

whether only those operating companies that fall within the definition of “accelerated filer” in Exchange Act Rule 12b–2 should be subject to the security holder nomination procedure. Implementing the proposed rule in this fashion would avoid the disproportionate burdens of regulation that the proposed procedure may impose on smaller companies. It also would allow our staff and the markets to gain experience with the proposed rule in an initial stage in which the rule applied only to larger companies, while we would retain the ability to expand the rule’s application to all companies after gaining this experience. In addition, the information available to us suggests that interest in the proxy process is, to a significant degree, concentrated within the universe of companies that are accelerated filers.

E. Request for Comments

We are sensitive to the costs and benefits imposed by our rules, and have identified certain costs and benefits imposed by these proposals. We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs and benefits. We encourage commenters to identify and supply relevant data concerning the costs and benefits of the proposed amendments. We also request comment on the following specific concerns:

O.1. We solicit quantitative data to assist our assessment of the benefits and costs of enhanced security holder access to company proxy materials when there has been a demonstrated failure in the proxy process. Will proposed Exchange Act Rule 14a–11 increase director accountability and responsiveness? If so, what costs would be incurred in instituting responsive policies and procedures? Will more accountability and responsiveness lead to better managed boards? What effects, if any, would increased accountability and responsiveness have on the board’s time spent in its duties overseeing management?

O.2. We solicit quantitative data on the potential increases, if any, of security holder proposals under Exchange Act Rule 14a–8 as a result of these proposed rules. We also solicit quantitative data on how often the two triggering events that would activate proposed Exchange Act Rule 14a–11 would occur.

O.3. We solicit quantitative data on the time and cost spent in preparing a no-action request to exclude a proposal under Exchange Act Rule 14a–8, the incremental cost spent to print and mail such a security holder proposal and to include a security holder nominee and

his/her background information in the proxy materials, and the cost borne by both companies and security holders to solicit security holders regarding a direct access security holder proposal and election of a nominee or nominees to the board.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act²²⁶ requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rules are intended to provide security holders with information about security holder nominees in company proxy materials where there has been evidence of an ineffective proxy process. The proposed rules should increase the transparency of security holder concerns and boards responsiveness to those concerns, increase investor confidence, and potentially cause companies to be better managed. Companies may consider their existing policies and responses to security holder concerns in relation to the policies and responses of other companies. As a result, companies may compete to adopt policies and procedures that effectively balance security holder and director interests and therefore attract investors.

The notice requirements of the proposed rules would enable investors to compare companies’ responsiveness to security holder proposals and compare security holders’ general level of satisfaction with companies’ nominees for director. Investors may place a premium on companies that are more responsive to security holder concerns and whose boards’ interests are more closely aligned with those of security holders.

In addition, if a company is required to include a security holder nominee in its proxy materials, there may be increased competition for board positions. To the extent that this would discourage less-qualified candidates from running or, alternatively, would increase the quality of board members due to increased competition, investors may be more or less willing to invest in those companies where proposed Exchange Act Rule 14a–11 has been triggered.

We request comment regarding the degree to which our proposed disclosure requirements would create competitively harmful effects upon public companies, and how to minimize those effects. We also request comment on any disproportionate cross-sectional burdens among the firms affected by our proposals that could have anti-competitive effects.

Section 3(f) of the Exchange Act²²⁷ and Section 2(c) of the Investment Company Act²²⁸ require 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 addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

One possible adverse impact on efficiency, competition and capital formation is that boards may devote less time to overseeing the management of companies because they are spending more time on security holder relations. We believe, however, that the proposed rules may increase director accountability and responsiveness, which would lead to better corporate governance and better-managed boards. As a result, we believe that these measures ultimately may serve to enhance investors’ value. In addition, we believe that investors may be able to evaluate a company’s board of directors more effectively and make more informed investment decisions. We believe that, as a consequence of these developments, there may be some positive impact on the efficiency of markets and capital formation. The possibility of these effects, their magnitude if they were to occur and the extent to which they would be offset by the costs of the proposals are difficult to quantify. We request comment on these matters and how the proposed amendments, if adopted, would affect efficiency and capital formation. Commenters are requested to provide empirical data and other factual support to the extent possible.

VI. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms under the Exchange Act and the Investment Company Act that would, under certain limited circumstances, require companies to include in their proxy materials security holder nominees for election as director. The

²²⁷ 15 U.S.C. 78c(f).

²²⁸ 15 U.S.C. 80a–2(c).

²²⁶ 15 U.S.C. 78w(a)(2).