Proxy Access by Private Ordering: A Review of the 2012 and 2013 Proxy Seasons

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I. Introduction

Although the process of selecting corporate directors is described in terms that track the political election process—director "candidates" are "nominated" and "elected," just as political representatives are—there have always been significant differences between political and corporate elections. Director candidates are generally nominated by the incumbent directors, not by shareholders. Few corporate elections involve more than one "candidate" for any director position. And proxy "campaign" materials are funded by the corporation and include only those candidates nominated by the incumbent directors, although other shareholders may prepare, and circulate at their own cost, proxy materials for their own candidates.

In recent years, shareholder activists have argued with increasing vigor that the corporate election process should be more open and, in particular, that excluding shareholder-nominated director candidates from the corporation's proxy materials undermines shareholder democracy.[1] Corporate traditionalists, on the other hand, have pushed back, arguing that facilitating direct shareholder access to the corporate proxy could make corporations vulnerable to special interests, increase the pressure on boards to focus on short-term rather than long-term shareholder value, and result in fragmented and ineffective boards.[2]

In the wake of the 2008 financial crisis, the U.S. Securities and Exchange Commission (the "SEC") added its support to the shareholder activist camp

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1. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675, 721 (2007); Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 Harv. L. Rev. 833 (2005); Thomas W. Briggs, Shareholder Activism and Insurgency Under the New Proxy Rules, 50 Bus. Law. 99, 100 (1994); Lawrence Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street*, 73 Tul. L. Rev. 409, 414 (1998); Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 Rutgers L. Rev. 33, 95 (1998).

2. Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 Va. L. Rev. 733 (2007); Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 Harv. L. Rev. 1759, 1765 (2006).

by proposing and then adopting new proxy access rules.[3] The SEC's proxy access rules had two distinct parts. First, the SEC adopted a mandatory proxy access rule (Rule 14a-11), which required all listed companies to grant proxy access for nominees of shareholders under defined circumstances ("mandatory proxy access").[4] Second, the SEC amended Rule 14a-8 to facilitate shareholder proposals seeking to amend a company's bylaws to address proxy access (the "private ordering amendment").[5] In 2011, the SEC's mandatory proxy access rules were invalidated after a legal challenge,[6] leaving in place only the SEC's private ordering amendment to Rule 14a-8.

The philosophical debate regarding the benefits and risks of a more direct shareholder democracy continues. With the focus now on proxy access by private ordering, success or failure for advocates of proxy access has been (and will be) measured at the corporate ballot box. Two proxy seasons are behind us since the SEC's private ordering amendments became effective, and some trends have begun to emerge. Results from the 2012 proxy season suggested that the broader shareholder body had limited interest in proxy access. The number of proxy access proposals in 2013 decreased slightly from 2012, but the 2013 proposals were more carefully crafted, and in some cases were proposed by management, resulting in the adoption of proxy access at a few more companies in 2013 than in 2012.[7] These results suggest that proxy access by private ordering may be gaining some momentum and support, albeit much more slowly than many anticipated.

II. The Rise and Fall of Mandatory Proxy Access

A. The Dodd-Frank Act

In the wake of the financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") was signed into law on July 21, 2010.[8] Section 78 of the Dodd-Frank Act amended section 14(a) of

3. Facilitating Shareholder Director Nominations, Exchange Act Release No. 60089, 74 Fed. Reg. 29024, 29025 (proposed June 18, 2009) (to be codified at 17 C.F.R. pts. 220, 232, 240, 249 & 274) [hereinafter Proposed Rule] ("The nation and the markets have recently experienced, and remain in the midst of, one of the most serious economic crises of the past century. This crisis has led many to raise serious concerns about the accountability and responsiveness of some companies and boards of directors to the interests of shareholders, and has resulted in a loss of investor confidence."); Facilitating Shareholder Director Nominations, Exchange Act Release No. 62764, 75 Fed. Reg. 56668, 56674 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240 & 249) [hereinafter Final Rule].

4. Final Rule, *supra* note 3, at 56674.

5. *Id.* at 56730–32. A summary of the SEC proxy access rulemaking appeared in Fed. Regulation of Sec. Comm., ABA Bus. Law Section, *Regulatory Developments*, 66 Bus. Law. 665, 732–40 (2011).

6. Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

7. *See infra* Part IV; *compare* App. A, *with* App. B.

8. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 121 Stat. 1376, 1915 (2010) (to be codified at 15 U.S.C. § 78n(a)(2) (2012)) [hereinafter Dodd-Frank Act].

the Securities and Exchange Act to permit—but not require—the SEC to adopt rules mandating proxy access[9]:

> The rules and regulations prescribed by the [SEC] . . . may include—[](A) a requirement that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer; and [](B) a requirement that an issuer follow a certain procedure in relation to a solicitation described in subparagraph (A).[10]

The SEC began its proxy access rulemaking process prior to enactment of the Dodd-Frank Act, but if doubts had existed regarding SEC authority to adopt proxy access rules, Dodd-Frank section 78 made that authority explicit.[11]

B. The SEC's Proxy Access Rulemaking Under Dodd-Frank

On June 10, 2009, the SEC published its proposed proxy access amendments and solicited public comments to determine the practical utility, burden, and benefit of the proposed amendments.[12] Demonstrating the extensive controversy associated with proxy access, the SEC received approximately 600 comment letters in support of, or in opposition to, the proposed proxy access rules.[13] Indeed, the SEC found that "[o]verall, commenters were sharply divided on the necessity for, and the workability of, the proposed amendments."[14] Ultimately, the proposed proxy access rules were adopted by the SEC in a divided vote of three to two.[15] Citing the recent "financial crisis" as impetus for adopting Rule 14a-11, the SEC reasoned that the rule would "facilitate shareholders' ability to nominate and elect directors" in order to "hold boards accountable and influence matters of corporate policy."[16] Further, the SEC stated that "[o]ne of the key tenets of the federal proxy rules on which the Commission has consistently focused is [ensuring that] the proxy process functions, as nearly as possible, as a replacement for an actual in-person meeting of the shareholders."[17]

9. *Id.*

10. *Id.* Section 78 confirmed power that many, including the SEC itself, believed was within the SEC's existing authority under section 14(a). Final Rule, *supra* note 3, at 56674 ("Several commenters challenged our authority to adopt Rule 14a-11. We considered those comments carefully but continue to believe that we have the authority to adopt Rule 14a-11 under Section 14(a) as originally enacted. In any event, Congress confirmed our authority in this area and removed any doubt that we have authority to adopt a rule such as Rule 14a-11.").

11. 15 U.S.C. § 78n(a) (2012); Proposed Rule, *supra* note 3, at 29025 ("Regulation of the proxy process and disclosure is a core function of the Commission and is one of the original responsibilities that Congress assigned to the Commission in 1934.").

12. Proposed Rule, *supra* note 3, at 29070.

13. Final Rule, *supra* note 3, at 56669 n.23 ("In total, the Commission received approximately 600 comment letters on the proposal.").

14. *Id.* at 56670.

15. Bus. Roundtable v. SEC, 647 F.3d 1144, 1147 (D.C. Cir. 2011).

16. Final Rule, *supra* note 3, at 56670 ("[W]e believe these changes will significantly enhance the confidence of shareholders who link the recent financial crisis to a lack of responsiveness of some boards to shareholder interests.").

17. *Id.*

As adopted, the final Rule 14a-11 issued on August 25, 2010 required public companies to grant certain shareholders the ability to nominate director candidates and to include candidates so nominated on the company's proxy card and in the company's proxy materials. Specifically, Rule 14a-11 required that shareholders seeking proxy access demonstrate ownership of shares evidencing at least 3 percent of the total voting power of the company (the "ownership threshold") for at least three years (the "duration threshold").[18] In addition, Rule 14a-11 limited the number of candidates that a qualified shareholder could nominate (the "nomination cap") to the greater of one nominee or 25 percent of the board,[19] and provided that, in the case of multiple qualified shareholder nominations, only the shareholder with the greatest voting power would be granted proxy access.[20] To address concerns about potential misuse of proxy access in control disputes, Rule 14a-11 disqualified shareholders seeking control of the company and provided that a nominating shareholder "must not be holding any of the company's securities with the purpose, or with the effect, of changing control of the company."[21]

At the same time, the SEC also adopted amendments to Rule 14a-8 that eliminated impediments to shareholder-initiated efforts to adopt proxy access by private ordering.[22] In adopting both mandatory proxy access rules and the private ordering amendments, the SEC made clear its view that private ordering, standing alone, would not be a sufficient measure to protect and enhance shareholder democracy.[23] Thus, the SEC reformed Rule 14a-8 to permit private ordering as an adjunct to the mandatory proxy access rules.[24]

C. Mandatory Proxy Access Faces Legal Challenge

Two groups—the Business Roundtable and the Chamber of Commerce of the United States—challenged the SEC's adoption of Rule 14a-11.[25] On July 22,

18. *Id.* at 56697.

19. *Id.* at 56706.

20. *Id.* at 56711 (rejecting a "first in" standard to avoid a rush to the nominations process that could undermine constructive dialogue between shareholders and management).

21. *Id.* at 56700.

22. *Id.* at 56730–32.

23. The SEC provided several reasons for declining to fully embrace private ordering as a solution to shareholder proxy access, including that: (i) federal securities laws, by their nature, create rights for individual security holders and not security holders in any aggregate or voting capacity; (ii) allowing each company to vote would trigger substantial marketwide costs, particularly given that some boards of directors may strongly oppose private ordering; (iii) a company-by-company vote would be unfair to shareholders supporting such a provision because management could utilize the expansive resources of the corporation; (iv) shareholders in certain states may have a difficult time showing a right to adopt a bylaw provision under state law; (v) corporations in certain states may be subject to laws permitting the board of directors to amend or repeal any shareholder-adopted bylaws; and (vi) the laws of some states and the requirements of some governing documents require a supermajority shareholder vote before shareholders can adopt a bylaw permitting access to the company's proxy. *Id.* at 56672–73.

24. *Id.* at 56673 (explaining the need for Rule 14a-11 and stating that "our amendment to Rule 14a-8 will facilitate the presentation of proposals by shareholders to adopt company-specific procedures for including shareholder nominees for director in company proxy materials").

25. Bus. Roundtable v. SEC, 647 F.3d 1144, 1147 (D.C. Cir. 2011).

2011, the U.S. Court of Appeals for the D.C. Circuit issued its opinion that the SEC acted arbitrarily and capriciously by enacting Rule 14a-11 without properly and adequately assessing its economic effects.[26] The court found that the SEC had

> inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.[27]

The court identified a number of deficiencies in the SEC's rulemaking process and rationale in support of proxy access.

- First, the court rejected the SEC's assumption that a company would not incur significant costs opposing unqualified, inept, or unfriendly nominees. The court concluded that the SEC had failed to consider properly historical data concerning the costs of proxy contests and had improperly rejected concerns that nominee contests could prove to be more frequent because directors could believe that their fiduciary duties required them to cause the company to oppose candidates they believed to be inappropriate or unqualified.[28]
- Second, the court found that the SEC had relied on insufficient empirical data and incorrectly concluded that an influx of shareholder-nominated directors would improve board performance and shareholder value, while giving no weight to studies showing that the presence of dissident directors on a board actually led to underperformance.[29]
- Third, the court criticized the SEC for overlooking the degree to which state and union pension funds could potentially use Rule 14a-11 as leverage to gain expensive concessions for unionized employees, forcing company management to expend funds for reasons completely unrelated to maximizing shareholder value. The court concluded that by failing to evaluate seriously the costs associated with special interest nominees, the SEC had acted arbitrarily.[30]
- Fourth, the court found that the SEC had acted arbitrarily by citing a likely increase in nominations under Rule 14a-11 when considering the benefits of the rule, but assuming infrequent use of Rule 14a-11 when weighing the costs to a company.[31]

26. *Id.* at 1148–49.
27. *Id.*
28. Historically, proxy control contest costs have been estimated at approximately $1 million for smaller companies and as much as $14 million for larger companies. *Id.* at 1149–50.
29. *Id.* at 1150–51.
30. *Id.* at 1151–52.
31. *Id.* at 1152–54.

- Fifth, the court found that the SEC failed to consider adequately concerns that had been raised regarding the application of proxy access rules to companies registered under the Investment Company Act of 1940 (the "1940 Act").[32] The court noted that the 1940 Act provides significant protection for shareholders of investment companies and that the SEC failed to consider or explain separately the benefits of Rule 14a-11 to shareholders of such companies, or how implementation of Rule 14a-11 could potentially undermine efficiency by eliminating the cluster board structure often used in such entities.[33]

Ultimately, the SEC determined not to appeal the court's decision invalidating Rule 14a-11 and not to re-propose the adoption of a mandatory proxy access rule, but instead to rely upon the private ordering amendments to Rule 14a-8 to provide a path for shareholders to pursue proxy access by private ordering.[34] The private ordering amendments to Rule 14a-8 were made effective as of September 20, 2011.

III. The Emergence of Private Ordering

From the beginning of the debate over proxy access, opponents of mandatory proxy access rules had argued that proxy access should be addressed through private ordering by the adoption of a bylaw or charter provision providing for proxy access on such terms as were appropriate to the particular circumstances of a specific company, rather than by mandatory rules.[35] The SEC, on the other hand, contended that proxy access was a matter of positive law that should not be left to negotiation and private agreements:

> Corporate governance is not merely a matter of private ordering. Rights, including shareholder rights, are artifacts of law, and in the realm of corporate governance some rights cannot be bargained away but rather are imposed by statute. There is nothing novel about mandated limitations on private ordering in corporate governance.[36]

Consistent with this view, the SEC had focused its efforts on consideration of mandatory proxy access, and its rules and policies for shareholder proposals submitted under Rule 14a-8 historically had impeded efforts by shareholders to adopt proxy access through private ordering.[37]

32. *Id.* at 1154–56.

33. *Id.*

34. Facilitating Shareholder Director Nominations, Securities Act Release No. 9259, 76 Fed. Reg. 58100, 58100 (Sept. 20, 2011) (to be codified at 17 C.F.R. pts. 200, 232, 240 & 249).

35. Final Rule, *supra* note 3, at 56672, 56758 (citing letters from those who oppose mandatory proxy access and compiling statements of advocates for private ordering).

36. Final Rule, *supra* note 3, at 56672.

37. In 1942, the SEC solicited comments to a proposal that would have revised the rules such that "minority stockholders [would have] be[en] given an opportunity to use the management's proxy material in support of their own nominees for directorships." Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, Staff Report: Review of the Proxy Access Regarding Nomination and Election of Directors 2 (July 15, 2003). Ultimately, however, the SEC did not adopt the proposal. *Id.* In 1977, the SEC again considered adopting proxy access rules but determined that, as noted in a staff report to the

Prior to 2010, the SEC's rules and polices under Rule 14a-8 actually impeded efforts by shareholders to adopt proxy access through private ordering, by permitting companies to exclude shareholder-initiated proxy access proposals because such access could "establish a procedure that may result in contested elections to the board which is a matter more appropriately addressed under Rule 14a-11."[38] The SEC's position on exclusion of proxy access proposals under Rule 14a-8(i)(8) was challenged and invalidated by the Second Circuit in 2006,[39] on an interpretation of the then-existing language of Rule 14a-8. In response, in 2007, the SEC amended Rule 14a-8(i)(8) to reaffirm and state explicitly that an issuer could exclude a shareholder proxy proposal "[i]f the proposal relates to a nomination or election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election."[40] A shareholder wishing to propose adoption of proxy access by private ordering was therefore required to bear the considerable expense of printing, mailing, and soliciting proxies, with a slim chance of success. For all practical purposes, this meant that proxy access could be adopted through private ordering only with the support of management and the incumbent board.

A. Delaware Lends Support to Private Ordering: Del. Code Ann. tit. 8, §§ 112, 113

As the proxy access debate was playing out at the SEC, the courts and legislature in Delaware—the place of incorporation for the majority of public companies[41]—took steps to facilitate private ordering as a matter of state law.[42]

Senate, "due to the emerging concept of nominating committees, the Commission should not propose and adopt a shareholder access rule at that time . . . [but] if an insufficient number of companies adopted nominating committees or the efforts of these committees with regard to shareholder nominations proved insufficient, [SEC] action might be necessary." *Id.* at 3–4. In 2003, the SEC again proposed proxy access and presented a mandatory proxy access provision, but the proposal fizzled under an onslaught of controversy. *Id.* at 5–6. In 2007, in conjunction with its clarification of Rule 14a-8(i)(8), the SEC again proposed a shareholder access rule that was never adopted. *See* Shareholder Proposals, Exchange Act Release No. 56160, 72 Fed. Reg. 43466 (proposed Aug. 3, 2007) (to be codified at 17 C.F.R. pt. 240); Mark J. Roe, *The Corporate Shareholder's Vote and Its Political Economy, in Delaware and Washington* 8–11 (Harvard John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 738, 2012).

38. Unocal Corp., SEC No-Action Letter, 1990 WL 285946, at *1 (Feb. 6, 1990).

39. Am. Federation of State, Cnty. & Mun. Emps. v. Am. Int'l Grp., Inc., 462 F.3d 121 (2d Cir. 2006).

40. Lillian Brown, Division Statement Regarding Shareholder Proposals Relating to the Election of Directors (Nov. 28, 2007).

41. *See Forms, Fees and Services*, St. of Del., www.corp.delaware.gov (last visited May 22, 2013) (reporting that more than 1,000,000 business entities are domiciled in Delaware, including a majority of all U.S. publicly traded companies and approximately 64 percent of the Fortune 500).

42. Also, during 2009, the Committee on Corporate Laws of the ABA Business Law Section developed and adopted amendments to the Model Business Corporation Act sections 2.06 and 10.20 to provide for proxy access by private ordering. The changes expand and clarify the permissive scope of a corporation's bylaws to include provisions that may require shareholder nominees in proxy materials or require the corporation to reimburse expenses incurred by a shareholder soliciting proxies in connection with the election of directors. Press Release, Am. Bar Ass'n, Corporate Laws Committee Adopts New Model Business Corporation Act Amendments to Provide for Proxy Access and Expense

1. *CA, Inc. v. AFSCME Employees Pension Plan*

As discussed above, companies facing a shareholder proposal seeking to gain proxy access prior to 2010 had typically sought to exclude such shareholder proposals under Rule 14a-8(i)(8) and Rule 14a-8(i)(2) on grounds that the proposal conflicted with state corporation law. In 2008, the SEC sought clarity on that issue by certifying a question of law to the Delaware Supreme Court.[43] In *CA, Inc. v. AFSCME Employees Pension Plan*, the Delaware Supreme Court accepted certification and considered the validity of a stockholder-proposed bylaw requiring the directors of CA, Inc. to reimburse any stockholder or stockholder group "for reasonable expenses incurred in connection with nominating one or more candidates in a contested election of directors to the corporation's board of directors."[44] The Delaware Supreme Court's opinion considered two primary questions: (i) whether the stockholder proposal was a proper subject for action by shareholders as a matter of law, and (ii) whether the stockholder proposal providing for direct amendment of CA, Inc.'s bylaws would, if adopted, cause CA, Inc. to violate Delaware law.[45]

The Delaware Supreme Court found that a shareholder-proposed bylaw drafted to facilitate shareholder nominees would generally be a proper subject for shareholder action and reasoned that "[i]t is well established Delaware law that a proper function of bylaws is not to mandate how the board should decide specific substantive business decisions, but rather, to define the *process and procedures* by which those decisions are made."[46] The court noted that, although the bylaw at issue addressed monetary compensation, its primary focus was procedural in that it sought to "promot[e] the integrity of th[e] electoral process by facilitating the nomination of director candidates by stockholders or groups of stockholders."[47] The court determined that, in regard to the foregoing, the bylaw would be a proper subject for shareholder action.[48]

The court found, however, that the mandatory expense reimbursement aspect of the proposed bylaw violated Delaware law by restricting the board's authority to govern the company's finances insofar as it would "commit the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties to the corporation and its shareholders."[49] The court implied, moreover, that the bylaw may have been permissible if it had reserved the direc-

Reimbursement (Dec. 17, 2009), *available at* http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=848; *see also* Corporate Laws Comm., *Changes in the Model Business Corporation Act—Proposed Amendments to Chapters 2 and 10*, 64 BUS. LAW. 1157, 1157 (2009); Lisa M. Fairfax, *The Model Business Corporation Act at Sixty: Shareholders and Their Influence*, 74 LAW & CONTEMP. PROBS. 27 (2011).

43. CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227 (Del. 2008). The question was certified to the Delaware Supreme Court by the SEC under a procedure established by Delaware Supreme Court Rule 41(a), as amended in 2007. DEL. SUP. CT. R. 41(a) (amended May 15, 2007).

44. *CA, Inc.*, 953 A.2d at 230.

45. *Id.* at 231.

46. *Id.* at 234–35 (emphasis added).

47. *Id.* at 237.

48. *Id.*

49. *Id.* at 238.

tors' power to exercise their fiduciary duties in determining whether reimbursement was warranted on a case-by-case basis.[50]

2. The Adoption of 8 Del. Code Ann. tit. 8, §§ 112, 113

Shortly after, and in apparent response to the *CA, Inc. v. AFSCME Employees Pension Plan* decision, the Delaware legislature adopted sections 112 and 113 of title 8 of the Delaware Code ("Section 112" and "Section 113," respectively, and collectively, the "Delaware proxy access provisions"), which clarified that a Delaware corporation's governing documents could include provisions addressing proxy access and/or proxy expense reimbursement.[51] Importantly, the Delaware proxy access provisions are permissive and not mandatory. Adopted in April 2009, Section 112 addresses bylaws establishing proxy access procedures and provides that a proxy access bylaw may contain various terms and limitations, including (i) minimum ownership and duration thresholds, (ii) disclosure requirements dealing with stock ownership and the qualifications of any shareholder nominee, (iii) nomination caps, (iv) protections against use of proxy access by those seeking to change control of the company, and (v) indemnification provisions addressing losses arising from false or misleading information statements by the nominating shareholder.[52] Section 113 addresses proxy expense reimbursement and expressly authorizes the adoption of bylaw provisions that require the company to reimburse bylaw expenses incurred by a stockholder that solicits proxies in connection with a director election,[53] subject to such limitations as the bylaw may prescribe.

Given the timing and the controversy arising from the SEC's proxy access proposals, some commentators speculated that the adoption of the Delaware proxy access provisions reflected an effort to preempt the SEC's proposed mandatory proxy access rules.[54] Others offered that it was just an example of Delaware's leadership on an issue that had become increasingly popular among shareholders and shareholder activists.[55] In either case, the Delaware proxy access provisions strengthened the foundation for the private ordering model of proxy access,[56] although shareholders seeking to adopt proxy access by private

50. *Id.* at 239.

51. Del. Code Ann. tit. 8, §§ 112, 113 (2012).

52. *Id.* § 112.

53. *Id.* § 113.

54. Roe, *supra* note 37, at 17–18 (seeking to "ascertain[] Delaware's motives" and finding that, at least in part, Delaware passed access laws to forestall federal access laws).

55. Charles M. Nathan, *Delaware Law Changes to Facilitate Voluntary Adoption of Proxy Access*, Harv. L. Sch. Forum on Corp. Gov. & Fin. Reg. (July 7, 2009), *available at* http://blogs.law.harvard.edu/corpgov/2009/07/07/delaware-law-changes-to-facilitate-voluntary-adoption-of-proxy-access/ ("There is speculation that Delaware adopted this amendment to maintain its importance as the pre-eminent state for company incorporation and corporate law.").

56. The Delaware proxy access provisions were less revolutionary than evolutionary, as the Delaware Supreme Court decision in *CA, Inc. v. AFSCME Employees Pension Plan* had confirmed that shareholders already possessed the power to adopt precatory proxy access bylaws and at least some limited power to adopt binding proxy access procedures. 953 A.2d 227, 234–37 (Del. 2008).

ordering still faced significant hurdles at the federal level, as the private ordering amendment to Rule 14a-8 had not yet been adopted.[57]

B. Federal Private Ordering: Rule 14a-8 Amendments

This final impediment to the private ordering model for proxy access was addressed by the SEC when the amendment to Rule 14a-8(i)(8) to eliminate the election exclusion became effective in September 2011.[58] When the Rule 14a-8 amendments took effect, they provided a clear path for shareholder activists seeking to submit proxy access proposals, just in time for the 2012 proxy season.[59]

IV. Private Ordering in Practice: 2012 and 2013 Proxy Seasons

Since the SEC's private ordering amendment became effective in 2011, two proxy seasons have passed. The discussion below summarizes the proxy access proposals and voting results of the 2012 and 2013 proxy seasons.

A. The 2012 Proxy Season: A Tepid Start

During the 2012 proxy season, approximately twenty-four shareholder proxy access proposals were reported by U.S. public companies.[60] On one hand, given that only approximately nine such proposals had been presented in the previous five years combined, the twenty-four proposals made in 2012 represented a significant increase in proxy access proposals. On the other hand, when viewed in the context of the significant commentary and controversy surrounding the SEC's adoption of Rule 14a-11 and its subsequent invalidation, twenty-four shareholder proposals for proxy access was a surprisingly tepid beginning to private ordering.[61]

57. Some commentators therefore described Delaware's adoption of the Delaware proxy access provisions as "Machiavellian" because the provisions were viewed as having little practical effect, absent a change in Rule 14a-8(i)(8). *See* Roe, *supra* note 37, at 17–18; Lisa M. Fairfax, *Delaware's New Proxy Access: Much Ado About Nothing?*, 11 Tenn. J. Bus. L. 87, 102 (2009).

58. Facilitating Shareholder Director Nominations, Securities Act Release No. 9259, 76 Fed. Reg. 58100, 58100 (Sept. 20, 2011) (to be codified at 17 C.F.R. pts. 200, 232, 240 & 249).

59. 17 C.F.R. § 240.14a-8 (2013).

60. Appendix 1 summarizes the terms of each of the twenty-four proxy access proposals made in 2012. The primary source of data regarding the 2012 and 2013 proxy season is SharkRepellant, unless otherwise stated.

61. Illustrating that twenty-five proposals represented a slow start to private ordering, the SEC originally predicted that shareholders would initiate approximately 147 proposals per year under Rule 14a-8. Final Rule, *supra* note 3, at 56769; Bus. Roundtable v. SEC, 647 F.3d 1144, 1153 (D.C. Cir. 2011). Admittedly, this comparison presents somewhat of an apples-to-oranges comparison, given that the SEC's prediction was based on the use of Rule 14a-8 as a supporting amendment to mandatory Rule 14a-11—as opposed to a stand-alone amendment. That said, it is arguable that this change in circumstances should have resulted in more proposals under Rule 14a-8 than the SEC originally predicted, not fewer.

1. The 2012 Proxy Season: Proposals and Responses

The proxy access proposals made by stockholders in 2012 included both binding proposals that sought to directly amend the company's bylaws and precatory (non-binding) proposals that requested the company's board to adopt or propose a proxy access bylaw. The proposals included a number of variations regarding ownership and duration thresholds and other terms, as described below and in Appendix A.

Each of the twenty-four proxy access proposals made in 2012 was opposed by company management, and management of fifteen of the companies sought no-action letters from the SEC to validate their desire to exclude the proxy access proposal under one or more provisions of Rule 14a-8. Seven of the fifteen no-action requests were granted by the SEC. There were two primary reasons the SEC granted no-action letters during 2012. Two of the proxy access proposals posed more than a single issue for shareholders to consider or posed an issue already substantially implemented and, as such, could properly be excluded from the company's proxy materials under Rule 14a-8(c) and 14a-8(i)(10).[62] The SEC also found that five of the proxy access proposals could properly be excluded from the company's proxy materials under Rule 14a-8(i)(3) for including material that was vague and indefinite regarding specific eligibility requirements.[63]

Ultimately, twelve of the reported proxy access proposals were presented at shareholder meetings, but only two proxy access proposals garnered enough votes to pass.

a. Precatory Proposals

Most of the proposals submitted in 2012 were precatory, including the two proposals that were ultimately successful. The successful proxy access proposals, presented to shareholders of Chesapeake Energy Corp. (the "Chesapeake Proposal") and Nabors Industries Ltd. (the "Nabors Proposal" and together the "Successful Proposals"), asked the respective boards to adopt a proxy access bylaw and present it for shareholder approval.[64] The Successful Proposals included ownership and duration thresholds and other terms that closely matched the terms of the vacated Rule 14a-11[65] and gave the board discretion to establish other terms, such as how to give priority to multiple nominations, how to determine whether nominations were timely, and whether the disclosure and statement satisfy the bylaw.[66] Both Chesapeake and Nabors were the target of

62. *See* Bank of Am., SEC No-Action Letter, 2012 WL 71855 (Feb. 29, 2012); Textron Inc., SEC No-Action Letter, 2011 WL 6859126 (Mar. 7, 2012); Goldman Sachs Grp., SEC No-Action Letter, 2012 WL 135725 (Mar. 15, 2012).

63. *See* Chiquita Brands Int'l, SEC No-Action Letter, 2012 WL 36452 (Mar. 7, 2012); Dell, Inc., SEC No-Action Letter, 2012 WL 1615814 (Mar. 30, 2012); MEMC Elec. Materials Inc., SEC No-Action Letter, 2012 WL 243724 (Mar. 7, 2012); Sprint Nextel Corp., SEC No-Action Letter, 2011 WL 6962628 (Mar. 7, 2012); Staples, Inc., SEC No-Action Letter, 2012 WL 364041 (Apr. 13, 2012).

64. Chesapeake Energy Corp., Definitive Proxy Statement (Schedule 14A), at 55 (May 11, 2012); Nabors Indus. Ltd., Definitive Proxy Statement (Schedule 14A), at 52 (Apr. 23, 2012).

65. *See supra* note 64.

66. *See supra* note 64.

scrutiny for other corporate governance practices. However, follow-on proposals presented in 2013 at Chesapeake and Nabors's annual meetings were both unsuccessful.[67]

The remaining ten precatory proposals either failed to survive the SEC no-action process or were defeated at the annual meeting. Most of the unsuccessful precatory proposals were based on a model proposal set forth by the United States Proxy Exchange ("USPE")—an organization focused on the interests of retail investors.[68] The USPE proposal asked the board of the target company, "to the fullest extent permitted by law, to amend [the company's] bylaws and governing documents to allow shareowners to make board nominations."[69] The USPE proposal proposed, among other things: (i) a threshold ownership requirement of 1 percent, (ii) a threshold duration requirement of two years, (iii) an alternative requirement of 100+ shareholders satisfying Rule 14a-8(b) eligibility requirements, (iv) the ability for each shareholder to make one nomination of up to 12 percent of the current number of board members with no total cap on the number of shareholder nominees, (v) disqualification of shareholders seeking a change in control, and (vi) defining "change in control" as any election not resulting "in a majority of board seats being filled by individuals nominated by the board and/or by parties nominating under these provisions."[70]

The SEC granted no-action letters to each of the companies that contested proposals based on the USPE form for two independent reasons. First, in no-action letters to Bank of America, Goldman Sachs, and Textron, the SEC found that the proposal language setting forth the definition for "change in control" violated Rule 14a-8(c) because it impermissibly required shareholders to vote on two issues: (i) whether to grant shareholders proxy access and (ii) whether to adopt the proposal language that established the definition of a "change in control."[71] As such, the SEC concluded that the USPE proposals could be properly excluded under Rule 14a-8(c).[72]

Second, the SEC granted no-action letters to proposals relying on the USPE form because, under Rule 14a-8(i)(3), such proposals were vague and indefinite. In no-action letters addressed to Chiquita Brands, Dell, MEMC Electronics, and Sprint Nextel, the SEC found that the proposal requirement that shareholders satisfy "SEC Rule 14a-8(b) eligibility requirements" was ambiguous and

67. *See infra* Part IV.B & app. B.

68. James McRitchie, Shareholder Proposal Entitled "Proxy Access for Shareholders" (n.d.) (on file with *The Business Lawyer*) ("This document presents a model shareowner proposal that can be presented to corporations for a shareowner vote under SEC Rule 14a-8 to ensure that long-term shareowners have a reasonable, but not necessarily easy, means for including board nominations in the proxy materials those corporations distribute—so called 'proxy access.'").

69. *Id.*

70. *Id.* ("Any election resulting in a majority of board seats being filled by individuals nominated by the board and/or by parties nominating under these provisions shall be considered to not be a change in control by the Company, its board and officers.").

71. *See supra* note 62.

72. *See supra* note 62. Rule 14a-8(c) provides that "each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting." 17 C.F.R. § 240.14a-8. (2013).

vague, absent further explanation regarding the specific eligibility requirements referenced.[73] The SEC reasoned that many shareholders voting on the proposal would not be familiar with the requirements of Rule 14a-8 and would be unable to determine with reasonable certainty the meaning of the requirement.[74]

Soon after the SEC issued the foregoing no-action decisions, the USPE updated its model proposal to correct the faults identified by the SEC.[75] Thereafter, two shareholder proposals based on the updated USPE form were submitted to Forest Laboratories and Medtronics. Both companies sought no-action letters, but the SEC declined and the proposals were presented to shareholders at the companies' respective annual meetings.[76] Each proposal was defeated and received the support of less than 10 percent of the shares voted.[77]

b. Binding Proposals

Eight of the twenty-four proxy access proposals presented in 2012 were binding proposals, and none of them received sufficient votes to pass.[78] Five of the eight binding proposals were submitted by Norges Bank (the "Norges Proposals").[79] The Norges Proposals proposed bylaw amendments to grant proxy access to a shareholder owning 1 percent of the company's securities for one year.[80]

Only one company—Staples—successfully sought and received a no-action letter from the SEC on a Norges Proposal. The SEC ruled that Staples could exclude the Norges Proposal because it conflicted with Staples's preexisting bylaw provision stating that "[e]xcept as otherwise required by law, nothing in this Section 7 shall obligate the corporation or the board of directors to include in any

73. *See supra* note 63.

74. *See supra* note 63.

75. *See supra* note 68.

76. Forest Labs., Inc., SEC No-Action Letter, 2012 WL 2641852 (June 28, 2012); Medtronic, Inc., SEC No-Action Letter, 2012 WL 1493951 (June 28, 2012).

77. Forest Labs., Inc., Current Report (Form 8-K), at 1 (Aug. 24, 2012); Medtronic, Inc., Current Report (Form 8-K), at 1 (Aug. 28, 2012).

78. KSW, Inc. received a binding proposal with a threshold of 2 percent, which was voted down by its shareholders. Of note, the company's board of directors adopted a bylaw on January 1, 2012 granting proxy access to shareholders owning 5 percent of the company's outstanding stock. KSW, Inc., Definitive Proxy (Schedule 14A), at 22 (Apr. 9, 2012). Management submitted a no-action letter to the SEC arguing that, given the similarities between the adopted bylaw and the shareholder proxy access proposal, the SEC should permit the exclusion of the proposal from the company's proxy materials. KSW, Inc., SEC No-Action Letter, 2012 WL 91382 (Mar. 7, 2012). The SEC denied the request and found that the newly adopted bylaw did not "substantially implement[]" the proposal. *Id.* at *1–2.

79. Norges Bank submitted proposals to The Charles Schwab Corporation, CME Group Inc., Wells Fargo & Company, The Western Union Company, and Staples, Inc. The Charles Schwab Corp., No-Action Letter, 2012 WL 77230 (Mar. 7, 2012); CME Grp., Inc., Definitive Proxy (Schedule 14A), at 14 (Apr. 25, 2012); Wells Fargo & Co., Definitive Proxy (Schedule 14A), at 107 (Mar. 15, 2012); The Western Union Co., SEC No-Action Letter, 2012 WL 173774 (Mar. 7, 2012); Staples Inc., Definitive Proxy (Schedule 14A), at 57 (Apr. 12, 2013); Staples, Inc., SEC No-Action Letter, 2012 WL 364041 (Apr. 13, 2012).

80. *See supra* note 79.

proxy statement or other stockholder communication distributed on behalf of the corporation or the board of directors information with respect to any nominee for director submitted by a stockholder."[81] Because the Norges Proposal "d[id] not address the conflict between these two provisions of Staples' bylaws," the SEC granted a no-action letter based on 14a-8(i)(3), given that "neither shareholders nor Staples would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires."[82] Among the remaining four companies that received Norges Proposals, three submitted no-action letters based on various other theories and each was rejected by the SEC.[83]

2. 2012 Proxy Season: Conclusion

The 2012 proxy season was a learning experience for both proponents of proxy access and corporate management. While many proposals failed to survive the no-action challenge, proponents of proxy access discovered a number of pitfalls and learned how to avoid them. Voting results on those proposals that made it to a vote also revealed that the shareholding body at large seemed to have little enthusiasm for proxy access, and even less enthusiasm for any proposal that was more aggressive than the SEC's defunct Rule 14a-11. The results from 2012 also showed that precatory proposals generally were able to garner greater support than binding proposals.

As the 2012 proxy season drew to a close, many commentators predicted that the 2013 season would bring an increase in the number and quality of proxy access proposals, as shareholders could draw upon the experiences and precedent of the 2012 season to draft proposals that would withstand no-action review and potentially succeed at the ballot box.[84] Commentators also considered the advisability of putting forward management-sponsored proxy access proposals as a way to preempt a potential uptick in shareholder proposals on proxy access.[85]

B. The 2013 Proxy Season: Limited Progress

Early results from 2013 suggest that the commentators were correct insofar as they predicted that proxy access proposals in 2013 would be better crafted to survive no-action review, and some companies did propose management-sponsored proxy access proposals in response to shareholder initiatives. But the predictions of a significant increase in the number of proxy access proposals

81. Staples, Inc., SEC No-Action Letter, 2012 WL 364041 (Apr. 13, 2012).
82. *Id.*
83. *Id.*
84. *See, e.g.*, Matt Orsagh, *Shareowners Gain Leverage Through Proxy Access at Nabors Industries, Chesapeake Energy*, Market Integrity Insights (June 13, 2012), http://blogs.cfainstitute.org/marketintegrity/2012/06/13/shareowners-gain-leverage-through-proxy-access-at-nabors-industries-chesapeake-energy/ ("The process will surely evolve, with even more proxy access proposals expected in 2013.").
85. *See, e.g.*, *id.*

in 2013 did not come to fruition. Appendix B shows that even fewer proxy access proposals were submitted in 2013 than in 2012. Yet, the 2013 proxy season arguably showed some greater success for proxy access, with proxy access proposals passing or proxy access bylaws being adopted at four companies, although two of the successful proposals were management-sponsored.[86]

Based on information collected by SharkRepellent and illustrated in Appendix B, proxy access proposals were made at sixteen companies in 2013. Most of the companies that received proxy access proposals in 2013 were also targets of proxy access proposals in 2012. In sharp contrast to 2012, requests to exclude proxy access proposals through the no-action process were uniformly denied by the SEC in 2013. Of the sixteen proxy access initiatives in 2013, two were management-sponsored proposals, one was a bylaw adopted by management without a shareholder vote but in response to shareholder activism, and the remainder were shareholder-initiated proposals.

1. The 2013 Proxy Season: Management Initiatives

Most of the progress for proxy access in 2013 came from proposals initiated by management, albeit likely in response to past shareholder activism for proxy access.[87] Interestingly, management sponsorship did not guarantee success; one of the proposals presented by management failed to garner sufficient votes to pass.[88]

In exchange for the withdrawal of a shareholder-sponsored proxy access proposal submitted during the 2012 season, Hewlett-Packard agreed to put a management-sponsored proposal on the ballot in 2013, and management of Hewlett Packard presented a proxy access proposal at the 2013 annual meeting.[89] The management-sponsored proposal closely tracked the terms of the former Rule 14a-11, establishing 3 percent ownership, three-year holding thresholds, and a 20 percent limit on the number of shareholder nominees.[90] The Hewlett Packard management-sponsored proposal passed with the affirmative vote of 68 percent of the outstanding shares.[91]

Western Union also adopted a management-sponsored proxy access bylaw in 2013.[92] Western Union had faced a Norges Proposal in 2012, which received the support of approximately one-third of the votes cast, and Norges Bank had submitted another proxy access shareholder proposal for 2013.[93] On March 6,

86. *See infra* app. B.

87. *See infra* app. B (showing two out of three management proposals passing in 2013).

88. Chesapeake Energy Corp., Definitive Proxy (Schedule 14A), at 13–14 (May 3, 2013); Chesapeake Energy Corp., Current Report (Form 8-K), exh. 99.1 (June 20, 2013).

89. *See* Hewlett Packard Co., Definitive Proxy (Schedule 14A), at 42 (Jan. 31, 2013).

90. *Id.*

91. *See* Hewlett Packard Co., Current Report (Form 8-K), at 3 (Mar. 21, 2013).

92. *See* Western Union Co., Current Report (Form 8-K), at 1 (Mar. 11, 2013).

93. *See* Western Union Co., Current Report (Form 8-K), at 1 (Mar. 25, 2012); Western Union Co., SEC No-Action Letter, 2013 WL 354800 (Mar. 13, 2013).

2013, Western Union's board adopted a proxy access bylaw with 3 percent ownership and three-year thresholds and a limit of 20 percent of the board.[94]

Following the passage of a precatory proxy access proposal in 2012, management of Chesapeake Energy Corporation proposed to stockholders the adoption of a resolution to amend the company's bylaws to implement proxy access.[95] The Chesapeake proposal followed the general outlines of the precatory proposal passed in 2012, with 3 percent and three-year thresholds and a 25 percent board cap, but also included a number of additional details concerning the process, procedures, and limitations of proxy access that were not part of the 2012 precatory proposal.[96] Chesapeake's certificate of incorporation required a 66 percent majority to amend the bylaws.[97] The management proposal fell short of the required supermajority, receiving the affirmative vote of approximately 60 percent of the shareholders.[98]

2. The 2013 Proxy Season: Proposals and Responses

Thirteen shareholder proposals for proxy access were presented in 2013.[99] The technical shortcomings that had permitted companies to exclude many shareholder-initiated proposals in 2012 had been corrected, and the SEC denied all no-action requests made in 2013.[100] Proxy access proposals by shareholders in 2013 broke down into three types: (i) proposals that followed the 3 percent and three-year ownership thresholds; (ii) proposals made by Norges Bank, which had 1 percent and one-year thresholds; and (iii) proposals following the USPE model, with lower thresholds. As in 2012, proposals that followed the 3 percent and three-year thresholds were more successful than either Norges Bank or USPE model proposals, although only two shareholder-initiated proposals passed.

a. 3 Percent and Three-Year Proposals

Shareholder proposals for proxy access with the 3 percent and three-year thresholds passed at two companies—Verizon Communications, Inc. and Century Link, Inc.—in 2013. The proposal at Verizon passed with a slim majority of approximately 52 percent of the votes cast, while the proposal at Century Link received the affirmative vote of approximately 70 percent of the votes

94. *See supra* note 93.
95. Chesapeake Energy Corp., Definitive Proxy (Schedule 14A), at 13–14 (May 3, 2013).
96. *Id.*
97. *Id.* at 15.
98. Chesapeake Energy Corp., Current Report (Form 8-K), exh. 99.1 (June 20, 2013).
99. *See infra* app. B.
100. Companies that sought no-action letters in 2013 include iRobot Corporation, Microwave Filter Co., Inc., Nabors Industries Ltd., PMC Commercial Trust, The Walt Disney Company, and The Western Union Company. iRobot Corp., SEC No-Action Letter, 2013 WL 2673351 (Mar. 26, 2013); Microwave Filter Co., SEC No-Action Letter, 2012 WL 5954494 (Feb. 22, 2013); Nabors Indus., Ltd., SEC No-Action Letter, 2013 WL 503327 (Mar. 21, 2013); PMC Commercial Trust/TX, SEC No-Action Letter, 2013 WL 444369 (Mar. 5, 2013) (finding the no-action letter moot); The Walt Disney Co., SEC No-Action Letter, 2012 WL 5267955 (Dec. 13, 2012); The Western Union Co., SEC No-Action Letter, 2012 WL 173774 (Mar. 7, 2012).

cast.[101] Interestingly, Verizon and Century Link both faced a number of governance-related shareholder proposals in 2013, and in each case the proxy access proposal passed but all other shareholder proposals failed. This may suggest that shareholders view proxy access as a less intrusive or less controversial alternative to other governance initiatives.

Shareholder proxy access proposals with 3 percent and/or three-year thresholds were presented in 2013 at three other companies—Microwave Filter Co., Inc., Nabors Industries Ltd., and the Walt Disney Company—but were voted down.[102] The proposals at Disney and Nabors received relatively substantial support, with approximately 40 and 50 percent of the votes cast respectively, while the proposal of Microwave Filter was less successful, receiving affirmative votes of only 15 percent of the votes cast.[103]

b. Norges Bank Proposals

Norges Bank again presented proposals at four companies—CME Group, Inc., Staples, Inc., Charles Schwab, and Western Union—each of which had also been targeted by Norges Bank in 2012.[104] As in 2012, the Norges Bank proposals had 1 percent and one-year thresholds, but the proposals made in 2013 were precatory in nature, as compared to the binding proposals made by Norges Bank in 2012. No Norges Bank proposal passed in 2013, but each received the affirmative vote of more than 30 percent of the votes cast, and in one case—Western Union—management adopted an alternative proxy access proposal apparently in response to the Norges Bank proposal.[105]

c. USPE Model or Other Proposals

Proposals following the USPE model or other proposals having lower ownership thresholds were uniformly unsuccessful. Such proposals were presented at four companies in 2013—iRobot Corporation, Bank of America Corporation, Netflix, Inc., and the Goldman Sachs Group.[106] These proposals would have permitted proxy access either (i) to a party of one or more shareholders who

101. Verizon Commc'ns Inc., Current Report (Form 8-K), at 1 (May 7, 2013); CenturyLink, Inc., Current Report (Form 8-K), at 1 (May 28, 2013).

102. Microwave Filter Co., Inc., Current Report (Form 8-K), at 3 (Apr. 10, 2013); Nabors Indus. Ltd., Current Report (Form 8-K), at 3 (June 6, 2013); The Walt Disney Co., Current Report (Form 8-K), at 2 (Mar. 8, 2013).

103. *See supra* note 102.

104. CME Grp. Inc., Definitive Proxy (Schedule 14A), at 22–24 (Apr. 8, 2013); Staples Inc., Definitive Proxy (Schedule 14A), at 57–58 (Apr. 12, 2013); The Charles Schwab Corp., Definitive Proxy (Schedule 14A), at 62–63 (Mar. 29, 2013); Western Union Co., Definitive Proxy (Schedule 14A), at 1, 11 (Apr. 17, 2013).

105. Western Union Co., SEC No-Action Letter, 2013 WL 354800 (Mar. 13, 2013) (explaining by letter to the SEC that Norges Bank submitted a proxy access proposal on December 11, 2012 and that the board of directors agreed to adopt proxy access unilaterally at 3 percent and three-year thresholds); Western Union Co., Current Update (Form 8-K), at 1 (Mar. 11, 2013).

106. iRobot Corp., Definitive Proxy (Schedule 14A), at 39–41 (Apr. 10, 2013); Bank of Am. Corp., Definitive Proxy (Schedule 14A), at 68–69 (Mar. 28, 2013); Netflix, Inc., Definitive Proxy (Schedule 14A), at 18–19 (Apr. 26, 2013); Goldman Sachs Grp., Definitive Proxy (Schedule 14A), at 66–67 (Apr. 12, 2013).

collectively own 1 percent of the outstanding shares for two years, or (ii) fifty parties, each holding for one year shares valued at $2000 and collectively holding at least one-half of 1 percent but less than 5 percent of the stock.[107] Proposals with the USPE thresholds were unpopular in 2012 and equally unpopular in 2013, receiving support on average of less than 10 percent of the votes cast.[108]

3. The 2013 Proxy Season: Implementation

Another issue brought into focus in the 2013 proxy season is the range of additional terms that must be considered in crafting an effective proxy access bylaw, whether after a precatory shareholder proposal has passed or in an attempt to forestall a shareholder proposal. Shareholder proxy access proposals often define only the broad outlines for proxy access, but a proxy access bylaw can and should include a number of additional details to define the process, procedures, and limitations on proxy access. Management-initiated proxy access proposals and bylaws adopted in 2013 provide guidance as to the issues that should be considered. These proposals also demonstrate that even after a precatory proxy access proposal has passed, a corporation and its board maintains a great deal of discretion to define the parameters of proxy access.

Although it did not achieve the requisite supermajority vote, the proxy access bylaw proposed at Chesapeake is an instructive example. In addition to the ownership and duration threshold and other terms included in typical proxy access proposals, the proposed Chesapeake bylaw included the following key terms[109]:

- **Priority:** In the event of multiple shareholder nominees in excess of the 25 percent cap, priority for inclusion in the proxy to be determined by size of holdings (largest to smallest), with each nominating shareholder entitled to nominate one candidate until the cap is reached.
- **Information Requirements and Representations/Undertakings:** Nominating shareholders or candidates must provide: (i) proof that ownership and duration thresholds were met; (ii) written consent signed by the director candidate to be named in the proxy and to serve if elected; (iii) representations/undertakings concerning no intent to change control and compliance with disclosure laws and company policies and procedures; (iv) completion of director questionnaires and information concerning independence of director candidates.
- **Independence:** All director candidates must meet independence standards.
- **Calculation of Ownership:** Ownership for qualification purposes should be calculated based solely on shares for which full voting and economic interests (i.e., net of any shares hedged or borrowed).

107. *See supra* note 106.

108. iRobot Corp., Current Report (Form 8-K), at 1 (May 24, 2013); Bank of Am. Corp., Current Report (Form 8-K), at 1 (May 8, 2013); Netflix, Inc., Current Report (Form 8-K), at 1 (June 7, 2013); Goldman Sachs Grp., Current Report (Form 8-K), at 1 (May 23, 2013).

109. *See e.g.*, Chesapeake Energy Corp., Definitive Proxy (Schedule 14A), at 13–14 (May 3, 2013).

- **Renominations:** Any candidate who is included in the company's proxy but withdraws, becomes unavailable, or does not receive a minimum vote of 25 percent of the votes cast would be ineligible for renomination for two years.
- **Qualification of Shareholder Nominees:** Officers and directors of competitors and persons having certain criminal connections or subject to ongoing criminal proceedings are excluded.

The specific terms and provisions proposed in the Chesapeake bylaw may not be appropriate for every company, but the foregoing list illustrates the issues that should be considered by any company considering a proxy access bylaw.

V. Conclusion: Lessons Learned from 2012 and 2013

Proxy access has been a hot topic in corporate governance and shareholder activist circles, with direct corporate democracy being touted as a potential cure-all for the ills of corporate America. Even as that debate carries on, experience seems to paint a different picture. While denied the full victory of mandatory proxy access that they sought, shareholder activists now have a clear path to proxy access by private ordering. With two proxy seasons under the belt since the advent of private ordering, proxy access has made some progress, but it has not been embraced by the shareholder body at large.

The experience of the 2012 and 2013 proxy access initiatives also shows a number of consistent trends. First, proposals with stock ownership thresholds and other limitations that closely track the provisions of the vacated SEC Rule 14a-11 are more likely to succeed than those with lower thresholds. Second, precatory proposals are far more likely to succeed than binding proposals, unless the binding proposal is management-sponsored. Third, shareholder activists are more likely to target, and may be more successful in achieving proxy access at, companies that are in need of other corporate governance reforms.[110] Fourth, while management-initiated proxy access proposals remain the exception, some companies have used a management-sponsored alternative to forestall or defeat a more aggressive shareholder proposal. Fifth, even where a shareholder-initiated precatory proposal has succeeded, there remain a number of significant terms and conditions that must be addressed to implement proxy access, and management retains a great deal of discretion in setting these terms.

110. *E.g.*, Chesapeake Energy Corp., Definitive Proxy (Schedule 14A), at 55 (May 11, 2012) (proxy access proponents alleging long-term underperformance, excessive CEO compensation and perquisites, extensive related party transactions with the CEO, and the shareholder's 42 percent vote against say on pay in a previous voting year); Verizon Commc'ns Inc., Definitive Proxy (Schedule 14A), at 29–30 (Mar. 18, 2013) (proxy access proponents alleging the "need for enhanced accountability at Verizon is compelling" and citing significant stock payouts for below median performance, certain resolutions opposed by the board, and the high percentage of votes cast against the board compensation committee chairman); CenturyLink, Definitive Proxy (Schedule 14A), at 24–25 (Apr. 10, 2013) (proxy access proponents citing the "compelling" need for greater accountability due to allegedly excessive golden parachutes and pension parachutes).

Appendix A: 2012 Proxy Access Proposals and Voting Results

2012 Proxy Access[1]										
	Company	Terms	State of Inc.	Meeting Date	Pass/Fail	For as % Shares Outstand.	For as % Votes Cast	Sponsor	Primary Proponent	No-Action Sought/ Granted
1	**Bank of America Corp.**	1% for 2 years or 100 investors with $2K for 1 year	DE	5/9/2012	Not Voted On	-	-	Shareholder	Kenneth Steiner	Yes/No
2	**Cadus Corp.**	1% for 1 year	DE	6/21/2012	Not Voted On	-	-	Shareholder	Daniel Rudewicz	No/No
3	**Chesapeake Energy Corp.**	3% for 3 years; 25% cap on board seats	OK	6/8/2012	Pass	38.26%	59.93%	Shareholder	NYC Retirement Systems	No/No
4	**Chiquita Brands Int'l, Inc.**	1% for 2 years, or 100 investors with $2K for 1 year	NJ	5/22/2012	Not Voted On	-	-	Shareholder	John Chevedden	Yes/Yes

[1] The charts herein are based primarily on information from SharkRepellant and include some withdrawn and omitted proposals known to the authors. Other commentators have reported a varying number of proposals. *See, e.g.*, ISS, Proxy Access Proposals Filed for the 2012 U.S. Proxy Season (May 10, 2012) (reporting 22 proposals in 2012); Rodgin Cohen et al., Proxy Access Proposals: 2012 Review and Outlook (July/Aug. 2012); Sullivan and Cromwell, Proxy Access Proposals: Review of 2012 Results and Outlook for 2013 (June 19, 2012) (reporting 23 proxy access proposals in 2012); Chadbourne & Parke, 2012 Proxy Season: Survey of Proxy Access Proposals (Sept. 2012) (reporting 24 proposals in 2012).

5	**CME Group Inc.**	1% for 1 year; 25% cap on board seats	DE	5/23/2012	Fail	26.63%	37.82%	Shareholder	Norges Bank	No/No
6	**Dell Inc.**	1% for 2 years, or 100 investors with $2K for 1 year	DE	7/13/2012	Not Voted On	-	-	Shareholder	James McRitchie	Yes/Yes
7	**Ferro Corp.**	1% for 2 years, or 100 investors with 2K for 1 year	OH	4/27/2012	Fail	11.25%	13.30%	Shareholder	Kenneth Steiner	No/No
8	**Forest Labs., Inc.**	1% for 2 years, or 100 investors with 2K for 1 year; 12% cap on board seats	DE	8/15/2012	Fail	7.97%	9.44%	Shareholder	Kenneth Steiner	Yes/No
9	**H&R Block, Inc.**	1% for 2 years, or 50 investors with $2K for 1 year	MI	9/13/2012	Fail	6.32%	8.21%	Shareholder	Kenneth Steiner	Yes/No
10	**Hewlett Packard Co.**	3% for 3 years; 25% cap on board seats	DE		Withdrawn			Shareholder		

(*Continued*)

Appendix A: 2012 Proxy Access Proposals and Voting Results (*Continued*)

	2012 Proxy Access									
	Company	**Terms**	**State of Inc.**	**Meeting Date**	**Pass/Fail**	**For as % Shares Outstand.**	**For as % Votes Cast**	**Sponsor**	**Primary Proponent**	**No-Action Sought/ Granted**
11	**KSW, Inc.**	2% for 1 year	NY	5/9/2012	Fail	9.18%	21.00%	Shareholder	Furlong Fund	Yes/No
12	**Medtronic, Inc.**	1% for 2 years, or 50 investors with $2K for 1 year; 12% cap on board seats	MI	8/23/2012	Fail	5.35%	7.36%	Shareholder	Kenneth Steiner	Yes/No
13	**MEMC Electronic Materials, Inc.**	1% for 2 years, or 100 investors with $2K for 1 year	DE	5/25/2012	Not Voted On	-	-	Shareholder		Yes/Yes
14	**Microwave Filter Co., Inc.**	15% for one month; 33% cap on board seats	NY	3/28/2012	Not Voted On	-	-	Shareholder	Furlong Fund	
15	**Nabors Indus.**	3% for 3 years; 25% cap on board seats	Bermuda	6/25/2012	Pass	44.5%	56%	Shareholder	NYC Retirement Systems	No/No

16	**Pioneer Natural Resources**	1% for 1 year; 25% cap on board seats			Withdrawn					
17	**Princeton Nat'l Bancorp, Inc.**	1% for 2 years, or 100 investors with $2K for 1 year	DE	5/17/2012	Fail	11.89%	31.10%	Shareholder	David J. Monier	No/No
18	**Sprint Nextel Corp.**	1% for 2 years, or 100 investors with $2K for 1 year	KS	5/15/2012	Not Voted On	-	-	Shareholder	Kenneth Steiner	Yes/Yes
19	**Staples, Inc.**	1% for 1 year; 25% cap on board seats	DE	6/4/2012	Not Voted On	-	-	Shareholder	Norges Bank	Yes/Yes
20	**Textron Inc.**	1% for 2 years, or 100 investors with $2K for 1 year	DE	4/25/2012	Not Voted On	-	-	Shareholder	Kenneth Steiner	Yes/Yes
21	**The Charles Schwab Corp.**	1% for 1 year; 25% cap on board seats	DE	5/17/2012	Fail	26.06%	30.88%	Shareholder	Norges Bank	Yes/No

(*Continued*)

Appendix A: 2012 Proxy Access Proposals and Voting Results (*Continued*)

2012 Proxy Access										
	Company	**Terms**	**State of Inc.**	**Meeting Date**	**Pass/Fail**	**For as % Shares Outstand.**	**For as % Votes Cast**	**Sponsor**	**Primary Proponent**	**No-Action Sought/ Granted**
22	**The Goldman Sachs Grp., Inc.**	1% for 2 years, or 100 investors with 2K for 1 yr	DE	5/24/2012	Not Voted On	-	-	Shareholder	James McRitchie	Yes/Yes
23	**The Western Union Co.**	1% for 1 year; 25% cap on board seats	DE	5/23/2012	Fail	27.62%	33.40%	Shareholder	Norges Bank	Yes/No
24	**Wells Fargo & Co.**	1% for 1 year; 25% cap on board seats	DE	4/24/2012	Fail	24.89%	32.33%	Shareholder	Norges Bank	Yes/No

Appendix B: 2013 Proxy Access Proposals and Voting Results

2013 Proxy Access										
	Company	Terms	State of Inc.	Meeting Date	Pass/Fail	For as % Shares Outstand.	For as % Votes Cast	Sponsor	Primary Proponent	No Action Sought/ Granted
1	**Bank of America Corp.**	1% for 2 years, or 50 investors with .5% with 2K for 1 year	DE	5/8/2013	Fail	4.60%	8.70%	Shareholder	John C. Harrington	No/No
2	**CenturyLink Inc.**	3% for 3 years; 20% cap on board seats	LA	5/22/2013	Pass	45.6%	70.20%	Shareholder	Hazel A. Floyd	No/No
3	**Chesapeake Energy Corp.**	3% for 3 years; 25% cap on board seats	OK	6/14/2013	Fail (2/3 vote required)	60%	-	Management		No/No
4	**CME Group Inc.**	1% for 1 year; 25% cap on board seats	DE	5/22/2013	Fail	24.20%	32.80%	Shareholder	Norges Bank	No/No

(*Continued*)

Appendix B: 2013 Proxy Access Proposals and Voting Results (*Continued*)

2013 Proxy Access										
	Company	Terms	State of Inc.	Meeting Date	Pass/Fail	For as % Shares Outstand.	For as % Votes Cast	Sponsor	Primary Proponent	No Action Sought/ Granted
5	**Hewlett Packard Co.**	3% for 3 years; 20% cap on board seats	DE	3/20/2013	Pass	68.20%	96.60%	Management		No/No
6	**iRobot Corp.**	1% for 2 years, or investors with .5% with $2K for 1 year	DE	5/22/2013	Fail	11.60%	16.90%	Shareholder	James McRitchie	Yes/No
7	**Microwave Filter Co., Inc.**	3% for 3 years	NY	4/10/2013	Fail	5.90%	14.70%	Shareholder	Furlong Fund, LLC	Yes/No
8	**Nabors Industries Ltd.**	3% for 3 years	Bermuda	6/4/2013	Fail	40.5%	50.9%	Shareholder	NYC Retirement Systems	Yes/No
9	**Netflix, Inc.**	1% for 2 years, or investors with .5% with $2K for 1 year	DE	6/7/2013	Fail	3.10%	4.40%	Shareholder	Myra K. Young	No/No

10	**PMCCommer. Trust**	3% for 3 years	TX	6/14/2013	Withdrawn	-	-	Shareholder	Adam Goldstein	Yes/No
11	**Staples, Inc.**	1% for 1 year; 25% cap on board seats	DE	6/3/2013	Fail	27.90%	36.70%	Shareholder	Norges Bank	No/No
12	**The Charles Schwab Corp.**	1% for 1 year; 25% cap on board seats	DE	5/16/2013	Fail	27.00%	31.50%	Shareholder	Norges Bank	No/No
13	**The Goldman Sachs Grp., Inc.**	1% for 2 years, or investors with .5% with $2K for 1 year	DE	5/23/2013	Fail	3.80%	5.20%	Shareholder	James McRitchie	No/No
14	**The Walt Disney Co.**	3% for 3 years; 20% cap on board seats	DE	3/6/2013	Fail	29.80%	39.80%	Shareholder	Hermes Equity Ownership Services	Yes/No

(*Continued*)

Appendix B: 2013 Proxy Access Proposals and Voting Results (*Continued*)

	2013 Proxy Access									
	Company	**Terms**	**State of Inc.**	**Meeting Date**	**Pass/Fail**	**For as % Shares Outstand.**	**For as % Votes Cast**	**Sponsor**	**Primary Proponent**	**No Action Sought/ Granted**
15	**The Western Union Co.**	3% for 3 years; 20% cap on board seats	DE	5/30/2013	Manage-ment Adopted	-	-	Adopted by management	Norges Bank	Yes/No
16	**Verizon Commc'ns Inc.**	3% for 3 years; 20% cap on board seats	DE	5/2/2013	Pass	32.90%	52.30%	Shareholder	C. William Jones	No/No