

MEMO# 24023

December 17, 2009

Comment Period on Proxy Access Proposal Re-Opened; Comments Due to SEC on January 19, 2010

[24023]

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 33-09
ETF ADVISORY COMMITTEE No. 42-09
SEC RULES COMMITTEE No. 73-09
SMALL FUNDS COMMITTEE No. 21-09 RE: COMMENT PERIOD ON PROXY ACCESS
PROPOSAL RE-OPENED; COMMENTS DUE TO SEC ON JANUARY 19, 2010

The Securities and Exchange Commission has re-opened the comment period on its proxy access proposal to permit comments on reports with additional data and related economic analyses that were filed with the Commission. [\[1\]](#) None of the reports discuss the applicability of proxy access rules to investment companies. Comments are due to the Commission on January 19, 2010. The reports are briefly summarized below.

Based on our analysis of the reports, the Institute does not plan on filing a comment letter. If you have specific comments with respect to the reports as they relate to investment companies, please contact Dorothy Donohue at ddonohue@ici.org as soon as possible but no later than January 6, 2010.

The Business Roundtable submitted *Report on Effects of Proposed SEC Rule 14a-11 on Efficiency, Competitiveness and Capital Formation* (prepared by NERA Economic Consulting). This report addresses the costs and benefits that would result if proposed Rule 14a-11 is adopted and concludes that it would result, at best, in modest savings for

shareholders at a handful of companies and would impose substantial costs on all public companies. The Report states that the key risks of permitting shareholder nominations pursuant to proposed Rule 14a-11 include: (i) causing boards to be less qualified; (ii) selecting board members whose interests diverge from the goal of maximization of shareholder value; (iii) imposing additional disincentives for U.S. companies to go public; and (iv) impeding capital formation for U.S. companies.

The Business Roundtable also submitted *Why Did Some Banks Perform Better During the Credit Crisis? A Cross Country Study of the Impact of Governance and Regulation* (prepared by Andrea Beltratti and Rene M. Stulz). This report investigates whether bank performance was related to bank-level governance, country-level regulation, and bank balance sheet and profitability characteristics before the recent financial crisis. The report concludes that banks with more shareholder-friendly boards performed worse during the crisis and that banks in countries with stricter capital requirement regulations and with more independent supervisors fared better.

The Shareowner Education Network and the Council of Institutional Investors submitted *The Limits of Private Ordering: Restrictions on Shareholders' Ability to Initiate Governance Change and Distortions of the Shareholder Voting Process* (prepared by the Corporate Library). This report analyzes the feasibility of shareholders being able to submit bylaw amendments permitting proxy access. The report concludes that data on bylaw amendment limitations show that at approximately 40% of companies, shareholders are either unable to amend the bylaws or face significant challenges in the form of supermajority vote requirements.

Finally, the Commission's Division of Risk, Strategy, and Financial Innovation submitted a memorandum updating an earlier analysis of share ownership level and holding period patterns in data derived from Form 13F filings.

Dorothy M. Donohue
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endnotes

[1] See *Facilitating Shareholder Director Nominations*, SEC Release No. 33-9086 (December 14, 2009) available at <http://www.sec.gov/rules/proposed/2009/33-9086.pdf>. See also [Memorandum](#) to Closed-End Investment Company Members No. 25-09; SEC Rules Members No. 67-09; and Small Funds Members No. 38-09 [Memorandum No. 23572], dated June 22, 2009 (summarizing the Commission's proxy access proposal); and [Memorandum](#) to Closed-End Investment Company Members No. 32-09; SEC Rules Members No. 90-09, and Small Funds Members No. 51-09 [Memorandum No. 23725], dated August 18, 2009 (summarizing the Institute's comment letter on the proposal).

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