Director Notes

E-Proxy Reform, Activism, and the Decline in Retail Shareholder Voting

by Fabio Saccone

The recent e-proxy reform by the SEC aims to provide all shareholders with the ability to choose the means to access proxy materials, expanding the use of the Internet so as to ultimately lower the costs of proxy solicitations, and improve shareholder communications. However, given the complexity of the proxy system, single amendments can have unintended consequences on the system as a whole. This report explores issues that have arisen since the introduction of the new electronic forms of delivering voting materials: the observed shareholder response-rate decline and the impact on activism.

Shareholder voting is today's hot button issue for regulators and policy makers in the United States as well as in Europe. However, amending the proxy system can be challenging, given the many unintended consequences of single changes on the system as a whole. The recent e-proxy reform by the U.S. Securities and Exchange Commission (SEC) is a case in point. The analysis of the initial phase of the implementation of this reform sheds light on how the shareholder communication system can affect voter turnout.

The SEC E- Proxy Rules

Adopted by the SEC in 2007 and effective for all companies starting from the 2009 proxy season,[1] the e-proxy rules require issuers to post all proxy materials on a public website and to choose between the "full set delivery" option and the "notice only" option to deliver such materials to shareholders. Alternatively, issuers can opt for a combination of these methods (the so-called "stratification" option).

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According to the SEC, this regulatory change aims at providing all shareholders with the ability to choose the means to access proxy materials, expanding the use of the Internet so as to ultimately lower the costs of proxy solicitations, and improve shareholder communications.

Concerned about a possible failure of the new rules due to certain unintended consequences of their implementation, on February 22, 2010, the SEC adopted amendments designed to remove regulatory obstacles that may have reduced shareholder response rates and to facilitate third-party solicitations.[2]

Notwithstanding these changes, data on the reform implementation shows that only few of those stated goals have been achieved.

Notice only Under this option an issuer must post its proxy materials on a publicly accessible website and, *in lieu* of mailing hard copies of the proxy materials to shareholders, send them a notice before the annual meeting, informing them that the proxy materials are available on a website. The notice must be sent either 40 days before the shareholder meeting date or, if no meeting is to be held, before the date in which votes, consents, or authorizations may be used to effect a corporate action,[3] and must indicate that the proxy materials are available on the specified website as well as explain how to access those materials.

Under the February 2010 amendments, issuers and other soliciting persons are allowed to send along with the notice an explanation of the "notice only" process as well as the reasons for the use of it. However, the new rules still prohibit to include with the notice materials designed to persuade shareholders to vote in a particular manner or change the method of delivery of proxy materials.

At the time the notice is sent, issuers are also required to enable the shareholders to execute proxies immediately.[4] To this purpose they are not obliged to establish an electronic voting platform; rather, they can satisfy the requirement by providing a toll-free number for voting or a printable proxy card available on the website. Since the SEC's intent is to encourage an "informed vote" by shareholders, the toll-free number for voting or the printable proxy card must be made accessible on the web site in a way that ensures that the shareholders have access to the proxy materials before voting.

Ten days after the delivery of the notice, issuers can send to shareholders a proxy card either via e-mail or via regular mail.[5] This provision is designed to increase the shareholder response rate by soliciting, for a second time, those shareholders who did not respond to the first notice. However, it seems to be hardly compatible with the two goals of the e-proxy reform for two reasons.

First, the second round of proxy card delivery duplicates the delivery costs. Indeed, issuers concerned about low shareholder response to the first round of electronic proxy card would probably opt for sending the second round via regular mail. Therefore, they would end up paying the mailing expenses both for sending the notice and for the second round of proxy cards.

Second, the voting process is complicated by the fact that the SEC does not allow proxy cards to be delivered along with the notice, requiring instead a 10-day delay. This complication may discourage smaller investors to vote.

In order to ensure maximum flexibility for shareholders, the amendments provide that issuers choosing the "notice only" option must provide hard or soft copies of proxy materials at no charge to shareholders that request them.[6] Additionally, issuers must allow shareholders to make permanent elections to receive paper or e-mail copies of proxy materials distributed in connection with future proxy solicitations, and maintain records of those elections.

Full set delivery The "full set delivery" option is substantially similar to the traditional means of providing proxy materials in paper.[7] Under this option, the company continues to deliver the full set of proxy materials to shareholders and, in addition, must (i) send a notice of availability along with the proxy materials or incorporate the information of the notice into the proxy statement and proxy card, and (ii) at the same time, post the proxy materials on a publicly available web site.

In contrast with the "notice only" model, the "full set delivery option" does not require the issuer to send the proxy materials 40 days before the meeting date, therefore granting a greater degree of flexibility. Moreover, since the issuer has already provided shareholders with a full set of proxy materials, it is relieved from the obligation to also provide paper copies of the proxy materials upon request.

Finally, under the "full set delivery" option, companies may use electronic means to distribute the full set of proxy materials. To this end, they may continue to rely on the SEC guidance issued under the traditional delivery system to send materials via e-mail to shareholders, provided that consent from individual shareholders is obtained.[8]

Third party solicitation The new rules apply, with a few adaptations, to any soliciting person different from the issuer. Such a person may solicit proxies pursuant to the "notice only" option, the "full set delivery" option, or a combination of the two.

Unlike an issuer, a non-issuer soliciting person is not required to solicit every shareholder. In other words, the soliciting person may select specific shareholders from whom he wishes to solicit proxies. This freedom of choice can make a significant difference, since a soliciting person, such as a shareholder nominator, "can choose to send notices only to those shareholders who have not previously requested paper copies,"[9] thus reducing its solicitation costs to a minimum.

In fact, while the initial e-proxy proposal would have allowed non-issuer solicitors to condition a solicitation only upon shareholders opting for web access, the rule as finally approved does not provide for this option and any soliciting person is required to provide paper copies to the issuer company who request them.

Non-issuer solicitors must also comply with different timing requirements. Non-issuer solicitors must send the notice to the issuer companies by (i) 40 days before the meeting or (ii) the date on which they file their definitive proxy statement with the SEC, whichever is later.[10] Clearly, this provision allows a shareholder solicitor to refine its proxy solicitation after having received and analyzed the issuer's documents.

Impact of the New Rules

On issuers Companies' reaction to the new e-proxy rules was cautious, at least in the initial phase. Within the "voluntary" period,[11] only 69 corporate issuers, ranging in size from under 1,000 to over 2 million retail shareholders chose the "notice only" for their shareholder meetings.[12] As a group, these early adopters represented less than 10 percent of all issuers whose shareholder meetings took place during the second half of 2007.

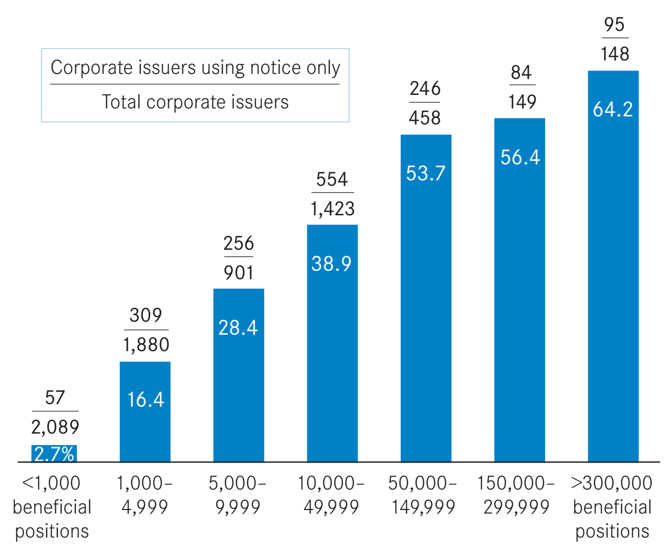
The number of companies that adopted the "notice only" option had doubled in the second year, going from 653 for the period July 1, 2007–June 30, 2008, to 1,363 for the period July 1, 2008–June 30, 2009, also as a consequence of the applicability of the e-proxy rules to all issuers as of January 2009. During the last year, the number of users has increased at a slower pace, reaching 1,601.[13]

> "Our decision was based 100 percent on the cost savings. Personally, I was also interested in helping the environment, knowing more often than not that annual reports are not widely read by individual shareholders and are tossed into the garbage."
>
> **Gale Smith**
> director of corporate development
> Pharmos
>
> *Source:* Chuck Callan, *Take note, E-Proxy Is on Its Way*, Corporate Secretary, (April 2008).

The vast majority of the issuers opting for the "notice only" distribution system are medium-to-large sized companies, as shown in the chart below.[14]

Those companies that decided to utilize the "notice only" method for their shareholder meetings were motivated by the envisaged cost savings and the perception of being environmentally friendly.[15]

Percentage of Companies Using Notice Only



Source: Broadridge, June 30, 2010.

The data confirm that the new delivery system actually brought significant savings on printing and mailing costs that exceeded the SEC's expectations. Indeed, largely relying on data and analysis of the 2006 proxy season, the SEC had estimated aggregate savings for all companies ranging from $48.3 million (if soliciting parties responsible for 10 percent of all proxy mailings choose to follow the "notice only" option) to $241.4 million (if soliciting parties responsible for 50 percent of all proxy mailings choose to follow the "notice only" option).[16] According to Broadridge,[17] companies sending the notice *in lieu* of the full set of materials, representing 22.7 percent of all issuers in 2010, saved an aggregate amount of $233 million, net of service fees. Savings for each company varied from 15 to 50 percent, depending on several factors including whether or not the company had sent out a second notice with the proxy card enclosed and how many copies it had printed in advance to satisfy possible shareholder requests.

In conclusion, as shown by the data above, at least under a strictly economical point of view, the issuers have benefited from the application of the new e-proxy rules.

On retail shareholders While it can be surmised that e-proxy reform reached the SEC's economical goal, a different conclusion can be drawn with regard to shareholder participation. Indeed, the new rules seem to have caused a dramatic drop in individual investor participation at companies using the new e-proxy process for their annual meetings.

In his speech of July 22, 2008, SEC Commissioner Paul Atkins reported: "Using statistics compiled through May 31, 2008, the retail vote declined dramatically when e-proxy was used (based on 468 meeting results), the number of retail accounts voting dropped from 21.2 percent to 5.7 percent (over a 70 percent drop), and the number of retail shares voting dropped from 31.3 percent to 16.4 percent (a 48 percent drop)."[18]

The reduction of shareholder participation is confirmed by a series of statistics elaborated by Broadridge, which highlighted that the rate of retail voting was reduced especially for small investors: this result is shown by the table below,[19] which compares the voting of the same set of 164 companies before and after the implementation of the new rules, categorizing by reference to the size of the account.

The analysis of more recent data confirms that the delivery of only the notice *in lieu* of the full set of proxy materials has the direct effect of decreasing the voting response of retail shareholders. In the 2009 and 2010 proxy seasons, voting retail accounts were, respectively, 4.03 percent and 4.58 percent of those who received the sole notice.

> "We did an initial cost estimate and came up with a range of 15-25 percent cost savings, all in. This is what motivated us to move forward on notice and access. Sustainability was a consideration, which goes hand-in-hand with the cost savings."
>
> **John Seethoff**
> deputy general counsel and
> assistant corporate secretary
> Microsoft
>
> *Source:* Chuck Callan, *Take note, E-Proxy Is on Its Way*, Corporate Secretary, (April 2008).

Participation Before and After Notice Only

Size of Account (number of shares)	Number of accounts in range	Number of accounts voted before "notice only"	Number of accounts voted after "notice only"	Percentage change =/(-)
<1,000	5,982,606	868,027	343,941	(61)
1,000 – 4,999	648,656	143,527	55,402	(61)
5,000 – 9,999	61,266	14,685	7,244	(51)
10,000 – 49,999	40,862	10,301	5,605	(46)
>50,000	7,657	2,324	1,626	(30)
Total	**6,741,047**	**1,038,864**	**413,818**	**(60)**

Note: Based on all 164 corporate shareholder meetings from July 1, 2007-April 30, 2008.
Source: Broadridge, November 18, 2008.

In comparison, the percentage of retail accounts of the same sample of companies[20] that voted after receiving the full set of proxy materials was much higher (i.e., 19.80 percent for proxy season 2009 and 22.10 percent for proxy season 2010). As noted by the SEC, "to the extent that retail account data represent individual shareholders, the data indicates a large difference in voting by individual shareholders that receive full-set delivery as opposed to those that receive notice only."[21]

This unintended consequence of the rules, which proves that several factors influencing shareholders participation needed to be better considered, raises two different concerns for the issuers:

- A low response rate from shareholders creates the risk of falling short of the required quorum, with the consequent possible inability to approve the resolutions on the agenda.
- A low retail turnout may amplify the impact of any activist vote, since retail shareholders are traditionally inclined to vote in favor of the company's proposals. In other words, a decrease in street shareholder response may help dissidents to prevail.

These issues could become critical especially after the elimination of broker discretionary voting on uncontested directors' elections pursuant to the amendment to NYSE Rule 452,[22] since issuers may no longer count on those shares routinely being voted in favor of the nominating committee's slate of directors by brokers, which are now prevented from voting absent specific instructions from the beneficial owners.

It follows that the loss of brokers' votes, coupled with the reduction of the retail voting could really challenge director elections, in particular for companies using a majority voting system.[23]

On shareholder activists As discussed above, non-issuer soliciting persons may limit their solicitation to shareholders that have not requested paper copies of the proxy materials, reducing significantly the costs of the proxy solicitation. Therefore, the expectation was that the reduction in costs associated with printing and delivery proxies would also have benefited soliciting persons other than the issuers. In fact, such solicitors were expected to reap even larger benefits for being allowed to target only certain shareholders and not all of them.[24]

Despite the expectations, recent surveys carried out among proxy solicitation professionals prove that most of them did not believe that the e-proxy rules would facilitate shareholder activism.

A 2008 Thomson Financial survey of investor relations officers found that only 12 percent expressed concern that the rule would make it easier for activists to initiate proxy battles.[25] Another survey conducted by Schulte Roth & Zabel LLP and Mergermarket[26] among companies and activists shows that the large majority of both groups expressed the view that the new rules would not favor either group over the other. Interestingly, more than a quarter (28 percent) of activists, compared to only 4 percent of corporate respondents, believed the new e-proxy rules would benefit them more than corporations.

A brief review of the 2008 and 2009 proxy seasons is sufficient to conclude that the corporate respondents were right not to be worried since, at least at this early stage, the e-proxy rules have not encouraged proxy battles.

Although these were seasons of increased activism,[27] there was only one instance in which a "soliciting person other than the issuer" used the "notice only" model for distribution to shareholders; and the matter was settled before the meeting.[28]

The Apple Case

At the annual meeting of Apple Inc. on March 4, 2008, the majority of voting shareholders – departing from the board's suggestion – approved a non-binding resolution designed to secure a shareholder vote on executive compensation. This outcome struck many observers as surprising, since the company had performed well, and its management is known for enjoying a high rate of shareholder affection and trust.

Some commentators pointed out that the unexpected result could be due, at least in part, to the low response rate of individual shareholders, which allowed dissident activists to prevail.[a] Under this theory, with as few as 4 percent of retail shareholders having gone online to vote and retail investors holding about 30 percent of Apple's shares, votes cast by dissidents easily emerged as a majority.

[a] See Dominic Jones, *Did e-proxy figure in Apple's surprise say-on-pay loss?*, March 5, 2008, www.irwebreport.com/daily/2008/03/05/did-e-proxy-figure-in-apples-surprise-say-on-pay-loss.

Conclusive Analysis

The data discussed above provide us with the following evidence that calls for further analysis:

- the e-proxy rules did not encourage activists' proxy solicitations;
- the savings for companies opting for the "notice only" method came at the price of a significant drop in retail shareholders participation.

The failure to spur proxy fights At a first glance, it could seem that the savings deriving from the "notice only" method could eliminate the long-debated problem concerning the reimbursement of proxy expenses to insurgents[29] and create a level playing filed among companies and dissident activists. Hence the fact that the new rules failed to spur proxy fights raises a quite puzzling question.

Actually, a closer look shows that printing and mailing expenses are only a marginal fraction of the overall costs of running a freestanding proxy solicitation. Far more substantial are the costs of drafting a proxy statement in compliance with rule 14-a9 and, most importantly, those associated with the potential liabilities for violation of disclosure obligations.[30] These regulatory-related disbursements are not reduced by the introduction of the e-proxy, and consist in the actual deterrent for shareholder activists.

This issue is further compounded by the long debated strategic problem that affects proxy fights: the contestants bear all the expenses related to a proxy contest but internalize only a small fraction of the benefits deriving from the proposed changes. This asymmetry provides disincentive to initiate a proxy contest, unless the amount of expected benefits is such that even the small fraction enjoyed by the contestants exceeds the expenses borne to wage the contest.

The drop of shareholder participation The main reason driving the reduction of shareholder participation is related to the changes of the system of shareholder communication and voting process brought about by the new regulation. This observation is consistent with the opinion that the way of distribution of meeting-related information affects retail shareholder participation.

Following a general distinction, shareholder communication systems may be classified into two different categories:

- "push" delivery, in which companies are obliged to send the relevant information to their shareholders, either directly or through the chain of intermediaries that hold the shares for the beneficial owners, and
- "pull" delivery, in which companies may make information available at a certain place made accessible to all shareholders.

The traditional U.S. system in force before the adoption of the e-proxy and the "full set delivery" system are clear examples of "push" delivery methods.

The data analyzed above confirm the opinion that "push" methods ensure a higher shareholder voting turnout.[31]

In addition, the empirical evidence discussed in this paper provides us with a further insight: even a minor deviation from a pure "push" method, such as the use of the "notice only" delivery option, can significantly affect retail shareholders participation in general meetings. Conversely, it can be argued that a switch in the opposite directions could positively affect retail shareholders voting.

The European Union regime covering shareholders' access to meeting-related information is set forth by the interplay of the Directive 2004/109/EC (Transparency Directive) and Directive 2007/36/EC (Shareholders' Rights Directive). Article 21 of the former provides, as a minimum standard, that regulated information must be disclosed "in a manner ensuring fast access to such information on a non-discriminatory basis." The same wording is used in Article 5(2) of the Shareholders' Rights Directive referring to the dissemination of the meeting notice.

These rules set a "pull" delivery system as the regulation floor for shareholders communication, and leave to the companies the option of implementing a "push" delivery method, as well as to each Member State the possibility of enacting additional rules to mandate issuers to provide certain information to their shareholder on an individual basis. In light of the analysis above, it can be argued that the European legislature would have better advanced shareholder democracy in Europe by mandating a "push-oriented" shareholder communication system.

Endnotes

1 After a thorough consultation process, on January 22, 2007, the Commission adopted rules allowing issuers and other soliciting persons to comply with the proxy rules by posting the proxy materials on a web site and providing securities holders with a notice of availability. See Rule 14a-16 under the Exchange Act of 1934. Also see SEC Release No. 34-56135 ("Shareholder Choice Regarding Proxy Materials"), July 26, 2007. This "notice only" model was initially intended to apply on a voluntary basis for solicitations commencing on or after July 1, 2007. However, the SEC accelerated the process and, on the same day of the adoption of the voluntary model, it proposed amendments to the proxy rules that would *mandate* all soliciting persons to post the proxy materials on the web and comply with "the notice only" model. Although many commenters were concerned that the timeline for the adoption of the mandatory e-proxy rules was too tight and allowed insufficient time to gather data on the voluntary rules, the SEC adopted the mandatory e-proxy rules on June 26, 2007. To address the timing concerns raised by commenters, the SEC established a phase-in schedule for the implementation of the new rules. The Rules entered into force for large, accelerated filers (not including registered investment companies) on January 1, 2008 and for all the other issuers on January 1, 2009. On the reform, also see Matteo Tonello, *Corporate Governance Handbook: Legal Standards and Board Practices*, The Conference Board, 2009, p. 52.

2 SEC Release No. 33-9108 ("Amendments to the Rules Requiring Internet Availability of Proxy Materials"), February 22, 2010.

3 The first day would be the day on which the issuer sends the notice. The 40th day would be the day prior to the meeting date or date of the corporate action.

4 See Exchange Act Rule 14a-16(b)(4).

5 Under Exchange Act Rule 14a-16, the proxy card or voting instruction form cannot be sent with the notice.

6 Issuers are required to respond to requests of paper or e-mail copies of proxy materials within three business days. See Exchange Rule 14a-3(b). The SEC has clarified that such a short deadline does not apply to request of copies received after conclusion of the meeting because in that case there is no need to provide the copies in a timely fashion.

7 The main difference is that under the "full set delivery" model issuers are required to post the proxy materials on an internet web site. This requirement, however, does not represent a significant change for issuers: a survey by Thomson Financial found that 94 percent of the companies it surveyed already posted their annual reports online, and 84 percent said they were either already compliant with the e-proxy rule or would be ready by the end of 2008; just 3 percent of the surveyed companies said the deadline would present a problem. See Jeffrey Marshall*, Companies Lukewarm To E-Proxy Option,* Financial Executive, March 24, 2008, p. 22, *available at* www.allbusiness.com/legal/securities-law/8927153-1.html.

8 See SEC Release No. 33-7233 (Oct. 6, 1995).

9 See 72 Fed. Reg. at 42,228. Under Exchange Act Rule 14a-7(a)(2), an issuer is required either to mail the notice on behalf of the soliciting person, in which case the soliciting person can request that the issuer send notices only to shareholders who have not requested paper copies, or to provide the soliciting person with a shareholder list, indicating which shareholders have requested paper copies. For a more complete discussion of the interaction of the model with Rule 14a-7, see Section II.C.4 of Release No. 34-55146 (Jan. 22, 2007).

10 Under Exchange Act Rule 14a-16(l)(2)(ii), as recently amended by the SEC, soliciting persons other than the issuer are required to file a preliminary proxy statement within 10 calendar days after the issuer files its definitive proxy statement and to send the notice to shareholders no later than the date on which they file their definitive proxy statement with the Commission.

11 See *supra*, note 1.

12 See *A Frank Discussion on Notice & Access*, Broadridge Financial Solution Inc., February 2008, available at www.shareholderforum.com/Reference/20080200_Broadridge.pdf.

13 See *Notice and Access. Statistical Overview of Use with Beneficial Shareholders as of June 30, 2010*, Broadridge, available at www.broadridge.com/notice-and-access/FY10_full_year.pdf. Note that among the large companies that opted for the adoption of the "notice only" model, several are hi-tech companies (e.g., Apple; Intel; Hewlett-Packard; Microsoft.).

14 Id., p. 2.

15 See Chuck Callan, *Take note, E-Proxy Is on Its Way*, Corporate Secretary, (April 2008), available at www.corporatesecretary.com.

16 This estimate was based on the expectation that (i) 19 percent of shareholders would choose to have paper copies sent to them when a soliciting party initially sends them only a notice and (ii) the costs for producing and delivering proxy materials would be reduced from $5.64 to $2.36 per set of material. See 72 Fed. Sec. L. Rep. 42,222, at 42,232, August 1, 2007.

17 See Broadridge, *supra*, note 13.

18 See Paul S. Atkins, *Shareholder Rights, the 2008 Proxy Season, and the Impact of Shareholder Activism*, Speech before the U.S. Chamber of Commerce, Washington, D.C., July 22, 2008.

19 *Introduction to Broadridge Samples of Data and Statistical Measurement*, Broadridge, November, 18, 2008, www.slideshare.net/irwebreport/statistics-and-fact-on-eproxy-implementation-in-the-us.

20 The sample of companies considered for the analysis used a mixed approach, using the "notice only" option for some retail shareholders and the "full set delivery" option for the remaining shareholders. See Broadridge, *supra*, note 13.

21 SEC Releases Nos. 33-9073.

22 Rule 452 of the NYSE permitted broker-dealers to vote street-name shares for uncontested director elections at their discretion unless they had received voting instructions from the beneficial owner of the shares at least 10 days prior to the meeting date. Absent such instructions, brokers have traditionally cast the ballot in favor of the issuers' candidates. The SEC approved the amendments on a split vote on July 1, 2009. See SEC Release No. 34-60215, available at www.sec.gov/rules/sro/nyse/2009/34-60215.pdf. The proposal was elaborated by the Proxy Working Group of the NYSE (see *Report and Recommendation of the proxy Working Group to the New York Stock Exchange*, June 5, 2006, available at www.nyse.com/pdfs/REVISED_NYSE_Report_6_5_06.pdf) and first filed with the SEC in October 2006. The amendments are effective as of the 2010 proxy season. On August 26, 2010, the NYSE submitted to the SEC a proposal to extend the ban on broker discretionary vote also to matters related to executive compensation, in accordance with the provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

23 The first data available on 2010 proxy season, however, show a limited impact of the loss of brokers' vote on directors elections. See ISS, 2010 Preliminary U.S. Postseason Report, *available* at www.thecorporatecounsel.net.

24 See 72 Fed. Sec. L. Rep. at 42,231, the SEC overcame the divided comments about the likely impact of the electronic proxies and concluded that the reduced costs for proxy solicitation would increase the "*effectiveness and efficiency of proxy contests as a source of discipline in the corporate governance process*." Also see Ronald D. Orol, Extreme Value Hedging: How Activist Hedge Funds Managers Are Taking On the World, John Wiley and Sons, 2008, p. 50, quoting Martin Dunn, deputy director of the SEC's corporate

finance division: "*[O]ne set of comments argue that e-proxy doesn't help reduce the costs of proxy contests at all because just someone's name on a web site and saying* 'here is how you can find it'*, does not eliminate the cost of soliciting people and getting them to vote, on the other side you have people commenting saying this is going to create great uncertainty in the board rooms because it makes contests so cheap and easy.*"

25 See Jeffrey Marshall, *supra*, note 7.

26 See *Shareholder Activism Insight*, Schulte Roth & Zabel LLP and Mergermarket, www.thehedgefundjournal.com/research/srz/shareholder-activism-insight.pdf.

27 See RiskMetrics Group, 2009 Postseason Report, Oct. 2009, p. 19.

28 See Broadridge, *Notice and Access. Statistical Overview of Use with Beneficial Shareholders as May 31, 2009*, available at www.broadridge.com.

29 See *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 128 N.E. 2d 291 (N.Y. 1955) and *Heineman v. Datapoint Corp.*, 611 A.2d 950 (Del. 1992). For a doctrinal analysis, *see* Lucian A. Bebchuk and Marcel Kahan, "A Framework for Analyzing Legal Policy Toward Proxy Contests," 78 *California Law Review* 1073 (1990).

30 See Jeffrey N. Gordon, "Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy," 61 *Vanderbilt Law Review* 475 (2008), 489.

31 See Dirk A. Zetzsche, "Virtual Shareholder Meetings and the European Shareholder Rights Directive—Challenges and Opportunities," CBC-RPS No. 0029, June 26, 2007, available at www.ssrn.com/abstract=996434, p.27.

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