No. 10-1305
ORAL ARGUMENT SCHEDULED FOR APRIL 7, 2011

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

BUSINESS ROUNDTABLE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for Review of Final Rule of the
United States Securities and Exchange Commission

BRIEF OF COUNCIL OF INSTITUTIONAL INVESTORS, TIAA-CREF, AND 14 OTHER FUNDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici curiae* state as follows:

Parties and *Amici*. All parties, intervenors, and *amici* appearing before the SEC and this Court are listed in the Opening Brief of Petitioners, with one exception. On December 9, 2010, the State of Delaware filed an *amicus* brief in support of petitioners.

Ruling Under Review. The rulings under review are listed in the Initial Brief of Respondent Securities and Exchange Commission.

Related Cases. There are no related cases of which *amici* are aware.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amici curiae* state as follows:

California Public Employees' Retirement System (CalPERS) is a state public-pension system that provides retirement benefits to over 1.6 million public workers, retirees, and their families and beneficiaries. Acting as fiduciaries to system members, CalPERS invests for the long term throughout global capital markets. Currently, CalPERS manages approximately $220 billion, with $110 billion invested in public securities. CalPERS has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

California State Teachers' Retirement System (CalSTRS) is the retirement fund for California's public school teachers. It has 847,000 plan participants and, as of November 1, 2010, over $141 billion in assets under management, with approximately $103.8 billion invested in public securities. CalSTRS has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

Colorado Public Employees' Retirement Association (PERA) provides retirement and other benefits to the more than 470,000 current and former employees of over 400 government and public employers in Colorado. PERA's total assets under management exceed $38.3 billion, including $22.1 billion in

global equities and $8.3 billion in fixed income. PERA has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

The New Jersey Division of Investment is responsible for the investment management of 196 accounts, including seven pension funds that compose the New Jersey Pension Fund and the State of New Jersey Cash Management Fund. As of June 30, 2009, the pension funds had net assets of $62.9 billion, supporting the retirement plans of approximately 800,000 active and retired employees. The New Jersey Division of Investment has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

New York City Employees' Retirement System (NYCERS) is a public employee retirement system that provides retirement, disability, and death benefits to 300,000 active and retired New York City employee-participants. Founded in 1920, NYCERS has total plan assets of over $36.7 billion. NYCERS has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

Board of Education Retirement System of the City of New York (BERS) provides pension benefits to approximately 32,000 active and 14,000 retired members, primarily non-pedagogical employees of the New York City Department of Education. Its plan assets exceed $2.5 billion. BERS has no parent corporation

and no publicly held corporation owns 10% or more of stock or partnership shares in it.

Teachers' Retirement System of the City of New York (TRS) provides a retirement program for approximately 180,000 current and former employees of the New York City Department of Education, New York City Charter Schools, or the City University of New York. TRS administers a basic qualified pension plan with approximately $36.8 billion in assets as well as a Section 403(b) tax-deferred annuity program with more than $9 billion in assets. TRS has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

New York Fire Department Pension Fund (FDPF) is a single-employer public employee retirement system serving full-time uniformed employees of the New York City Fire Department. FDPF has approximately 11,000 active members and 17,500 retired members, including widows and beneficiaries. Its assets total approximately $6.8 billion. FDPF has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

New York City Police Pension Fund (PPF) was the first municipal retirement system established in the United States. Initially founded in 1857 to pay benefits to New York City police officers injured in the line of duty, it has expanded to provide partial-pay retirement benefits to retired officers. Administering benefits

for approximately 74,000 active and retired members, PPF has plan assets, including variable supplements funds, of approximately $21 billion. PPF has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

New York State Common Retirement Fund (NYSCRF) holds and invests the assets of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System. NYSCRF manages more than $130 billion to provide pension, disability, and death benefits for more than one million New York state and local government employees, beneficiaries, and retirees, as well as employees of certain other participating employers. NYSCRF has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

North Carolina Retirement System administers statutory retirement and benefit plans, as authorized by the General Assembly of North Carolina. The fund manages approximately $69.7 billion in assets for the benefit of approximately 820,000 North Carolina employees. The North Carolina Retirement System has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

Ted Wheeler is Oregon State Treasurer. The Oregon Public Employees Retirement Fund (OPERF)—with approximately 320,000 active and inactive

members—is a public pension plan that manages approximately $53 billion in assets, with over $21 billion in the public markets, for the benefit of past and present Oregon government employees. OPERF has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

Washington State Investment Board (WSIB) manages investments for 17 retirement plans for public employees, teachers, school employees, law enforcement officers, firefighters, and judges. WSIB also manages investments for 22 other public funds that support or benefit industrial insurance, colleges and universities, individuals with developmental disabilities, and wildlife protection. Total assets under management as of September 30, 2010 were $76.7 billion. WSIB has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

State of Wisconsin Investment Board (SWIB) is responsible for investing the trust fund assets for over 557,000 participants in the Wisconsin Retirement System. SWIB manages over $67 billion in public securities, of which $38.3 billion is invested in public equities. SWIB has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

Teachers Insurance and Annuity Association of America (TIAA) is a New York stock life insurance company whose sole shareholder is the TIAA Board of Overseers, a New York not-for-profit corporation. College Retirement Equities

Fund (CREF) is a New York not-for-profit corporation that is an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940. Affiliates of TIAA sponsor a family of mutual funds that are also investment companies registered under the Investment Company Act of 1940. These entities and other TIAA affiliates (collectively known as TIAA-CREF) provide financial services to over 3 million individual participants. TIAA-CREF's primary mission is to help individuals in the academic, research, medical, cultural, and research fields plan for and live through retirement by maximizing long-term shareholder value. TIAA-CREF had $434 billion in combined assets under management as of September 30, 2010. CREF is one of this country's largest institutional investors, holding shares in over 7,000 publicly traded companies.

Council of Institutional Investors (CII) is a not-for-profit trade association of more than 120 pension funds dedicated to promoting corporate governance that truly serves investor interests. Its members—with assets exceeding $3 trillion—are major long-term shareholders with duties to protect the retirement assets of millions of American workers. CII has no parent corporation and no publicly held corporation owns 10% or more of stock or partnership shares in it.

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29 C.F.R. § 2509.08-2 11

[1] Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY/LIST OF RECORD CITATIONS

APA	Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (and scattered other sections in Title 5 of the U.S. Code)
BRT	Business Roundtable
CalSTRS	California State Teachers' Retirement System
ICA	Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, *et seq.*
ICI	Investment Company Institute
IDC	Independent Directors Council
TIAA-CREF	Teachers Insurance and Annuity Association of America and College Retirement Equities Fund
CRI	Certified Record Index
CRI 6	Comment Letter from Julian Reid, London, United Kingdom, May 21, 2009
CRI 57	Comment Letter from Peter Montagnon, Christianna Wood, and Michelle Edkins, International Corporate Governance Network, London, United Kingdom, July 15, 2009
CRI 83	Comment Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors, August 4, 2009
CRI 102	Comment Letter from Gerald W. McEntee, International President, American Federation of State, County and Municipal Employees, AFL-CIO, August 7, 2009
CRI 113	Comment Letter from Heather Booth, Executive Director, Americans for Financial Reform, Washington, DC, August 10, 2009

CRI 117	Comment Letter from Keith Bozarth, Executive Director, State of Wisconsin Investment Board, August 10, 2009
CRI 178	Comment Letter from Jennifer S. Taub, Lecturer & Coordinator of the Business Law Program, Isenberg School of Management at the University of Massachusetts, Amherst, August 13, 2009
CRI 219	Comment Letter from Michael O'Sullivan, Australian Council of Superannuation Investors, August 14, 2009
CRI 227	Comment Letter from Joseph F. Keefe, President & CEO, Pax World Management Corp., August 14, 2009
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CRI 295	Comment Letter from Lynne L. Dallas, Professor of Law, University of San Diego School of Law, August 17, 2009

CRI 320	Comment Letter from Alexander M. Cutler, Chairman and Chief Executive Officer of Eaton Corporation, Chair, Corporate Leadership Initiative, Business Roundtable, August 17, 2009
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CRI 502	Comment Letter from Greg Sword, Chief Executive Officer, Labour Union Co-operative Retirement Fund, Super, August 24, 2009
CRI 539	Comment Letter from Hye-Won Choi, Senior Vice President and Head of Corporate Governance, Teachers Insurance and Annuity Association of America and College Retirement Equities Fund, New York, New York, September 19, 2009
CRI 566	Comment Letter from Julie Gresham, Corporate Secretary, Shareowner Education Network and Ann Yerger, Executive Director, Council of Institutional Investors, November 18, 2009
CRI 595	Comment Letter from Jonathan D. Urick, Analyst, Council of Institutional Investors, January 14, 2010
CRI 597	Comment Letter from Keith Bozarth, Executive Director, State of Wisconsin Investment Board, Madison, Wisconsin, January 15, 2010

CRI 608	Comment Letter from Lucian A. Bebchuk and Scott Hirst, Harvard University, School of Law, January 19, 2010
CRI 616	Comment Letter from Meredith Williams, Executive Officer, The Colorado Public Employees' Retirement Association, January 19, 2010
CRI 625	Comment Letter from Lucian A. Bebchuk, Friedman Professor of Law, Economics, and Finance, Harvard Law School, January 19, 2010
CRI 626	Comment Letter from Joseph A. Dear, Chief Investment Officer, California Public Employees' Retirement System, January 19, 2010
CRI 667	Comment Letter from Anne Stausboll, California Public Employees' Retirement System; Meredith Williams, Colorado Public Employees' Retirement Assoc.; John Liu, City of New York; Chris De Rose, Ohio Public Employees' Retirement System; Thomas P. DiNapoli, New York State Common Retirement Fund; Denise L. Nappier, Connecticut Retirement Plans and Trust Funds; Sandra J. Matheson, Maine Public Employees Retirement System; Ted Wheeler, Oregon Public Employees Retirement Fund; Gail L. Hanson, State of Wisconsin Investment Board; Gregg Rademacher, Los Angeles County Employees' Retirement Assoc.; Jack Ehnes, California State Teachers' Retirement System; and Nancy K. Kopp, Maryland State Treasurer's Office, August 17, 2010

INTEREST OF *AMICI CURIAE*

Amici curiae (listed and described in Addendum A) are a national financial services organization that serves over 3 million participants, 14 public pension funds serving millions more, and an association of over 120 pension funds.[1] *Amici* and their members cumulatively manage assets exceeding $3 trillion and make annual benefit payments totaling billions of dollars. As long-term investors with a fiduciary obligation to safeguard and expand their investments, *amici* seek to ensure that the companies in which they invest operate with transparency, have boards and management that are accountable to shareholders, and appropriately manage risk. Because sound corporate governance and avoiding inefficient regulation are critical to long-term returns, *amici* have a profound interest in and unique perspective on the SEC proxy-access rules at issue here. Those rules will further important shareholder interests. Contrary to petitioners' claim that enhanced proxy access will empower special-interest groups (*e.g.*, unions, hedge funds, and public-interest groups) to create mischief, proxy access will significantly improve shareholders' ability to ensure that corporate stewards maximize shareholder wealth. Proxy access is thus consistent with the best traditions of corporate governance.

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[1] Pursuant to F.R.A.P. 29(c)(5), *amici* certify that no counsel for any party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, its members, and its counsel made such a monetary contribution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Seeking to restore investor confidence and management accountability in the wake of the recent financial crisis, Congress reaffirmed the SEC's authority to establish proxy-access rules that "are in the interests of shareholders and for the protection of investors." *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971(b), 124 Stat. 1376, 1915 (2010). Congress's decision was well founded. Economists and courts alike have long recognized the agency costs that investors suffer when corporate officers make decisions based on interests that diverge from those of long-term shareholders. *See Foltz v. U.S. News & World Report, Inc.*, 865 F.2d 364, 372 (D.C. Cir. 1989) (defining agency costs); Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675, 679 (2007) (describing the "widely recognized" agency-cost problem).

Shareholder meetings theoretically reduce those costs by enabling shareholders to remove directors who provide insufficient oversight over corporate managers. Bebchuk, *Shareholder Franchise*, *supra*, at 680. In practice, however, company policies can impede shareholders' ability to remove underperforming directors. And the current proxy process can exacerbate agency costs by rendering shareholders largely voiceless. *Id.* at 682-91.

After years of study, the SEC adopted Rule 14a-11 (the "Rule") and associated amendments to remedy those defects. Shareholders and their repre-

sentatives—who suffer most when excessive regulation harms corporate profitability—have not challenged the Rule. To the contrary, "institutional investors with a proven commitment to enhancing long-term value" support the Rule. *See* Certified Record Index ("CRI") Doc. No. 539 at 2. For example, *amicus* TIAA-CREF, a financial services company whose sole goal is to protect and maximize the wealth of its individual participants, supports the Rule. The other signatories to this brief—which manage over $3 trillion with the same goal of safeguarding and growing those assets for the benefit of tens of millions of individuals—do so as well. The administrative record is replete with other examples of market-driven supporters. *See* pp. 23-24, *infra*.

The challenge here comes not from *shareholders* who would be injured by inappropriate regulation, but from the corporate *agents* the Rule would make more accountable. Petitioner BRT is "an association of chief executive *officers* of leading U.S. companies." Business Roundtable, *About Us*, http://businessroundtable.org/about-us/ (emphasis added). Its claim that the Rule will injure *shareholder* interests thus warrants skepticism.[2]

Petitioners claim that the SEC underestimated the likely costs of its Rule. But they in essence simply re-argue the merits of the Rule. When "an agency's

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[2] The other petitioner, the Chamber of Commerce, has membership from across the business community, but corporate officers determine the extent of corporate support.

decision is primarily predictive"—such as an assessment of future costs and benefits—this Court's "role is limited; [it] require[s] only that the agency acknowledge factual uncertainties and identify the considerations it found persuasive." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). Here, the SEC's assessment is well reasoned and amply supported by the record.

I. Because attending shareholder meetings is impractical for most shareholders, state law typically allows shareholders to vote for directors by proxy. For 70 years, the SEC has sought to ensure that the proxy process functions as a reasonable substitute for in-person meetings. The current proxy process, however, does not. Shareholders generally cannot have their director nominees placed on the company proxy, but must instead circulate competing proxy materials and campaign for support separately. The costs can be prohibitive, and incumbents can impose significant procedural hurdles. Absent a realistic prospect of removal, directors can fail to act in the long-term interests of the corporation, with disastrous results.

II. Responding to those failures, the Rule allows certain shareholders to include director nominees in the company's proxy materials. The SEC carefully circumscribed that right, limiting it to shareholders with a large, long-term stake in the corporation, while deterring shareholders with parochial agendas. Experience abroad with similar rules strongly supports the SEC's conclusion that, while proxy

access will rarely be invoked, it provides broad benefits: The possibility of shareholder candidates enhances communication between management and significant investors, improves management performance, and thereby limits the need to invoke proxy access. And when proxy access is invoked, it increases financial returns.

Petitioners complain that proxy access will force corporations to oppose parochial-interest nominees or make concessions to avoid such contests. But petitioners ignore the experience of foreign systems; preconditions that limit proxy access to long-term, value-maximizing shareholders; and the minimal chance that parochial nominees will be elected. Petitioners also assert that the SEC did not explain why proxy-access contests would occur less frequently than traditional proxy contests. As the SEC observed and overseas proxy access demonstrates, however, proxy access is rarely exercised precisely because it provides management with incentives to address shareholder concerns *before* contested elections become necessary.

III. The SEC properly rejected petitioners' so-called "private-ordering" approach under which each corporation would independently decide whether to allow proxy access. The notion that one generation of shareholders could disenfranchise the next is contrary to the purpose of shareholder meetings. That company-by-company approach would impose staggering costs. Moreover, effec-

tive private ordering is not possible because many companies impose impediments such as supermajority requirements, restrictions on shareholders' ability to amend or propose bylaws, and board repeal of shareholder-adopted bylaws. The Rule, by contrast, provides a baseline that improves corporate accountability for *all* shareholders.

IV. The SEC properly justified its decision not to exempt investment companies from the Rule. The Rule's core purpose—to facilitate the exercise of shareholders' traditional state-law rights to nominate and elect the directors who are supposed to protect their interests—applies with equal force to investment-company boards and operating-company boards.

ARGUMENT

Petitioners urge that the SEC failed to exercise reasoned decisionmaking because it did not adequately assess the Rule's costs. As long-term shareholders interested in maximizing share values, *amici* agree that it is vital to avoid unnecessary regulatory costs and distractions that could hinder corporate profitability. But petitioners overlook the far larger costs, identified by the SEC, of preserving the status quo. They overlook the SEC's extensive analysis of the very issues they raise—including the alleged potential for "distracting" and "expensive" "politicized elections." 75 Fed. Reg. 56,668, 56,677 (Sept. 16, 2010). Petitioners, moreover, ignore what the SEC actually did: Based on a thorough review of the

record, the SEC determined that the benefits of the Rule—which confines proxy access to shareholders reflecting broad investor interests—amply justify any reasonable estimate of costs. While framed in APA terms, petitioners' challenge is merely an attempt to re-litigate the merits of a debate they lost below. Under the standards governing this Court's review, that effort must fail.

I. The Current Proxy System Imposes Enormous Costs

A. Proxies Serve A Critical Function

Because corporations are owned by their shareholders, the law has long provided for meetings where shareholders elect the board of directors that will appoint, remove, and supervise the agents who run the corporation. 2 William Meade Fletcher *et al.*, *Fletcher Cyclopedia of the Law of Corporations* §§ 283, 357 (Supp. 2010). As corporations grew and ownership became diffuse, however, it became impracticable for most shareholders to attend those meetings. *See* Bernstein & Fischer, *The Regulation of the Solicitation of Proxies*, 7 U. Chi. L. Rev. 226, 226-27 (1940).

State law therefore typically allows shareholders to vote by proxy, casting their "vote[s] through a surrogate without physically being present at the shareholders' meeting." 5 *Fletcher Cyclopedia*, *supra*, § 2049.10. "[T]he proxy process represents shareholders' principal means of participating" in corporate governance. 75 Fed. Reg. at 56,670. Before the SEC regulated proxies, however, "the

solicitation of proxies was controlled, or it might be better described as uncontrolled," by state law. Bernstein & Fischer, *supra*, at 226. Frequently, "[t]he shareholder was invited merely to sign … and return the proxy without being furnished the information essential to" intelligently exercising the franchise right. 5 *Fletcher Cyclopedia*, *supra*, § 2052.10.

When Congress enacted the Securities Exchange Act in 1934, "[r]egulation of the proxy process was one of the [SEC's] original responsibilities." 75 Fed. Reg. at 56,670; H.R. Rep. No. 1383, at 13-14 (1934); S. Rep. No. 792, at 12 (1934). As a result, the SEC "has actively monitored the proxy process," focusing on "whether the proxy process functions, as nearly as possible, as a replacement for an actual in-person meeting of shareholders." 75 Fed. Reg. at 56,670.

B. The Current Proxy Process Does Not Function Properly

Petitioners nowhere seriously dispute that the existing proxy process does not effectively "facilitat[e] the exercise of shareholders' State law rights to nominate and elect directors." 75 Fed. Reg. at 56,670. Because management often controls access to the company-prepared proxy, and soliciting proxies separately can be prohibitively expensive, many shareholders can express dissatisfaction with the board only by withholding their director vote. Even shareholders who attend an annual meeting cannot influence outcomes because "most, if not all, share-

holders return their proxy cards in advance." *Id.* By the time the meeting occurs, it is too late for even major, sophisticated investors to pose realistic alternatives.

Competing with incumbents through a traditional proxy contest is rarely an alternative. While management mails proxies with its slate of candidates using corporate funds, shareholders must send out separate proxies, "incur[ring] costs involved with preparing proxy materials" and mailing them "to each shareholder solicited." 75 Fed. Reg. at 56,755. That can be "prohibitively expensive." *Id.* And when it does occur, it is wasteful: Twice as many mailings are made and must be read by potentially millions of shareholders. Requiring shareholders to send a separate set of proxies is akin to requiring shareholders who support a new candidate at an in-person shareholder meeting to rent a separate meeting space, advertise the meeting, and conduct all discourse on that candidate in that separate space as well. That would have made *no* sense in the era of in-person voting. It makes no sense in the era of proxy voting either.

There is, moreover, a "collective action problem": The company uses corporate funds, but the shareholder must assume all the costs of a proxy contest himself, even though he seeks "a greater aggregate benefit for all shareholders." 75 Fed. Reg. at 56,755-76. Such impediments are magnified for "fiduciaries who must determine whether the very significant costs of a proxy contest are in the best interests of their plan participants and beneficiaries." CRI 83 at A.1.

As a result, shareholder nominees often lack any "realistic prospect of being elected" to the board, 75 Fed. Reg. at 56,670, and "shareholders are too often locked out of the decision making process for board appointments," CRI 254 at 2. Virtually guaranteed reelection so long as they have management support, directors can become more accountable to management than shareholders. *See* CRI 83 at 1-2.

That lack of accountability has cost shareholders dearly. Shareholders have seen a surfeit of "directors failing to appropriately oversee risk, executive pay packages that reward failure rather than performance, [and] a focus on market short-termism." CRI 113 at 1. As the SEC stated, the recent financial crisis demonstrates the "loss of investor confidence" that results from diminished "accountability and responsiveness … to the interests of shareholders." 74 Fed. Reg. 29,024, 29,025 (June 18, 2009). "It is unlikely [corporate directors] would have been so negligent had this rule been in place and boards were forced to be more accountable to shareowners and directors more conscientious about their oversight responsibilities." CRI 257 at 1; *see* 75 Fed. Reg. at 56,670.

C. Other Supposed "Tools" Fail To Promote Efficiency Or Maximize Long-Term Share Values

Petitioners nowhere challenge the SEC's conclusion that the existing proxy process fails to offer shareholders a meaningful opportunity to exercise their state-law right to elect directors. Downplaying those findings in their *fact section*,

petitioners baldly assert that shareholders have "numerous other means to respond to concerns about a company's performance," such as " 'vot[ing] with their feet' by selling their shares," "seek[ing] to amend the corporation's governing documents," and " 'withhold[ing]' their vote or vot[ing] against candidates or measures supported by the corporation." Pet. 7. Petitioners overlook why the SEC found those "means" insufficient. For example, "the ability of shareholders to 'vote with their feet' " is no solution once, as often happens, "a period of weak management . . . has depressed the company's share price" already. 75 Fed. Reg. at 56,673. Petitioners nowhere explain why, to express dissatisfaction, shareholders should be required to sell stock at a loss and leave potentially valuable assets in the hands of incompetent management. And some shareholders cannot express dissatisfaction by selling shares, as "shareholders who invest in indices may not be readily able to sell securities of a particular company that is part of the index." *Id.*

Petitioners' vote-with-their-feet approach proves too much. Under that view, *no* franchise is necessary, because shareholders express their views by heading for the exit. But state law has long required shareholder voting, both to ensure proper governance, and because that right is inherent in share ownership. "[S]tock is property and the right to vote that stock is an interest in property." *Lobato v. Health Concepts IV, Inc.*, 606 A.2d 1343, 1348 n.3 (Del. Ch. 1991); *see* 29 C.F.R. § 2509.08-2 ("fiduciary obligations of prudence and loyalty" require

those managing investments for plan beneficiaries "to vote proxies on issues that may affect the … plan's investment"). For many years, the SEC's rules impeded those rights by allowing companies to exclude shareholder-nominated board candidates from a contested corporate ballot. *See AFSCME v. Am. Int'l Group, Inc.*, 462 F.3d 121, 126-30 (2d Cir. 2006). The SEC did not err in reforming federal proxy regulation to make the shareholder franchise more meaningful.

The SEC also properly concluded that shareholder amendments to the corporation's governing documents, and shareholder "vote no" campaigns, are equally insufficient. "[M]any companies have supermajority voting requirements to amend the bylaws, thereby 'making shareholder-proposed bylaw amendments nearly impossible to implement.'" 75 Fed. Reg. at 56,675 n.1063; *id.* at 56,673. And "[t]here is no reason why shareholders who have the affirmative right to elect directors should be limited to the negative option of opposing board candidates through majority voting or 'just say no' campaigns." CRI 295 at 3. As petitioners acknowledged, "'vote no' campaigns do not have a legally binding effect where the targeted company uses a plurality voting regime in an uncontested election." CRI 320 at 13. Many companies with "majority" voting, moreover, simply "refus[e] to accept the resignations of directors who failed to receive a majority vote." 75 Fed. Reg. at 56,775. Nowhere in their argument do petitioners offer *any* challenge to the SEC's finding that existing tools are inadequate.

Petitioners instead claim that the SEC did not anticipate all the costs of reform. Because petitioners do not urge that the SEC failed to consider a specific option they think less costly (*e.g.*, higher ownership requirements), however, they can prevail only by showing that the SEC's assessment was so far out of line that the agency, upon reconsideration, might reasonably choose to leave the current dysfunctional system in place. "'No principle of administrative law or common sense requires [this Court] to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result.'" *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 118 (D.C. Cir. 2004) (citation omitted); *see City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007). Petitioners have not shown any error, much less prejudicial error. 5 U.S.C. § 706.

II. Petitioners Ignore The Rule's Content, The SEC's Reasoning, And The Record Evidence

Confronted with the current system's inadequacy, the SEC established modest, calibrated adjustments to increase shareholder access to director nominations while minimizing associated costs. Petitioners' constant refrain that investors with "ulterior motives" will use proxy access to impose undue costs defies the experience of other countries with proxy access; ignores the Rule's preconditions; contradicts basic economics; assumes irrational voting behavior; and disregards record evidence.

A. The SEC Rule Is A Reasonable, Balanced Solution

To "enable the proxy process to more closely approximate the conditions of the shareholder meeting" at reasonable cost, 75 Fed. Reg. at 56,670, the Rule requires public companies to include shareholder nominees in proxy materials only where "shareholders that hold a *significant, long-term interest* in the company" provide substantial advance notice that they want such a nominee included, *id.* at 56,688 (emphasis added). The shareholder or shareholder group must:

- "Hold[ ] . . . individually or in the aggregate, ***at least 3% of the voting power*** . . . of the company's securities that are entitled to be voted on the election";
- "Ha[ve] held th[at] qualifying amount of securities . . . ***continuously for at least three years***"; and
- "Provide[ ] a ***notice to the company*** . . . , and file[ ] the notice with the Commission . . . ***no earlier than 150 calendar days, and no later than 120 calendar days***, before the anniversary of the date that the company mailed its proxy materials for the prior year's annual meeting."

Id. (emphasis added). The Rule, moreover, does not apply "if state or foreign law or a company's governing documents prohibits shareholders" from nominating directors. *Id.* at 56,680.

Those requirements reflect a careful balance. Allowing major, long-term shareholders to nominate directors following advance notice "facilitate[s] shareholders' ability to exercise their traditional State law rights to nominate and elect directors." 75 Fed. Reg. at 56,755. It also encourages the sort of shareholder-management interactions that improve performance and usually make the nomina-

tion of competing directors unnecessary. *Id.* At the same time, by restricting access to significant, long-term shareholders and "limit[ing] the number of nominees a company will be required to consider for inclusion in its proxy materials," the Rule reduces costs and deters attempts to propose parochial candidates. *Id.* at 56,776. The Rule also impedes shareholders "seeking to change the control of the company" because a company is not required "to include more than one shareholder nominee or the number of nominees that represents 25%" of the board, whichever is greater. *Id.* at 56,707.

The experience of other countries confirms the SEC's assessments. For example, "most European markets allow shareholders to file binding items for consideration at annual meetings . . . , typically based on ownership thresholds ranging from one share to 5% or, in the case of Germany . . . , 5% or EUR 500,000" (under $1,000,000 at the Euro's high-water mark). CRI 231 at 7. Similarly, in Australia, "[s]hareholder candidates may be nominated by 100 shareholders, or shareholders possessing 5% of the votes eligible to be cast at a general meeting of the company," with "no minimum holding periods." CRI 219 at 1; CRI 502; 75 Fed. Reg. at 56,767 (recognizing the "many foreign countries" with proxy access). In those countries, granting proxy access has not resulted in excessive shareholder participation. *See, e.g.*, CRI 57 at 2.

To the contrary, shareholders in those countries exercise their proxy-access rights "judiciously," CRI 231 at 7; CRI 249 at 3 ("actual use" is "rare"), because proxy access *increases* management responsiveness and thereby *decreases* the need for shareholders to invoke their rights, CRI 57 at 2. In Australia, for example, proxy access "has led to better functioning board nominating committees, who take into account not only the skills and experience of potential candidates, but their likely acceptability to shareholders." CRI 219 at 1. The United Kingdom's experience is similar. *See, e.g.*, CRI 227 at 3-4; CRI 249 at 3; CRI 117 at 2. Where shareholder candidates were appointed to underperforming companies in that country—"which has had proxy access for over 100 years"—the appointment was generally "followed by a significant improvement in financial returns." CRI 626 at 3.

There are several reasons why shareholders with proxy-access rights rarely need to exercise them. First, having proxy-access rights "can lessen the need to use them," CRI 57 at 2, because allowing underperforming directors to be challenged increases management's willingness to communicate with shareholders, CRI 333 at 1. Second, the "additional information flow helps inform shareholders and keeps directors in touch with market sentiment," which "strengthens board independence, reduces risk surprises and improves corporate governance." *Id.* "It is the threat of use at all companies that has had the most beneficial impact and has

helped increase dialogue and accountability over director nominations" in foreign markets. CRI 539 at 2; *see* CRI 293 at 3. Finally, "[d]irectors aware that they have lost shareholder support tend to resign of their own volition." CRI 57 at 2.

Against that backdrop, the SEC's predictive judgment that proxy access will improve management incentives is amply justified. Once proxy access is granted, "the board and management of a company may be increasingly responsive to shareholders' concerns, even when contested elections do not occur, because of shareholders' ability to present their director nominees more easily." 75 Fed. Reg. at 56,761. Numerous studies examining "the effects of reducing incumbent directors' insulation from removal," the SEC observed, demonstrate that rules "mak[ing] incumbent directors more vulnerable to replacement by shareholder action have salutary deterrent effects against board complacency and improve corporate governance and shareholder value." *Id.* Such measures "significantly enhance the confidence of shareholders." *Id.* at 56,670. As Professor Bebchuk summarized, "reducing the extent to which directors are insulated from removal would be value-enhancing." CRI 625 at 2 (citing five empirical studies); CRI 608 at 7-10.

The SEC's predictions have already been proven correct. One recent event study concluded that "financial markets placed a positive value on shareholder access, as implemented in the SEC's August 2010 Rule." Becker *et al.*, *Does*

Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable Challenge, at 3 (Harvard Business School Working Paper No. 11-052, 2010). While that study necessarily concluded after the administrative record closed, it further demonstrates that proxy access benefits shareholders.

B. Petitioners' Assault On The Rule Lacks Merit

Petitioners complain that the SEC underestimated costs because it "nowhere addressed . . . the motives of union and state pension funds, including commenters' concern that access nominees would be used as leverage to obtain concessions from management," or "placed on the company proxy not to achieve election, but to air grievances with the company," forcing the company to incur substantial costs. Pet. 18. But the SEC recognized those assertions, noting the "concern that mandating shareholder access to company proxy materials would lead to more proxy contests or 'politicized elections,' which would be distracting, expensive, time-consuming, and inefficient for companies, boards, and management." 75 Fed. Reg. at 56,677; *id.* at 56,705-06 (discussing so-called "special interest" directors). The SEC likewise acknowledged that "companies could be negatively affected if shareholders use the new rules to promote their narrow interests at the expense of other shareholders." *Id.* at 56,772. The SEC simply found those assertions unpersuasive; concluded that the benefits of proxy access readily justify the costs; and determined that, "historically, proxy contests have created value in both the

short-run and long-run for shareholders." *Id.* at 56,763. Those determinations are well supported.

1. Petitioners' speculation about potential proxy-access abuse is unfounded. *First*, proxy access has been a reality in other countries that have the sort of union and government pension funds whose motives petitioners assail. But abuse of proxy access "has not taken place in [those] foreign markets." CRI 539 at 2; pp. 15-17, *supra*.

Second, the election process itself prevents proxy-access abuse. Even apart from the SEC's stringent requirements, parochial-interest nominees will rarely be proposed because, even if "included on the ballot, they would not be elected." CRI 539 at 1-2. The Rule's disclosure requirements would "alert shareholders to the narrow interests of the nominating shareholder or group in advance," allowing shareholders instead to "cast their votes in favor of the candidate who will best serve the interests of all shareholders." 75 Fed. Reg. at 56,772; *cf.* 17 C.F.R. § 240.14a-101 (disclosure requirement). A nominee must reflect the interests of a majority of shareholders to win despite management opposition. And a candidate who obtains a majority of votes cannot credibly be called a special-interest nominee. Any shareholder candidate who wins a seat on the board, moreover, owes fiduciary duties "to serve the interests of *all* shareholders." CRI 539 at 2 (emphasis added).

Perhaps for those reasons, petitioners complain about "costs companies would incur *short of* the nominee's election, including succumbing to a shareholder's demands to avoid a costly election contest." Pet. 42; *see id.* at 10, 16-20, 29. But the threat to invoke proxy access is a paper tiger if the nominee cannot be elected. If the candidate is not credible, a corporation will not have to spend significant funds opposing him or "submit to unreasonable demands made by an investor with little support from other shareholders." CRI 539 at 2. Management need not kowtow to shareholder demands lacking broad appeal.

Third, petitioners' theory and purported fear of costs "short of the nominee's election" largely ignore the Rule's strict requirements. The requirement that nominating shareholders or groups hold at least 3% of eligible voting securities is a formidable obstacle to nomination of so-called special-interest candidates. Even an institutional investor such as CalSTRS—one of the country's largest pension funds—"generally owns only about 0.3 percent of the outstanding stock of any company." CRI 595 at 2; *see* CRI 667 at 3. Likewise, a Council of Institutional Investors study demonstrated that "the holdings of the ten largest public pension funds in a sample of five accelerated filers and five non-accelerated filers indicate[d] that if a group of the ten largest holders were to aggregate shares, they . . . would be unlikely to meet even a three percent threshold," as "[t]he holdings by the ten largest public pension funds in those companies ranged from 0 percent to

2.69 percent, with an average of .872 percent." CRI 83 at C.1. Thus, even large investors would have to band together in large numbers to meet the 3% threshold. Such alliances will rarely occur unless they reflect widely-held, share-value-maximizing interests. The 3% holding requirement is, moreover, a powerful disincentive to behavior that might damage company performance: Declines in a stock's value will prove especially costly to shareholders meeting the 3% threshold.

The SEC also requires nominating shareholders or groups to have held their 3% interest for at least *3 years*. That is three times the durational requirement initially proposed, 74 Fed. Reg. at 29,083, and longer than the two-year period petitioner BRT proposed to exclude "shareholders with a short-term focus," CRI 320 at 66. Because "holding securities for at least a three-year period better demonstrates a shareholder's long-term commitment and interest in the company," the SEC determined, the durational requirement "limit[s] the possibility of shareholders attempting to use" proxy access "inappropriately." 75 Fed. Reg. at 56,697-98.[3]

[3] The SEC's change from a 1-year to a 3-year holding period explains why its estimate of the frequency of proxy contests decreased from the Proposed Rule. Petitioners thus err in asserting that the changed frequency estimate was unsupportable. *See* SEC Br. 43-44.

The Rule also imposes a lengthy notice period of between 120 and 150 days. 75 Fed. Reg. at 56,688. That period facilitates meaningful shareholder-management communication, potentially rendering proxy access unnecessary. Currently, incentives for managers to engage shareholders on corporate-performance issues are inadequate. The Rule and its notice requirement give managers a greater incentive to work with shareholders and time to act on that incentive.

Fourth, the "special-interest" shareholder petitioners purport to fear is a phantom. They offer no credible evidence to support their erroneous assertion that the actions of "state government and labor union[ ]" investors often "appear to be driven by concerns other than a desire to increase" shareholder value. Pet. 11. They offer no evidence that such "parochial" investors have burdened corporations with unreasonable demands in countries with proxy access. *See* pp. 15-17, *supra*. And the one anecdote cited by petitioners (at 12) *undermines* their claim. They do not assert that the Safeway "vote-no" campaign participants would have met the Rule's 3%-ownership-for-3-years requirement. To the contrary, the participating funds there "collectively h[e]ld about 7 million of Safeway's 445 million outstanding shares"—or only 1.6%. Walsh, *State Pension Officials Accuse Safe-way Leaders of Conflict*, N.Y. Times, Mar. 25, 2004, http://www.nytimes.com/2004/03/25/business/state-pension-officials-accuse-safeway-leaders-of-conflict.html.

Petitioners' own example thus *proves* the Rule's efficacy. And if there were outlier abuses, the across-the-board benefit to shareholders of greater director responsiveness abundantly justifies any minimal outlier costs.

Fifth, if there were substance to petitioners' claimed fear that special-interest groups with ulterior motives will impair company performance by proposing nominees, one would expect most investors to oppose the Rule. But TIAA-CREF, for example, has *none* of the characteristics petitioners attribute to supposed special-interest investors. TIAA-CREF's members do not stand to benefit "*as employees* by forcing companies to take certain actions that deliver no benefits to shareholders." Pet. 11. Nor is TIAA-CREF "overseen by elected officials who may use [shareholder activism] to advance political objectives." *Id.* at 12 (internal quotation marks and citation omitted). TIAA-CREF is a pure market player focused solely on maximizing long-term shareholder returns. Other market-driven investors also support the Rule. *See, e.g.*, CRI 231 (RiskMetrics Group); CRI 249 (Relational Investors LLC); *see also* 75 Fed. Reg. at 56,670 nn.31-33. Profit-driven investment companies similarly support "grant[ing] long-term shareholders greater access to companies' proxies" in the operating companies in which they invest, subject to appropriate safeguards. ICI, *ICI Endorses Broader Shareholder Access to Proxy*, (Sept. 27, 2007), http://www.ici.org/policy/governance/corp_governance/07_news_proxy. And a "Bi-Partisan Group of Eighty Professors of

Law, Business, Economics, or Finance" likewise "support[s] the SEC's proposals to remove impediments to the exercise of shareholders' rights to nominate and elect directors." CRI 335 at 1. Concerns about "special-interest" investors, by contrast, were raised by commenters who "represent the interests of [the] manage[rs]" the Rule seeks to make more accountable. CRI 539 at 2.

2. Petitioners repeatedly complain (at 15, 29, 31, 35-39) that the SEC emphasized "the Rules' supposed accessibility, yet performed an about-face to claim the Rules will be used relatively little" when evaluating costs. *Id.* at 39. But proxy access, by increasing shareholder-management dialogue, *decreases* the likelihood that shareholders will contest an election. That is well-documented in the record; empirically proven based on experience abroad; and addressed by the SEC. *See* pp. 16-17, *supra*. Petitioners simply ignore that phenomenon.

Petitioners likewise err in challenging (at 35-39) the SEC's prediction that proxy access will be used less often than traditional proxy contests. Petitioners ignore the SEC's finding that the Rule's "stringent eligibility requirements" severely limit the investors who can invoke it. 75 Fed. Reg. at 56,744 & nn.805-07. They ignore the limited use of proxy access in other countries. And they ignore the limited company costs even when proxy access is invoked. *See* SEC Br. 18. Judicial deference is at its apogee where, as here, the agency applies its expertise to make "predictive judgments." *Rural Cellular Ass'n v. FCC*, 588 F.3d

1095, 1105 (D.C. Cir. 2009). The SEC repeatedly concluded that future benefits amply justify estimated costs. *See, e.g.*, 75 Fed. Reg. at 56,753-71. Petitioners provide no reason to overturn that judgment.

III. The Rule Properly Sets Minimum Standards

"Providing shareholders with minimum rights of access to the company's proxy card," while not allowing companies "to take away the set minimum, is consistent with the long-standing and established role of the proxy rules (and the securities laws in general)." CRI 335 at 2; SEC Br. 29 n.4. As the SEC explained, shareholder participation in "corporate governance" is not merely a "matter of private ordering" but also involves legal rights that cannot be "bargained away." 75 Fed. Reg. at 56,672. Petitioners nonetheless urge that the SEC should allow corporations to decide for themselves whether to have proxy access. But for most companies, that so-called "private-ordering" approach *is* the failed status quo. Such "private ordering" would eviscerate the Rule's benefits for many. And it would create a hodgepodge of inconsistent standards that impose prohibitive costs on all.

A. The SEC Adequately Analyzed The Issue

Petitioners now contend that the SEC should allow shareholders "to decide whether to adopt an access mechanism," Pet. 46, despite having *opposed* that approach in 2007, *see* Chamber of Commerce Letter to SEC (Oct. 2, 2007),

http://www.sec.gov/comments/s7-16-07/s71607-482.pdf; BRT Letter to SEC (Oct. 1, 2007), http://www.sec.gov/comments/s7-17-07/s71707-77.pdf. The SEC, however, properly concluded that an opt-in solution would often deny access even where most shareholders favor it. The record demonstrated that between 38% and 43% of companies either preclude shareholder-proposed bylaw amendments or have supermajority requirements. CRI 566, Attachment at 9. Many commenters thus identified the "supermajority voting standard," "restrict[ions on] shareholders' ability to amend or propose bylaws," and the "potential ability of a board to repeal or amend a shareholder-adopted bylaw procedure," as "procedural and legal difficulties that they believe would hinder the establishment of a shareholder director nomination procedure under private ordering," even when most shareholders favor it. 75 Fed. Reg. at 56,759.

The SEC also properly rejected an "opt-out" approach because allowing "some shareholders … to restrict the Federal securities law rights of other shareholders would be without precedent and … a fundamental misreading of basic premises of the Federal securities laws." 75 Fed. Reg. at 56,673. Allowing one generation of shareholders to disenfranchise succeeding generations no more enhances corporate-democracy principles than, for example, allowing one set of citizens to disenfranchise themselves and their heirs would promote civic-democracy principles. When it comes to shareholder choice, the Rule allows

shareholders both the choice of supporting management candidates and the "opportunity to vote for director candidates who otherwise might not have been included in the company proxy materials." *Id.*

Allowing opt-outs, moreover, would "contravene a fundamental rationale" of proxy access—"improving the degree to which shareholders participating through the proxy process are able 'to control the corporation as effectively as they might have by attending a shareholder meeting.'" 75 Fed. Reg. at 56,680; *see* pp. 7-8, *supra*. And those "[c]ompanies most in need of governance improvements are those most likely" to opt out. CRI 597 at 2; CRI 616 at 2.

Finally, petitioners never contest the SEC's conclusion that private ordering would impose staggering costs. "[R]equiring shareowners to proceed company-by-company to obtain" proxy access—or to wage company-by-company warfare to retain it—would "cost shareowners and companies significant time, and unnecessary expense." CRI 254 at 6; CRI 102 at 5-6. Those costs are particularly acute for investors with diverse portfolios that may include "hundreds or even thousands of companies." CRI 227 at 3. The SEC thus properly concluded that allowing different companies to adopt different rules could add "significant complexity and cost for shareholders," especially for shareholders with diverse portfolios. 75 Fed. Reg. at 56,680, 56,775.

B. The Delaware Approach Proves The SEC's Decision Is Proper

As their brief's centerpiece, petitioners cite (at 5, 8, 9, 22-23, 46, 51-52) Delaware's revision to its General Corporation Law, Del. Code Ann. tit. 8, § 112, which ostensibly permits companies to provide proxy access by amending corporate bylaws. But that shows precisely why an "optional" approach does *not* work. The cited Delaware statute merely *restates* longstanding Delaware law: "[T]he permissibility of such bylaws was generally recognized prior to the enactment of section 112." CRI 608 at 12 n.46. Even though over half of all corporations traded on major stock exchanges are incorporated in Delaware, shareholders there have rarely obtained access, and *never* over strong management opposition. *Id.* at 12-13; 75 Fed. Reg. at 56,759 n.904.

Petitioners' invocation of the Delaware model is thus just another way of urging that the SEC should have done nothing. Given petitioners' failure to challenge the SEC's findings on the current system's dysfunction, the SEC cannot be faulted for rejecting that do-nothing approach. The SEC thus properly concluded that "it would be inappropriate to rely solely on an enabling approach to facilitate shareholders' ability to exercise their state-law rights to nominate and elect directors" because such enablement would—apart from its potentially enormous costs, *see* pp. 27, *supra*—exist in theory but not in fact. 75 Fed. Reg. at 56,672-73.

IV. The SEC Properly Justified Its Decision Not To Exempt Investment Companies

Petitioners' *amici* ICI/IDC supplement petitioners' 2-page challenge to the SEC's application of the Rule to investment companies with a 7,000-word *amicus* brief. But there is no reason to treat shareholders of investment and operating companies differently, and the SEC properly explained why it declined to do so.

A. The SEC Reasonably Declined To Treat Shareholders Of Investment And Operating Companies Differently

Like shareholders of operating companies, fund investors dissatisfied with the governance of investment companies may have few options. Indeed, because investment-company directors are often particularly close with their company's investment advisers, they are especially reluctant to fire those advisers. *See* CRI 178 at 1-2; CRI 6 at 1. The need to apply the Rule "to all companies subject to the proxy rules, including investment management firms," was thus repeatedly recognized by investors, *see* CRI 83 at B.4, and the mutual fund industry itself. For example, the Mutual Fund Directors Forum acknowledged that, because fund boards must be "responsive and accountable to the funds' shareholders," they should be "treated similarly to operating companies with respect to" proxy access. CRI 338 at 2. Likewise, TIAA-CREF—which contains a family of investment companies—believes that applying the Rule will benefit investment company investors by increasing board responsiveness.

ICI/IDC (at 4, 9) urge that the SEC "provide[d] no logical explanation for why the SEC deemed the material *differences* between funds and operating companies to be wholly irrelevant." But that was not the SEC's burden. Instead, it was required to provide a "rational connection between the facts found and the choice made." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626 (1986) (plurality) (internal quotation marks and citations omitted). The SEC did just that, finding that key *similarities* between investment and operating companies justified its decision to apply the Rule to both.

The SEC explained that the purpose of the Rule is to "facilitate the exercise of shareholders' traditional State law rights to nominate and elect directors … and thereby … participate more meaningfully" in oversight of "companies in which they invest." 75 Fed. Reg. at 56,684. Regarding that purpose, the SEC found that such "State law [shareholder] rights apply to the shareholders of investment companies" no less than to other shareholders. *Id.* "[A]lthough investment companies and their boards may have different functions," investment-company boards still "have significant responsibilities in protecting shareholder interests, such as the approval of advisory contracts and fees." *Id.* ICI/IDC may disagree that the similarities justify applying the Rule to investment and operating companies alike. But the SEC clearly explained the connection between the facts found (similarities between shareholders' rights and directors' roles for all companies) and the

regulatory choice made (applying the Rule to all companies). The SEC also reasonably found that the costs of the Rule for investment companies will be lower than for operating companies, both because the retail shareholder base of investment companies will be less inclined to use the Rule and because fewer of those shareholders will meet the 3-year holding requirement. *Id.* at 56,685. Resort to proxy access in the investment-company context is thus likely to be even more infrequent than in other contexts. *Id.*

B. The SEC Reasonably Concluded That Investment Company Act Protections Do Not Render The Rule Unnecessary

Petitioners and their *amici* argue that the SEC failed to explain why the protections of the Investment Company Act ("ICA") do not render the Rule unnecessary for investment companies. Pet. 53-54; ICI/IDC Br. 6, 13-18. But the SEC did explain. Enacted in 1940, the ICA was designed to address the fact that, because the investment *advisers* who supervise the daily operations of funds often select affiliated persons to serve on the investment *company*'s board, the "relationship between investment advisers and mutual funds is fraught with potential conflicts of interest." *Burks v. Lasker*, 441 U.S. 471, 480 (1979) (internal quotation marks and citation omitted). The ICA sought to address those potential conflicts by "entrust[ing] to the independent directors … the primary responsibility for looking after the interests of [mutual] funds' shareholders." *Id.* at 484-85.

The ICA thus imposes duties on fund *boards* to monitor conflicts of interest with respect to funds' investment advisers. But it has little to say about *shareholder* influence over those directors—and their ability to replace incompetent directors. *See* 75 Fed. Reg. at 56,684. The Rule addresses that separate question. Indeed, the fact that the ICA "emphasizes the importance of investment company *directors* in dealing with the conflicts of interest created by the external management structure of most investment companies" only underscores the need for shareholder input on the directors playing that pivotal role. *Id.* (emphasis added).

CONCLUSION

The petition for review should be denied.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d), because this brief contains 6,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

/s/ Jeffrey A. Lamken
Jeffrey A. Lamken

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ADDENDUM A—LIST OF *AMICI CURIAE*

California Public Employees' Retirement System (CalPERS) is a state public-pension system that provides retirement benefits to over 1.6 million public workers, retirees, and their families and beneficiaries. Acting as fiduciaries to system members, CalPERS invests for the long term throughout global capital markets. Currently, CalPERS manages approximately $220 billion, with $110 billion invested in public securities.

California State Teachers' Retirement System (CalSTRS) is the retirement fund for California's public school teachers. It has 847,000 plan participants and, as of November 1, 2010, over $141 billion in assets under management, with approximately $103.8 billion invested in public securities.

Colorado Public Employees' Retirement Association (PERA) provides retirement and other benefits to the more than 470,000 current and former employees of over 400 government and public employers in Colorado. PERA's total assets under management exceed $38.3 billion, including $22.1 billion in global equities and $8.3 billion in fixed income.

New Jersey Division of Investment is responsible for the investment management of 196 accounts, including seven pension funds that compose the New Jersey Pension Fund and the State of New Jersey Cash Management Fund.

As of June 30, 2009, the pension funds had net assets of $62.9 billion, supporting the retirement plans of approximately 800,000 active and retired employees.

New York City Employees' Retirement System (NYCERS) is a public employee retirement system that provides retirement, disability, and death benefits to 300,000 active and retired New York City employee-participants. Founded in 1920, NYCERS has total plan assets of over $36.7 billion.

Board of Education Retirement System of the City of New York provides pension benefits to approximately 32,000 active and 14,000 retired members, primarily non-pedagogical employees of the New York City Department of Education. Its plan assets exceed $2.5 billion.

Teachers' Retirement System of the City of New York (TRS) provides a retirement program for approximately 180,000 current and former employees of the New York City Department of Education, New York City Charter Schools, or the City University of New York. TRS administers a basic qualified pension plan with approximately $36.8 billion in assets as well as a Section 403(b) tax-deferred annuity program with more than $9 billion in assets.

New York Fire Department Pension Fund (FDPF) is a single-employer public employee retirement system serving full-time uniformed employees of the New York City Fire Department. FDPF has approximately 11,000 active members

and 17,500 retired members, including widows and beneficiaries. Its assets total approximately $6.8 billion.

New York City Police Pension Fund (PPF) was the first municipal retirement system established in the United States. Initially founded in 1857 to pay benefits to New York City police officers injured in the line of duty, it has expanded to provide partial-pay retirement benefits to retired officers. Administering benefits for approximately 74,000 active and retired members, PPF has plan assets, including variable supplements funds, of approximately $21 billion.

New York State Common Retirement Fund (NYSCRF) holds and invests the assets of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System. NYSCRF manages more than $130 billion to provide pension, disability, and death benefits for more than one million New York state and local government employees, beneficiaries, and retirees, as well as employees of certain other participating employers.

North Carolina Retirement System administers statutory retirement and benefit plans, as authorized by the General Assembly of North Carolina. The fund manages approximately $69.7 billion in assets for the benefit of approximately 820,000 North Carolina employees.

Ted Wheeler is Oregon State Treasurer. The Oregon Public Employees Retirement Fund—with approximately 320,000 active and inactive members—is a

public pension plan that manages approximately $53 billion in assets, with over $21 billion in the public markets, for the benefit of past and present Oregon government employees.

Washington State Investment Board (WSIB) manages investments for 17 retirement plans for public employees, teachers, school employees, law enforcement officers, firefighters, and judges. WSIB also manages investments for 22 other public funds that support or benefit industrial insurance, colleges and universities, individuals with developmental disabilities, and wildlife protection. Total assets under management as of September 30, 2010 were $76.7 billion.

State of Wisconsin Investment Board (SWIB) is responsible for investing the trust fund assets for over 557,000 participants in the Wisconsin Retirement System. SWIB manages over $67 billion in public securities, of which $38.3 billion is invested in public equities.

Teachers Insurance and Annuity Association of America (TIAA), College Retirement Equities Fund (CREF), and other TIAA affiliates (collectively known as TIAA-CREF) provide financial services to over 3 million individual participants. TIAA-CREF's primary mission is to help individuals in the academic, research, medical, cultural, and research fields plan for and live through retirement by maximizing long-term shareholder value. TIAA-CREF had $434 billion in combined assets under management as of September 30, 2010. CREF is one of

this country's largest institutional investors, holding shares in over 7,000 publicly traded companies. Affiliates of TIAA sponsor a family of mutual funds that, along with CREF, are registered with the SEC under the Investment Company Act of 1940.

The Council of Institutional Investors (CII) is a not-for-profit trade association of more than 120 pension funds dedicated to promoting corporate governance that truly serves investor interests. Its members—with assets exceeding $3 trillion—are major long-term shareholders with duties to protect the retirement assets of millions of American workers.

CERTIFICATE OF SERVICE

I hereby certify that, on January 27, 2011, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also hereby certify that I caused eight copies of the foregoing to be hand delivered to the Clerk's Office.

Dated: January 27, 2010

/s/ Jeffrey A. Lamken
Jeffrey A. Lamken