominees. Instead, in these cases the amendments we are adopting will serve to further shareholder enfranchisement by adding the director election to the menu of voting choices faced by shareholders voting on the proponent's card. We acknowledge that there is some risk of confusion when the soliciting proponent includes some but not all nominees on its proxy card. However, above we have clarified that when a dissident includes some but not all nominees on its proxy card, the dissident should disclose that shareholders who wish to vote for nominees not included on the dissident's proxy card may do so on the registrant's proxy card in order to avoid potential liability under Rule 14a-9 for omission of material facts.[339] Such disclosures should help mitigate any confusion among shareholders in these cases.

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337 *See* letters from BR; Society; Sidley.

338 *See* letters from BR; Society.

339 *See supra* Section II.I.2.c.

An alternative to the final amendments would be to require proponents conducting solicitations without a competing slate to include the names of all duly nominated director candidates on their proxy cards (unless they are soliciting votes against all nominees). This approach may have limited effect in the case of a "vote no" campaign, because shareholders would already be able to vote "for" and "against" their choice of any registrant nominees by using the registrant proxy card. By contrast, in the case of a proponent that solicits in favor of a particular proposal, the registrant may choose to not include the proposal on its proxy card, in which case, shareholders voting on the proponent's proxy card would be disenfranchised as to the selection of directors under current rules and similarly may be disenfranchised under the final approach unless the proponent chooses to include all director nominees on its proxy card. This alternative would remove the risk of such disenfranchisement with respect to voting for directors. However, the risk of such disenfranchisement under the final amendments is likely mitigated because we expect that such proponents would have the incentive to include the director nominees on their proxy card to increase the incentive for shareholders to use their card and would generally not have strategic reasons to exclude nominees from their proxy card because of the lack of a competing slate.

b. Use of Universal Proxies

Mandatory Use of Universal Proxies in Non-Exempt Solicitations in Contested Elections

Mandatory vs. Optional Use of Universal Proxies

Requiring both the registrant and the dissident in any contested election with competing slates to use universal proxies will enable all shareholders to vote for the combination of candidates of their choice in all such elections, whether they vote by

proxy or in person at the meeting. As discussed in more detail above, imposing this mandate on the registrant as well as the dissident may impose some direct costs on both parties and may result in potentially significant, but uncertain, strategic advantages or disadvantages for these parties, leading to further costs and benefits for these parties and either benefits or costs for shareholders at large. Mandating the use of universal proxies by registrants in particular may have certain significant implications. Specifically, requiring registrants to use universal proxies will likely result in all shareholders receiving a proxy card that will allow them to vote for any combination of the full set of director nominees, more accurately reflecting the voting options available to shareholders at the meeting. However, requiring the names of the dissident nominees to appear on the registrant's proxy card will allow a form of access to the registrant's proxy materials without the eligibility criteria that accompany other forms of access,[340] and could result in an increased incidence of nominal contests that capitalize on this new channel for such access. As discussed in Section IV.C.4.b above, it is unclear to what extent any dissidents would choose such an approach and whether any such contests would be beneficial or detrimental.

Some commenters were in favor of making the use of universal proxies optional for all parties rather than mandatory,[341] which also has been recommended by certain observers in the past.[342] Under an optional approach, whether or not a party chose to provide a universal proxy likely would depend on strategic considerations. Having the option rather than a requirement to use a universal proxy may benefit either registrants or

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340 For example, proxy access bylaws, where available, generally apply certain eligibility criteria including an ownership threshold.

341 *See, e.g.,* letters from Davis Polk; Society.

342 *See* IAC 2013 Recommendation, at 2.

dissidents, depending on the nature of individual contests. Optional universal proxies likely would be used by a contesting party, to the possible detriment of its opponent, when the party believes that including the names of the opponent's nominees on its own card would be in its best interest, but not otherwise. For example, a party that expects strong support for its opponent's nominees may prefer to include those nominees on its proxy card to increase the likelihood that shareholders use its card, since they would be able to do so without giving up the ability to support at least some of the opponent's nominees. Optional universal proxies may also mitigate the risk, relative to that under the final amendments, of electing a mixed board when such an outcome is inconsistent with the intentions of both the dissident and the registrant, because both parties may be less likely to use a universal proxy in such cases. This alternative may also reduce the likelihood of an increase in nominal contests because the registrant would control whether or not the names of dissident candidates were included on its proxy card. Finally, because allowing the optional use of universal proxy cards would necessarily entail removing the impediments to such proxies in the existing proxy rules, such an approach might facilitate the "private ordering" of a universal proxy requirement – that is, the ability of shareholders to request that individual registrants commit to a policy of using universal proxies in future contests through changes to their corporate governing documents – at only those registrants where shareholders believe mandatory universal proxies would be beneficial.[343]

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[343] The availability of such private ordering may depend on developments in state law. Also, if only a minority of shareholders is potentially interested in splitting their votes, it may be difficult to obtain the support required to revise bylaws or other corporate governing documents to require universal proxies.

However, under an optional approach it is likely that in many cases neither registrants nor dissidents would include their opponent's nominees on their proxies, to avoid diluting the potential support for their own nominees among those shareholders that use their proxy card. To the extent that contesting parties were further given the option to determine how many and which of their opponent's nominees to include, it is likely that the contesting parties would often include fewer than all of the duly-nominated candidates on their proxy cards, even when they did include some of their opponent's nominees. In any such cases, shareholders would continue to have more limited voting options when voting by proxy than when voting in person. Thus, we expect that an optional approach would result in inconsistent application and not fully achieve the goal of allowing shareholders the ability to vote by proxy for their preferred combination of director candidates, as they could at a shareholder meeting. Several commenters also raised concerns about an optional approach based on the risk for such inconsistent application of universal proxy due to strategic considerations by both registrants and dissidents.[344] As discussed in more detail in the Proposing Release, we additionally note that Canada's system of optional universal proxies has not resulted in widespread and consistent application of universal proxy in director contests.[345]

Some commenters recommended different versions of an opt-out approach rather than a mandatory approach. For example, one commenter advocated a mandatory requirement that registrants could opt out of with approval of a majority of (non-insider)

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344 *See* letters from SIFMA; CCGG; Fidelity.

345 *See* Section IV.D.5.b of the Proposing Release. *See also* letter from CCGG (stating that "Universal proxy ballots are currently legal in Canada, and nothing prevents parties from using them now and yet they are seldom used, presumably because the parties do not see an advantage.").

shareholders.[346] Another commenter advocated that registrants be able to opt out of universal proxy through a board vote.[347] Theoretically, such opt-out approaches could maximize the benefits and minimize the costs of a mandatory approach if shareholders or boards would only opt out from the mandatory use in those cases where it is expected to be harmful to shareholders. However, in practical application this is less likely to be the case, since there is a risk that self-interested large shareholders or board members would vote to opt out precisely in such cases where mandated use of universal proxy and shareholder enfranchisement in director elections is optimal to shareholders at large. In addition, such opt-out alternatives would run counter to the objective of allowing shareholders to elect their preferred candidates through the proxy process as they can at the annual meeting, and the efficiency gains to shareholders that are interested in split-ticket voting would be lost for the registrants that would opt out of mandatory universal proxies.

In the Proposing Release, we also considered hybrid alternatives that would require at least one party to a contest to use a universal proxy, potentially allowing a greater number of shareholders to split their ticket using a proxy compared to an optional approach but also potentially allowing fewer shareholders the ability to split their ticket compared to the final rule. We discuss the potential economic effects of these hybrid alternatives in more detail in the Proposing Release.[348] We did not receive any support

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346 *See* letter from Prof. Hirst.

347 *See* letter from Sidley.

348 *See* Section IV.D.5.b of the Proposing Release.

for the hybrid alternatives from commenters, whereas two commenters were explicitly against such approaches.[349]

Applicability of Mandatory Universal Proxies to Registered Investment Companies and Business Development Companies

As discussed above, the Commission is continuing to consider the application of a universal proxy mandate to some or all funds.[350]

Notice Requirements

The final amendments would require that dissidents in all contested elections provide notice to registrants of their intention to solicit proxies in favor of other nominees, and the names of those nominees, no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date.[351] A notice to the registrant is necessary for the registrant to be able to include the names on the universal proxy card it prepares and distributes to shareholders. Without providing such notice, a dissident would not be permitted to run a non-exempt solicitation in support of its director nominees. The final amendments would also require registrants to provide similar notice to dissidents no later than 50 days before the anniversary of the previous year's annual meeting date, to allow dissidents sufficient time to include the names of registrant nominees on the universal proxy card that they prepare and disseminate to shareholders.

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349 *See* letters from CII Dec. 28, 2016; Colorado PERA.

350 *See supra* section II.J.

351 If the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then the final amendments would require that notice must be provided no later than 60 calendar days prior to the date of the annual meeting or the tenth calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant, whichever is later.

Because advance notice bylaws commonly require a similar amount of notice by dissidents seeking to nominate alternative candidates, the effect of the notice requirement for dissidents may be limited.[352] As discussed above, we understand that advance notice bylaws generally have deadlines ranging from 90 to 120 days before the meeting anniversary date.[353] However, it is possible that some registrants have advance notice bylaws with later deadlines. Also, some registrants do not currently have such bylaws and it is possible that boards may waive the applicability of such bylaws.[354] Further, relatively smaller registrants are somewhat less likely to have advance notice provisions than larger registrants, and proxy contests are more common among these relatively smaller registrants.[355] The final amendments would, in effect, replicate the primary effects of an advance notice bylaw applying to contested elections even at registrants that currently have no advance notice bylaws (or bylaws with later deadlines, to the extent these exist).

Although we believe that only a small fraction of registrants do not already have a comparable or stricter notice requirement, because the bylaws at different registrants may have been designed to reflect their individual circumstances, imposing this new requirement on all registrants may result in costs. In particular, the notice requirements would impose a new constraint on dissidents in cases in which the same degree of notice was not otherwise required, potentially imposing some incremental costs on such dissidents. The final amendments would also prevent the incidence (and eliminate the

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352 It has been estimated that 99% of S&P 500 firms and 95% of Russell 3000 firms had an advance notice bylaw at the end of 2020. *See supra* Section IV.B.2.b.

353 *See* S&C 2015 Report.

354 *See supra* note 214.

355 *See supra* Section IV.B.2.b.

threat) of contests initiated later than the required notice deadline ("late-breaking" proxy contests) at all registrants. As in the case of other potential effects of the final amendments on the incidence and perceived threat of contested elections, these effects of the notice requirements may reduce either the degree of board discipline or the risk of unproductive distraction for boards.[356]

To consider potential effects on late-breaking proxy contests, we reviewed the timing of recent proxy contests. As shown in Table 2 above, we estimate that dissidents filed their initial preliminary proxy statements on average 65 days before the meeting anniversary date for contested elections initiated in years 2017–2020.[357] We also estimate that approximately 57% of these contested elections had an initial preliminary proxy statement filed by the dissident within 60 days of the meeting anniversary date, which may represent some late-breaking contests.[358] While the filing of a preliminary proxy statement does not mark the earliest point at which a dissident initiates a proxy contest and finalizes a slate of nominees, it does provide a threshold date before which these actions must have occurred. We also considered the earliest date at which a dissident either directly communicated its intent to nominate directors to the registrants or publicly announced its intent to pursue a proxy contest in a regulatory filing. For those contests for which we have such information, we estimate that in approximately 10% of these contested elections the dissident communicated or publicly announced its intent to pursue a proxy contest within 60 days of the meeting anniversary date, which is another

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356 *See supra* Section IV.C.4.

357 *See supra* Section IV.B.2.b.

358 *Id.*

measure of potential late-breaking contests.[359] The initial communication or public announcement of intent does not necessarily coincide with providing notice of the names of the dissident nominees, but it may mark a threshold date after which such notice could have been provided.

We therefore cannot rule out that the notice requirement may prevent some proxy contests that would otherwise have occurred. However, dissidents who might have initiated late-breaking contests may simply adjust their timetable to be compatible with the notice requirement. Also, any effects of the notice requirements on the incidence or threat of late-breaking contested elections may be offset somewhat by the ability of dissidents who are unable to meet the notice deadline to take other actions, such as initiating a "vote no" campaign, using an exempt solicitation,[360] or calling a special meeting (to the extent possible under the bylaws) to remove existing directors and elect their own nominees, which may allow them to achieve similar goals with respect to changes to the board.

While advance notice bylaws currently apply to dissidents at many registrants, registrants are not currently subject to a requirement that they provide notice of their nominees to dissidents. Thus, the notice requirement for registrants would represent a new obligation for registrants in contested elections. We estimate that 61% of registrants filed a preliminary proxy statement (or definitive proxy statement if they did not file a preliminary) at least 50 days before the meeting anniversary date for contested elections initiated in years 2017–2020,[361] so we expect that the majority of registrants will have a

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[359] *Id.*

[360] In this case, the total number of persons solicited could be no more than 10. *See* Section IV.B.3.

[361] Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings.

list of nominees ready by the notice deadline. However, the notice requirement may require some registrants to finalize their list of nominees somewhat earlier than they would otherwise.

Also, to the extent that a registrant might consider changing its selected nominees after providing notice and after the dissident thereby disseminates its definitive proxy materials (but perhaps before the registrant does so), the notice requirement may provide registrants with an increased incentive not to make such changes because of the risk that votes for registrant nominees on the dissident card could be invalidated. Because the notice requirement may require some registrants to finalize their nominees earlier than they would otherwise and may increase registrants' incentives not to change their nominees, there is a possibility that this requirement could have a detrimental effect on the quality of candidates that registrants nominate. However, the majority of registrants in recent contests filed a preliminary proxy statement at least 50 days before the meeting anniversary date, so the notice deadline is close to the date by which registrants typically disclose their nominees. We therefore expect any such effects to generally be comparatively minor.

We have also considered alternatives to the notice requirements included in the final amendments, such as earlier as well as later potential notice deadlines for dissidents. In these alternatives, we have assumed that the notice deadline for registrants would also be revised to be 10 days after the revised deadline for the dissident, to allow the registrant sufficient time to prepare its notice and list of nominees in reaction to the receipt of a notice from a dissident. Under a later notice deadline, the risk of preventing late-breaking proxy contests that would otherwise have occurred, particularly at registrants without advance notice bylaws, would be reduced. For example, when considering a

deadline of no later than 45 calendar days (as opposed to 60 calendar days, as in the final rule) prior to the meeting anniversary date, we found that in approximately 7% of contested elections initiated in years 2017–2020, the dissident announced its intent to pursue a proxy contest within 45 days of the anniversary (as compared to 10% within 60 days), and in 25% of the contests initiated in years 2017–2020, the dissident filed a preliminary proxy statement within 45 days of the meeting (as compared to 57% within 60 days).

Additionally, a later deadline for registrants would reduce the likelihood that some registrants may have to finalize their nominees earlier than they would otherwise. For example, we estimate that in approximately 19% of contested elections initiated in years 2017–2020, the registrant filed its preliminary proxy statement within the 35 days before the meeting anniversary date (as compared to 39% within 50 days).

However, a later deadline may increase the risk of confusion among shareholders and impose additional solicitation costs if the registrant's non-universal proxy card has already been disseminated and requires revision. In particular, we estimate that in 22% of contests initiated in years 2017–2020, registrants filed a definitive proxy statement at least 45 days before the meeting anniversary date.[362] By contrast, we estimate that in fewer than 10% of contests in this sample did the registrant file a definitive proxy statement earlier than 60 days before the meeting anniversary date.[363]

An earlier deadline, such as 90 days prior to the anniversary of the prior year's meeting, would reduce the risk, relative to the final amendments, of the potential confusion or costs related to notice being received after non-universal registrant proxy

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[362] Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings.

[363] *Id.*

cards have already been disseminated. However, the risk that registrants will have distributed their proxy cards prior to the 60-day deadline seems relatively low, and an earlier deadline may further preclude late-breaking contests beyond those prevented by the required deadline. For example, when considering a deadline of no later than 90 calendar days (as opposed to 60 calendar days, as in the final rule) prior to the anniversary of the previous year's annual meeting date, we found that in a significant percentage of contested elections initiated in years 2017–2020, the dissident communicated or announced its intent to pursue a proxy contest or filed its preliminary proxy statement between 60 and 90 days prior to the meeting anniversary date. Some of these contests may have been permitted under a 60-day deadline but excluded in the case of a 90-day deadline.[364]

Additionally, an earlier deadline for registrants would increase the likelihood that some registrants may have to finalize their nominees earlier than they would otherwise. For example, we estimate that in approximately 52% of contested elections initiated in years 2017–2020, the registrant filed its preliminary proxy statement between 80 and 50 days before the meeting anniversary date.[365]

A further alternative would be to require universal proxies in cases where the dissident provides notice to the registrant, and not require them in cases where the

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[364] Staff estimates that in 25% of contested elections initiated in years 2017–2020, the dissident communicated or announced its intent to pursue a proxy contest between 60 and 90 days prior to the meeting, and that in 30% of contested elections initiated in years 2017–2020, the dissident filed a preliminary proxy statement between 60 and 90 days prior to the meeting. *See supra* Section IV.B.2.b. Neither the date on which intent to pursue a contest is initially communicated/announced nor that on which a preliminary proxy statement is filed need correspond to the date on which notice could have been provided in these contests, though they may provide some indication of the universe of contests that might have been affected by a particular notice deadline.

[365] Based on data from Factset's SharkRepellent database and staff analysis of EDGAR filings.

dissident does not meet the notice deadline. Under this alternative, the dissident would be permitted to initiate a late-breaking proxy contest but, because of the risk of confusion if proxies have already been disseminated, would not trigger the use of universal proxies, while other contests (in which notice was provided) would require universal proxies. This alternative may raise similar concerns to those discussed above with respect to the optional use of universal proxies, in that there would still be some elections without universal proxies, and the dissident could strategically time its actions to avoid triggering universal proxies when it believes there is an advantage to doing so.

One commenter claimed that registrants typically re-evaluate their contemplated slate after receiving advance notice of a contest, often leading to recruitment of new nominees, and that such important decisions will not be possible within 10 days.[366] As an alternative that would address this comment, we have also considered not requiring registrants to provide notice to dissidents of their nominees. In this case, dissidents would generally become aware of the registrant nominees when the registrant files its preliminary proxy statement, which is required to be filed at least 10 calendar days prior to the date the registrant's definitive proxy statement is first sent to shareholders, and would have to finalize their own proxy cards thereafter. This alternative would avoid imposing a new notice obligation on registrants, and may reduce the risk that such an obligation could marginally reduce the quality of registrant nominees in some cases. However, requiring that notice be provided by both parties to the contest would limit the possibility that registrants may gain a strategic advantage by learning about and being

[366] *See* letter from Society dated Jan. 10, 2017.

able to react to the dissident's slate of nominees significantly earlier than when the dissident may be informed of the registrant's slate.

Minimum Solicitation Requirement for Dissidents

As discussed above, we have raised the threshold from the proposed majority of the voting power to 67% of the voting power in response to commenters' concerns that setting the threshold at the majority of the voting power would insufficiently deter the potential for "freeriding" of dissident nominees on the registrant's proxy card.[367] As discussed in more detail above,[368] because the vast majority of typical proxy contests will not be affected by this increase in solicitation requirement, and in the infrequent cases in which there may be an effect this requirement will impose minor incremental costs to dissidents, we maintain our assessment from the Proposing Release that the solicitation requirement will not have significant effects on the costs of typical proxy contests.[369]

Nevertheless, we expect that the solicitation requirement in the final amendments will impose a cost on any dissidents that may try to capitalize on the ability to introduce the names of alternative candidates on the registrant's proxy card by running a nominal proxy contest, in which minimal resources are spent on solicitation. As discussed above, in addition to the existing cost of pursuing a nominal proxy contest, we estimate that, using the least expensive approach, it will cost on average between $5,300 and $9,800 depending on the size of the registrant to meet the minimum solicitation requirement through an intermediary.[370] Under the proposed threshold of a majority of the voting

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367 *See supra* Section II.D.3.

368 *See supra* Section IV.C.2.a.

369 *See supra* Section IV.C.2.b.

370 *Id.*

power, the equivalent estimated range would instead be approximately $5,100 to $6,200, depending of the size of the registrant.[371] Thus, raising the threshold to 67% from a majority of the voting power will increase the cost of nominal contests somewhat across the board, but especially for dissidents targeting larger registrants. Therefore, the additional cost required to comply with the minimum solicitation requirement, beyond current expenditures in contests, is likely to represent a relatively larger incremental cost in the case of nominal contests relative to the baseline. We expect that the minimum solicitation requirement to some degree may deter dissidents from initiating nominal contests, as discussed in Section IV.C.4.b above.

In the Proposing Release we considered the alternative of requiring universal proxies without imposing any minimum solicitation requirement on dissidents,[372] but did not receive much support from commenters in favor of such an alternative.[373] By contrast, we received significant support for a minimum solicitation requirement on dissidents when mandating the use of universal proxies in director elections, generally based on concerns related to the risk that dissidents could otherwise "freeride" on registrants' solicitation efforts and launch potentially frivolous contests without meaningful solicitation efforts of their own.[374] We share these concerns and continue to believe, for reasons discussed in more detail in the Proposing Release,[375] that without

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371 *See supra* note 273 for estimation details. The lower estimated costs compared to the 67% threshold case is due to fewer accounts needed to be solicited and a reduction in the estimated number of nominees causing lower nominee coordination fees. Note that the estimated costs are bounded from below at $5,000, which is the minimum intermediary unit fee per NYSE Rule 451.

372 *See* Section IV.D.5.b of the Proposing Release for a more detailed discussion of this alternative.

373 Only one commenter supported no solicitation requirement. *See* letter from Bulldog.

374 *See supra* Section II.D.2 for a review of the comments received on the minimum solicitation requirement.

375 *See* Section IV.D.5.b of the Proposing Release.

such a requirement, dissidents' ability to introduce an alternative set of nominees to all shareholders on registrants' universal proxy cards without incurring meaningful solicitation expenditures may result in an increase in frivolous contests that do not enhance shareholder value. Such contests could also cause registrants to incur significant expenses to advocate against the dissident's position and could distract management from critical business matters. However, we acknowledge that by imposing a minimum solicitation requirement it may make some otherwise beneficial contests cost-prohibitive. We believe such instances will be rare, as dissidents in most typical contests already meet the solicitation requirement, or, in the few cases they do not, we estimate they face relatively limited increases in solicitation costs to meet the requirement, as discussed above.

Although some of the commenters in favor of the solicitation requirement also supported the proposed threshold of a majority of the voting power, other commenters in favor recommended higher thresholds, such as two-thirds, 75%, or 100% of the voting power.[376] In the Proposing Release we considered the alternative of requiring that dissidents solicit all shareholders,[377] and concluded that this alternative could increase minimum solicitation costs to such an extent that it may reduce the incidence of nominal contests that might not be in the interests of shareholders at large. However, we also concluded that this alternative may significantly increase the costs borne by dissidents in a large fraction of typical proxy contests and may prevent some value-enhancing contests from taking place. In response to commenters who recommend that we require dissidents

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[376] *See supra* Section II.D.2 for a review of the comments received on the minimum solicitation requirement

[377] *See* Section IV.D.5.b of the Proposing Release for a more detailed discussion of this alternative.

to solicit all shareholders,[378] we have updated and expanded our estimations of the costs to dissidents of meeting such a requirement both for nominal and typical contests, respectively.

Specifically, we estimate that the average cost for a dissident soliciting all shareholders using the least expensive approach[379] in a nominal contest would be approximately $14,900 at companies with less than $300 million in market capitalization, approximately $26,200 at companies with between $300 million and $2 billion in market capitalization, approximately $58,300 at companies with between $2 billion and $10 billion in market capitalization, and approximately $516,900 at companies with market capitalization above $10 billion.[380] These are significantly higher estimated costs, especially for larger registrants, than what we estimated above for using the least expensive approach to meet the final rule's 67% minimum solicitation requirement through an intermediary, which vary between on average $5,300 and $9,800 depending on the registrant's size in terms of market capitalization.[381]

In addition, a requirement that dissidents solicit all shareholders would also affect the cost to dissidents in more typical proxy contests. As discussed above, we understand that in 48% of recent proxy contests, dissidents solicited a number of shareholders fewer

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378 *See* letters from SIFMA; Mediant.

379 *See supra* note 262.

380 These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 273 (providing assumptions for the estimation of the average costs of solicitation at a registrant in each of four different market capitalization categories). In this case, staff estimated the costs of NYSE Rule 451 fees and postage for soliciting the average total number of accounts in each size category (*see supra* Section IV.B.1.a for the average number of total accounts in each category of registrant) using notice and access delivery, and assumed that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee is equal to 84, 130, 214, and 701, respectively.

381 *See supra* Section IV.C.2.b.

than all of the shareholders eligible to vote.[382] We estimate that, using the least expensive approach,[383] it would have cost dissidents in these contests approximately an additional $9,000 to $4.0 million, with a median of approximately $37,000, beyond the costs they already incurred, to increase their level of solicitation to include all shareholders.[384] These new cost estimates strengthen our belief that requiring dissidents to solicit all shareholders would increase the costs borne by dissidents in most typical proxy contests and may prevent some contests that may be beneficial to shareholders at large from taking place.

As another alternative, we have also considered a 75% threshold of the voting power for the minimum solicitation requirement, as recommend by at least one

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382 *See supra* Section IV.B.2.

383 *See supra* note 262.

384 These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider for a sample of 31 proxy contests for annual meetings held between July 1, 2018 and June 30, 2019. In particular, the required increase in expenses to solicit all shareholders was estimated based on the number of additional accounts that would have to be solicited among the 15 cases where all shareholders were not solicited and the applicable fees under NYSE Rule 451 and postage costs for notice and access delivery. For the purpose of the nominee coordination fee, staff also used the provided data on the proxy contests to estimate the increase in the number of banks or brokers considered "nominees" under NYSE Rule 451 that might be involved at the higher solicitation level. The estimated incremental solicitation cost for each contest includes nominee coordination fees of $22 for each of the additional nominees expected to be involved, plus basic processing fees, notice and access fees, preference management fees, and postage totaling $1.57 (for suppressed accounts, such as those that have affirmatively consented to electronic delivery) to $1.80 (for other accounts) per account for additional accounts solicited within the first 10,000 accounts solicited, and on a declining scale for additional accounts thereafter. Staff assumed that half of the additional accounts to be solicited are suppressed and that none of these accounts requested full set delivery by prior consent or upon receipt of the notice (because such delivery requirements may apply to only a small fraction of accounts and are not expected to significantly affect the overall estimate of costs). Additional notice and access fees of $0.25 per account for the first 10,000 accounts, and on a declining scale thereafter, were assumed to be required for each account that was solicited prior to increasing the level of solicitation because of the use of notice and access delivery for some accounts. The estimates also include incremental intermediary unit fees of $0.25 per account for each additional account above 20,000 accounts solicited. This estimate does not include printing costs for the notice, for which we do not have relevant data to make an estimate.

commenter.[385] Repeating our estimations above using this threshold, we estimate that the average cost for a dissident to meet a 75% minimum solicitation requirement using the least expensive approach[386] in a nominal contest would be approximately $5,600 at companies with less than $300 million in market capitalization, approximately $6,400 at companies with between $300 million and $2 billion in market capitalization, approximately $7,300 at companies with between $2 billion and $10 billion in market capitalization, and approximately $13,100 at companies with market capitalization above $10 billion.[387] Not surprisingly, increasing the threshold to 75% would increase the expected average costs of nominal contests compared to the 67% threshold we are adopting, even if the increase is modest for the smaller registrant categories.

As discussed above, it is our understanding that dissidents in very few typical contests in recent years solicit shareholders representing less than 75% of the voting power.[388] However, based on the few cases we have observed, we estimate the average additional cost those dissidents would have incurred, beyond their actual incurred solicitation expenses, to meet the 75% requirement using the least expensive approach through an intermediary to be approximately $20,000.[389] This estimated additional cost

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385 *See* letter from CII dated Nov. 8, 2018.

386 *See supra* note 262.

387 These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 273 (providing assumptions for the estimation of the average costs of solicitation at a registrant in each of four different market capitalization categories). In this case, staff estimated the costs of NYSE Rule 451 fees and postage for soliciting the minimum number of accounts representing at least 75% of the voting power in each size category (estimated at 79, 149, 256, and 898, respectively) using notice and access delivery, and assumed that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee is equal to 20, 50, 85, and 299, respectively.

388 *See supra* Section IV.B.2.b.

389 These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 263 (providing assumptions for the estimation of the average costs of solicitation in a typical contest). In this case, staff estimated the

is approximately four times the additional cost we estimated for the 67% threshold we are adopting. This indicates that increasing the threshold to 75% (or beyond) would materially increase costs for dissidents in typical contests.

As an alternative to a solicitation requirement based on voting power, one commenter recommended a minimum solicitation threshold of a majority of shareholder accounts entitled to vote on director nominations, asserting that this would help ensure meaningful dissident solicitation efforts.[390] Repeating our estimations using a 50% of shareholder accounts threshold, we estimate that the average cost for a dissident soliciting all shareholders using the least expensive approach[391] in a nominal contest would be approximately $10,900 at companies with less than $300 million in market capitalization, approximately $17,100 at companies with between $300 million and $2 billion in market capitalization, approximately $33,200 at companies with between $2 billion and $10 billion in market capitalization, and approximately $270,600 at companies with market capitalization above $10 billion.[392] Thus, the increase in costs of nominal contests under this alternative solicitation requirement is significantly greater than the increase in costs we expect under the 67% of the voting power threshold we are adopting, which we

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average additional costs of NYSE Rule 451 fees and postage needed to meet a minimum solicitation requirement of 75% of the voting power, using the two cases out of the 35 contests from June 30, 2015 through April 15, 2016 provided by a proxy services provider in which less than 75% of the shares eligible to vote were originally solicited by the dissident.

390 *See* letter from Elliott.

391 *See supra* note 262.

392 These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 273 (providing assumptions for the estimation of the average costs of solicitation at a registrant in each of four different market capitalization categories). In this case, staff estimated the costs of NYSE Rule 451 fees and postage for soliciting the average total number of accounts in each size category (estimated at 79, 149, 256, and 898, respectively) using notice and access delivery, and assumed that the number of brokers and banks involved for the purpose of determination of the nominee coordination fee is equal to 20, 50, 85, and 299, respectively.

estimate would be on average approximately $5,300 to $9,800 depending on the size of the registrant.[393]

For the recent typical contests discussed above in which dissidents solicited a number of shareholders fewer than all of the shareholders eligible to vote,[394] dissidents solicited less than 50% of accounts in 13 out of 15 contests. We estimate that the alternative of requiring solicitation of at least 50% of shareholder accounts in these 13 cases would have cost approximately an additional $3,000 to $1.9 million, with a median of approximately $28,000,[395] beyond the costs they already incurred, to increase their level of solicitation to meet this threshold, using the least expensive approach.[396] Even though this alternative would increase solicitation costs of typical contests less than the alternative of requiring solicitation of all shareholders, it still represents a significant increase compared to the current rules and also compared to the increase in costs we expect under the 67% of the voting power threshold we are adopting, which we estimate would be zero for most typical contests and on average approximately $5,400 for the infrequent typical contests soliciting less than 67% of the voting power.[397]

In general, any solicitation requirement that imposes a very low cost on the dissident may increase the risks discussed above that are associated with permitting the

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393 *See supra* Section IV.C.2.b.

394 *See supra* Section IV.B.2.

395 These estimates were derived by staff based on the NYSE Rule 451 fee schedule and industry data provided by a proxy services provider. *See supra* note 384 (providing assumptions for the estimation of the average costs of solicitation in a typical contest in which the dissident does not solicit all shareholders). In this case, staff estimated the average increase in costs of NYSE Rule 451 fees and postage based on the number of additional accounts that would have to be solicited to reach 50% of accounts based on the sub-sample of 13 proxy contests in which the dissident solicited less than 50% of accounts.

396 *See supra* note 262.

397 *See supra* Section IV.C.2.a.

dissident to obtain exposure for its nominees on the registrant's card with minimal expenditure of its own resources in the solicitation, while a solicitation requirement that imposes a very high cost may deter value-enhancing proxy contests. Based on the estimated dissident solicitation costs for both nominal and typical contests under different alternative minimum solicitation requirements, we think the 67% of the voting power solicitation requirement we are adopting achieves a reasonable balance of reducing the risk of frivolous contests without materially impeding legitimate contests.

One concern raised by several commenters related to the proposed minimum solicitation requirement is that retail shareholders would not receive solicitation materials from dissidents soliciting the minimum required.[398] One of these commenters indicated that shareholders omitted from the dissident's solicitation would be at an informational disadvantage, making it difficult for those shareholders to make informed voting decisions, which would potentially discourage shareholders from participating in the election.[399]

We acknowledge that any approach that requires the dissident to solicit less than all of the shareholders entitled to vote (such as under the final amendments) may result in many shareholders, especially those with relatively few shares in their accounts such as many retail investors, not receiving proxy material directly from the dissident. As noted in the Proposing Release, any shareholders not solicited by the dissident will still see the names of the dissident's nominees on the registrant's proxy card but would have to seek out the dissident's proxy statement in the EDGAR system (as directed by the registrant's

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398 *See* letters from BM; SIFMA; ABC; BR; CCMC; CGCIV; Davis Polk.

399 *See* letter from BR.

proxy statement) to learn about those nominees and make an informed voting decision.[400] For a shareholder that is motivated enough to vote in a director election, we generally do not think that having to seek out the dissident's proxy statement online through EDGAR is a burden large enough to discourage the investor from making the effort to become informed about the dissident's nominees. However, we cannot rule out that there will be some shareholders at the margin who will not be willing to expend the effort required to find the information, and consequently become discouraged enough that they do not follow through on their plans to vote in the election, but we think this will be a small fraction of otherwise interested shareholders. More importantly, given that there is no minimum solicitation requirement in place currently under the baseline, and assuming current dissidents conducting typical contests will not reduce their solicitation efforts under the final amendments, we expect that more rather than fewer shareholders will directly receive dissidents' proxy statements.

Dissemination of Proxy Materials

The final amendments will require any dissident in a contested election to file a proxy statement by the later of 25 calendar days prior to the meeting date, or five calendar days after the date that the registrant files its definitive proxy statement, regardless of the choice of proxy delivery method. This requirement will help to ensure that all shareholders who receive a universal proxy, which will not be required to include complete information about the opposing party's nominees, will have access to information about all nominees a sufficient time before the meeting. We do not expect

[400] See Section IV.D.5.b of the Proposing Release.

this requirement to impose a substantial burden or constraint on dissidents given existing requirements and the notice requirement of the final amendments.

In particular, dissidents that elect notice-only delivery are currently required to make their proxy statement available at the later of 40 calendar days prior to the meeting date or 10 calendar days after the registrant files its definitive proxy statement. For such dissidents, the required filing deadline will provide five fewer days to furnish a proxy statement in cases in which the registrant files its definitive proxy statement within fewer than 30 calendar days of the meeting date, which we estimate occurred in approximately 11% of recent contested elections, and this new deadline should not otherwise present an incremental timing constraint for such dissidents.[401] Dissidents that elect full set delivery are not currently subject to any such requirement, and thus the dissemination requirement would impose a new filing deadline for all such dissidents. Some dissidents may therefore be required to prepare their proxy statements earlier than they would otherwise. In particular, we estimate that dissidents filed a definitive proxy statement within 25 days of the meeting in 18% of recent contested elections.[402]

In the absence of other requirements, the required filing deadline might prevent late-breaking proxy contests. However, because the final amendments separately require dissidents to provide notice of the contest and the names of their nominees by the 60th calendar day before the anniversary of the prior year's meeting (with alternative treatment for cases in which the meeting date has changed significantly since the prior year), we do not expect this requirement to impose a significant further limitation on late-breaking contests. Also, while the filing deadline will require some dissidents to prepare

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401 Based on staff review of contested elections initiated in years 2017–2020.

402 *Id.*

their proxy statements earlier than they would otherwise, we do not expect this requirement to impose a substantial incremental constraint or burden in most cases. In particular, because of the notice requirement, dissidents will generally have approximately one month to furnish a definitive proxy statement after having provided the names of their nominees to the registrant.

Alternatively, we have considered proposing an earlier filing deadline for dissidents. While an earlier filing deadline may reduce the risk that some shareholders receive the registrant's proxy statement and make their voting decisions before the dissident's proxy statement is available, such a deadline may also impose an incremental burden on dissidents and could prevent some late-breaking proxy contests beyond those prevented by the notice requirement.

One commenter expressed concerns that imposing a filing deadline on the dissident without imposing a similar filing deadline on registrants would confer a strategic advantage to registrants.[403] As an alternative, we considered adopting a similar 25-day filing deadline also for registrants, which would mitigate such concerns. However, as discussed in more detail above, registrants already have incentives to file their definitive proxy statement well in advance of the meeting date.[404] Providing further evidence for such incentives, we find that 95% of registrants in a sample of recent contest filed their definitive proxy statement at least 25 days before the annual meeting.[405] Thus, despite the absence of a filing deadline for registrants, it is unlikely that the required 25-

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403 *See* letters from Olshan.

404 *See supra* Section II.E.3.

405 Based on a review of the 101 contested elections initiated from 2017 through 2020.

day filing deadline for dissidents in the final amendments will confer significant strategic benefits to registrants.

Formatting and Presentation of the Universal Proxy Card

The final amendments specify certain presentation and formatting requirements for universal proxies. We do not expect the presentation and formatting requirements to impose any significant direct costs on registrants or dissidents, though they may bear some indirect costs in the form of reduced flexibility to strategically design their proxy card.

These presentation and formatting requirements are expected to mitigate the risk that shareholders receiving universal proxies may be confused about their voting choices and how to properly mark their card. For example, shareholders could otherwise be unsure about the total number of candidates for which they can grant authority to vote, or about which candidates are nominated by which party. Such confusion could increase the likelihood that some shareholders submit invalid proxies or submit proxies that do not reflect their intentions.[406] This may be exacerbated in the case of nominees being put forth by multiple dissidents or when there are proxy access nominees as well as dissident and registrant nominees.[407]

In addition to preventing confusion, these presentation and formatting requirements may also promote the fair and equal presentation of all nominees on the proxy cards. In particular, these requirements would prevent registrants and dissidents from strategically choosing the font, style, sizing, and order of candidate names in ways

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406 *See* letter from BR for similar concerns.

407 *See*, *e.g.*, Roundtable Transcript, comment of David Katz, Partner, Wachtell, Lipton, Rosen and Katz, at 42.

that could create an advantage for their slate. For example, political science research has found that the order of placement of candidates' names on ballots can affect voting outcomes.[408]

One commenter raised a concern that the presentation and formatting requirements we are adopting do not adequately address the risk that a shareholder who returns a paper universal proxy card may inadvertently vote for more nominees than are up for election, resulting in all of that shareholder's votes being wholly invalidated.[409] We disagree with this assessment and think that we are adequately addressing this risk in the final amendments by requiring prominent disclosure in the proxy card regarding the effect and treatment of the proxy in such cases.

Some commenters argued for more standardization of the universal proxy, including some that wanted a requirement for identical proxy cards.[410] We acknowledge that further standardization may come with some added incremental benefits in terms of reducing potential confusion and potential gamesmanship. However, we think the requirements we are adopting strike a good balance by promoting clarity and fairness of the presentation while preserving some flexibility in design choices for registrants and dissidents, who may have particular views on what they think is an effective presentation of their proxy cards and therefore may experience some costs from an overly prescriptive approach.

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408 *See*, *e.g.*, Joanne Miller & Jon Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 Pub. Opinion Q. 291 (1998); David Brockington, *A Low Information Theory of Ballot Position Effect*, 25 Pol. Behav. 1 (2003); Jonathan G.S. Koppell & Jennifer A. Steen, *The Effects of Ballot Placement on Election Outcomes*, 66 J. Pol. 267 (2004).

409 *See* letter from BR.

410 *See supra* Section II.G.2.

In the Proposing Release we also considered alternatives that would provide for more flexibility in presentation and formatting of the universal proxy card.[411] We have received little support by commenters for such approaches and our original assessments of these alternatives stand.

c. Voting Standards Disclosure and Voting Options

The final amendments require certain disclosures with respect to voting options and voting standards in proxy statements, which would also apply to funds. We expect that the costs to registrants of such additional disclosures will be minimal. In particular, as discussed below, even though we expect registrants may need to update certain standardized portions of their proxy statements and proxy cards, many of those disclosures, once revised, are not likely to require significant revision from year to year, and for the purpose of the PRA (defined below), we estimate the average burden per affected registrant to be 10 minutes.[412] To the extent that such disclosures reduce shareholder uncertainty or confusion as to the effect of their votes, the efficiency of the voting process may be improved. However, we do not anticipate significant changes in voting outcomes or corporate decisions as a result of these disclosures.

V. PAPERWORK REDUCTION ACT

A. Summary of the Collection of Information

Certain provisions of our rules, schedules, and forms affected by the amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[413] The Commission published a notice requesting

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411 *See* Section IV.D.5.b of the Proposing Release.

412 *See infra* Section V.C.

413 44 U.S.C. 3501 *et seq*.

comment on changes to these collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[414] While several commenters provided comments on the potential costs of the Proposed Rules, no commenters specifically addressed our PRA analysis.[415]

The hours and costs associated with preparing, filing, and distributing the schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not confidential and there is no mandatory retention period for the information disclosed. The titles for the affected collections of information are:

(1) Regulation 14A (Commission Rules 14a-1 through 14a-21 and Schedule 14A) (OMB Control No. 3235-0059); and

(2) Rule 20a-1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents, and Authorizations (OMB Control No. 3235-0158).

The Commission adopted Regulation 14A pursuant to the Exchange Act and Rule 20a-1 pursuant to the Investment Company Act. These rules set forth the disclosure and other requirements for proxy statements filed by soliciting parties to help investors make informed investment and voting decisions.

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414 44 U.S.C. 3507(d); 5 CFR 1320.11.

415 *See supra* Section II.

A description of the final amendments, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the expected economic effects of the final amendments can be found in Section IV above.

B. Effect of the Final Amendments on Existing Collections of Information

For operating companies, the amendments revise the consent required of a bona fide nominee, eliminate the short slate rule, and establish new procedures for the solicitation of proxies, the preparation and use of proxy cards, and the dissemination of information about all director nominees in contested elections.[416] The amendments will affect the collection of information requirements of soliciting parties by requiring the use of a universal proxy card in all non-exempt solicitations in connection with contested elections. They will also establish requirements for universal proxy cards, including specified formatting and presentation mandates. The amendments require all parties to refer shareholders to the other party's proxy statement for information about the other party's nominees and explain that shareholders can access the other party's proxy statement on the Commission's website. In addition, the amendments require dissidents in election contests to provide a notice of intent to solicit and a list of their nominees to the registrant and they eliminate the ability of dissidents to round out their slate with registrant nominees through use of the short slate rule. The amendments further establish filing deadlines for a dissident's definitive proxy statement and require dissidents to solicit at least 67% of the voting power of shares entitled to vote on the election of

[416] These amendments do not apply to funds.

directors. These requirements for contested elections do not meaningfully impact the reporting and cost burden associated with the collection of information.[417]

We are also amending the proxy rules for all director elections to:

- specify that the proxy card must include an "against" voting option when applicable state law gives effect to a vote "against" a nominee;
- require proxy cards to give shareholders the ability to "abstain" in an election where a majority voting standard is in effect; and
- mandate disclosure about the effect of a "withhold" vote in an election.

We arrived at the estimates discussed below by reviewing our burden estimates for similar disclosure. The amendments regarding the use of a universal proxy card, required notices and related disclosure should result in only a small amount of additional required disclosure and the addition of only a limited amount of information (the names of duly nominated director candidates for which the soliciting party has complied with Rule 14a-19 on proxy cards). The application of these amendments will be limited to contested elections. In addition, the additional disclosure and changes to the proxy card

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417 Our current proxy rules do not prescribe a minimum solicitation requirement for either registrants or dissidents; however, customary practice has been for soliciting parties to solicit more than 67% of the voting power of shares entitled to vote on the election of directors because either, in the case of a registrant, it wishes to meet notice, informational and quorum requirements for the annual meeting, or, in the case of a dissident, such solicitation is necessary in order to successfully wage a proxy contest. Based on staff analysis of the industry data provided by a proxy services provider for 31 proxy contests between July 1, 2018 and June 30, 2019, less than 67% of the voting power was solicited by a dissident in not a single proxy contest in that sample. Of the 35 proxy contests between June 30, 2015 and April 15, 2016 analyzed in the Proposing Release (*see* Section IV.B.2.b of the Proposing Release), only 2 dissidents solicited less than 67% of the voting power. In those instances, we estimate that the proposed amendments would have resulted in average incremental solicitation expenses (exclusive of printing costs) to the dissident of approximately $5,400 if the least expensive approach to soliciting through an intermediary had been used to solicit the required additional number of shareholders. *See supra* notes 262 and 263. For PRA purposes, we therefore estimate that there would be one contest annually that would not have otherwise solicited 67% and thus would incur additional solicitation costs of $5,400, which amount we add to the estimated reporting and cost burden associated with Regulation 14A.

relating to the appropriate use of "against," "abstain" or "withhold" voting options should similarly result in only a small incremental increase in required disclosure; however, those changes will apply to proxy materials in all director elections, not just contested elections.

C. Aggregate Burden and Cost Estimates for the Amendments

We derived our burden hour and cost estimates by estimating the total amount of time it will take to prepare and review the required disclosures called for by the final amendments. This estimate represents the average burden for all soliciting parties, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among soliciting parties. Some soliciting parties may experience costs in excess of this average in the first year of compliance with the amendments and some parties may experience less than the average costs.

As discussed more fully in Section IV.C.4 above, it is unclear whether the amendments will result in an increase or decrease in the number of election contests, and we therefore estimate no change in the number of proxy statement filings as a result of the amendments. We estimate that the average incremental burden for a registrant to prepare a universal proxy card in a contested election and include the required disclosure will be two hours. We similarly estimate that the average incremental burden for a dissident to prepare a universal proxy card in a contested election and include the required disclosure will be two hours. We additionally estimate that the average incremental burden for a dissident and registrant to prepare the notice to the opposing party containing the names of its nominees in a contested election will be approximately one hour. Thus, we estimate that the total incremental burden for Schedule 14A will increase by three hours per election contest for registrants and three hours per election

contest for other soliciting parties.[418] For purposes of the PRA, we estimate there will be 25 annual election contests per year,[419] resulting in 150 additional total incremental burden hours (6 hours x 25 election contests) under Schedule 14A as a result of adopted Rule 14a-19 and the related amendments.

We estimate that the additional disclosure and changes to the proxy card relating to the appropriate use of "against," "abstain" or "withhold" voting options in proxy materials for all director elections will be considerably less than one hour for each proxy statement and card relating to an election of directors. Unlike the other amendments relating specifically to election contests, these amendments will apply to all director elections, including director elections for funds. As a result of these amendments, registrants may need to update certain standardized portions of their proxy statements and proxy cards, and many of those disclosures, once revised, are not likely to require significant revision from year to year. We estimate that these changes will result in an average of 10 minutes of additional burden per response.[420] For purposes of the PRA, we estimate the changes will result in 1,062 hours of additional total incremental burden under Regulation 14A (10 minutes x 6,369 filings) and 222 hours of total incremental burden under Rule 20a-1 (10 minutes x 1,333 filings).[421]

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418 There may be a range of burdens by soliciting parties as they determine exactly how to present the proxy card and the language of the required disclosure; however, we estimate the burdens described above as the average burden for soliciting parties.

419 We do not estimate that there will be additional election contests as a result of the final rules. We estimate approximately 25 election contests per year based on the average of actual proxy contests for elections of directors in calendar years 2017–2020.

420 We estimate that the incremental burden for the additional disclosure and changes to the proxy card will increase by 20 minutes in the first year and then be reduced to five minutes in years two and three, resulting in a three-year average of an increased 10-minute burden per response.

421 For purposes of the Regulation 14A and Rule 20a-1 collections of information, the number of filings corresponds to the estimated number of new filings that will be made each year under Regulation 14A and Rule 20a-1, which include filings such as DEF 14A; DEFA14A; DEFM14A;

These estimates include the time and cost of preparing disclosure that has been appropriately reviewed, including, as applicable, by management, in-house counsel, outside counsel and members of the board of directors. This burden will be added to the current burden for Regulation 14A and Rule 20a-1, as applicable. For proxy statements under Regulation 14A, we estimate that 75% of the burden of preparation is carried internally and that 25% of the burden of preparation is carried by outside professionals retained at an average cost of $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried internally is reflected in hours. We estimate a similar allocation between internal burden hours and outside professional costs with respect to the PRA burden for Rule 20a-1.

As a result of the estimates discussed above, we estimate for purposes of the PRA that the total incremental burden on all soliciting parties of the final amendments under Regulation 14A will be 909 hours for internal time (1,212 total incremental burden hours[422] x 75%) and $121,200 (1,212 total incremental burden hours x 25% x $400) plus $5,400 in professional costs due to the additional solicitation burden) for the services of outside professionals. We further estimate for purposes of the PRA that the total incremental burden on all soliciting parties of the final amendments under Rule 20a-1

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and DEFC14A. When calculating the PRA burden for any particular collection of information, the total number of annual burden hours estimated is divided by the total number of annual responses estimated, which provides the average estimated annual burden per response. The current inventory of approved collections of information is maintained by the Office of Information and Regulatory Affairs ("OIRA"), a division of OMB. The total annual burden hours and number of responses associated with Regulation 14A and Rule 20a-1, as updated from time to time, can be found at https://www.reginfo.gov/public/do/PRAMain. We recognize that the adopted rules may only effect a subset of the estimated proxy filings in the OMB inventory, but we are using the estimate for all proxy filings to provide a conservative estimate of the impact of the rule amendments.

422 This figure represents the sum of the aforementioned 150 additional total incremental burden hours from election contests and the aforementioned 1,062 additional total incremental burden hours from director elections generally.

will be 166.5 hours for internal time (222 total incremental burden hours x 75%) and $22,200 (222 total incremental burden hours x 25% x $400) for the services of outside professionals.

A summary of the estimated changes is included in the table below.

Table 1: Calculation of Incremental PRA Burden Estimates

	Current Annual Responses (A)	Estimated Annual Responses (B)	Current Burden Hours (C)	Estimated Increase in Burden Hours (D)	Estimated Total Burden Hours (E) =C+D	Current Professional Costs (F)	Estimated Increase in Professional Costs (G)	Estimated Total Professional Costs =F+G
Schedule 14A	6,369	6,369	777,590	1,212	778,802	$103,678,712	$126,600	$103,805,312
Rule 20a-1	1,333	1,333	113,305	222	113,527	$39,990,000	$22,200	$40,012,200

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act ("RFA")[423] requires the Commission, in promulgating rules under Section 553 of the Administrative Procedure Act,[424] to consider the impact of those rules on small entities. We have prepared this Final Regulatory Flexibility Analysis ("FRFA") in accordance with Section 604 of the RFA.[425] An Initial Regulatory Flexibility Act Analysis ("IRFA") was prepared in accordance with the RFA and was included in the Proposing Release. The FRFA relates to the amendments to Exchange Act Rules 14a-2, 14a-3, 14a-4, 14a-5, 14a-6, and 14a-101, and new Exchange Act Rule 14a-19.

A. Need for, and Objectives of, the Final Amendments

423 5 U.S.C. 601 *et seq.*

424 5 U.S.C. 553.

425 5 U.S.C. 604.

The final amendments will allow a shareholder voting by proxy to choose among director nominees in an election contest in a manner that more closely reflects the choice that could be made by voting in person at a shareholder meeting. To this end, we are amending the proxy rules applicable to operating companies to:

- revise the consent required of a bona fide nominee;
- eliminate the short slate rule;
- require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections; and
- prescribe requirements for universal proxy cards including notice, filing and solicitation requirements.

We are also adopting amendments that will apply to all director elections and will require disclosure regarding the effect of shareholder action to vote "against," "withhold" or "abstain" and require that the appropriate voting option be included on the proxy card.

The need for, and objectives of, the amendments are discussed in more detail in Section I, above. We discuss the economic impact, including the estimated compliance costs and burdens, of the amendments in Sections IV and V above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on all aspects of the IRFA, including how the Proposed Rules could further lower the burden on small entities, the number of small entities that would be affected by the Proposed Rules, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the Proposed Rules. We did not receive any comments specifically addressing the IRFA. However, we received a number of comments on the

Proposed Rules generally,[426] and have considered these comments in developing the FRFA.

C. Small Entities Subject to the Final Amendments

The final amendments will affect small entities that file proxy statements under the Exchange Act. The RFA defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[427] For purposes of the RFA, under our rules, an issuer, other than an investment company, is a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year and is engaged or proposing to engage in an offering of securities that does not exceed $5 million.[428] We estimate that there are approximately 660 issuers that file with the Commission, other than investment companies, that may be considered small entities and are potentially subject to all of the final amendments.[429] Under 17 CFR 270.0-10, an investment company, including a business development company, is considered to be a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. Commission staff estimates that, as of June 2021, there were 70 registered investment companies that would be subject to the proposed amendments that

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426 *See supra* Section II.

427 5 U.S.C. 601(6).

428 *See* 17 CFR 230.157 under the Securities Act and 17 CFR 240.0-10(a) under the Exchange Act.

429 This estimate is based on staff analysis of issuers potentially subject to the final amendments, excluding co-registrants, with EDGAR filings on Form 10-K, or amendments thereto, filed during the calendar year of January 1, 2020 to December 31, 2020, or filed by September 1, 2021, that, if timely filed by the applicable deadline, would have been filed between January 1 and December 31, 2020. Analysis is based on data from XBRL filings, Compustat, Ives Group Audit Analytics, and manual review of filings submitted to the Commission.

may be considered small entities.[430]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

As noted above, the purpose of the final amendments is to allow a shareholder voting by proxy to choose among director nominees in an election contest in a manner that more closely reflects the choice that could be made by voting in person at a shareholder meeting. In addition, we are adopting amendments that apply to all director elections and require disclosure regarding the effect of shareholder action to vote "against," "withhold" or "abstain" and mandate that the appropriate voting option be listed on the proxy card. The changes in reporting requirements for soliciting parties are outlined in detail in Section I above. Compliance with certain provisions of the amendments may require the use of professional skills, including legal skills.

These amendments are unlikely to impose significant recordkeeping requirements. We discuss the economic effects, including the estimated costs and burdens, of the final amendments on all registrants, including small entities, in Sections IV and V above.

E. Agency Action to Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. Accordingly, we considered the following alternatives:

- establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;

[430] These estimates are based on staff analysis of Morningstar data and data submitted by investment company registrants in forms filed on EDGAR as of June 30, 2021.

- clarifying, consolidating, or simplifying compliance and reporting requirements under the rule for small entities;
- using performance rather than design standards; and
- exempting small entities from all or part of the requirements.

The current proxy rules relating to election contests and the proxy rules generally do not impose different standards or requirements based on the size of the registrant or dissident. These rules contain both performance and design standards in order to achieve appropriate disclosure in the proxy voting process under the Exchange Act.[431]

The final amendments require very limited additional disclosure by either the registrant or the dissident, but do impose additional filing and solicitation requirements on dissidents and an obligation on both parties in an election contest to include the other side's nominees on their respective proxy cards and to notify the other party of the names of their respective director nominees.

The final amendments are intended to permit shareholders voting by proxy in an election contest to reflect their choices as they could if voting in person at a shareholder meeting. We believe the final amendments are equally appropriate for parties of all sizes engaged in an election contest because they facilitate the important objective of shareholder enfranchisement, which does not depend on the size of the soliciting party. For that reason, we are not adopting different compliance or reporting requirements or timetables for small entities, or an exception for small entities. Similarly, we believe that the final amendments do not need further clarification, consolidation, or simplification

[431] For example, the proxy rules include filing deadlines and some required specific disclosure. However, Schedule 14A generally permits parties to craft their disclosure as they deem appropriate.

for small entities.

Finally, as with the current proxy rules, the final amendments include both performance and design standards. In particular, the universal proxy card is subject to certain presentation and formatting requirements, but there is flexibility as to the exact design of the card within the guidelines established by the amendments.

VII. STATUTORY AUTHORITY

We are adopting the rule amendments contained in this release under the authority set forth in Sections 14 and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we are amending title 17, chapter II, of the Code of Federal Regulations as follows:

PART 240 - GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

2. Amend § 240.14a-2 by revising paragraph (b) introductory text to read as follows:

§ 240.14a-2 Solicitations to which § 240.14a-3 to § 240.14a-15 apply.

* * * * *

(b) Sections 240.14a-3 to 240.14a-6 (other than paragraphs 14a-6(g) and 14a-6(p)), § 240.14a-8, § 240.14a-10, §§ 240.14a-12 to 240.14a-15 and § 240.14a-19 do not apply to the following:

* * * * *

3. Amend § 240.14a-3 as follows:

a. In paragraph (a)(3)(i) remove the period at the end of the paragraph and add in its place "; or";

b. In paragraph (a)(3)(ii) remove the semi-colon and add a period in its place.

4. Amend § 240.14a-4 as follows:

a. Revise paragraph (b)(2);

b. Redesignate paragraph (b)(3) as paragraph (b)(5);

c. Add new paragraph (b)(3) and paragraph (b)(4);

d. Revise the Instructions to paragraph (b)(2);

e. Revise paragraphs (c)(5) and (d)(1);

f. In paragraph (d)(3) add a comma before "or" at the end of the paragraph; and

g. Revise paragraph (d)(4).

The revisions and additions read as follows:

§ 240.14a-4 Requirements as to proxy.

* * * * *

(b) * * *

(2) A form of proxy that provides for the election of directors shall set forth the names of persons nominated for election as directors, including any person whose nomination by a shareholder or shareholder group satisfies the requirements of an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

(3) Except as otherwise provided in § 240.14a-19, a form of proxy that provides for the election of directors may provide a means for the security holder to grant authority to vote for the nominees set forth, as a group, provided that there is a similar means for the security holder to withhold authority to vote for such group of nominees (or, when applicable state law gives legal effect to votes cast against a nominee, a similar means for the security holder to vote against such group of nominees and a means for security holders to abstain from voting for such group of nominees). Any such form of proxy which is executed by the security holder in such manner as not to withhold authority to vote for the election of any nominee, or not to grant authority to vote against the election of any nominee, shall be deemed to grant authority to vote for the election of any nominee, provided that the form of proxy so states in bold-face type. Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group or to vote against any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

(4) When applicable state law gives legal effect to votes cast against a nominee, then in lieu of providing a means for security holders to withhold authority to vote, the

form of proxy shall provide a means for security holders to vote against each nominee and a means for security holders to abstain from voting. When applicable state law does not give legal effect to votes cast against a nominee, such form of proxy shall not provide a means for security holders to vote against any nominee and such form of proxy shall clearly provide any of the following means for security holders to withhold authority to vote for each nominee:

(i) A box opposite the name of each nominee which may be marked to indicate that authority to vote for such nominee is withheld; or

(ii) An instruction in bold-face type which indicates that the security holder may withhold authority to vote for any nominee by lining through or otherwise striking out the name of any nominee; or

(iii) Designated blank spaces in which the security holder may enter the names of nominees with respect to whom the security holder chooses to withhold authority to vote; or

(iv) Any other similar means, provided that clear instructions are furnished indicating how the security holder may withhold authority to vote for any nominee.

INSTRUCTION TO PARAGRAPHS (b)(2), (3), and (4). These paragraphs do not apply in the case of a merger, consolidation or other plan if the election of directors is an integral part of the plan.

* * * * *

(c) * * *

(5) The election of any person to any office for which a bona fide nominee is named in a proxy statement and such nominee is unable to serve or for good cause will not serve.

* * * * *

(d) * * *

(1) To vote for the election of any person to any office for which a bona fide nominee is not named in the proxy statement,

(i) A person shall not be deemed to be a bona fide nominee and shall not be named as such unless the person has consented to being named in a proxy statement relating to the registrant's next annual meeting of shareholders at which directors are to be elected (or a special meeting in lieu of such meeting) and to serve if elected.

(ii) Notwithstanding paragraph (d)(1)(i) of this section, if the registrant is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)), a person shall not be deemed to be a bona fide nominee and shall not be named as such unless the person has consented to being named in the proxy statement and to serve if elected. Provided, however, that nothing in this § 240.14a-4 shall prevent any person soliciting in support of nominees who, if elected, would constitute a minority of the board of directors of an investment company registered under the Investment Company Act of 1940 or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940, from seeking authority to vote for nominees named in the registrant's proxy statement, so long as the soliciting party:

(A) Seeks authority to vote in the aggregate for the number of director positions then subject to election;

(B) Represents that it will vote for all the registrant nominees, other than those registrant nominees specified by the soliciting party;

(C) Provides the security holder an opportunity to withhold authority with respect to any other registrant nominee by writing the name of that nominee on the form of proxy; and

(D) States on the form of proxy and in the proxy statement that there is no assurance that the registrant's nominees will serve if elected with any of the soliciting party's nominees.

(2) * * *

(4) To consent to or authorize any action other than the action proposed to be taken in the proxy statement, or matters referred to in paragraph (c) of this section.

* * * * *

5. Amend § 240.14a-5 as follows:

a. Revise paragraph (c);

b. In paragraph (e)(2) remove the "and" at the end of the paragraph;

c. In paragraph (e)(3) remove the period and add "; and" in its place; and

d. Add paragraph (e)(4).

The revisions and addition read as follows:

§ 240.14a-5 Presentation of information in proxy statement.

* * * * *

(c) Any information contained in any other proxy soliciting material which has been or will be furnished to each person solicited in connection with the same meeting or subject matter may be omitted from the proxy statement, if a clear reference is made to the particular document containing such information.

* * * * *

(e) * * *

(4) The deadline for providing notice of a solicitation of proxies in support of director nominees other than the registrant's nominees pursuant to § 240.14a-19 for the registrant's next annual meeting unless the registrant is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

* * * * *

6. Amend § 240.14a-6 by revising NOTE 3 TO PARAGRAPH (a) to read as follows:

§ 240.14a-6 Filing requirements.

* * * * *

(a) * * *

NOTE 3 TO PARAGRAPH (a): Solicitation in Opposition. For purposes of the exclusion from filing preliminary proxy material, a "solicitation in opposition" includes: (a) Any solicitation opposing a proposal supported by the registrant; (b) any solicitation supporting a proposal that the registrant does not expressly support, other than a security holder proposal included in the registrant's proxy material pursuant to § 240.14a-8; and (c) any solicitation subject to § 240.14a-19. The inclusion of a security holder proposal in the registrant's proxy material pursuant to § 240.14a-8 does not constitute a "solicitation in opposition," even if the registrant opposes the proposal and/or includes a statement in opposition to the proposal. The inclusion of a shareholder nominee in the registrant's proxy materials pursuant to an applicable state or foreign law provision, or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials does not constitute a "solicitation in

opposition" for purposes of § 240.14a-6(a), even if the registrant opposes the shareholder nominee and solicits against the shareholder nominee and in favor of a registrant nominee.

* * * * *

7. Add § 240.14a-19 to read as follows:

§ 240.14a-19 Solicitation of proxies in support of director nominees other than the registrant's nominees.

(a) No person may solicit proxies in support of director nominees other than the registrant's nominees unless such person:

(1) Provides notice to the registrant in accordance with paragraph (b) of this section unless the information required by paragraph (b) of this section has been provided in a preliminary or definitive proxy statement previously filed by such person;

(2) Files a definitive proxy statement with the Commission in accordance with § 240.14a-6(b) by the later of:

(i) 25 calendar days prior to the security holder meeting date; or

(ii) Five (5) calendar days after the date that the registrant files its definitive proxy statement; and

(3) Solicits the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors and includes a statement to that effect in the proxy statement or form of proxy.

(b) The notice shall:

(1) Be postmarked or transmitted electronically to the registrant at its principal executive office no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date, except that, if the registrant did not hold an annual meeting

during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice must be provided by the later of 60 calendar days prior to the date of the annual meeting or the 10th calendar day following the day on which public announcement of the date of the annual meeting is first made by the registrant;

(2) Include the names of all nominees for whom such person intends to solicit proxies; and

(3) Include a statement that such person intends to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees.

(c) If any change occurs with respect to such person's intent to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors in support of director nominees other than the registrant's nominees or with respect to the names of such person's nominees, such person shall notify the registrant promptly.

(d) A registrant shall notify the person conducting a proxy solicitation subject to this section of the names of all nominees for whom the registrant intends to solicit proxies unless the names have been provided in a preliminary or definitive proxy statement previously filed by the registrant. The notice shall be postmarked or transmitted electronically no later than 50 calendar days prior to the anniversary of the previous year's annual meeting date, except that, if the registrant did not hold an annual meeting during the previous year, or if the date of the meeting has changed by more than 30 calendar days from the previous year, then notice must be provided no later than 50 calendar days prior to the date of the annual meeting. If any change occurs with respect

to the names of the registrant's nominees, the registrant shall notify the person conducting a proxy solicitation subject to this section promptly.

(e) Notwithstanding the provisions of § 240.14a-4(b)(2), if any person is conducting a proxy solicitation subject to this section, the form of proxy of the registrant and the form of proxy of any person soliciting proxies pursuant to this section shall:

(1) Set forth the names of all persons nominated for election by the registrant and by any person or group of persons that has complied with this section and the name of any person whose nomination by a shareholder or shareholder group satisfies the requirements of an applicable state or foreign law provision or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials;

(2) Provide a means for the security holder to grant authority to vote for the nominees set forth;

(3) Clearly distinguish between the nominees of the registrant, the nominees of the person or group of persons that has complied with this section and the nominees of any shareholder or shareholder group whose nominees are included in a registrant's proxy materials pursuant to the requirements of an applicable state or foreign law provision or a registrant's governing documents;

(4) Within each group of nominees referred to in paragraph (e)(3) of this section, list nominees in alphabetical order by last name;

(5) Use the same font type, style and size for all nominees;

(6) Prominently disclose the maximum number of nominees for which authority to vote can be granted; and

(7) Prominently disclose the treatment and effect of a proxy executed in a manner

that grants authority to vote for the election of fewer or more nominees than the number of directors being elected and the treatment and effect of a proxy executed in a manner that does not grant authority to vote with respect to any nominees.

(f) If any person is conducting a proxy solicitation subject to this section, the form of proxy of the registrant and the form of proxy of any person soliciting proxies pursuant to this section may provide a means for the security holder to grant authority to vote for the nominees of the registrant set forth, as a group, and a means for the security holder to grant authority to vote for the nominees of any other soliciting person set forth, as a group, provided that there is a similar means for the security holder to withhold authority to vote for such groups of nominees unless the number of nominees of the registrant or of any other soliciting person is less than the number of directors being elected. Means to grant authority to vote for any nominees as a group or to withhold authority for any nominees as a group may not be provided if the form of proxy includes one or more shareholder nominees in accordance with an applicable state or foreign law provision or a registrant's governing documents as they relate to the inclusion of shareholder director nominees in the registrant's proxy materials.

(g) This section shall not apply to:

(1) A consent solicitation; or

(2) A solicitation in connection with an election of directors at an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

INSTRUCTION TO PARAGRAPHS (b)(1) and (d). Where the deadline falls on a Saturday, Sunday or holiday, the deadline will be treated as the first business day

following the Saturday, Sunday or holiday.

INSTRUCTION TO PARAGRAPH (f). Where applicable state law gives legal effect to votes cast against a nominee, the form of proxy may provide a means for the security holder to grant authority to vote for the nominees of the registrant set forth, as a group, and a means for the security holder to grant authority to vote for the nominees of any other soliciting person set forth, as a group, provided that, in lieu of the ability to withhold authority to vote as a group, there is a similar means for the security holder to vote against such group of nominees as well as a means for security holders to abstain from voting for such group of nominees).

9. Amend § 240.14a-101 as follows:

a. Revise Instruction 3(a)(i) and (ii) to Item 4;

b. Add Item 7(h); and

c. In Item 21, revise paragraph (b) and add paragraph (c).

The revisions and addition read as follows:

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 4. Persons Making the Solicitation * * *

Instructions. * * *

3. For purposes of this Item 4 and Item 5 of this Schedule 14A:

(a) * * *

(i) In the case of a solicitation made on behalf of the registrant, the registrant, each director of the registrant and each of the registrant's nominees for election as a director;

(ii) In the case of a solicitation made otherwise than on behalf of the registrant,

each of the soliciting person's nominees for election as a director;

* * * * *

Item 7. Directors and executive officers * * *

(a) * * *

(h) If a person is conducting a solicitation that is subject to § 240.14a-19, the registrant must include in its proxy statement a statement directing shareholders to refer to any other soliciting person's proxy statement for information required by Item 7 of this Schedule 14A with regard to such person's nominee or nominees and a soliciting person other than the registrant must include in its proxy statement a statement directing shareholders to refer to the registrant's or other soliciting person's proxy statement for information required by Item 7 of this Schedule 14A with regard to the registrant's or other soliciting person's nominee or nominees. The statement must explain to shareholders that they can access the other soliciting person's proxy statement, and any other relevant documents, without cost on the Commission's website.

* * * * *

Item 21. Voting Procedures * * *

(a) * * *

(b) Disclose the method by which votes will be counted, including the treatment and effect under applicable state law and registrant charter and bylaw provisions of abstentions, broker non-votes, and, to the extent applicable, a security holder's

withholding of authority to vote for a nominee in an election of directors.

(c) When applicable, disclose how the soliciting person intends to treat proxy authority granted in favor of any other soliciting person's nominees if such other soliciting person abandons its solicitation or fails to comply with § 240.14a-19.

* * * * *

By the Commission.

Date: November 17, 2021.

J. Matthew DeLesDernier
Assistant Secretary