

Empowering Shareholders in Directors' Elections: A Revolution in the Making

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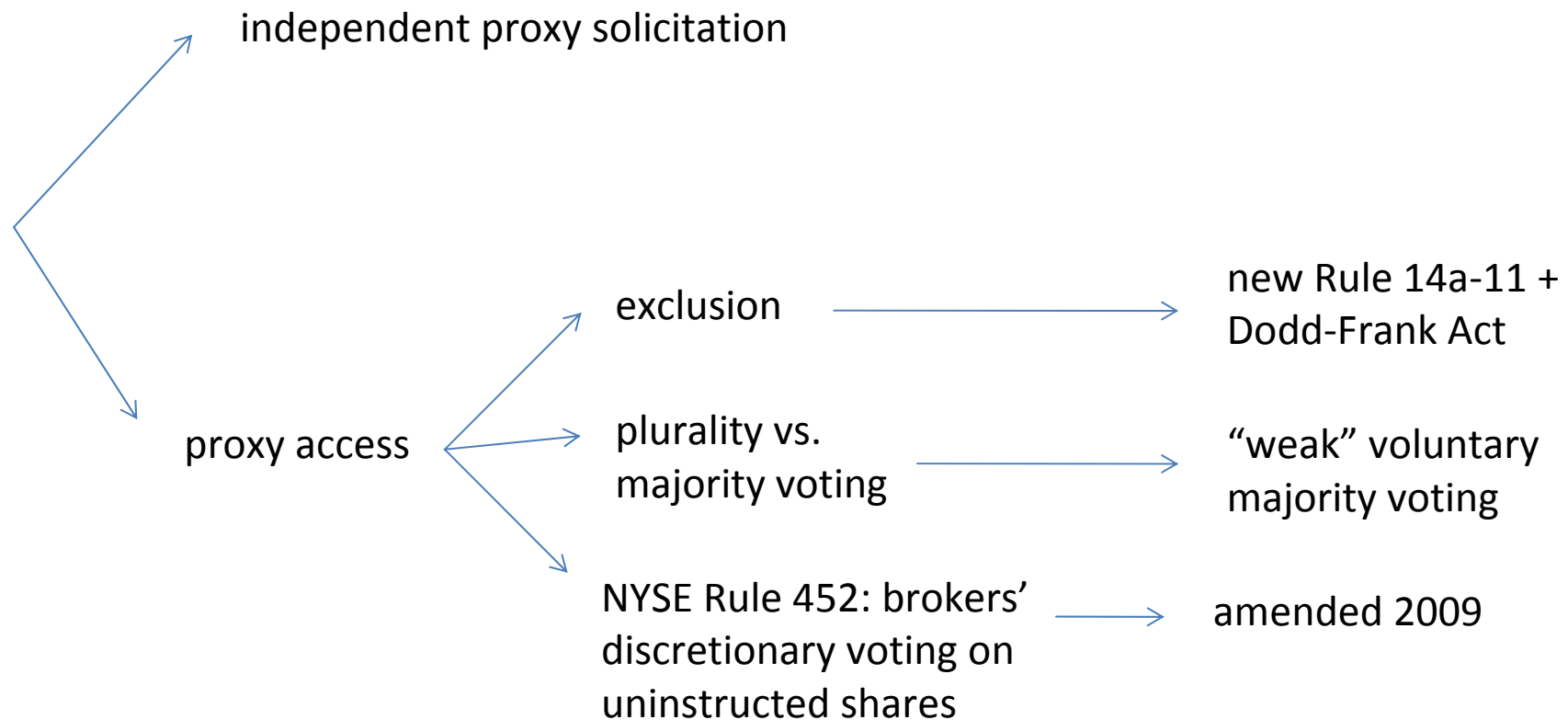
Penn State University, Dickinson School of Law, University Park, USA

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A Ghost is Haunting Corporate America

1. Directors: By Grace of God, or by Will of the Shareholders? Why Shareholders are (were?) so Weak in Directors' Elections;
2. The Evolution that lead to the New SEC Rules on Proxy Access;
3. New SEC Rule 14 a-11;
4. Is it enough?
 - Defenses against Proxy Access;
 - A (Truly) Revolutionary Proposal: Proportional Voting through "List Voting"

1. Traditional Obstacles to Shareholders in Directors' Elections



2. Recent State-law Evolution

- 2007: North Dakota Publicly Traded Corporations Act:
 - proxy access and reimbursement of proxy solicitation expenses;
 - majority voting
- 2009: Delaware “Mini-Reform”:
 - § 112 DGCL
 - § 113 DGCL

3. The SEC (and Congress) Enter the Scene

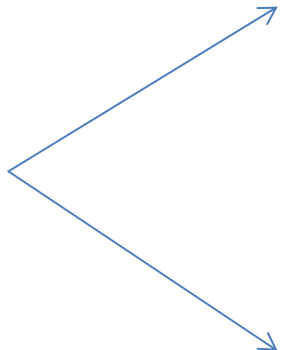
- Rule 14a-11
 - 3% for 3 years;
 - priority to largest shareholders, not first come, first served

4. Is it Enough?

- Defenses:
 - directors' qualifications;
 - non-rescindable resignation conditioned on nominating committee's approval;
 - withholding protections, e.g. § 102(b)(7);
 - contingent dividends based on presence in the board of directors approved by the board of directors
- Will these defenses survive Judicial Scrutiny?
 - shareholders' franchise (*Blasius*)?
 - takeover defenses standards?
 - pre-empted by Federal law?
- Is it enough?
 - how is proxy access affected by majority voting?

4. Is it Enough?

- A more Radical Proposal: Cumulative Voting and List Voting



coalition # votes x vacancies on the board = “pool” of votes to distribute among candidates

seat(s) on the board reserved for second ranking list