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.

On Review of an Order of the Securities and Exchange Commission

---

INITIAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT

DAVID M. BECKER
General Counsel

MARK D. CAHN
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

MICHAEL A. CONLEY
Deputy Solicitor

RANDALL W. QUINN
Assistant General Counsel

MICHAEL L. POST
Senior Litigation Counsel

TRACEY A. HARDIN
Senior Counsel

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
(202) 551-5048 (Hardin)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties, intervenors, and amici appearing before the Commission and this Court are listed in the brief for the petitioners.

B. The Ruling Under Review

On August 25, 2010, the Commission adopted the rule that petitioners challenge here in *Facilitating Shareholder Director Nominations*, Securities Act Release No. 9136, Securities Exchange Act Release No. 62764, Investment Company Act Release No. 29384, which was published in the Federal Register at 75 Fed. Reg. 56,668 (September 16, 2010).

C. Related Cases

The case on review has not previously been before this, or any other, Court. Counsel is not aware of any other related cases currently pending in this, or any other, Court.

TABLE OF CONTENTS

Page

Certificate as to Parties, Rulings, and Related Cases. i

Glossary. xi

Preliminary Statement. 1

Counterstatement of Issues. 3

Statutes and Regulations. 5

Counterstatement of the Case. 5

A. Nature of the Case.. 5

B. The Rulemaking Proceeding.. 6

1. The Commission proposed changes to the federal proxy rules.. 6

2. The Commission determined that it was in the interests of shareholders and for the protection of investors to adopt Rule 14a-11.. 8

a. The Commission stated that it was adopting Rule 14a-11 to make the proxy process function more like an in-person meeting of shareholders by facilitating shareholders' ability to exercise their state-law rights to nominate and elect directors at shareholders' meetings.. 8

TABLE OF CONTENTS (CONTINUED)

Page

b. The Commission considered and explained why it rejected the policy argument that shareholder access to the company proxy should be determined exclusively through "private ordering.". 10

c. The Commission considered the potential benefits and costs of Rule 14a-11 and made several changes to the proposed rule to minimize potential costs.. 11

d. The Commission considered Rule 14a-11's possible effect on efficiency, competition, and capital formation.. 19

e. The Commission considered the alternative of excluding investment companies from the scope of Rule 14a-11.. 21

Standard of Review. 21

Summary of Argument. 22

Argument. 25

I. The Commission's Policy Judgment Not to Allow Boards or Shareholders to Deprive Other Shareholders of the Proxy Access Provided by Rule 14a-11 Was Reasonable.. 25

A. The Commission made a reasonable policy choice not to rely exclusively on private ordering.. 25

B. The Commission, in adopting a federal proxy access rule, gave appropriate consideration to state law.. 31

TABLE OF CONTENTS (CONTINUED)

Page

II. The Commission Satisfied Its Obligation to Consider the Potential Economic Consequences of Rule 14a-11 by Making Reasonable Predictive Judgments Based on Available Evidence and Concluding That, on Balance, the Rule's Benefits Justify Its Costs.. 34

A. Petitioners misconstrue this Court's precedent.. 34

B. The Commission appropriately made predictive judgments in its economic analysis. 36

C. The Commission adequately addressed the potential for "management distraction and discord on the board" and the potential costs of management opposition to shareholder nominees.. 37

D. The Commission reasonably estimated the frequency with which Rule 14a-11 would be used. 42

E. The Commission considered whether shareholders might use Rule 14a-11 to promote narrow interests at the expense of other shareholders.. 47

III. The Commission Reasonably Decided Not To Exclude Investment Companies from Rule 14a-11.. 50

A. The Commission reasonably concluded that the protections afforded by the Investment Company Act do not obviate the need for Rule 14a-11.. 51

B. The Commission thoroughly weighed the distinct costs and benefits of applying Rule 14a-11 to investment companies as well as the rule's effect on competition, efficiency, and capital formation for investment companies.. 53

TABLE OF CONTENTS (CONTINUED)

Page

C. The application of Rule 14a-11 to investment companies does not represent a change in policy from the Commission's approval of an amendment to NYSE Rule 452.. 58

IV. Rule 14a-11 Does Not Violate the First Amendment.. 60

A. Because Rule 14a-11 regulates internal communications, it does not infringe on companies' First Amendment rights.. 60

B. In any event, the strict scrutiny standard does not apply to disclosures under the securities laws, and Rule 14a-11 withstands scrutiny under any lower standard.. 64

1. Strict scrutiny does not apply.. 64

2. Rule 14a-11 withstands scrutiny under any commercial speech standard.. 66

Conclusion.. 68

Certificate of Compliance

Certificate of Service

TABLE OF AUTHORITIES

Cases **Page**

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996). 64, 65

Allied-Signal, Inc. v. NRC,
988 F.2d 146 (D.C. Cir. 1993). 68

American Equity v. SEC,
613 F.3d 166 (D.C. Cir. 2010). 34, 35, 53

AT&T Corp. v. FCC,
236 F.3d 729 (D.C. Cir. 2001). 21

Black & Decker Disability Plan v. Nord,
538 U.S. 822 (2003). 28

Business Roundtable v. SEC,
905 F.2d 406 (D.C. Cir. 1990). 25

* *Cablevision Sys. Corp. v. FCC*,
597 F.3d 1306 (D.C. Cir. 2010). 28, 36

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,
447 U.S. 557 (1980). 66

Chamber of Commerce v. SEC,
412 F.3d 133 (D.C. Cir. 2005) 34, 35, 42

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984). 22, 28

Citizens United v. FEC,
130 S.Ct. 876 (2010). 65

* Asterisks denote authorities principally relied upon.

TABLE OF AUTHORITIES (CONTINUED)

Cases (Continued) **Page**

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985). 64

Graham v. SEC,
222 F.3d 994 (D.C. Cir. 2000). 21

International Ladies' Garment Workers' Union v. Donovan,
722 F.2d 795 (D.C. Cir. 1983). 59

Inv. Co. Inst. v. Bd. of Governors, Fed. Reserve Sys.,
551 F.2d 1270 (D.C. Cir. 1977). 6

Jones v. Harris Assoc. L.P.,
130 S.Ct. 1418 (2010). 51

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995). 65

Milavetz, Gallop & Milavetz, P.A. v. United States,
130 S.Ct. 1324 (2010). 66

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983). 59

Nat'l Cable & Telecomm. Ass'n v. FCC,
567 F.3d 659 (D.C. Cir. 2009). 59

Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005). 28

New York State Rest. Ass'n v. New York City Bd. of Health,
556 F.3d 114 (2d Cir. 2009). 66

TABLE OF AUTHORITIES (CONTINUED)

Cases (Continued) **Page**

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978). 64

Overby v. Nat'l Assoc. of Letter Carriers,
595 F.3d 1290 (D.C. Cir. 2010). 62

* *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*,
475 U.S. 1 (1986). 61, 62, 63

Paris Adult Theatre I v. Slaton,
413 U.S. 49 (1973). 64

* *Rural Cellular Assoc. v. FCC*,
588 F.3d 1095 (D.C. Cir. 2009). 36

Schoenbohm v. FCC,
204 F.3d 243 (D.C. Cir. 2000). 21

SEC v. Wall Street Publishing Inst., Inc.,
851 F.2d 365 (D.C. Cir. 1988). 64, 65, 66

SpeechNow.org v. FEC,
599 F.3d 686 (D.C. Cir. 2010). 65

Time Warner Entertainment Co. v. FCC,
240 F.3d 1126 (D.C. Cir. 2001). 21

United States v. Mead Corp.,
533 U.S. 218 (2001). 22

United States v. Playboy Entm't Group, Inc.,
529 U.S. 803 (2000). 65

TABLE OF AUTHORITIES (CONTINUED)

Cases (Continued) **Page**

United States v. United Foods,
533 U.S. 405 (2001). 61

United States v. Wenger,
427 F.3d 840 (10th Cir. 2005). 64

Wooley v. Maynard,
430 U.S. 705 (1977). 61

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985). 66

Statutes

Administrative Procedure Act, Section 706, 5 U.S.C. 706.. . . . . 6, 21

* Dodd-Frank Wall Street Reform and Consumer Protection Act,
Section 971, Pub. L. 111-203, § 971, 124 Stat. 1376 (2010). 2, 8, 26, 27

Investment Company Act of 1940, 15 U.S.C. 80a-1, *et seq*.. . . . . 51, 52, 53

Paperwork Reduction Act, 44 U.S.C. 3501 *et seq*.. 43

Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq*.

Section 14(a), 15 U.S.C. 78n(a) 8
Section 25(a), 15 U.S.C. 78y(a) 6
Section 25(b), 15 U.S.C. 78y(b). 6

TABLE OF AUTHORITIES (CONTINUED)

Rules **Page**

Exchange Act Rule 14a-8, 17 C.F.R. § 240.14a-8. . . . . 27, 47, 61, 63, 67

NYSE Rule 452. . . . . 56, 58, 59

Miscellaneous

74 FR 33,293-01 (July 10, 2009) 56, 58

Brief of the Chamber of Commerce of the United States of America
as Amicus Curiae, *Bebchuk v. Electronic Arts Inc*.,
No. 08-5842 (2d Cir., filed April 22, 2009) pp. 18-19,
available at http://secure.uschamber.com/nclc/caselist/default 28

Lucian A. Bebchuk and Scott Hirst, *Private Ordering and the Proxy*
Access Debate, 65 Bus. Law. 329 (2010). 29

R. Franklin Balotti, Jesse A. Finkelstein and Gregory P. Williams; Daniel H.
Burch, *Meetings of Stockholders*, § 13.4 (2009). 11

GLOSSARY

Adopting Release	*Facilitating Shareholder Director Nominations*, 75 FR 56,668 (Sept. 16, 2010)
APA	Administrative Procedure Act
Br.	Opening Brief of Petitioners Business Roundtable and Chamber of Commerce of the United States of America
Commission, or SEC	Securities and Exchange Commission
CRI	Certified Index to Record
Dodd-Frank or Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010)
Exchange Act	Securities Exchange Act of 1934
FR	Federal Register
ICA	Investment Company Act of 1940
ICI/IDC Br.	Brief of Amici Curiae Investment Company Institute and Independent Directors Council in Support of Petitioners
NYSE	New York Stock Exchange
Proposing Release	*Facilitating Shareholder Director Nominations*, 74 FR 29,024 (June 18, 2009)

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.

On Review of an Order of the Securities and Exchange Commission

---

INITIAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT

PRELIMINARY STATEMENT

On June 10, 2009, the Securities and Exchange Commission proposed Exchange Act Rule 14a-11, which would require public companies under certain circumstances to include shareholders' nominees for a company's board of directors in the company's proxy solicitation materials. Petitioners and the interests they represent vigorously opposed proxy access, claiming that such a rule would represent an impermissible incursion by the SEC into state-law issues of corporate governance. Congress then enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act. Reflecting Congress's view that proxy access under federal law is desirable, but leaving the contours of any proxy access rule to the expert agency, the Act provides that the SEC may adopt a proxy access rule "under such terms and conditions as the Commission determines are in the interests of shareholders and for the protection of investors." In so doing, Congress removed any legal uncertainty about the Commission's authority to regulate the use of company proxies by shareholders to nominate director candidates.

In adopting Rule 14a-11, the SEC recognized that state laws create shareholders' rights to nominate and elect directors at an in-person shareholder meeting. While leaving the nature and scope of these rights to state law, the Commission, through Rule 14a-11, acted to benefit shareholders and protect investors by ensuring that proxies are used in a way that furthers, rather than frustrates, the rights to nominate and elect directors. The Commission stated that the rule would facilitate these rights because most shareholders vote by means of a proxy submitted prior to the meeting. Although petitioners strenuously urge (Br. 46-51) that exclusive reliance on "private ordering" would have been preferable to a rule establishing a minimum standard for proxy access under federal law, the Commission rationally rejected this alternative, and petitioners' policy disagreement does not provide any basis for setting aside Rule 14a-11.

Petitioners also claim (Br. 51) that Rule 14a-11 is based on "sheer guesswork" and is "the product of an agency that does not know what it has wrought." But the specific charges they lodge in support of this overheated rhetoric fail to account for the Commission's detailed and comprehensive analysis in support of its conclusion that the collective benefits of Rule 14a-11 justify its costs.

COUNTERSTATEMENT OF ISSUES

1. The Commission adopted Rule 14a-11, which requires companies to include the director nominees of significant, long-term shareholders in the company's proxy materials, to facilitate shareholders' exercise of their state-law rights to nominate and elect directors, thereby enabling the federal proxy process to more closely approximate the shareholders' meeting. The Commission concluded that adopting an alternative mechanism that would allow a group of shareholders (even a majority) to deprive other shareholders of the minimum level of access provided by the rule would not accomplish its objective. Was this judgment reasonable?

2. The Rule 14a-11 Adopting Release comprehensively addressed potential costs and benefits of the rule and its likely effect on efficiency, competition, and capital formation. The Commission made predictive judgments about Rule 14a-11's economic consequences based on the available evidence and its expertise, and concluded that, on balance, it was in the interests of shareholders and for the protection of investors to adopt the rule. Did this satisfy the Commission's obligation to consider the potential economic effects of its rules?

3. The Commission decided that investment companies should not be excluded from the coverage of Rule 14a-11. The shareholders of those companies have the right under state law to nominate candidates for the board of directors. Based on the available evidence and its expert judgment, the Commission concluded that neither the potential costs to investment companies nor the separate regulatory regime to which investment companies are subject obviate the need for Rule 14a-11 or justify depriving investment company shareholders of its potential benefits. Was this reasonable?

4. Is Rule 14a-11 consistent with the First Amendment: (a) because it relates exclusively to internal communications and does not require a company to publicly disseminate a third party's message; and (b) alternatively, because it is narrowly tailored to advance the Commission's substantial interest in assuring that

the federally regulated proxy process approximates the in-person shareholders' meeting by facilitating shareholders' exercise of their state-law rights to nominate and elect directors?

STATUTES AND REGULATIONS

The pertinent statutes and regulations are contained in the Addendum to petitioners' brief.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

The Commission amended its proxy rules to facilitate the effective exercise of shareholders' state-law rights to nominate and elect directors to company boards of directors. The amendments enable the federally regulated proxy process to more closely approximate the conditions of the shareholders' meeting. *See Facilitating Shareholder Director Nominations*, Final Rule, 75 FR 56,668, 56,670 (Sept. 16, 2010). Rule 14a-11, the rule being challenged here, requires a company, under certain circumstances, to include in its proxy materials information about and the ability to vote for shareholders' nominees for director. On September 29, 2010, petitioners filed a petition for review in this Court [1/] and requested a stay from the Commission. On October 4, 2010, the Commission granted a stay. *In re Motion of Business Roundtable and the Chamber of Commerce of the United States of America, Order Granting Stay*, available at http://www.sec.gov/rules/other/2010/33-9149.pdf.

B. The Rulemaking Proceeding

1. The Commission proposed changes to the federal proxy rules.

The Commission proposed the rules under review here on June 10, 2009. *See Facilitating Shareholder Director Nominations*, 74 FR 29,024 (June 18, 2009). The initial comment period, which closed on August 17, 2009, was re-opened for thirty days to provide interested persons the opportunity to comment on additional data and related analyses included in the public comment file at or following the close of the original comment period. 74 FR 67,144-01 (Dec. 18, 2009).

[1/] Petitioners' statement of jurisdiction (Br. 1) is not correct. This Court has jurisdiction under Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a), not Section 25(b) (*see Inv. Co. Inst. v. Bd. of Governors, Fed. Reserve Sys.*, 551 F.2d 1270, 1278 (D.C. Cir. 1977)). In addition Section 706 of the APA, 5 U.S.C. 706, addresses scope of review, not jurisdiction.

The Commission received approximately 600 comment letters. 75 FR 56,669 n.23. The comments were sharply divided. 75 FR 56,670. Supporters generally believed that, if adopted, the amendments would facilitate shareholders' ability to exercise their state-law rights to nominate and elect directors and provide meaningful opportunities to effect changes in the composition of the board. *Id.* These commenters predicted that the amendments would lead to more accountable, responsive, and effective boards. *Id.* Many commenters saw a link between the recent economic crisis and shareholders' inability to have their nominees included in a company's proxy materials. *Id.*

Commenters opposed to the proposed amendments believed that recent corporate governance developments, including increased use of a majority voting standard for the election of directors and certain state-law changes, already provide shareholders with meaningful opportunities to participate in director elections. *Id.* These commenters viewed the amendments as inappropriately intruding into matters traditionally governed by state law or imposing an inappropriate "one size fits all" rule for all companies. They also expressed concerns about "special interest" directors forcing companies to focus on the short term rather than the creation of long-term shareholder value and other perceived negative effects the amendments could have on boards and companies. 75 FR 56,670-71.

A principal argument raised by several opponents of the proposed amendments, including petitioners, was that Exchange Act Section 14(a) did not give the Commission authority to adopt rules requiring companies to include shareholder director nominees in the company's proxy materials. 75 FR 56,674 n.55. While the Commission was considering the proposed amendments, Congress passed Section 971 of the Dodd-Frank Act (Pub. L. 111-203 § 971, 124 Stat. 1376 (2010)), which expressly confirms the Commission's authority to adopt such rules. 75 FR 56,674.

2. The Commission determined that it was in the interests of shareholders and for the protection of investors to adopt Rule 14a-11.

a. The Commission stated that it was adopting Rule 14a-11 to make the proxy process function more like an in-person meeting of shareholders by facilitating shareholders' ability to exercise their state-law rights to nominate and elect directors at shareholders' meetings.

As the Commission explained in adopting Rule 14a-11, a key tenet of federal proxy regulation is making the proxy process function, as nearly as possible, as a replacement for the in-person shareholders' meeting at which shareholders exercise their rights as owners of the company. 75 FR 56,670. Because most, if not all, shareholders vote by returning their proxy card in advance of the meeting, rather than by attending the meeting, they rely on the proxy process as their principal means of participating meaningfully at a meeting. 75 FR 56,670. Prior to Rule 14a-11, shareholders faced obstacles in using that process effectively to nominate and elect candidates to the board of directors, and the proxy process therefore had the practical effect of frustrating shareholders' state-law rights to do so.

The Commission concluded that ameliorating this problem would benefit shareholders and further its purpose "to regulate the proxy process in the public interest and on behalf of investors" (75 FR 56,671), and tailored Rule 14a-11 to make the proxy process more closely approximate the shareholders' meeting. 75 FR 56,670. If applicable state law or a company's governing documents "prohibit * * * shareholders from nominating a candidate or candidates for election as director" at the meeting, the rule does not apply. 75 FR 56,782 (Rule 14a-11(a)(2)). In response to commenters' concerns, the Commission also made several modifications to the proposed rule, including limiting use of Rule 14a-11 to significant long-term shareholders or groups of shareholders—those who have continuously owned at least three percent of the voting power of the company's securities for at least three years. 75 FR 56,674-75; 56,688-93; 56,697-99.

b. The Commission considered and explained why it rejected the policy argument that shareholder access to the company proxy should be determined exclusively through "private ordering."

In adopting the rule, the Commission addressed commenters' arguments that, as a policy matter, it should allow a company's board of directors, or a majority of shareholders, to opt into, or out of, Rule 14a-11's requirements. As discussed in more detail *infra* pp.25-26, the Commission concluded that exclusive reliance on such "private ordering" "would not be as effective and efficient in facilitating the exercise" of the rights to nominate and elect. 75 FR 56,759. A shareholder's ability to access the proxy should not be determined by private ordering because it would not be appropriate to permit a company's board or a majority of shareholders to deprive other shareholders of an effective means to freely exercise their franchise rights as owners of public companies. 75 FR 56,680. The Commission further reasoned that companies and their shareholders do not have the option to opt out of other federal proxy rules. *Id*.

c. The Commission considered the potential benefits and costs of Rule 14a-11 and made several changes to the proposed rule to minimize potential costs.

The Commission determined that, by enabling nominating shareholders to include their director nominees in a company's proxy materials instead of engaging in a traditional proxy contest,[2/] Rule 14a-11 may provide shareholders direct cost savings in the form of reduced expenditures for advertising and promoting their director nominees as well as reduced printing and postage costs. 75 FR 56,756.

In addition, nominating shareholders may see certain intangible benefits. First, the cost savings resulting from Rule 14a-11 could mitigate "collective action" and "free-rider" problems, which can discourage an individual shareholder from exercising its state-law right to nominate and elect its own director candidates, despite the prospect of a greater aggregate benefit for all shareholders, because it alone would have to bear the costs of a traditional proxy contest. 75 FR 56,755-56. Second, Rule 14a-11 could address a problem encountered in a traditional proxy contest, in which shareholders may not evaluate a shareholder

---

[2/] In a traditional proxy contest, both the company and the opposition mail separate proxy statements and different color cards to stockholders with only their own slate of directors on their card and in their materials. R. Franklin Balotti, Jesse A. Finkelstein and Gregory P. Williams; Daniel H. Burch, *Meetings of Stockholders*, § 13.4 (2009).

nominee in the same manner as management nominees due to a different, and perhaps negative, reaction to the presentation of a shareholder nominee in a separate, unfamiliar set of proxy materials. 75 FR 56,758. Third, shareholders relying on Rule 14a-11 may see less need for additional soliciting efforts—such as the hiring of a proxy solicitor, public relations advisers, or advertising—if their nominees are presented alongside management nominees in a set of proxy materials with which shareholders are familiar. *Id*. Finally, including management and shareholder nominees in one set of proxy materials may simplify shareholders' decision-making and reduce confusion, potentially resulting in greater shareholder participation in corporate governance. *Id*.

In addition, the Commission concluded that establishing a minimum federal procedure has greater potential benefits and fewer potential costs than exclusive reliance on private ordering. 75 FR 56,759. The Commission observed that commenters had identified procedural and legal difficulties with relying exclusively on private ordering, and, as discussed in more detail *infra*, pp.25-26, the Commission considered and rejected both an "opt-in" and an "opt-out" approach. *Id.*

The Commission further reasoned that because state law provides shareholders with the right to nominate and elect directors to ensure that boards remain accountable to shareholders and to mitigate agency problems associated with the separation of ownership from control, facilitating shareholders' exercise of these rights could improve board accountability and efficiency and increase shareholder value. 75 FR 56,760. The Commission considered studies showing both improved corporate governance and shareholder value from analogous measures making incumbent directors more vulnerable to replacement by shareholder action, and economically significant reductions in company performance from anti-takeover provisions protecting incumbent management. *Id.* at n.911. Finally, the Commission considered studies and empirical evidence showing that closely analogous "hybrid boards" (*i.e.*, boards composed of a majority of incumbent directors and a minority of dissident directors) produce positive changes in corporate governance and strategy and result in increased shareholder value. 75 FR 56,762.

As discussed in detail below, the Commission also considered the contrary possibility that Rule 14a-11 could adversely affect company and board performance, including considering various studies with conclusions that would argue against the adoption of Rule 14a-11. 75 FR 56,762-63. The Commission also considered whether the rule could result in costs from disclosures, printing and mailing, and additional solicitations, as well as other potential costs that petitioners do not discuss. *See* 75 FR 56,764-71.

1. With regard to company and board performance, the Commission considered comments asserting that Rule 14a-11 may (a) result in board distraction; (b) cause disruptions in boardroom deliberations; and (c) increase costs for investment company complexes that utilize unitary or cluster boards.

In response to commenters' concerns about board distraction, the Commission adopted ownership threshold and holding period requirements that limit the use of Rule 14a-11 to shareholders who have demonstrated a significant, long-term economic commitment to the company. The Commission observed that those requirements would likely result in fewer Rule 14a-11 contests and reduce the likelihood that shareholders would use the rule as leverage to obtain short-term gains (inconsistent with long-term shareholder value) from companies trying to avoid distracting contests. 75 FR 56,765.

The Commission also made revisions to the proposed rule to "encourage constructive dialogue between a company and a nominating shareholder or group regarding * * * director nominees," which could lead to the company's including the shareholder nominee as a company nominee and thereby avoiding potential costs from an election contest. 75 FR 56,765. In addition, the Commission explained that the potential costs to company and board performance from election contests may be offset because the "additional communication between a board and the company's shareholders may lead to enhanced transparency into the board's decision-making process, more effective monitoring of this process by shareholders, and, ultimately, a better decision-making process by the board." 75 FR 56,765. Further, shareholders may "understand that the board's time and other resources are in scarce supply and will take these considerations into account in deciding to nominate directors * * * ." 75 FR 56,765.

The Commission nonetheless observed that "by making it easier for large shareholders in public firms to threaten directors, a more effective shareholder franchise might increase the risk of intershareholder 'rent-seeking' in public companies." 75 FR 56,766 n.968 (quotation omitted). In addition, the Commission stated that "it may be possible for an investor to submit director nominees through the new rules with the intention of having the nominees, if elected, advocate for board decisions that maximize the investor's private gains but at the expense of other shareholders." 75 FR 56,766. The Commission also recognized that "boardroom disruption may occur when one or more directors seek to promote an agenda that conflicts with that of the rest of the board" and that such disruption "could constitute an indirect economic cost to shareholder value." 75 FR 56,766.

The Commission reasoned that these potential costs may be mitigated because use of the rule is limited to shareholders with a significant, long-term commitment to the company, who are therefore less likely to take actions detrimental to shareholder value; disclosures may alert shareholders to narrow interests; a director cannot be elected without the support of a significant number of shareholders; and any elected director owes fiduciary duties to the shareholders. 75 FR 56,766.

While recognizing that the empirical evidence regarding board and company performance may be mixed, the Commission concluded that:

> the totality of the evidence and economic theory supports the view that [Rule 14a-11] has the potential of creating the benefit of improved board performance and enhanced shareholder value—both in companies with the actual election of shareholder-nominated directors and in companies that react to shareholders' concerns because of the possibility of such directors being elected.

75 FR 56,761.

The Commission also addressed commenters' concerns that, because investment companies often use "unitary" or "cluster" boards,[3] the election of a shareholder nominee to the board of one fund within a complex, but not others, could increase costs. *See* 75 FR 56,767. The Commission noted that such costs would occur only if the shareholders elect the nominee, that the companies could discuss these potential costs in their proxy materials, and that companies can take steps to minimize the costs should a shareholder nominee be elected. *Id*. The Commission also noted a commenter's argument that "competition in the board nomination process may improve efficiency by providing additional leverage for boards in negotiations with the [funds'] investment adviser." *Id.* Ultimately, the Commission concluded that investment company shareholders should have the opportunity to exercise their traditional state-law rights to elect a non-unitary or non-cluster board. *Id*.

2. The Commission also considered potential costs related to disclosures, printing and mailing, and additional solicitations. 75 FR 56,768-70. The Commission noted that although Rule 14a-11 does not require companies to solicit against the election of a shareholder director nominee (75 FR 56,770 &

[3] On unitary boards, one group of individuals serves on the board of every fund in the complex; on cluster boards, two or more groups of individuals oversee different sets of funds in the complex. 75 FR 56,767.

n.1008), the boards of some companies likely would oppose the election of a shareholder director and may be motivated to expend significant resources doing so. 75 FR 56,770. The Commission also considered comments urging that directors' fiduciary duties may compel them to expend company resources to oppose a shareholder director nominee. 75 FR 56,770 & n.1010. The Commission recognized that any large expenditures that companies may incur would represent an indirect cost to all shareholders. 75 FR 56,770.

The Commission reasoned, however, that these costs may be limited to the extent that: (1) directors' fiduciary duties prevent them from using corporate funds to resist shareholder director nominations for no good-faith corporate purpose; (2) directors determine not to expend such resources and include the shareholder nominee in the company's proxy materials; and (3) the ownership and holding period requirements limit the number of nominations that a board may receive, consider, and possibly contest. 75 FR 56,770.

While recognizing both the inherent uncertainties in its analysis and the difficulty of quantifying certain of the rule's benefits, the Commission ultimately concluded that the collective benefits of facilitating shareholders' rights to nominate and elect directors justified these potential costs. 75 FR 56,755.

d. The Commission considered Rule 14a-11's possible effect on efficiency, competition, and capital formation.

The Commission also considered Rule 14a-11's effects on efficiency, competition, and capital formation. 75 FR 56,771-76. The Commission predicted that Rule 14a-11 would promote efficiency by, for example, reducing the costs of administering informed shareholder voting and effective communication among shareholders and directors. In addition, to the extent that the rule improves board and company performance, it would "promote efficiency of the economy on the whole." 75 FR 56,771-72. The Commission also considered potential negative effects of Rule 14a-11 on the efficiency of U.S. public companies and concluded that the rule would promote efficiency overall. 75 FR 56,772-73.

Addressing competition, the Commission stated that the potential for improved board accountability and corporate governance may ultimately increase shareholder value, generate stronger company performance, and increase competition. 75 FR 56,773. The Commission also observed that shareholder-nominated directors may exercise more independent judgment and have less bias than incumbent directors with regard to transactions that may be contrary to director interests but beneficial for shareholders. The presence of these directors may also increase competition in the market for corporate control. 75 FR 56,774.

Regarding capital formation, the Commission stated that a more competitive election process may result in increased overall board quality, and that potential investors may be more willing to invest in a company if they have greater confidence in the abilities of the board and a meaningful way to nominate directors for election. 75 FR 56,774. In addition, the Commission reasoned that investors may be attracted to the potential for increased shareholder value from a greater ability to replace directors and the enhancement of shareholders' rights. 75 FR 56,774. Further, the Commission observed that by increasing accountability to shareholders, the rule may contribute to restoring investor confidence in the U.S. markets. 75 FR 56,774.

Lastly, the Commission discussed numerous alternatives to Rule 14a-11 and concluded that they may not be as efficient or effective. 75 FR 56,774. The Commission considered: recent amendments to state corporation laws enabling companies to adopt proxy access through private ordering and to adopt proxy reimbursement provisions; the trend towards majority voting standards; the growing effectiveness of "withhold" or "vote no" campaigns in director elections; the effect of the Commission's adoption of its notice and access model for electronic delivery of proxy material; and existing means of "management discipline." 75 FR 56,776.

e. The Commission considered the alternative of excluding investment companies from the scope of Rule 14a-11.

In addition to discussing investment companies in its cost-benefit analysis and its consideration of the effect of Rule 14a-11 on efficiency, competition, and capital formation, the Commission separately considered additional aspects of its policy choice not to exclude investment companies. 75 FR 56,683-85. The Commission's rationale is discussed *infra*, pp.50-52.

STANDARD OF REVIEW

Under Section 706 of the Administrative Procedure Act, 5 U.S.C. 706, this Court considers whether an order of the Commission is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See, e.g., AT&T Corp. v. FCC*, 236 F.3d 729, 734-735 (D.C. Cir. 2001). The Commission's findings of fact are conclusive if supported by substantial evidence. *See, e.g., Graham v. SEC*, 222 F.3d 994, 999-1000 (D.C. Cir. 2000); *Schoenbohm v. FCC*, 204 F.3d 243, 246 (D.C. Cir. 2000). *See also Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) ("Substantial evidence does not require a complete factual record—we must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency."). The Commission's conclusions of law with respect to the statutes it administers are "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

SUMMARY OF ARGUMENT

1. Rule 14a-11 requires companies, under certain circumstances, to include shareholder nominations for director in the company's proxy materials. The Commission adopted this rule to ensure that, to the extent practicable, shareholders can use the federal proxy process to meaningfully exercise the rights they have under state law to nominate and elect directors at an in-person shareholders' meeting. There is nothing inconsistent or arbitrary about the Commission's decision to allow shareholders to submit proposals to expand the proxy access provided by the rule but to preclude companies and shareholders from opting out of Rule 14a-11 in favor of a more restrictive access regime. Allowing shareholders to expand the proxy access provided by Rule 14a-11 furthers the purpose of that rule: advancing the federal interest in shareholders' being able to exercise their ownership rights through the proxy process as effectively as they might have by attending a shareholder meeting. Allowing

companies or shareholders to diminish the minimum level of access provided by the rule, in contrast, undermines the rule's purpose.

2. The Commission carefully considered the likely economic effects of Rule 14a-11 and reasonably concluded that the rule's potential benefits— including improved board performance and enhanced shareholder value—justify its potential costs. By thoroughly analyzing the record evidence and making informed predictive judgments where appropriate, the Commission fully complied with its obligations under statute and this Court's precedent to apprise itself of the potential economic consequences of its rules. The Commission did not evade its responsibility to assess the rule's potential costs by ignoring them or "blaming" such costs on state law. Rather, the Commission correctly recognized that the potential for some costs identified by petitioners and other commenters would exist whenever a shareholder nominee is nominated or elected—irrespective of Rule 14a-11—and then went on to thoroughly consider *all* of those potential costs. In particular, the Commission carefully considered (although not using the precise language petitioners prefer) the concern that government and union pension funds may use Rule 14a-11 as leverage to obtain concessions from companies unrelated to shareholder value, and concluded that

the potential benefits from increased responsiveness of boards to shareholders justified these potential costs.

3. Investment companies are generally subject to the federal proxy rules and were properly included in Rule 14a-11. The Commission carefully considered differences in the regulation and governance structure of investment companies and reasonably concluded that these differences did not justify depriving investment-company shareholders of the proxy access rights provided by the rule.

4. Rule 14a-11 does not violate the First Amendment because the rule governs only internal communications—neither requiring companies to disseminate or subsidize the speech of third parties nor speak to the public at large. In any event, strict scrutiny does not apply to disclosures under the securities laws, and Rule 14a-11 withstands scrutiny under any lower standard.

ARGUMENT

I. The Commission's Policy Judgment Not to Allow Boards or Shareholders to Deprive Other Shareholders of the Proxy Access Provided by Rule 14a-11 Was Reasonable.

A. The Commission made a reasonable policy choice not to rely exclusively on private ordering.

Rule 14a-11 improves the ability of shareholders to use the federally regulated proxy process to exercise their state-law rights to nominate and elect directors. Petitioners argue (Br. 46) that it was "arbitrary" for the Commission to adopt Rule 14a-11 without giving shareholders "the authority to institute alternative, more demanding requirements for proxy access, or to bar it altogether." The Adopting Release, however, contains a thorough analysis of this issue (*see* 75 FR 56,679-80; 56,758-60) and the Commission's determination not to adopt petitioners' preferred policy was reasonable.

Allowing companies to opt out of the rule would undermine a fundamental rationale of the proxy rules in general and Rule 14a–11 in particular—improving the degree to which the proxy process allows shareholders "'to control the corporation as effectively as they might have by attending a shareholder meeting.'" 75 FR 56,680, quoting *Bus. Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990). Moreover, "allowing a company or a majority of its shareholders to opt out of the rule would diminish the ability of shareholders to vote for nominees put forth by other shareholders." 75 FR 56,680. In addition, companies and their shareholders do not have the option to elect to opt out of other federal proxy rules. *Id.*

The Commission also considered, and rationally rejected, the alternative of requiring proxy access only if shareholders "opt in," pointing to "procedural and legal difficulties" (75 FR 56,759) that "would frustrate the benefits that our new rule seeks to promote" (75 FR 56,679). In sum, the Commission concluded that "exclusive reliance on private ordering under state law would not be as effective and efficient in facilitating the exercise" of shareholders' rights to nominate and elect directors. 75 FR 56,759.

Petitioners' attacks (Br. 46-51) on this policy judgment miss the mark.

1. Petitioners recognize (Br. 49-50) that Dodd-Frank "gave the Commission authority to adopt a proxy access rule," but argue that the statute merely "permitted a limited foray in an area of law traditionally left to the States," and therefore "the Commission should have given weight to States' approach toward the rights the Commission claimed to be vindicating." But nothing in the language of Dodd-Frank, which explicitly confirmed that proxy access rules are an appropriate subject for federal regulation, indicates that this amendment

represented a "limited foray" into an area of law traditionally left to the states or that a proxy rule must defer to state law. *See* Pub. L. No. 111-203, § 971 (2010).

Nor is the rule's establishment of a mandatory but non-exclusive proxy access process an arbitrary use of the Commission's authority. Rule 14a-11 falls squarely within the traditional realm of federal proxy regulation: enabling proxy voters to exercise their ownership rights through the proxy process as effectively as they might have by attending a shareholder meeting. *See* 75 FR 56,680. In light of this federal interest, the Commission reasonably determined that it need not take the same approach as state law.

At bottom, petitioners' argument amounts to a disagreement with the Commission's policy choice not to rely exclusively on private ordering, and this disagreement provides no basis to overturn the rule. Indeed, as one of the petitioners argued in a recently filed amicus brief in a case regarding Rule 14a-8 (17 C.F.R. § 240.14a-8), such policy disputes should be resolved by Congress and the SEC:

> Professor Bebchuk may have lively policy disagreements with the SEC about the optimal structure of Rule 14a-8 * * *. Such disagreements are properly resolved by the elected branches and their subordinate agencies, not the courts: "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial

> ones." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984). When a court examines a "comprehensive regulatory program"—such as the proxy rules at issue here—the case against "judicial innovation" is particularly strong. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831-32 (2003).

Brief of the Chamber of Commerce of the United States of America as Amicus Curiae, *Bebchuk v. Electronic Arts Inc*., No. 08-5842 (2d Cir., filed April 22, 2009) pp. 18-19, available at http://secure.uschamber.com/nclc/caselist/default.

2. Petitioners also contend (Br. 47) that allowing shareholders to opt out would have been "the rational approach" given the Commission's "admissions that the Rules could impair corporate performance." Far from an admission, however, the Commission's consideration of this alternative possible outcome was a proper recognition of the necessarily predictive nature of its judgment that the rule had the potential to improve board and company performance. Even assuming petitioners' contrary preference is also rational, the Commission permissibly made a different choice. *See*, *e.g.*, *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1311 (D.C. Cir. 2010) ("[W]e will not substitute our judgment for the agency's, especially when, as here, the decision under review requires expert policy

judgment of a technical, complex, and dynamic subject," citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 1002-03 (2005)). [4/]

Moreover, the Commission fully considered the costs and benefits of allowing shareholders to opt out (*See* 75 FR 56,758-60), including a number of difficulties that shareholders would face in opposing an opt out, such as "management's ability to draw on the company's resources to promote the adoption of [an opt-out] proposal." 75 FR 56,760. Even under a rule that allowed an opt out only if shareholders approved, "the effort to procure such approval could be supported by management and funded by company assets" while opposing views may not be. 75 FR 56,760. The Commission thus rationally determined to reject an opt out.

Petitioners nonetheless contend (Br. 49) that the Commission did not justify establishing a "one-way ratchet" that allows shareholders to submit

---

[4/] Petitioners assert (Br. 46 n.10) that "leading academic proponents of access supported allowing shareholders to opt out." Petitioners omit that the article they cite states that "prohibiting opting out that would weaken shareholder rights *would not be unreasonable*." Lucian A. Bebchuk and Scott Hirst, *Private Ordering and the Proxy Access Debate,* 65 Bus. Law. 329, 352 (2010) (emphasis added). The article also points out that "[a]lthough the [Rule 14a-11] Proposal Opponents now argue strongly that shareholders should be allowed to opt out of *any* access regime, in 2007 many of them—including the Business Roundtable [and] the U.S. Chamber of Commerce" strongly opposed allowing shareholders to opt out of a no-access rule. *Id*. at 353.

proposals to expand proxy access but not to opt out of proxy access. But this is entirely consistent with Rule 14a-11's goal of making a shareholder's rights under the proxy process more like those it has at an in-person shareholders' meeting. Allowing companies and shareholders to expand the minimum access to the company's proxy materials provided by the rule furthers that goal; allowing them to diminish the minimum access provided by the rule, in contrast, does not. Numerous federal securities laws require specific disclosures, for example, but leave an issuer free to make additional disclosures. Rule 14a-11 similarly sets a fixed minimum level of proxy access that issuers and shareholders may not eliminate or reduce, but permits issuers and shareholders to expand that level of proxy access by private choice. 75 FR 56,678 (citing examples).

3. Petitioners argue (Br. 47) that not allowing shareholders to opt out is arbitrary in light of the "numerous places in the Adopting Release where the Commission relied on the wisdom of shareholders to contend that the Rules would not impose undue costs." As the Commission stated, however, "[t]his is not an issue of shareholder competence. It is, instead, a recognition that permitting a company or a group of shareholders to prevent shareholders from effectively participating in governing the corporation through participation in the proxy

process is fundamentally inconsistent with the goal of Federal proxy regulation." 75 FR 56,680 n.96.

4. Finally, petitioners assert (Br. 47 and n.11) that allowing an opt out would have "reduced or eliminated" "First Amendment problems," and assert that the Commission should have considered "whether the Rules should be narrowed to avoid constitutional concerns." As discussed *infra* pp.60-67, however, the Commission correctly determined (75 FR 56,674) that there was no constitutional problem to be avoided.

B. The Commission, in adopting a federal proxy access rule, gave appropriate consideration to state law.

Petitioners erroneously contend that the Commission acted arbitrarily because "[w]hile claiming to effectuate state law rights for director elections, the Rules effectively nullify them, establishing a federal proxy access regime by fiat * * *." Br. 51. The rationale underlying Rule 14a-11, however, is to more closely approximate the shareholders' meeting by facilitating the specific state-law rights to nominate and elect directors. *See* 75 FR 56,673-74. Those rights are indeed furthered through the rule and, rather than "nullify" state law, the rule defers to the state law that creates those rights. Thus, "a company to which the rule would otherwise apply will not be subject to Rule 14a-11 if applicable State law or the company's governing documents prohibit shareholders from nominating candidates for the board of directors." 75 FR 56,678.

Nor does the rule preclude the adoption of access bylaws under state-law provisions dealing with proxy access, such as Delaware's newly revised corporation law. As the Commission explained, if a company adopts a more stringent access provision (for example, with a ten percent ownership threshold) under that law, shareholders who do not satisfy the company's access provision but do meet the requirements of Rule 14a-11 would be able to submit their nominees for inclusion in the company proxy materials pursuant to Rule 14a-11. 75 FR 56,678. But if a company adopts bylaws providing an access procedure with conditions more permissive in some respects and more stringent in others (for example, requiring a ten percent ownership threshold but allowing a change of control intent), a nominating shareholder or group could choose which procedure to proceed under and must satisfy the requirements of whichever procedure it selects. *Id*. The only constraint on the adoption of such bylaws is that they cannot prevent Rule 14a-11 from applying by its own terms.

Petitioners also err in arguing that the Commission's "disregard for state law" is "reflected in the fact that the Rules require companies to place access nominees on the ballot who fail to satisfy the company's reasonable director qualification standard * * *." Br. 52. Far from disregarding state law, the Commission pointed out that "[u]nder State law, shareholders generally are free to nominate and elect any person to the board of directors, regardless of whether the candidate satisfies a company's qualification requirement at the time of nomination and election." 75 FR 56,704. If a candidate who does not meet a company's director qualifications is elected, state law would determine whether the candidate is seated. In addition, a nominating shareholder or group is required by Rule 14a-11 to provide additional disclosure regarding whether the nominee "meets the company's director qualifications, if any, as set forth in the company's governing documents." 75 FR 56,705. The company may also provide disclosure as to whether it believes that it would be precluded, consistent with state law, from seating a director who does not meet these qualifications. *Id*.

Finally, the State of Delaware filed an amicus brief disagreeing with the Commission's policy judgment in adopting Rule 14a-11. Delaware asserts (Br. 9) that the Commission "ignores" its choice "to create an enabling regime as to proxy access" that embodies Delaware's tradition of private ordering, and that Rule 14a-11 fails to facilitate traditional state-law rights because "it expressly grants a non-traditional, inflexible right contrary to the 'traditional' rights that Delaware's General Assembly and Governor have determined to grant." But rejecting a policy choice is not "ignoring" it: the Commission did consider Delaware's existing 2009 statutory amendment but rationally determined not to rely on private ordering as the exclusive means for establishing proxy access. On the other hand, the rule does facilitate the specific state-law right to nominate and elect directors traditionally provided under Delaware law. *See supra* pp.8-9.

II. The Commission Satisfied Its Obligation to Consider the Potential Economic Consequences of Rule 14a-11 by Making Reasonable Predictive Judgments Based on Available Evidence and Concluding That, on Balance, the Rule's Benefits Justify Its Costs.

As we explain in detail below, in adopting Rule 14a-11 the Commission engaged in a comprehensive economic analysis that fully satisfied its obligation to meaningfully consider the economic consequences of its rules. Petitioners' challenges to this economic analysis fail because they rest on an erroneous application of relevant precedent and mischaracterize the Adopting Release.

A. Petitioners misconstrue this Court's precedent.

Petitioners repeatedly invoke this Court's decisions in *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005) ("*Chamber I*"), and *American Equity v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), arguing that Rule 14a-11 should be set aside because it suffers from the same defects the Court identified in those cases. These arguments ignore both the actual holdings in those cases and what the Commission did in this rulemaking.

In *Chamber I*, this Court found the rules at issue defective because the Commission did not consider either the costs of two conditions established by the challenged rule or a potential alternative to one of the conditions that was raised by dissenting Commissioners. 412 F.3d at 143-45. Similarly, in *American Equity*, this Court held that the Commission erred in concluding that, in evaluating the economic consequences of the particular rule at issue, it was not required to consider at all the extent of competition, efficiency, and capital formation under the existing state-law regime. 613 F.3d 178-79. In contrast, as discussed more fully below, the Commission carefully considered the potential economic consequences of Rule 14a-11, alternatives to adopting the rule, and the extent of competition, efficiency, and capital formation under existing regulatory regimes. The Commission reasonably concluded, based on this analysis, that the potential benefits of Rule 14a-11 justified the potential costs. 75 FR 56,755; 56,761; 56,771.

B. The Commission appropriately made predictive judgments in its economic analysis.

Petitioners argue erroneously (Br. 21) that the Commission's economic analysis is generally defective because it discussed economic effects that the rule "may have" and countervailing factors that "may reduce" those effects "without resolving which outcome was more likely." Rather than a defect, however, the Commission's approach represents responsible decision-making.

Any assessment of the economic effects of Rule 14a-11, which creates for the first time a mechanism for shareholders to use company proxy materials to nominate director candidates, is necessarily predictive and hence uncertain. As this Court has explained, "predictive calculations are a murky science in the best of circumstances, and the [agency] naturally has no access to infallible data about [circumstances] that do not exist." *Cablevision Sys. Corp.*, 597 F.3d at 1314. In such a case, an agency must "rel[y] on its expertise to evaluate existing evidence" and make a judgment about how to proceed. *Rural Cellular Assoc. v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). In so doing, the Commission must only "acknowledge factual uncertainties and identify the considerations it found persuasive." *Id*. This is precisely what the Commission did in adopting Rule 14a-11: it reasonably assessed potential costs and benefits and, recognizing the uncertainties in its analysis, concluded that the collective benefits of adopting Rule 14a-11 justify the costs. 75 FR 56,755; 56,761; 56,771.

C. The Commission adequately addressed the potential for "management distraction and discord on the board" and the potential costs of management opposition to shareholder nominees.

There is no merit to petitioners' argument that the Commission attempted to "evade responsibility" for and "discount" the potential costs of reduced board effectiveness and additional solicitation costs by "repeatedly blaming state law for costs it was imposing." Br. 29, 32-34.

1. Petitioners distort the Commission's statement that the potential costs of management distraction and discord on the board are associated with the state-law rights to nominate and elect. This statement correctly recognizes that any potential for reduced board effectiveness would exist whenever a shareholder nominee (as opposed to a management nominee) is nominated and elected—whether through a traditional proxy contest or through a Rule 14a-11 nomination—and that can occur *only* if shareholders have the rights under state law to nominate and elect directors. Rule 14a-11 does not create those rights.

The Commission did not, however, use this observation to discount or evade responsibility for those potential costs; instead, it explicitly recognized that Rule

14a-11 "may result in potential adverse effects on the performance of a company and its board of directors." 75 FR 56,765. The Commission reasonably explained that such costs could be mitigated because "the ownership threshold and holding period that we adopted in response to commenters' concerns should limit the use of Rule 14a-11 to only holders who demonstrate a long-term, significant commitment to the company." *Id*. The Commission also explained that it made revisions to the proposed rule to "encourage constructive dialogue between a company and a nominating shareholder or group regarding * * * director nominees," which could lead to the company's including the shareholder nominee as a company nominee and thereby avoiding potential costs from an election.

In addition, the Commission reasoned that the potential costs may be offset because "additional communication between a board and the company's shareholders may lead to enhanced transparency into the board's decision-making process, more effective monitoring of this process by shareholders, and, ultimately, a better decision-making process by the board." 75 FR 56,765. Finally, the Commission stated that potential costs "may be offset to the extent that shareholders understand that the board's time and other resources are in scarce supply and will take these considerations into account in deciding to nominate directors, recognizing that the cost of a distracted board may not justify pursuing their own specific concerns." 75 FR 56,765.

2. The Commission did not advert to state law to "discount" or "evade responsibility for" the expenditures companies may make for additional solicitations in opposition to shareholder nominees. Br. 33-34. The Commission never referred to state law in discussing these potential costs. Although the Commission observed that such solicitation costs are "not * * * required under our rules," 75 FR 56,770, this is simply a correct observation that neither Rule 14a-11 nor any other rule *requires* a company to engage in additional soliciting activities.

More importantly, the Commission recognized that, "as a practical matter, it can reasonably be expected that the boards of some companies *likely would* oppose the election of shareholder director nominees." 75 FR 56,770 (emphasis added). Thus, the Commission expressly acknowledged that there could be additional solicitations costs to companies "*resulting from Rule 14a-11*." 75 FR 56,770 (emphasis added). Similarly, there is no merit to petitioners' assertion that the Commission "ignored the intensity with which access nominees would be opposed by issuers." Br. 43. The Commission acknowledged that "company boards may be motivated by the issues at stake to expend *significant resources* to challenge shareholder director nominees [or] elect their own nominees * * *." 75 FR 56,770 (emphasis added).

Petitioners challenge (Br. 43) the Commission's observation that "the costs for companies may be less to the extent that directors determine not to expend" resources to oppose a nominee. 75 FR 56,770. A decision not to actively oppose a nominee, however, does not mean that "issuers' opposition to access candidates was disingenuous and would dissipate once nominees were placed on the proxy." Br. 43. A board could reasonably make such a choice where, for example, it concludes that the nominee has little chance of winning or, though not management's first choice, is an unobjectionable alternative. In these circumstances, the board could conclude that there are better ways to spend the company's money than opposing the nominee, and that not opposing would be consistent with its fiduciary duties. 75 FR 56,770. Indeed, petitioner Chamber of Commerce recognized in its own comment letter for this rulemaking that the intensity with which a board will oppose the election of a shareholder nominee depends on the particular circumstances. CRI 245 at 6, JA __.

Petitioners' assertion that the Commission "dismissed without reason" the statement by an ABA committee and others "that boards would conclude that their fiduciary duty required them to actively support their nominees and oppose access nominees" (Br. 44) rests on an inaccurate paraphrasing of the ABA statement. *See* Br. 19-20. The committee's actual statement refers to "an *appropriate* effort to oppose the nominee which *may* include committing company resources and money to campaign against the candidate * * *." CRI 517 (ABA) at 35 (emphasis added), JA __.

Moreover, the Commission considered the views of commenters, including the ABA, who believed that "directors' fiduciary duties may compel them to expend company resources to oppose a shareholder director nominee." 75 FR 56,770. While recognizing that some companies likely would oppose a particular shareholder nominee and incur the consequent expenses (75 FR 56,770), the Commission reasoned that these costs "may be limited to the extent that the directors' fiduciary duties prevent them from using corporate funds to resist shareholder director nominations for no good-faith corporate purpose." 75 FR 56,770. The Commission then cited Delaware case law discussing the impropriety of expenditures made "'solely in the personal interests of the directors to maintain themselves in office.'" 75 FR 56,770 n.1007 (citation omitted).

Finally, petitioners err in faulting the Commission for "provid[ing] no estimate at all" of company solicitation costs. Br. 39. But the Commission did consider these costs. It solicited comment on this subject and cited and considered all the estimates that it received from commenters. Petitioner Chamber of Commerce pointed to costs of recent proxy contests ranging from $800,000 to $3,000,000 for smaller companies and $4,000,000 to $14,000,000 for large companies. 75 FR 56,770. Other commenters provided estimates of the costs of their own recent proxy contests that ranged from $330,000 to $11,000,000. *Id*. The Commission then explained why the solicitation costs for a company facing a shareholder director nomination submitted pursuant to Rule 14a-11 may prove less than these estimates. *Id*. This analysis satisfied the Commission's obligation to "do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation." *Chamber I*, 412 F.3d at 144.

D. The Commission reasonably estimated the frequency with which Rule 14a-11 would be used.

Petitioners' contention that the Commission acted arbitrarily and capriciously in estimating the frequency with which the proxy access rule would be used is also meritless, representing, at bottom, a disagreement with the Commission's predictive judgment on a subject the Commission recognized is inherently uncertain. 75 FR 56,742.

As an initial matter, petitioners omit that the frequency estimate in question was made for the purposes of the Paperwork Reduction Act, which requires the

Commission to estimate both the number of persons likely to be subject to any requirement to collect and report particular information under a new rule such as Rule 14a-11 and the total annual burden of collecting and reporting that information. *See* 44 U.S.C. 3501 *et seq*. This estimate does not have the "broad" (Br. 39) implications petitioners describe. The Commission's overall assessment of the economic effects of the rule was informed by, but not limited to, the prescribed methodology and results of the PRA and includes a more comprehensive analysis of the potential economic effects, which are inherently uncertain.

Moreover, the Commission's PRA estimate was reasonable. Petitioners' assertions that the Commission's frequency estimate was a "radical, unexplained departure from the Proposing Release * * *" (Br. 38; 29) and that "[n]owhere did the Commission explain why * * * election contests would be rarer" than traditional proxy contests (Br. 37) disregard the Adopting Release's detailed explanation of these very subjects.

The Commission cited its initial frequency estimate and then explained that it adjusted the estimate based on both more accurate indicators and the altered requirements of the rule as adopted. 75 FR 56,743-44. Most obviously, Rule 14a-11 as adopted requires that the nominating shareholders hold at least three percent of the company's voting power and that the amount of securities must have been held continuously for at least three years. 75 FR 56,743-44. The Commission discounted the number of contested elections and board-related shareholder proposals by approximately 75 percent to reflect these much more stringent eligibility requirements. 75 FR 56,744 & n.806.

This reduction is similar to the analysis estimating the number of eligible shareholders (which petitioners do not challenge), in which the Commission relied on empirical data to adjust its initial estimates, and determined that the number should be reduced by 62.5 percent just to account for the increase from the proposed one-year holding period to the three-year period adopted. *See* 75 FR 56,690 n.221.

Petitioners argue that the Commission's decision to use board-related shareholder proposals as an indicator of shareholder interest in using Rule 14a-11 was unreasonable because a broader category of all "governance shareholder proposals" is an "equally strong indicator of interest in putting forward access nominees." Br. 37 & n.6. But this ignores that Rule 14a-11 facilitates shareholders' rights to nominate and elect members of the board of directors. Unlike the broader group of proposals petitioners urge as a metric, the category of board-related proposals the Commission considered—including "proposals to have an independent chairman of the board, proposals to allow for cumulative voting and proposals to require a majority vote to elect directors"—relate directly to the composition of the board or the procedural rules by which that composition is determined and thus "provide useful information about the degree of interest in using Rule 14a-11." 75 FR 56,743 n.804. [5/]

Nor did the Commission opine that this was the *only* potentially useful information. *See* Br. 37. In any event, the information regarding board-related proposals, together with the other indicators considered by the Commission, such as the number of traditional proxy contests that occurred during the same period, sufficed for the Commission to make a reasonable estimate.

Petitioners next complain (*id*.) that the frequency estimate is arbitrarily low because the Commission "amended several existing rules to make it easier for shareholders to communicate and coordinate to form nominating groups," and "estimated that 75 percent of access nominees would be put forward by such groups * * *." Br. 37. But the Commission's discussion of its frequency estimate expressly accounts for both individual shareholders and shareholder groups. 75 FR 56,743; *id.* at 56,744; *see also* 75 FR 56,692. Moreover, the Commission's

---

[5/] Petitioners also erroneously contend that the RiskMetrics 2009 Proxy Season Scorecard relied on by the Commission is not in the rulemaking record. Br. 37, n.6. This data was cited in the proposing release (74 FR 29,064 n.303).

estimate that 75 percent of shareholder nominees will be put forward by groups rather than individual shareholders shows the Commission's recognition that it generally will be significantly easier for a group than for an individual shareholder to meet the eligibility criteria. 75 FR 56,744 nn.805, 807.

There is also no merit to petitioners' challenge to the Commission's assumption that "Rule 14a-11's ownership thresholds would mean that fewer shareholders can use proxy access than can mount traditional proxy contests." Br. 36. It was reasonable to predict that Rule 14a-11, which has not only significantly more stringent eligibility criteria but also a narrow use limitation, may be used less frequently than a traditional proxy contest. One who has owned a single share for one day can start a traditional proxy contest—even to gain control of the company. In contrast, shareholders cannot use Rule 14a-11 unless both the three percent voting power and three-year holding period are met and they have no purpose of changing control. The combination of these requirements reasonably supports the Commission's estimate.

Similarly, it was reasonable to predict that the number of shareholder proposals regarding proxy access submitted pursuant to Rule 14a-8 would be significantly higher than the number of shareholder nominations submitted pursuant to Rule 14a-11. A shareholder who has held shares worth only $2,000 for just one year may submit a shareholder proposal. *See* Rule 14a-8, 17 C.F.R. 240.14a-8.

E. The Commission considered whether shareholders might use Rule 14a-11 to promote narrow interests at the expense of other shareholders.

Petitioners contend (Br. 39-46) that the Commission did "not com[e] to terms" with potential costs arising from government and union pension funds using the rule "as leverage to obtain concessions from the company not related to shareholder value" (Br. 40) and fault the Commission for not using the words "union" or "leverage" (Br. 41). The Commission, however, carefully considered this concern (although not using petitioners' preferred terminology) and concluded that "the totality of the evidence and economic theory" supported the view that the rule "has the potential of creating the benefit of improved board performance and enhanced shareholder value * * * in companies that react to shareholders' concerns because of the possibility of [shareholder-nominated] directors being elected." 75 FR 56,761.

The Commission explained the rule could lead to potential benefits in that "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." *Id*. It also relied on studies showing that "measures that make incumbent directors more vulnerable to replacement by shareholder action have salutary deterrent effects against board complacency and improve corporate governance and shareholder value." 75 FR 56,761.

The Commission recognized that "companies could be negatively affected if shareholders use the new rules to promote their narrow interests at the expense of other shareholders" (75 FR 56,772) and cited, among others, a comment letter submitted by petitioner Business Roundtable. The Commission also quoted an academic article stating that "'by making it easier for large shareholders in public firms to threaten directors, a more effective shareholder franchise might increase the risk of intershareholder "rent-seeking" in public companies.'" 75 FR 56,766 n.968 (quotation omitted).

The Commission noted, however, that these potential costs "may be limited to the extent that the ownership threshold and holding requirement allow the use of the rule by only holders who demonstrated a significant, long-term commitment to the company" (75 FR 56,766) and thus would be less likely to act in a way that would harm shareholder value. Petitioners' concern also presupposes that directors will grant concessions "not related to shareholder value" (Br. 40), even though this may violate the directors' fiduciary duties.

Petitioners assert that the Commission erred in "repeatedly speculat[ing]" that costs would be contained because, in deciding whether to nominate director candidates, shareholders will consider that the board's time is scarce, arguing that this view ignores that "*threatening* an access contest will be useful leverage." Br. 41 (emphasis in original). But the Commission never stated that shareholders seeking to use such leverage would be dissuaded by the negative effect of their actions on board efficiency. Instead, the Commission observed that other potential costs—such as those of election contests—"may be offset to the extent that shareholders understand" the board's scarce resources. 75 FR 56,765; *see also* 56,772.

Petitioners make the same error in arguing (Br. 42) that the Commission's view that election disclosures might mitigate some potential costs of Rule 14a-11 is "non-responsive" to costs incurred short of the nominee's election. The Commission did not state that election disclosures could mitigate such costs. Rather, as already discussed, the Commission observed that factors such as the ownership threshold and holding requirements make it less likely that shareholders would use Rule 14a-11 to advance interests inconsistent with shareholder value.

III. The Commission Reasonably Decided Not to Exclude Investment Companies from Rule 14a-11.

Rule 14a-11 applies to "companies that are subject to the Exchange Act proxy rules, including investment companies." 75 FR 56,682-83. Because the traditional state-law rights to nominate and elect directors apply to shareholders of investment companies, and the boards of investment companies (like other companies) have significant responsibilities in protecting shareholder interests, the Commission concluded that exempting registered investment companies from the rule would be inconsistent with its purpose of facilitating these state-law rights. *Id*. at 56,684.

Petitioners, joined by amici Investment Company Institute and Independent Directors Council, challenge this conclusion and argue that Rule 14a-11 should be vacated "to the extent it covers investment companies." Br.53; *see also* ICI/IDC Br. 4. Petitioners' arguments lack merit for the reasons discussed below. If, however, the Court finds any legal error in the Commission's decision not to exclude investment companies, the Commission agrees that the remedy should be limited to investment companies.

A. The Commission reasonably concluded that the protections afforded by the Investment Company Act do not obviate the need for Rule 14a-11.

Contrary to amici's assertion that the Commission paid "scant attention" to the differences between investment companies and operating companies (ICI/IDC Br. 3), the Commission carefully considered and addressed at length the argument that differences in the regulation of the two types of companies make it inappropriate to apply Rule 14a-11 to investment companies.

The Commission recognized that the Investment Company Act of 1940 ("ICA"), 15 U.S.C. 80a-1, *et seq*., provides a panoply of regulatory protections to shareholders of investment companies, "including requirements to obtain shareholder approval to engage in certain transactions and activities" (75 FR 56,684), but noted a staff study concluding that those protections were meant to provide "additional" safeguards "*beyond those required by state corporate law*." *Id*. & n.141 (emphasis in original). Indeed, both the Commission and the Supreme Court have recognized the continuing role of the board as the "cornerstone of the * * * effort to control conflicts of interest within [investment companies]." *Jones v. Harris Assoc. L.P.*, 130 S.Ct. 1418, 1427 (2010) (quotation omitted); 75 FR 56,684. Thus, the protections of the ICA do not reduce the importance of the rights to nominate and elect director candidates facilitated by Rule 14a-11. *Id*. at 56,684; 56,683; 56,763.

Petitioners and amici characterize the Commission's emphasis on facilitating nomination and election rights for investment company shareholders as "non-responsive" (Br. 53) and "flawed" (ICI/IDC Br. 13-18) because state law "has deferred to" (ICI/IDC Br. 15) the ICA in many areas. The Commission, however, correctly determined that the protections of the ICA affect neither the specific state-law rights furthered by the rule—the rights to nominate and elect directors at a shareholders' meeting—nor their interaction with the proxy process. 75 FR 56,684; 56,763; 56,776.

The fact that state law does not require investment companies to have annual meetings (ICI/IDC Br. 15-16) does not alter this conclusion. The application of Rule 14a-11 to investment companies represents a reasonable determination that, when investment companies do have meetings at which shareholders could exercise their state-law nomination and election rights, they should be equally able to do so through the proxy process. Nor does the fact that the ICA requires shareholder votes on the terms and approval of investment advisory contracts diminish the need for the rule. Br. 53-54. Given the significant responsibilities of investment company directors in protecting shareholders, such as annual approval of advisory contracts and safeguarding against conflicts of interest between a funds' shareholders and its investment adviser, the Commission appropriately concluded that there was a continuing need for the shareholders of investment companies to "participate more meaningfully in the nomination and election of directors[.]" 75 FR 56,684, *see also* 75 FR 56,685.

B. The Commission thoroughly weighed the distinct costs and benefits of applying Rule 14a-11 to investment companies as well as the rule's effect on competition, efficiency, and capital formation for investment companies.

Petitioners and amici argue that the Commission failed to follow this Court's directive in *American Equity* to appropriately address the benefits of a new rule against the "baseline protections" of existing law. Br. 54; ICI/IDC Br. 28-29. They also assert, again relying on *American Equity*, that the Commission failed to address the impact Rule 14a-11 would have on competition among, and the efficiency of, mutual funds. ICI/IDC Br. 28-30. As already discussed, however, the Commission did consider whether the baseline of ICA regulation diminished the need for the application of Rule 14a-11 to investment companies. 75 FR 56,684; 56,673-74. Moreover, as discussed below, the Commission weighed the distinct costs that may be incurred by investment companies in complying with Rule 14a-11 due to differences in their governance structure. Despite these costs, the Commission concluded that the "policy goals and the benefits of the rule justify these costs." 75 FR 56,684.

The Commission considered amici's assertion (ICI/IDC Br. 18-22) that the election of a shareholder-nominated director to the board of one fund in a complex would frustrate the unitary or cluster board structure used by many investment companies. 75 FR 56,684-85; 56,767; 56,773. Although the Commission noted that any consequent effects on competition and efficiency ultimately derived from the state-law right to nominate facilitated by the rule (*Id*. at 56,684; 56,767; 56,773), it did not "disclaim responsibility" (Br. 55, n.12) for these possible effects by "blaming state law." ICI/IDC Br. 22; 29-30. Instead, the Commission fully considered the potential effects on efficiency and competition for investment companies. 75 FR 56,684-85; 56,767; 56,773.

The Commission observed that any potential disruptions to board structure would occur only in the event that the shareholder nominee was elected. Investment companies would therefore have the opportunity to include information in their proxy materials making shareholders aware of their views as to the potential for disruption. 75 FR 56,684-85; 56,767; 56,773. The Commission also explained that the election of a shareholder-nominated director would not necessarily result in decreased effectiveness of a unitary or cluster board, noting that one commenter argued that competition in the board nomination process may improve efficiency by providing additional leverage for boards in their negotiations with the investment adviser. 75 FR 56,773.

Further, the Commission noted that any potential disruptions to a unitary or cluster board can be mitigated through various means, such as the use of confidentiality agreements to protect the information regarding other funds or having separate meetings or materials for the board with the shareholder-nominated director. 75 FR 56,684-85 & n.145; 56,767. Petitioners and amici question the efficacy of confidentiality agreements (Br. 55; ICI/IDC Br. 23-24), but the Commission reasonably rejected those arguments as "either not compelling or speculative." 75 FR 56,767. The assertion in the comments cited (CRI 648, JA __) that shareholder-nominated directors would likely not sign confidentiality agreements because they are voluntary is speculative, and does not preclude the Commission's observation that potential costs could be mitigated if an agreement were signed (75 FR 56,684; 56,767). Moreover, the comments overlook the fact that signing such an agreement could be made a condition of board membership. Similarly, the comments cited (CRI 648, JA __) state that "overly broad" confidentiality agreements "raise concerns regarding enforceability," without providing any analysis of relevant statutory or case law, and therefore are not compelling.

More importantly, as the Commission observed, the use of confidentiality agreements is only one way to mitigate potential disruptions created by a shareholder-nominated director. 75 FR 56,684-85 & n.145; 56,767. And despite amici's predictions of doom (ICI/IDC Br. 24), the Commission reasonably concluded that the potential costs of having separate meetings and board materials for the fund with a shareholder-nominated member were justified by the benefits to shareholders of having the opportunity to knowingly choose this structure. 75 FR 56,684-85 & n.145; 56,767.

Amici are similarly incorrect in asserting that the Commission either "failed to consider" (ICI/IDC Br. 24-25) or dismissed as a cost associated with state law (ICI/IDC Br. 25) the possibility that investment companies would be subject to increased costs due to the interaction of Rule 14a-11 and NYSE Rule 452. Under NYSE Rule 452, as applied to investment companies, brokers who hold their customers' investment company securities in "street name" are permitted to vote those securities without instruction from the customer, who is the beneficial owner of the security, in "uncontested" director elections. *See* 74 FR 33,293-01, 33,293-94 (July 10, 2009). If, however, the election were rendered "contested" by the presence of a Rule 14a-11 nominee, discretionary broker voting would be prohibited, and amici assert that investment companies would face increased costs in achieving a quorum. ICI/IDC Br. 24-25.

The Commission did note that these costs were associated with the state-law right to nominate (75 FR 56,684), but, once again, it explicitly considered the issue. The Commission observed that these and other costs imposed on investment companies would be "less significant than the costs imposed on other companies" because use of the rule by investment company shareholders would be less frequent for a number of reasons. 75 FR 56,685; 56,770. Under these circumstances, the Commission determined that the policy goals and benefits of the rule justified the costs. 75 FR 56,684.

Finally, amici also assert that the Commission did not meaningfully consider that the cost of compliance with Rule 14a-11 would drive small funds out of the industry. ICI/IDC Br. 30. But the Commission explicitly considered the potential effects on small investment companies and reasonably determined that exempting them from the rule would interfere with its goal of facilitating shareholders' rights to nominate and elect directors. 75 FR 56,773; 56,778 (noting ways in which costs may be avoided or mitigated, and concluding that exempting small investment companies would inappropriately interfere with shareholders' rights to nominate and elect directors).[6/]

C. The application of Rule 14a-11 to investment companies does not represent a change in policy from the Commission's approval of an amendment to NYSE Rule 452.

The NYSE amended Rule 452 in 2009 to preclude discretionary broker voting in director elections, even if uncontested, for operating companies. 74 FR 33,293-01. The rule change exempts investment companies and therefore discretionary broker voting is still permitted in uncontested investment company director elections. *Id*. at 33,293-94. In approving the 2009 amendment, the Commission found that the exemption for investment companies was "reasonable and consistent with the Act" (*id.* at 33,303) and that "the different regulatory regime for registered investment companies supports the exemption." *Id*.

[6/] Amici also contend that the Commission erred in relying on empirical data that did not include investment companies, citing the Commission's analysis of holdings information to determine eligibility thresholds. ICI/IDC Br. 27 & n.16. The Commission, however, considered specific data regarding investment companies (*see*, *e.g.*, 75 FR 56,744 & nn.807, 809; 56,751), including the limited data provided by commenters regarding the application of eligibility thresholds (75 FR 56,693 n.249). The Commission further explained that no commenter recommended a higher threshold for investment companies than for operating companies. 75 FR 56,693. Nor did any commenter provide data indicating the need for a different threshold. *Id*.

Amici contend that the Commission's failure to exempt investment companies from Rule 14a-11 was a "revers[al]" of policy from its approval of this amendment and required a specific explanation. ICI/IDC Br. 25-26. There was no such reversal in policy, however.

Both *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983), and *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983), relied on by amici (ICI/IDC Br. 25-26), involved agency rescissions of rules. *State Farm*, 463 U.S. at 42; *ILGWU*, 722 F.2d at 814. Other cases in which this Court has required agencies to explain policy shifts similarly involved a reversal of course on the precise issue before the agency. *See*, *e.g.*, *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

The Commission's consideration of whether to exempt investment companies from Rule 14a-11 is not analogous. While both NYSE Rule 452 and Rule 14a-11 involve shareholder voting, as the Commission explained in considering whether the changes to Rule 452 obviated the need for Rule 14a-11 for any company, Rule 452 addresses who exercises the right to vote in uncontested director elections whereas Rule 14a-11 addresses shareholders' ability to have their director nominees put forth for a vote in the company proxy materials. *See* 75 FR 56,672. The Commission's determination that it was reasonable to exempt investment companies from the changes in Rule 452 in no way renders it unreasonable to reach a different conclusion in the distinct context of Rule 14a-11.

IV. Rule 14a-11 Does Not Violate the First Amendment.

Because Rule 14a-11 affects only internal communications—neither requiring companies to disseminate or subsidize the speech of third parties nor requiring speech to the public at large—the Commission correctly rejected the argument that the rule violates the First Amendment. 75 FR 56,674. The Commission also correctly concluded that, even if Rule 14a-11 affects more than internal company communications, it is consistent with the First Amendment. *Id*. Petitioners' contrary arguments ignore the internal nature of proxy communication, mischaracterize the effect of the rule, and incorrectly apply precedent.

A. Because Rule 14a-11 regulates internal communications, it does not infringe on companies' First Amendment rights.

Petitioners argue that Rule 14a-11 violates the First Amendment by "forcing companies to fund and carry campaign speech by third parties that is opposed by the company's duly-elected board of directors" (Br. 55), relying on cases holding that the First Amendment bars regulations that compel individuals or companies to publicly disseminate (or subsidize the dissemination of) third-party speech with which they disagree. *See United States v. United Foods*, 533 U.S. 405, 413-14 (2001); *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 5 (1986); *Wooley v. Maynard*, 430 U.S. 705, 713 & 715 (1977). As the Commission correctly recognized, however, these cases are inapposite because Rule 14a-11 applies only to *internal* proxy communications and does not require companies to carry the message of a third party to the public at large.

In so concluding, the Commission relied on the Supreme Court's decision in *Pacific Gas*. In that case, while the Court struck down a requirement that a public utility disseminate the newsletter of a third-party interest group in its billing envelope, it stated that its reasoning would not invalidate Rule 14a-8, which requires companies to include certain shareholder proposals in their proxy materials. As the Court explained, Rule 14a-8 governs speech by a company "to itself," and thus does not alter the range of information that the company "may contribute to the public debate." 475 U.S. at 14, n.10. Moreover, Rule 14a-8 does not implicate the First Amendment because "[m]anagement has no interest in corporate property except such interest as derives from the shareholders * * *." *Id*.

Petitioners do not (and cannot) dispute that (1) only shareholders of the company—and not third parties—may rely on Rule 14a-11 to have nominations included in the company's proxy materials; and (2) the proxy materials including those nominations are addressed to other shareholders, not the public at large. In an effort to avoid these dispositive facts, petitioners erroneously argue (Br. 58-59) that the reasoning in *Pacific Gas* on which the Commission relied is merely *dicta* and does not apply to Rule 14a-11.

As this Court has recognized, however, "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Overby v. Nat'l Assoc. of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (quotation omitted). In addition, petitioners err in arguing (Br. 58-59) that the Commission's statement that the rights created by the rules are conferred to "individual" shareholders (75 FR at 56,673) somehow alters the internal nature of the speech.

According to petitioners, because the "individual" shareholders exercising access rights under Rule 14a-11 are large institutional shareholders "that have their own corporate existences, interests and objectives" (Br. 59), speech under the rule is no longer internal. Neither the terms of the rule nor the Commission's rationale in adopting it, however, dictate that only large institutional shareholders will seek access to the corporate proxy. Indeed, petitioners' assumption that this will be the case ignores the fact, on which they rely in other parts of their brief (Br. 37), that shareholders can form groups to meet the nominating threshold. Moreover, even where the nominating shareholders are institutions, the speech remains internal. "Individual" or "particular" (Br. 59) institutions do not cease to be owners of the company merely because they are themselves corporate entities.

Nor does Rule 14a-11 "trump" the "interest in corporate property" that "derives from the shareholders," relied on in the relevant footnote of *Pacific Gas*, by "forcing shareholders to provide access * * * even if the vast majority of shareholders oppose any access regime, or favor a more restrictive one." Br. 59. Rule 14a-8, discussed in *Pacific Gas*, likewise cannot be overridden by a majority of shareholders. And, as in Rule 14a-8, the shareholders granted access to company proxy materials under Rule 14a-11, even if a minority, are still owners of the company. Thus, like Rule 14a-8, Rule 14a-11 merely "allocate[s] shareholder property between management and certain groups of shareholders" and "limit[s] management's ability to exclude some shareholders' views from corporate communications." 475 U.S. at 14, n.10.

B. In any event, the strict scrutiny standard does not apply to disclosures under the securities laws, and Rule 14a-11 withstands scrutiny under any lower standard.

1. Strict scrutiny does not apply.

Petitioners err in asserting that strict scrutiny applies to Rule 14a-11's access requirements. Br. 57-58. The Supreme Court has repeatedly suggested that only limited First Amendment scrutiny applies to disclosure under the securities laws. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985).

Moreover, this Court explained in *SEC v. Wall Street Publishing Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988), that in areas of comprehensive regulation of a field of economic activity such as securities law, courts have upheld regulation of the communications of the regulated parties. 851 F.2d at 372-73. As the Court held, "the government's power to regulate [speech about securities] is at least as broad as with respect to the general rubric of commercial speech" (*id*. at 373) and, accordingly, lesser scrutiny applies. While *United States v. Wenger*, 427 F.3d 840, 846 n.1 (10th Cir. 2005), questioned *Wall Street Publishing*'s continued validity in light of statements by a plurality of the Supreme Court in *44 Liquormart, Inc. v.*

Rhode Island, 517 U.S. 484, 511 (1996), this Court has never disavowed its holding. [7/]

The authority on which petitioners rely does not require more exacting scrutiny either. In striking down a prohibition on anonymous political campaign material, the Court in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), focused on the "core political" nature of the speech. *Id*. at 347. Although the election of members of the board of directors may be significant to the shareholders of a particular company, it cannot be said that it is similarly "integral to the operation of the system of government established by our Constitution." *Id*. at 346.

Nor does Rule 14a-11 "restrict" or prohibit speech like the statute at issue in *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 817 (2000). Rather, it is more akin to disclaimer or disclosure requirements, which, even in the context of core political speech, traditionally receive lesser scrutiny. *See Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010). Thus, even if petitioners are correct that no clear fit exists

[7/] In any event, *44 Liquormart* does not cast doubt on *Wall Street Publishing*. In contrast to the comprehensive scheme of securities regulation, in *44 Liquormart*, the Supreme Court addressed a concededly bare, direct regulation of speech. 517 U.S. at 511-12.

between the commercial speech doctrine and the regulation of the securities markets (Br. 56, n.13), securities regulations do not receive greater scrutiny than regulations of commercial speech. *See Wall Street Publishing*, 851 F.2d at 372.

2. Rule 14a-11 withstands scrutiny under any commercial speech standard.

In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), the Court held that restrictions on non-misleading commercial speech must "directly advance[]" a substantial government interest and be "no[] more extensive than is necessary to serve that interest." In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985), however, the Court identified "material differences between disclosure requirements and outright prohibitions on speech" and held that compelled disclosures in the commercial speech context need only be "reasonably related to the State's interest in preventing deception of consumers." [8/] Regardless of which commercial speech standard applies, Rule 14a-11 withstands scrutiny.

[8/] Although *Zauderer*'s lower standard is traditionally applied to regulation designed to prevent deception or confusion, *see Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324, 1340 (2010), courts have not limited it to that context. *See, e.g., N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132-33 (2d Cir. 2009).

As already discussed (*supra* pp.8-9), Rule 14a-11 advances the Commission's substantial interest in assuring that the federally regulated proxy process more closely approximates the in-person shareholders' meeting by facilitating shareholders' exercise of their state-law rights to nominate and elect members of the board. Petitioners assert that the rules are not narrowly tailored because the Commission could have relied on "less restrictive" alternatives, such as only amending Rule 14a-8(i)(8), deferring to the opportunity to establish proxy access under state law, or preserving the status quo in which shareholders can only nominate directors through proxy contests. Br. 58. The Commission, however, carefully considered and rationally rejected these alternatives. 75 FR 56,672; 56,678-79 (14a-8); 56,671-72 (state law); 56,755-56 (proxy contests). Moreover, the Commission reasonably limited proxy access to long-term, significant shareholders, thereby ensuring that any disclosure requirements would be limited to situations in which substantial owners of the company sought to include nominations for the board of directors in company proxy materials.

* * * * *

Because all of petitioners' challenges to Rule 14a-11 fail for the reasons discussed above, their request for vacatur (Br. 59-60) must be denied. In any event, the appropriate remedy is always, rather than "occasionally" (Br. 59), assessed on a case-by-case basis. *See Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993).

CONCLUSION

For the foregoing reasons, the order of the Commission should be affirmed.

Respectfully submitted,

DAVID M. BECKER
General Counsel

MARK D. CAHN
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

MICHAEL A. CONLEY
Deputy Solicitor

RANDALL W. QUINN
Assistant General Counsel

MICHAEL L. POST
Senior Litigation Counsel

TRACEY A. HARDIN
Senior Counsel

/s/ Tracey A. Hardin
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
(202) 551-5048 (Hardin)

January 2011

CERTIFICATE OF COMPLIANCE

Business Roundtable et al. v. SEC (10-1305)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,705 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

I also certify that 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 it has been prepared in a proportionally-spaced typeface using Word Perfect in 14-Point Times New Roman.

/s/ Tracey A. Hardin

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2010, I electronically filed the foregoing Initial Brief of the Securities and Exchange Commission, Respondent, with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using 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. Service was accomplished on the following by the CM/ECF system:

Eugene Scalia
Amy Goodman
Daniel J. Davis
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Robin S. Conrad
Amar D. Sarwal
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062

Shannon Elizabeth German
Morris Nichols Arsht & Tunnell, LLP
1201 North Market Street
Wilmington, DE 19801

Jeffrey Alan Lamken
Molo Lamken LLP
The Watergate
600 New Hampshire Avenue, NW
Washington, D.C. 20037

Timothy J. Simeone
Christopher J. Wright
Wiltshire & Grannis LLP
1200 18th Street, NW
12th Floor
Washington, D.C. 20036

George Eric Brunstad, Jr.
Dechert LLP
90 State House Square
Hartford, CT 06103

Steven Andrew Engel
Ruth S. Epstein
Dechert LLP
1775 Eye Street, NW
Suite 900
Washington, D.C. 20006-0000

/s/ Tracey A. Hardin