

candidates recommended by security holders, as well as more specific disclosure of the processes by which security holders may communicate with the directors of the companies in which they invest.²⁹

Today, we are proposing rules that would implement the second of the Division's recommendations. These proposals would create a mechanism for nominees of long-term security holders, or groups of long-term security holders, with significant holdings to be included in company proxy materials where there are indications that the proxy process has been ineffective or that security holders are dissatisfied with that process.

B. Prior Commission Consideration

The Commission first addressed the issue of security holder access to company proxy materials for the nomination of directors as early as 1942, when it requested that the staff review the proxy rules and submit to the Commission recommended changes.³⁰ The Commission solicited comments on the staff recommendations, including a proposal to revise the proxy rules to provide that "minority stockholders be given an opportunity to use the management's proxy material in support of their own nominees for directorships."³¹ According to testimony of Chairman Ganson Purcell before the House Committee on Interstate and Foreign Commerce, the staff had proposed that "stockholders be permitted to use the management's proxy statement to canvass stockholders generally for the election of their own nominees for directorships, as well as for the nominees of the management."³² Under the proposal, a company would not have been required to include more than twice as many candidates on the proxy as director positions to be filled.³³ The Commission did not adopt the proposal.³⁴

In 1977, the Commission again focused on security holder access to company proxy materials regarding the

nomination and election of directors during its broad review of security holder communications, security holder participation in the corporate electoral process, and corporate governance generally. In anticipation of public hearings held in September of 1977, the Commission, without formally proposing rule changes, requested comment on a number of issues, including whether "shareholders [should] have access to management's proxy soliciting materials for the purpose of nominating persons of their choice to serve on the board of directors."³⁵

After the 1977 hearings, the Commission proposed and adopted amendments to the proxy rules. These amendments did not relate directly to security holder access to company proxy materials regarding the nomination and election of directors. The Commission did adopt a requirement, however, that companies state whether they have a nominating committee and, if so, whether the nominating committee will consider security holder recommendations. Although the Commission stated its intent to address "some of the more complex questions which have been raised in this proceeding relating to corporate governance and the means by which corporations can best account to shareholders and the public" and determine "what further action, if any, is appropriate with respect to shareholder communications and shareholder participation in the

corporate electoral process generally,"³⁶ the Commission did not take further action on security holder access to company proxy materials at that time.³⁷ According to a 1980 staff report to the Senate, the staff concluded that, due to the emerging concept of nominating committees, the Commission should not propose and adopt a rule regarding the inclusion of security holder nominees in company proxy materials at that time.³⁸ The staff report recommended, however, that the staff monitor the development of nominating committees and their consideration of security holder recommendations.³⁹ The staff report further cautioned that, if an insufficient number of companies adopted nominating committees or the efforts of these committees with regard to security holder nominations proved insufficient, Commission action might be necessary.⁴⁰

In the broad proxy revisions adopted in 1992,⁴¹ the Commission briefly revisited the security holder nominee issue in connection with amendments to the bona fide nominee rule set out in Exchange Act Rule 14a-4, which provides that no person shall be deemed a bona fide nominee "unless he has consented to being named in the proxy statement and to serve if elected."⁴² In adopting the Exchange Act Rule 14a-4 amendments, the Commission noted "the difficulty experienced by shareholders in gaining a voice in determining the composition of the board of directors," but stated the following with regard to security holder

³⁵ Release No. 34-13482 (April 28, 1977) [42 FR 23901], in which the Commission also asked:

(a) what criteria should be applied to nominating security holders;

(b) what disclosures should be required of nominating security holders;

(c) whether security holder nominations are permissible under state law; and

(d) whether a meaningful distinction can be drawn between control and non-control nominations.

See also Release No. 34-13901 (August 29, 1977) [42 FR 44860], in which the Commission published the final schedule of issues to be considered at the hearings, which included:

(a) whether security holders should have access to the company's proxy soliciting materials for the purpose of nominating directors;

(b) whether security holder nominations are permissible under state law and consistent with Congressional intent in enacting Exchange Act Section 14(a);

(c) what type of rule would be most appropriate and what criteria should be applied to nominating security holders;

(d) whether the proxy rules should apply to soliciting activities by a nominating security holder; and

(e) whether nominating security holders should be subject to the then-existing rules governing election contests.

³⁶ Release No. 34-14970 (July 18, 1978) [43 FR 31945]. See also Release No. 34-15384 (December 6, 1978) [43 FR 58522].

³⁷ See *id.*

³⁸ The Task Force on Corporate Accountability was formed as an outgrowth of the review of the proxy rules that began in 1977. The work of the Task Force culminated in the Staff Report on Corporate Accountability, completed and presented to the Senate Committee on Banking, Housing, and Urban Affairs. *Division of Corporation Finance, Securities and Exchange Comm'n, Staff Report on Corporate Accountability* (Sept. 4, 1980) (printed for the use of Senate Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 2d Sess.), at A60-65.

³⁹ The Staff Report on Corporate Accountability states: "all nominating committees should be open to suggestions of nominees from shareholders." *Id.* at A56.

⁴⁰ With regard to security holder nominations, the staff recommended, "If there is not a substantial increase in the percentage of companies with independent nominating committees who consider shareholder nominations, the Commission should authorize the staff to develop a rule to require companies to adopt a procedure for considering shareholder nominations." *Id.* at A69. See also *id.* at A60-65.

⁴¹ See Release No. 34-31326 (October 16, 1992) [57 FR 48276].

⁴² 17 CFR 240.14a-4(d)(4).

²⁹ See Release No. 34-48301 (August 14, 2003) [68 FR 48724].

³⁰ See *Securities and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm on Interstate and Foreign Commerce*, 78th Cong., 1st Sess., at 17-19 (1943) (testimony of Chairman Ganson Purcell).

³¹ Release No. 34-3347 (December 18, 1942).

³² *Securities and Exchange Commission Proxy Rules: Hearings*, at 19.

³³ See *id.* at 157.

³⁴ The Commission did not provide an explanation for its determination, stating simply that, "a number of the suggestions proposed by the staff were not adopted," including the suggestion related to security holder access to company proxy materials. See Release No. 34-3347 (December 18, 1942).